IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	No. S107508
ALFREDO REYES VALDEZ,	)	
	)	
Petitioner.	)	Related Appeal S023672
	)	
	)	DEATH PENALTY CASE

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

PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	
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ALFREDO REYES VALDEZ,	)	No.
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PETITION FOR WRIT OF HABEAS CORPUS

ALFREDO REYES VALDEZ petitions this Court to issue a writ of habeas corpus ordering that his conviction for capital murder and his sentence of death be reversed and vacated. In support thereof, Petitioner submits the following:

PRELIMINARY ALLEGATIONS

I

UNLAWFUL RESTRAINT

1. Petitioner is unlawfully confined and restrained of his liberty at San Quentin State Prison, San Quentin, California, by Jeanne Woodford Warden of San Quentin State Prison.

2. Petitioner is confined pursuant to the judgment conviction and sentence of imprisonment and death entered by the Superior Court of the State of California for the County of Los Angeles, County Superior Court in Case

Number KA007782 on May 22. 1992.

3. Petitioner is factually innocent of a capital crime. His imprisonment and death sentence are the result of a fundamentally unfair trial in violation of his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A combination of factors including, but not limited to, trial court error, prosecutorial misconduct, and ineffective assistance of counsel leading to a breakdown of the adversarial process denied petitioner constitutionally required safeguards and require that this Court grant the present petition.

II

PROCEDURAL HISTORY

A. TRIAL COURT

1. An information filed June 12, 1989 alleged that on April 30, 1989, petitioner murdered Ernesto Macias in violation of Penal Code section 187 (a). The information specifically alleged that the murder was committed during the commission of a robbery in violation of Penal Code section 211, all within the meaning of Penal Code sections 190.2 subdivision (a) (17). (CT 136.) It was further alleged that petitioner personally used a firearm within the meaning of Penal Code section 1203.06 subdivision (a) (1) and 12022.5. (CT 137.) Count II alleged that on April 8, 1991, petitioner escaped while felony charges were pending in violation of Penal Code section 4532, subdivision (b). (C.T. 137.) It

was further alleged, as to Count I, that on August 3, 1983, in Los Angeles County, petitioner had been convicted of first degree burglary in Case No A529204 and A530354 within the meaning of Penal code section 667 (a). (CT 138.) On June 12, 1991, petitioner was arraigned and entered a plea of not guilty to all charges. (CT 145.) On August 14, 1991, the prosecution gave notification, pursuant to Penal Code section 190.3, of evidence to be introduced in aggravation at the penalty phase. An amended information was filed on February 3, 1992, alleging that in January 1983, petitioner suffered an additional prior conviction in the state of Texas for aggravated robbery which included all of the elements of California Penal Code section 664/211, attempted robbery within the meaning of Penal Code section 667, subdivision (a). (CT 141.)

2. Petitioner was arraigned on February 3, 1992, on the amended information. (CT 158.) On February 10, 1992, petitioner's first ***Marsden*** motion was heard and denied in Department East A, by the Honorable Theodore Piatt. Petitioner's first ***Faretta*** motion was made at the close of the Marsden hearing and was summarily denied by the judge, who informed Petitioner that he did not have the ability to represent himself. (CRT, 2-20-92, p 73-76.) [1] On February 14, 1992, petitioner agreed that his trial could start on March 2, 1992, or within ten

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1

CRT stands for confidential reporter's transcript, CCT stands for confidential clerk's transcript.

days of that date in Department East S, before the Honorable Thomas F. Nuss. (RT 82.) On February 19, 1992, the matter was transferred for pretrial motions to Department East S. All pretrial motions were ordered to be filed in Department S by February 25, 1992, and all responses by February 28, 1992. (RT 84, 85.) Petitioner advised the court on his first appearance in Department S, that he wished a ***Marsden*** hearing. (RT 94.) The court set the hearing for February 26, 1992, and ordered that petitioner be brought to court on February 24, 1992, for the specific purpose of filing his ***Marsden*** motion. (RT 97.)

3. Petitioner filed a handwritten ***Marsden*** motion on February 24, 1992. (CCT 189-205 .) Petitioner's second ***Marsden*** motion was heard and denied on February 26, 1992. (CT 187, CRT 2/26/92 p. 118.) On that same date, defense counsel filed a motion to suppress evidence pursuant to Penal Code section 1538.5, a motion to set aside the information pursuant to Penal Code section 995 and a motion for severance of the escape charge. (CT 183-186.) Hardship voir dire took place on March 2, 1992; a panel of 87 prospective jurors were sworn and ordered to return on March 9, 1992. (CT 206, RT 300 .) On March 6, 1992, petitioner's motions pursuant to Penal Code sections 1538.5 and 995 were denied. The severance motion was put over for further argument. (RT 334, 352.) On March 9, 1992, petitioner's motion to sever the escape charge from the murder charge was denied. (RT 361.) Petitioner made his second ***Faretta*** motion. (RT 365.) His motion was denied as untimely and not in good faith. (RT 365-368.) Petitioner's

motion to bifurcate the trial on the prior convictions was granted. (CT 212.)

4. Jury selection commenced on March 11, 1992. (CT 212.) On March 16, 1992, the prosecution made its opening statement, the defense reserved opening statement, and the prosecution commenced its case in chief which it completed on on March 18, 1992. (CT 222.) On March 19, 1992 the defense waived opening statement and commenced its case in chief. (CT 225.) Following a hearing pursuant to Evidence Code section 402, the testimony of Frank Guenther regarding the arrest at the crime scene of Liberato Gutierrez for the murder of Ernesto Macias and the presence of blood on his clothing was excluded pursuant to Evidence Code section 352. (RT 224, 1170-1171.) The defense rested in the early afternoon, of March 18, 1991 and the prosecution presented a brief rebuttal, after which a jury instruction conference took place. (CT 225, 1264-1280.) On March 20, 1992, the jury was instructed and closing arguments heard. (CT 227.) Jury deliberations began at 9:00 a.m. on March 23, 1992, and a verdict was returned at 3:34 p.m.. (CT 299.) The jury found petitioner guilty as charged and found the special circumstance and use allegations true. (CT 300.)

5. The penalty phase commenced on March 24, 1992. The prosecution made an opening statement, the defense reserved opening statement, and the prosecution commenced presentation of its case in chief. (CT 302.) On the afternoon of March 25, 1992, the prosecution rested, the defense waived opening statement and began its case. (CT 302.) Court was not in session on

Thursday, March 26, 1992. (RT 1683.) On Friday, March 27, 1992, petitioner presented the court with a handwritten letter requesting a ***Marsden*** hearing. His third ***Marsden*** motion was heard and denied on that same date. (Trial Exhibit 66, CT 303, CCT 205, CRT 1720-1729.) The defense presented evidence on March 27, 1992 (CT 302, 1776-1803.) On Monday March 30, 1992 a jury instruction conference was held and following the testimony of James Parks, the defense rested. (CT 304, 1807-1825.) The prosecution presented one rebuttal witness on March 31, 1992 and rested. (RT 1867.) On April 1, 1992, the court further instructed the jury and deliberations began, continuing through the following day. (CT 306.) On April 3, 1992, at 11:37 a.m., the jury returned a verdict of death. (CT 436.)

6. Trial on the priors commenced and concluded that afternoon. The jury found all three prior allegations to be true. (CT 436, 437.) Sentencing was set for May 5, 1992, and then continued to May 22, 1992, on which date, the defense motion to modify the verdict was filed, heard and denied. (CT 439, 2070-2083.) The court found that there was no lingering doubt and that the weight of the evidence supported the jury verdict. (CT 450, RT 2081-2083.)

7. Petitioner was sentenced to death on Count I. On Count II, he was sentenced to the high term of three years plus 5 years for the personal use allegation, and 15 years for the three prior convictions pursuant to Penal Code section 667, subdivision (a), for a total determinate sentence of 18 years. (CT

450-451.)

B. AUTOMATIC APPEAL

8. On October 24, 1996 Marilee Marshall was appointed to represent petitioner on his direct appeal and related habeas corpus proceedings. The direct appeal is presently pending before this court.

C. STATE HABEAS CORPUS

9. This is petitioner's first state habeas petition.

III

JURISDICTION

1. This petition is presented to this Court pursuant to its original habeas corpus jurisdiction under Article VII of the California Constitution.

2. Petitioner's imprisonment is illegal and in contravention of the rights guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and their individual clauses and sections, and by the Treaties, Covenants and Agreements of International law.

3. Each of the claims asserted in this petition infected the regularity of the trial, violated fundamental fairness and resulted in a miscarriage of justice.

4. Petitioner has no other adequate remedy at law other than to raise these claims.

IV

TIMELINESS OF PETITION

1. This petition is timely filed pursuant to this Courts Policies Regarding Cases Arising from Judgments of Death (Policies) in that it is filed within ninety days of the final due date for the reply brief which was timely filed on March 15, 2002.

V

INCORPORATION

1. Petitioner hereby incorporates and bases his claims on each and every exhibit to this petition, including all factual and legal theories set forth in the in each claim presented as if fully set forth therein.

2. Petitioner hereby incorporates by reference and bases his claims on each and every paragraph of this petition in each and every claim presented as if fully set forth therein. Petitioner hereby incorporates by reference and bases his claims on all records, documents, exhibits and pleadings in **People v.Valdez**, Case No. S026872.

3. Petitioner requests that this Court take judicial notice of the certified record on appeal and all documents and pleadings on file in the case of ***People v. Valdez***, Case No. S026872.

VI

INVESTIGATION

1. Petitioner needs and is entitled to adequate funding, discovery, an evidentiary hearing and any other opportunity to fully and fairly develop the claims raised herein.

2. Further investigation must be conducted in connection with the present petition for writ of habeas corpus. After that investigation is completed, petitioner may have further claims to present, as well as further evidence in support of the claims set forth herein. At that time, petitioner will seek leave to supplement the petition as appropriate.

CLAIMS FOR RELIEF

Petitioner's confinement, conviction and death sentence are illegal under the laws of the United States, the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their separate clauses and subsections, as they have been interpreted by clearly established federal law as determined the United States Supreme Court, the federal Circuit Courts of Appeal, United States District Courts, the California Constitution and laws and the Treaties, Covenants and Agreements of International law. petitioner sets forth in summary form the facts and legal theories supporting each of the grounds thus specified. The grounds upon which petitioner contends that he is entitled to relief are as follows:

CLAIM I

PETITIONER IS FACTUALLY INNOCENT

Petitioner's conviction and death sentence were obtained in violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I Sections 7, 15, 16 and 17 of the California Constitution and state law, because a fundamental miscarriage of justice has occurred, in that evidence existing before the trial as well as recently discovered evidence, demonstrates that petitioner is actually innocent of a robbery murder.

The errors of constitutional magnitude contributing to this fundamental miscarriage of justice include, but are not limited to: ineffective assistance of counsel, prosecutorial misconduct, and denial of petitioner's rights to a fair trial, to trial by jury, to present evidence on his behalf, and to due process.

The facts supporting this claim among others to be presented after full investigation, discovery, access to this court's subpoena power, adequate funding and an evidentiary hearing, are set forth below and in succeeding sections of this petition and include but are not limited to, the following:

On April 30, 1989, Ernesto Macias died of multiple gunshot wounds . His body was found on the street, about fifty feet from the front door of his residence. One of the pockets of his jeans was turned out, but he had $80 in his other pocket. He was wearing rings and other jewelry. Physical evidence indicated that he had been shot inside his residence. petitioner was arrested a day later for being under the

influence of a controlled substance. The Monte Carlo in which he was riding was searched and a gun and a pair of pants both containing human blood were found in the passenger compartment.

A. <u>The Blood on The Pants In the Monte Carlo Did Not Belong to Macias and, Therefore, Neither Did the Blood on the Gun</u>

1. The whole case against petitioner was predicated on the proposition that blood which ***could have*** belonged to the victim, Ernesto Macias, was found on the gun in the Monte Carlo. This fallacious proposition was bootstrapped by the equally dubious claim that since Macias had been killed with a similar gun, the gun in the Monte Carlo which ***could have*** his blood on it ***could have*** been the murder weapon. In addition to the blood on the gun, blood was also present on grey pants found in the passenger compartment of the Monte Carlo and on a piece of vinyl. (RT 1118, 1119.) A report prepared by Cellmark Laboratories unequivocally establishes that the blood on the pants found in the Monte Carlo was not the blood of Ernesto Macias. (Exhibit F.) Detective Guenther gave the pants to Ron Linhart at the Sheriff's Department crime lab on May 6, 1991 and noted in his report (Exhibit E) that a decision on the testing of those stains was forthcoming. Cellmark's report which is actually a letter directed to Ron Linhart dated August 19, 1991 (Exhibit F.) indicates that they received material cuttings inside an envelope labeled "blood stains from pants," extracted the DNA and determined that it did not match the blood of Ernesto Macias. (Exhibit F.) On the other hand, the blood on the gun was not

subjected to DNA testing but only to serology testing by the Los Angeles County Sheriff's laboratory. The serology test indicated that the blood did not belong to petitioner bit ***could*** have belonged to Ernesto Macias. In the County of Los Angeles, 16.4 percent of the population share the same PGM subtype as Ernesto Macias. (RT 933, 935.) That means that the blood could have belonged to approximately 1.3 million people in Los Angeles County. The most reasonable inference, which unfortunately petitioner's jury never had a chance to draw, is that all the blood in the car belonged to the same person and that since the blood on the pants did not belong to Macias, the blood on the gun did not belong to him either.

2. Given the fact that the Sheriff's crime lab received the pants from Guenther on May 6 and Cellmark did not receive the cuttings till June 20, 1991 it would appear that Linhart may have first subjected the stains to serology testing before sending them out for DNA testing. Such tests if done, may show conclusively that the blood on the gun belongs to the same person who deposited the blood on the pants. Whether such testing was done or such reports exist cannot be determined absent discovery and an evidentiary hearing. It is also strange that law enforcement would send the pants for DNA testing in 1991, which was probably not available in 1989 and not send the blood stains collected from the gun. Instead they relied on on outdated serology testing from 1989 to attempt to link petitioner to the crime..

3. The blood on the gun in all likelihood belonged to the same person who deposited the blood on the pants and if that person was not Ernesto Macias, the

already extremely tenuous link to petitioner is completely broken. Possible sources of the blood on the pants and the gun could be Eliseo Morales the driver of the car, or Juan Velador, the owner of the car, neither of whom were tested. Morales was arrested in possession of the gun. (Exhibit K.) Morales made statements to the police which were obviously not true and could be construed as consciousness of guilt. Morales claimed that petitioner, initially the passenger, had the gun and showed it to Morales. According to Morales, petitioner moved into the driver's seat to try to start the car and at that time placed the gun under the seat. Morales maintained that he did not touch the gun, but that he had seen similar guns at his friend Juan Velador's house (Exhibit L. .) Officer Palermino's report, which is presumably more credible, as he would have had no reason at that time to fabricate, indicates that it was Morales in the driver's seat who was arrested with the gun. Petitioner approached the car on the passenger side and was arrested for being under the influence. (Exhibit K.) Palermino's version of the incident comports with petitioner's statement as to how his arrest for being under the influence took place. (Exhibit J.) Thus Morales, not only transposed himself with petitioner in terms of who had the gun, but also regarding their respective positions in the car. Morales' lie, when viewed in conjunction with the police reports, strongly suggests that Morales had the gun, played with it in the car and may have showed it to petitioner in the way that Morales claims petitioner showed it to him. Although the whole trial was conducted as if petitioner was found in possession of a gun that linked him to the murder of Macias, Morales and not

petitioner was charged on May 1, 1989 with being in possession of a concealed firearm in a car. (Exhibit K.) When Palermino was asked at trial for what charge Morales was arrested, Palermino conveniently could not remember and counsel was apparently not prepared to refresh his memory with his report. (R.T. 878, Exhibit K.)

B. <u>Petitioner Did Not Kill Ernesto Macias</u>

1. There were initially three suspects , Arturo Vasquez Chavez," El Pato",[whose other names are Andres Gutierrez and Jorge Coronado], and Liberato Gutierrez. (Exhibit A.)

2. El Pato and Arturo Vasquez were both arrested and booked for the murder of Ernesto Macias. Apparently, El Pato resided at least some of the time with Ernesto and Arturo. The residence on West Second where the three men went to contact El Pato on the evening of the murder was said to be his girlfriend's house but Arturo did not see a female at the location and El Pato's girlfriend was unknown to him. (Exhibit B, page 7.) El Pato's Pontiac Transam was seen by two neighbors leaving Ernesto's residence after shots had been fired and after three men had been heard arguing loudly in the street. El Pato evaded the police prior to his arrest the morning after the murder; he was free just long enough to sell or dispose of a gun or other evidence connecting him with the crime. (See Exhibit B, page 2, 8, 9, Exhibit N) According to Ernesto's brother, two years before the murder,Ernesto and El Pato almost had a gun fight with each other in Mexico, in the town of Venadero.

(Exhibit B, page 5.) Initially Arturo told the police that El Pato had not been drinking with them that evening. (Exhibit B, p. 6.) Arturo later told the police that El Pato had been there drinking with him and Ernesto until approximately 11:00 p.m.. (Exhibit B, page 6.) Arturo insisted that there was no money or drugs at the location that evening while they were drinking. (Exhibit B, page 6.) In his first statement , Arturo told the police that he [Arturo] had left the house on foot that night to get something to eat, was gone for about fifteen minutes and returned. He did not actually get as far as the store but upon returning from the walk he found that there was blood all over. (Exhibit B, p. 6.)

3. At a later interview Arturo stated that he, Ernesto, and a "Cholo," person whose name he didn't know, were drinking at the residence when two other men came looking for El Pato. (Exhibit C, p. 2.) Arturo said the "Cholo" stayed with Ernesto while he took Gerardo Macias and Rigoberto Perez to see El Pato. (Exhibit C, p. 3.) Arturo stated that he did not know if El Pato sold drugs and that there did not seem to be any argument between "the Cholo" and Ernesto. Arturo further said that he was gone from the residence between fifteen and twenty minutes. Upon returning and discovering the body, Arturo told El Pato, "they killed Ernesto." El Pato, purportedly said that the police would come and try to charge the people who were at the scene with the victim with murdering him.. El Pato also said "why did you run? why didn't you stay there and wait for the police, because they will think that you did it. (Exhibit C, p. 3,4.) Gerardo Macias recalled that Ernesto wanted "the

cholo" to leave and told him that he could come back when the others returned (Exhibit C, page 4.) Gerardo also recalled that "the cholo' wanted to buy $20 worth of cocaine but Gerardo denied knowing from whom he was trying to buy it. (Exhibit C, page 4.)

4. When El Pato was apprehended he told the police that he had been with Ernesto and Arturo until 2:15 a.m., after which he went to his home at 931 West Second Street. Ernesto and Arturo were alone when Pato left. El Pato claimed he was awakened by the three men after they had discovered the bloody crime scene and that he did not remember them coming over earlier. (Exhibit C, p. 8,9) When shown a mug shot line up containing petitioner he stated that he had seen him at Ernesto's residence on other occasions. Pato stated that Arturo had told him that petitioner was the person who probably killed Ernesto, and that petitioner had been alone with Ernesto. (Exhibit, C, p. 10.) At a later interview, conducted while he was in prison El Pato told the police that both he and Ernesto Macias sold cocaine and heroin and they had in fact sold these substances to Petitioner on a regular basis over the few months preceding Ernesto's death. Pato also reported that both he and Ernesto sold guns, including the stolen Jennings, which they were buying for $20-$40 and re-selling for $70-$80. (Exhibit D, p. 6) According to El Pato, on the night of the murder, he had been at Ernesto's residence, left the residence, and then returned later in the evening. El Pato stated that Ernesto, Arturo, Rigo and Gerardo were there on that occasion and they briefly mentioned to him that petitioner ***had been***

there and left. The also said that petitioner had told them that the gun he had bought from Ernesto was no good and that he wanted his money back. (Exhibit D. p. 2,3.) El Pato reported that the group came to his house shortly after he went home and they purchased an "eight ball," street slang for an eighth of an ounce of cocaine. (Exhibit D., p. 4.) El Pato stated that he did not like petitioner because he was a heroin addict, a thief and a rat. (Exhibit D, p. 6.) Pato's opinion of petitioner, would explain why if petitioner were at Ernesto's residence, he was not allowed to accompany the others to El Pato's house to purchase cocaine. It may also explain why El Pato and Arturo would decide to say that petitioner was the one who must have killed Ernesto.

5. Based on the admissions made by El Pato and the inconsistent statements by Arturo and El Pato, it appears that the case against petitioner was contrived by Arturo and El Pato, perhaps to conceal guilt on their part , or at least out of fear that one of them would ultimately be blamed. In petitioner's own statement to the police, only part of which was provided to the jury, through the testimony of Investigator Alex Maxwell, he stated that he was at the house that evening [although this may well have been earlier, before El Pato's latest visit.] Petitioner said that at the time he was at the house, Ernesto was suppose to be going somewhere with the others to obtain drugs, that he wanted to stay behind in the house [perhaps because El Pato didn't like him] by himself, Ernesto would not let him stay and he left. (Exhibit J.) It is logical that Ernesto, who dealt in drugs and guns, may not have

wanted petitioner, or anyone, to stay alone in his house. It is not logical that if Ernesto was going to stay home he would say, to leave and you can come back in when the others return. [with the eight ball]. (Exhibit C, p. 4.) Ernesto would certainly not want petitioner attracting police attention by waiting outside the house for his $20 worth of cocaine, just so Ernesto could take a short nap before the others returned to divide up and or use the cocaine they purchased from El Pato.

C. **No Robbery Was Committed.**

1. The only theory of liability presented was felony murder based on a mythical robbery. Although petitioner was arrested within a very short time of the homicide, no property belonging to Ernesto Macias was ever found in petitioner's possession. Circumstantial evidence showed, at most, that Macias ***could have had*** a wallet containing cash on his person that evening. The idea that he ***could have had*** a wallet was apparently based solely on the fact that some men carry wallets. Arturo, his roommate and cousin said that Ernesto did not carry a wallet. Ernesto may not have had anything with him other than the $80.00 in his pocket. His airline tickets, if he had any, his travelers checks, his Versateller card, if he had one, and his identification could well have been in his suitcase in his car. Ernesto drove a gold or brown mustang which was at his residence at the time of his death, which was a logical place to leave his suitcase, if he planned to depart early in the morning. (Exhibit B, PP. 2,3.) There is no evidence that petitioner, or for that matter anyone else, ever took anything of value from Macias, much less that Macias was killed for

the purpose of obtaining anything of value. Although the condition of Macias' body and the cause of death establish the use of force against him, these facts alone do not suggest or give rise to an inference that the force was exerted for the purpose of obtaining Macias' property. Macias was engaged in the sale of heroin and cocaine and stolen guns. (Exhibit D, p. 6 .) A reasonable inference from the evidence is that Macias and El Pato were involved in a joint enterprise, where they stored product at the Second Street address and sold it out of the crime scene residence. Ernesto's relationship with El Pato was apparently volatile, as they reportedly had been in a near gunfight in Mexico. (Exhibit B, page 5.) On the evening of Macias' death both Ernesto and El Pato as well as Arturo, and probably others had been drinking and using cocaine at the Macias residence. (Exhibit D.)

2. No one knows the events that led to Macias' death, and while it is apparent that numerous people had access to him that evening, any one of whom could have killed him, it can not be inferred from the state of the evidence that anyone robbed him. The prosecutor conceded that there was a struggle for the gun when, in a desperate attempt to come up with something of value that may have been missing, she suggested that maybe petitioner only wanted the gun and they fought over the gun. (RT 1339, 1340.) The first problem with that scenario supporting a robbery is that even assuming for argument's sake that whoever killed Macias took his gun, it is impossible to determine when the intent to take the gun was formed. It is more likely that any intent to take the gun was formed after Macias was dead or perceived

to be dead. This is because, if Macias was killed with his own gun, whoever killed him was obviously initially unarmed. It defies logic that an unarmed houseguest, knowing that mutual friends were moments from returning, would suddenly attack his armed host for the purposes of stealing his gun. The more logical inference is that there was a struggle for some other reason, after which the victor ran away with the gun. The second problem with the gun being the target of a robbery is that there is no evidence that the gun found in the Monte Carlos belonged to Ernesto Macias. Evidence not introduced at trial set forth, infra in subpart 4, indicates that Arturo, took Gerardo and Rigo to El Pato's to purchase an eight of an ounce of cocaine not to "party" for an undetermined period of time. (Exhibit D, p.4.) ***If*** petitioner was there, late that evening and ***if*** Ernesto stayed behind while the others left, petitioner knew where they were going, what they were going for, and petitioner was told (according to Gerardo) that he could come back into the house when they returned, The reasonable inference being that petitioner was to participate in either consumption of the cocaine or permitted to purchase his $20 worth. (Exhibit, C, p.4.) Petitioner, would thus have known that he would be immediately blamed for anything that happened in their absence.

3. The fact that Macias' body was found in the street, indicates that if anything was removed from the body, such as a wallet or money, it was likely removed by someone who found the body in the street, and quickly removed the wallet, the money or whatever property they found in one pocket, not wanting to take

time to check the other pocket or remove his jewelry. The evidence presented herein, Exhibits A through D, indicate that Ernesto Macias and El Pato were known drug dealers in whose pockets one would expect to find cash or drugs. Gerardo, Rigoberto, Arturo, El Pato, Asuncio [2] and who knows how many others, all of whom thought that Ernesto was likely to have money or cocaine, would have thought that since Ernesto was dead, they might as well take it. The claim that the three young men discovered the fallen Macias, their relative and friend, but did not get out of the car to try and help but instead went to El Pato's house to decide how to handle the situation indicates that they had criminal misdeeds to cover up that went far beyond traffic warrants. (Exhibit, C p.p. 3-4 .) Another known suspect in both the murder and/or the removal of any property that may have been removed from the body was Liberato Gutierrez, a drunk young man who had blood on his shirt and shoes when arrested in the alley. (RT 1165-1166.) ***If*** any property was taken from Ernesto Macias, any one of the aforementioned individuals or an as yet unknown individual is likely to have been the culprit.

D. <u>PETITIONER'S MENTAL STATE PRECLUDED HIS FORMING THE REQUISITE CRIMINAL INTENT FOR FELONY MURDER OR THE SPECIAL CIRCUMSTANCES</u>

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2 During the search of Ernesto's residence a Pomona Police Department Booking slip in the name of Asuncio, Romo Macias was found. Upon contact, Asuncio, who lived at 965 West Third in Pomona, told the police that he also had been drinking beer with Ernesto on the night Ernesto was killed but he couldn't remember what time. Asuncio was uncooperative and denied knowing El Pato until he had a private audience with Roberto Macias, Ernesto's brother, at which time he admitted he knew. El Pato. (Exhibit B, p. 3.)

Petitioner's mental state precluded his having formed the requisite felonious intents for capital murder.

1. As set forth more fully in Claim IV and V, although further research and investigation are necessary, and cannot be accomplished absent additional funding, Dr. Nancy Kaser Boyd (Exhibit AA.) is of the opinion that petitioner's adult behavior is the result of post traumatic stress syndrome and organic brain damage as a result of head trauma and ingestion of toxic substances.

CLAIM II

THE TRIAL COURT'S RULINGS VIOLATED PETITIONER'S FOURTH, FIFTH, SIXTH EIGHT AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION.

1. The facts supporting this claim among others to be presented after full investigation, discovery, access to this court's subpoena power, adequate funding and an evidentiary hearing, are set forth below and in succeeding sections of this petition and include but are not limited to, the following:

2.. Petitioner refers to all of the allegations pled in

Claim I and by this reference, incorporates them herein as if set forth in full.

A. The Court Deprived Petitioner of the Effective Assistance of Counsel When it Failed to Grant Petitioner's Marsden Motions

1. At the first Marsden on February 10, 1992, before the Honorable Theodore Piatt several weeks before trial. Petitioner expressed the extreme frustration he felt with his counsel's failure to communicate with him about his case, and to take

appropriate steps to prepare for trial. Petitioners complaints about counsel filled approximately three transcript pages before he was cut off by the trial court. (RT 60, CT 159.)

2. Counsel, who was permitted to speak at length. stated that petitioner's case was not a complex one, he had not filed any pretrial motions because he felt that there was no legal basis for them. Counsel asserted that he had only recently learned of certain potential penalty phase witnesses. Petitioner voiced his concern again that counsel has failed to gather information from witnesses and the need to interview them long ago. (CRT 2-10-92, p. 62, 75 64.) Trial counsel then proceeded to give the factual details of the instant case and informed the court that he did not believe a motion pursuant to Penal Code section 995 to strike the special circumstance allegation would be successful because there was, in his opinion, sufficient evidence. (CRT 2-10-92, p. 64-67.) In fact, as, has been extensively argued on direct appeal, and a set forth in Claim I, ante, there was no evidence that a robbery had been committed and a motion to strike the special circumstances would have been meritorious. Even if not granted it may have exposed the weaknesses in the prosecution's case, and led to a favorable case disposition. Counsel also informed the court that he did not feel there was any legal basis to suppress the gun found in the car. (CRT 2-10-92, p. 67.) Counsel did, however, file a motion to suppress the gun in the car and then unreasonably argued against his client's interest by informing the court that he had no standing.

In fact, counsel could have no tactical reason for gratuitously informing the court that petitioner was not the driver of the car, and even if he was not the driver, petitioner had standing as a passenger in his borrowed vehicle to assert a violation of his Fourth Amendment Rights.

3. The court denied Petitioner's request to substitute counsel, whereupon petitioner asked to represent himself. (CRT 2-10-92, p 73-76.) Judge Piatt told petitioner that he would not permit petitioner to represent himself because he did not have the ability to serve as his own attorney, and, therefore, Judge Piatt , would not discuss the matter. (CRT 2-10-92, p. 76.)

4. On February 26, upon being transferred to the trial court, petitioner again requested a ***Marsden*** hearing and submitted a handwritten motion for substitution of counsel. (RT 97-98, 104-199; CCT 189-205.) Petitioner complained that he was being denied the right to effective assistance of counsel and that he and trial counsel had a conflict of interest. (CCT 191.) Petitioner reiterated that trial counsel did not visit him, they did not communicate, and that counsel took no interest in petitioner's case. (CCT 192, 194.) Petitioner stated that counsel had not talked to potential witnesses, including witnesses who heard the gunshots and third party suspects. Petitioner had not been contacted by the investigator assigned to his case and had heard nothing about the blood evidence found on Liberato's clothing. (CCT 195, CRT 2-26-92, p. 107.)

Petitioner was correct, Liberato's clothing, boots as well as his GSR kit was

booked into evidence by the Pomona Police Department, but there is no report in discovery provided to the defense, indicating that any testing was ever ordered much less completed. (Exhibit M, BB.) Defense counsel, according to petitioner, was unaware of the evidence that the District Attorney intended to offer and had failed to file motions, including a motion to dismiss the special circumstances allegation. Counsel had repeatedly opined that petitioner's case was not a complex case; but he had still not contacted important penalty phase witnesses. (CCT 192-194, CRT 2-26-92, p. 106-109.)

5. Trial counsel again assured the court that petitioner's case was not complex and that he was prepared to proceed. (CRT 2-26-92, p. 114.) According to counsel, the neighbors where the killing occurred had been questioned (CRT 2-26-92, p. 115.) The trial judge denied petitioner's second ***Marsden*** motion concluding that no grounds for granting the motion had been articulated to the court. (CT 187;CRT 2/26/92 p. 106, 118.)

6. On March 9, 1992, two days before trial commenced, following the denial of defense counsel's motions, petitioner moved pursuant to ***Faretta*** to represent himself. (RT 365.) The trial court denied petitioner's ***Faretta*** motion as untimely and not in good faith. (CT 212.) Petitioner was forced to proceed to trial represented by the attorney he had twice tried to replace. Petitioner was convicted on March 23, 1992. (CT 300.)

7. The penalty phase commenced on March 24, 1992. After the prosecution

presented its case, defense counsel advised the court that petitioner wanted to testify against counsel's advice. (RT 1717.) Petitioner filed a handwritten letter with the court, requesting a ***Marsden*** hearing. In the letter, petitioner complained that his attorney was not presenting available favorable evidence about the alleged incidents introduced in aggravation concerning behavior at Soledad, Tracy and Los Angeles County Jail. Petitioner also stated that he did not know ahead of time what the prosecutor was going to present. (CCT 205-206, CRT 1724.) Because counsel had not informed him about the prosecution's evidence and inquired about the possibility of exculpatory witnesses or other evidence, petitioner had not been able to assist in his own defense. Petitioner wanted to testify or to call witnesses who had knowledge of the incidents and who could explain to the jury the special problems of an inmate who is not affiliated with any prison gang. (CRT 1726-1727.) Petitioner's prison file contains documentation that petitioner, had failed to take orders from the Mexican Mafia and was so concerned for his safety that he had subjected himself to a voluntary indeterminate segregated housing term. (Exhibit O .) In response to petitioner's motion, trial counsel indicated that given his discussion with petitioner regarding the prison incidents, "I just don't know what I can do with that particular fact pattern that is presented to me." (CRT 1721, Exhibit 66, CT 303, CCT 205, CRT 1720-1729.) The court stated, "That motion is denied. The court finds quite to the contrary, that you have had one of the best defenses that this court has seen, that the comments raised in your letter that's been identified as Number 66 are incorrect, they are

misleading and insufficient." (CRT 1728.)

8. The court again failed to take into account that there had been total breakdown of the attorney client relationship between petitioner and the attorney he had continually tried to replace. Petitioner was not aware of the "jailhouse" evidence which was going to be presented in aggravation, until he heard it being presented. Given counsel's failure to communicate with petitioner about the prosecution's evidence, the reasonableness of counsel's disagreement with petitioner's analysis of the incidents and his rejection of the evidence petitioner wanted to introduce, including his own testimony, should not have been given deference by the trial court and should not be given deference by this Court.

9. Counsel had been given notice of the incidents that were going to be introduced in aggravation as required by state statute . Counsel had not, however, performed basic investigation concerning this evidence. Obviously counsel had not talked to petitioner about the incidents, asked him about potential exculpatory evidence and witnesses or other mitigating circumstances. Counsel also had not considered or discussed with petitioner whether there was other evidence which might mitigate or explain petitioner's alleged behavior, such as the brutal and dangerous conditions under which he was confined, and his refusal to associate with or do the bidding of a prison gang. As petitioner told the judge in his letter, prison was a mafia world, he was not affiliated with a prison gang, never had been and never would be. (CCT 205-206.) (See Exhibit O.) In his letter to the court, at the hearing, and in the

discussion that counsel reported, petitioner listed specific items of exculpatory evidence that he wanted counsel to investigate and bring forward. Petitioner also noted he would have offered further investigative leads including the names of witnesses if he had been aware of the proposed aggravating evidence. Petitioner observed that one of the alleged victims, had he been called, would have testified that petitioner was not the one who stabbed him. (CRT 1722 .) Petitioner was referring to the Copeland incident. In that incident, which took place at Deuel Vocational Institution in 1984, the victim was a prisoner named Copeland. Mr. Copeland's provides evidence which would have contradicted the prosecutions account. He had no problems with petitioner while in prison and did not see who stabbed him. Yet he was pressured and threatened both in prison and on the outside by representatives of the district attorney's office to falsely accuse petitioner. (Exhibit P.)

10. If counsel and petitioner had the attorney client relationship, counsel would have thoroughly investigated these aggravating incidents and certainly would have talked to Wayne Copeland; Wayne Copeland was not even in custody at the time of trial and in fact had been subpoenaed to court by the prosecution. (Exhibit P.) Effective counsel would have queried petitioner about the incidents and would have called witnesses to impeach the prosecution's version of the incidents, rather than simply taking the prosecution's evidence at face value. It is no small wonder that counsel didn't know what to do with the "fact pattern presented, " because he had waited until after the evidence was presented to think about possible defenses. He

had not performed basic investigation in a timely manner. Petitioner was erroneously and falsely portrayed as a leader in aggressive incidents, a prisoner with power and influence who threatened and controlled other inmates. The prosecutor requested and received an instruction pursuant to CALJIC. 206 that the jury could consider whether petitioner had intimidated witnesses. (CT 370.) The prosecutor argued and invited the jury to speculate about threats of violence as the reason why Copeland did not testify against petitioner. Petitioner's attorney obviously had not interviewed Copeland or completed any investigation of the incident and, therefore, could not have made a reasoned tactical decision as to whether or not Copeland's testimony would have been helpful.

11. The prosecution presented the majority of this aggravating evidence through the testimony of prison and jail guards. The prosecution produced only one inmate to testify against petitioner. The prosecutor invited the jury to speculate that the absence of such witnesses was due to intimidation or threats by petitioner. However, these witnesses many not have been called because the reports initially made by the inmates were not reliable and they were unwilling to go to the point of perjuring themselves in a capital case. [3] The prosecutor produced no credible evidence that petitioner had threatened ***anyone***, or that any potential witness was afraid that if he testified petitioner would do something to harm him. The prosecutor

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3. Such perjury is itself a capital crime.

deliberately exhibited Robinson for the jury to see and elicited testimony from Deputy Whipple that he had been unable to persuade Robinson to testify. (RT 1590 .) In argument the prosecutor mentioned how big and buff Robinson was and how despite his size he was afraid of petitioner, a much smaller man. (RT 1977.) Petitioner had in fact told his attorney that he was afraid of Robinson, as petitioner was the only Mexican inmate in the module and didn't want to end up being "somebody's woman or ....end up being hurt or killed." (RT 1721, 1722.) This information would have prompted a diligent advocate to talk to interview Robinson, especially since Robinson had apparently decided not to cooperate with the prosecution's efforts to secure the death penalty for petitioner. Because defense counsel had not interviewed Robinson he was unable to assess the extent to which Robinson 's testimony may have been favorable to petitioner.

B. The Trial Court Refused to Permit Evidence That a Third Party May Have Committed the Murder and or Any Taking of Property from Ernesto Macias.

The facts supporting this claim among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner refers to all of the allegations pled in Claim I as if fully set forth herein. The defense sought to have Detective Guenther testify that on the night of the homicide he had arrested an individual by the name of Liberato Gutierrez, for the murder of Ernesto Macias. (SCT 15.) A hearing was held pursuant to Evidence Code section 402. According to Detective Guenther's reports and his testimony at the

hearing, upon his arrival at the murder scene, he was advised that four individuals had been discovered in the alley north of the Macias residence and were subsequently detained. (SCT 22, RT 1164.) Guenther noted there were footprints leading north toward the alley. (RT 1165.) There was also a distinctive footprint in blood on the front porch. (SCT 34.) Upon contacting the detained individuals, Guenther focused on Gutierrez because he had blood on his shirt and shoes and he was visibly nervous. (SCT 23, RT 1165.) Guenther had reasonable cause to believe that Gutierrez was involved in the incident and arrested him for suspicion of murder. (SCT 23.) A breath test administered at the police station indicated that Gutierrez's blood alcohol was .30. (RT 1165-1166.) In addition to sending Gutierrez's clothing to the crime lab, a gun shot residue test was administered to Gutierrez, the result of which is apparently unknown. (ACT 30.)

2. The prosecutor argued that the defense had not made a sufficient showing under ***People*** v. ***Kaurish*** (1990) 52 Cal.3d 648 and ***People*** v. ***Hall*** (1986) 41 Cal.3d 826, because Gutierrez did not physically resemble petitioner and the tread on Gutierrez' work boots did not match the shoe print on the porch. (RT 1166-1167.) According to the prosecutor, Gutierrez was never a suspect and was just taken to the police station, along with all the other persons who were detained in the alley, because that was the way Detective McLean does things. (RT 1166.) However, at the time of Gutierrez's arrest, McLean had not yet arrived on the scene. (SCT 22-23, 26.) The other individuals who were detained in the alley also went to the police station;

Pedro Venagas, who lived at 1017 West Third, Jose Vargas who lived at 1043 West Third, and Angelica Reyes from 1041 West Third. They were interviewed by Detective Holzberger as witnesses, not suspects. (SCT 55-57 .) These individuals were acquaintances who lived on the street, had come home from a bar and were visiting with each other in the alley. Gutierrez was not mentioned as part of this group and did not live on the street. His booking sheet indicates that he lived on Second Street. (ACT 21 .)

3. Defense counsel noted that the lack of a match between Gutierrez' boots and the shoe prints on the porch was not a sufficient reason to rule out Gutierrez as a suspect. In particularly Gutierrez could have taken property from Macias or from the residence. Other persons' shoes could also have have made the prints on the porch. For example, at least as indicated by discovery to the defense, no shoe impressions had been taken from Arturo Vasques, Rigoberto Perez or El Pato or anyone else. Furthermore, as counsel stated, since it had not been tested, the blood on Gutierrez could have been that of Ernesto Macias. (RT 1169-1170.)

4. The court, citing ***Hall*** and ***Kaurish,*** ruled that counsel could not inquire into the arrest of Liberato, the blood on his shoes, or specifics such as him being nervous. (RT 1170.) The court only permitted counsel to elicit the fact that other individuals had been found and detained in the alley. (RT 1170-1171.) The court's ruling invaded the province of the jury and deprived petitioner of his right to present his only real defense: to establish that there was reasonable doubt as to his actions

even though witnesses alleged he was the last to see Macias alive. If the proffered evidence had been admitted, petitioner could have shown that (1) Gutierrez had the opportunity to have killed Macias or at the least the opportunity to have grabbed his wallet out of his pocket after Macias collapsed in the street and that (2) circumstantial evidence connected Gutierrez with the crime.

C. The Court Refused To Hold a Full and Fair Hearing on Petitioner's Fourth Amendment Claim

1. Defense counsel moved pursuant to Penal Code Section 1538.5 to suppress the alleged murder weapon, a Jennings semiautomatic found in a Monte Carlo, on the ground that it was seized in violation of the Fourth Amendment of the United States Constitution, since the initial detention of petitioner was unlawful. Counsel argued that the discovery and seizure of the gun was the product of the initial unlawful stop and, thus, inadmissible under the exclusionary rule. (CT 166-174.)

2. The prosecution's response to the motion indicated that at approximately 1:40 a.m., Officer Todd saw a dark colored Monte Carlo parked in the lot at 7-11 in an area which was not well lit.[4] Todd saw a group of people around the front of the vehicle and recognized some of them as homeless black people whom he had been

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[4] The facts relevant to the 1538.5 motion are taken from the prosecution's opposition and the preliminary hearing, since due to the court's summary denial, the issue was not fully litigated in the trial court. Although Officer Todd testified at trial, the legality of the stop was not in issue, so Todd was never examined in that regard.

monitoring because they had been selling bad drugs to people who stopped at convenience stores. Todd turned into the parking lot with the intent to contact the owner of the vehicle, make him aware of the homeless people, find out what their activity was, whether the owner of the vehicle had car problems, or whether he was going to buy dope from the homeless people. (CT 189.) Todd pulled into the parking lot, pulled up behind the Monte Carlo blocking it in the parking space and turned his spotlight on the car. (CT 37.) At that point, the driver's door opened and petitioner got out of the car, leaving the door open. (CT 189, 37.) After "making the stop and calling in," Todd got out of his marked patrol car and started to walk to the front of the Monte Carlo. As Todd approached the open driver's door, his spotlight hit an object that reflected light back as if it were chrome. (CT 37, CT 189.) At that point, Todd looked down and observed a small caliber semi automatic weapon protruding from under the driver's seat.

3. The prosecutor argued that petitioner lacked standing even though he was the driver of the car because he had no reasonable expectation of privacy in a vehicle owned by another. The prosecutor also argued that the search was lawful since the object was in plain view but that argument was never reached. (CT 189.) On March 6, 1992, the court summarily denied petitioner's motion concluding without a hearing that petitioner lacked standing to challenge the seizure under Penal Code Section 1538.5. (RT 334-335.) In so ruling, the trial court erred as a matter of law and violated petitioner's Fourth, Sixth , Eighth, and Fourteenth Amendments.

4. Contrary to the court's belief, the mere fact that petitioner did not own the vehicle from which the gun was seized did not deprive him of standing to challenge the search and seizure. The prosecution stated that petitioner was the driver of the Monte Carlo. Based on Officer Todd's preliminary hearing testimony, this assertion was supported by the evidence at the time the motion to suppress was filed. (CT 99, 203.) It was developed at trial that the Monte Carlo was registered to Juan Velador, but, according to Todd and the prosecution, petitioner was driving the vehicle. The vehicle was not stolen and was released to Juan Velador three days after petitioner's arrest. (RT 894.) It was reasonable to infer, based on the known evidence, that petitioner borrowed the vehicle from Mr. Velador. Therefore, since petitioner had lawful possession of the vehicle which creates a reasonable expectation of privacy, petitioner had standing to challenge the unlawful search and seizure of the gun (***Rakas*** v. ***Illinois*** (1978) 439 U.S. 128, 133 [99 S.Ct. 421, 425, 58 L.Ed.2d 387], A person who has the owner's permission to use a vehicle and is exercising control over it has a legitimate expectation of privacy in it ***(People v. Leonard*** (1987) 197 Cal. App. 3d 235, 237.)

CLAIM III

EGREGIOUS PROSECUTORIAL MISCONDUCT DEPRIVED PETITIONER OF A FAIR TRIAL DUE PROCESS OF LAW AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The facts supporting this claim among others to be presented after full

investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner refers to all of the allegations pled in

Claim I through III and by this reference, incorporates them herein as if set forth in full.

A. The Prosecutor Presented False Evidence and Argued Theories Of Guilt She Knew to Be False

1. The state is required to reveal testimony from its witnesses which it knew or should have known was false or misleading. This applies whether the state solicits false testimony, or does not correct it when made.(***Napue v. Illinois*** (1959) 360 U.S. 264, 268 [79 S. Ct. 1173, 3 L. Ed. 2d 1217].) The knowing use of false evidence by the prosecution, whether or not the falsity bears directly on the defendant's guilt or credibility of the state's witness, is misconduct.(***Giglio v. United States*** (1972),405 U.S. 150, 153-154 [92 S. Ct. 763, 31 L. Ed. 2d 104]; ***Miller v. Pate,*** (1967) 386 U.S. 1 [87 S. Ct. 785, 17 L. Ed. 2d 690]; ***Napue v. Illinois, supra.,*** 360 U.S. at 268.) When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." ***(United States v. Agurs*** (1976) 427 U.S. 97, 103 [96 S. Ct. 2392, 49 L. Ed. 2d 342].) In ***Sanders v. Sullivan*** (2d Cir.1988) 863 F.2d 218, 222-226] , *opinion after remand*, (2d Cir. 1990) 900 F.2d 60, the Court of Appeal explained that the duty to correct testimony is a continuing

one, and when the prosecution is put on notice that testimony it has presented was false and misleading, even if it was not previously aware of the problems, the judgment must be set aside.

2. The prosecution's statutory duty under California Penal Code Section 1473 to correct false evidence, is the same. In ***People v. Pensinger*** (1991) 52 Cal. 3d 1210 this Court held that the prosecution's presentation of false evidence "substantially material or probative on the issue of . . . punishment" violated section 1473, subdivision (b)(1). The statutory violation occurs whether or not the prosecutor knew that the evidence was false at the time it was presented. § 1473, subd. (c). Moreover, the presentation of false evidence violates the prosecution's duty even without proof that the evidence amounted to perjury. (***In re Hall*** (1981) 30 Cal. 3d 408, 424.) "[S]ubstantially material" evidence "means false evidence of such significance that it may have affected the outcome of the trial." ***(In re Wright*** (1978) 78 Cal. App. 3d 788 . This state law entitlement is protected by federal due process under ***Hicks v. Oklahoma*** (1980) 447 U.S. 343 [100 S. Ct. 2227, 65 L. Ed. 2d 175.]

3. Frank Terrio testified that when he searched the Monte Carlo, he found a pair of gray trousers in the passenger compartment of the Monte Carlo. He observed traces of blood on the pants and noted the pants and the blood in his inventory report. (RT 1118, 1119.) Defense counsel mentioned in argument that the jury should consider the fact that the blood on the pants had not been tested

and an analysis provided by the prosecution to show that the blood on the pants was consistent with the blood on the gun (R.T. 1373, 1324.)

3. During her rebuttal arguments, the prosecution asked the jury to infer that the blood found on the grey pants in the Monte Carlo belonged to Macias. (RT 1394-1395, 1410.) The prosecutor quoted defense counsel's argument saying:

> Now he mentioned these pants that had possible blood in the car that the defendant was arrested in. Now if the blood was consistent with that of the victim, don't you think you would have known that? He didn't ask Detective Terrio anything about testing. He didn't ask Detective Terrio what was done. He didn't ask Detective Terrio what he thought, how it was analyzed, if it was done, if it wasn't done.
> It's a little unfair then to get up in front of you and say where's the testing? Where's the blood? Where's the beef?
> You know what I mean, ladies and gentlemen. If in fact this blood was so relevant defendant Valdez could have had it analyzed. He could have called his own experts. They could have taken the blood. They could have told you you know, yes it was no it wasn't.
> So ladies and gentlemen, it really is unfair to ask these questions about ***why things weren't done*** when the question was not asked to the expert at the time that he was on the witness stand.
> Now when the defendant was arrested with the gun, with the blood, with the fingerprint, the shift- - the shift of the investigation changes. It changes because now you have some evidence pointing in the direction of an individual. (RT 1394-1395.)
> . . . ***Now we don't know what Detective Terrio did on those pants. And, again, if that was an important issue in this case, you would have - - the question would have been asked.*** . . (RT 1410.)

5. The prosecutor certainly knew that the blood had been tested and did not belong to Macias, as she was in possession of the DNA results (Exhibit F.)

(Kyles v. Whitley (1995) 514 U.S. 419, 131 L.Ed. 2d 490, 115 S. Ct. 1555, ***In re John Brown*** (1998) 17 Cal. 4th 873. The prosecution's statement that defense counsel would have asked the questions or that petitioner would have done his own testing and called his own experts if it had been important to him, implied that petitioner did not do so because the blood was clearly inculpatory and it was in fact Macias's blood was on the pants. The prosecutor, however, knew better and to state otherwise in the face of a DNA report ***excluding*** Macias as the donor of the blood was egregious misconduct which deprived petitioner of his Fourteenth Amendment right to due process of law and a reliable guilt and penalty determination..

6. During defense counsel's cross-examination of Frank Terrio, Terrio testified that he was present at the search of petitioner's house on May 4, 1989 and his duty was to collect evidence. (RT 1080.) Terrio testified that although there were tennis shoes in petitioner's house, he did not collect any of them because none matched the pattern left at the murder scene. (RT 1081.) Terrio's testimony in this regard was false and misleading. On the inventory sheet, which was signed by Terrio, and attached to the return to the search warrant, it indicates that a pair of Nike tennis shoes were in fact seized from petitioner's house. (SCT Vol. I of I, p. 6.) Terrio admitted at trial that the tread on tennis shoes observed at petitioner's house during the search obviously did not match any of the shoe prints left at the murder scene. However, his false testimony that no shoes were seized from

petitioner's house made it possible for the prosecutor to argue that the Nike tennis which petitioner had been wearing that evening were not at the house when the police arrived and had in fact been destroyed by petitioner in order to conceal his guilt. Despite Terrio's false and misleading testimony which the prosecutor knew was factually incorrect, the prosecutor failed to correct the record and in fact, as set forth ante, used the false testimony to argue that petitioner suppressed evidence connecting him to the crime.

7. During closing argument the prosecutor argued that the booking slip from May 1, 1989, showed that petitioner had been wearing Nike tennis shoes and that he had retained them. (Exhibit 23, SCT II, p. 29.) Based on the information on the booking sheet, therefore, the prosecutor urged the jury to infer that petitioner destroyed the Nike tennis shoes upon his release from custody because the shoes were not found during a subsequent search of petitioner's house. (RT 1330.) The prosecutor then asked the jury to conclude that the Nike shoes that petitioner had been wearing when he was booked actually matched the Nike shoe print found at the murder scene. (RT 1329-1330.) ***People v. (Shawn) Hill*** (1998) 17 Cal. 4th 800

> . . . But more enlightening is he was - - he retained a pair of black Nikes. Why is that significant? And now you're sitting here thinking, wait a minute. What was all this testimony about tennis shoes walking through the crime scene? Okay. The reason why the black Nikes are so important - - and you know that they weren't found - - he retained them - - so obviously he had them ***and the police never got custody of them.*** But No. 38, Detective Terrio

> testified yesterday that there was this partial print that he couldn't tell was coming or going. But it was consistent with an Addidas or a Nike tennis shoe. Now this print is kind of a light print. And we're trying to draw - - we are going to draw some inferences here, ladies and gentlemen, and it is not as heavy an imprint as the tennis shoe prints on 37 and 36. People suggest to you that Valdez made this partial print when he was running out of the crime scene. When you run you don't run flatfooted and heavy. You run lightly, briskly, and sometimes the whole foot - - the whole shoe doesn't touch the ground. I think that you can use your common sense to figure that out. These prints appear to be - - the other two photographs appear to be a lot more deliberate. It looks like there's a lot more on the toe. Maybe one of the detectives was wearing those shoes he wasn't supposed to be wearing. I mean this is the early morning hours and there was - - there were a lot of detectives that rolled on that location, paramedics, and everything else before Terrio got there. Police walk through crime scenes. Sometimes these things happen. But think, ladies and gentlemen, about the Nike print and the fact that he was booked with a Nike shoe and the shoes were never found. Coincidence? I don't know ladies and gentlemen. (RT 1329-1330.)

8. Defense counsel attempted to refute the prosecutor's argument by reminding jurors in closing that the Niki tennis shoes petitioner was wearing on the night he was arrested were never tested and that tennis shoes found at petitioner's house were not seized precisely because the soles did not match the impression taken from the scene. (RT 1371-1372, 1387.) During her rebuttal argument, the prosecutor went on to argue that since there was no evidence that petitioner remained in custody at the time of the search, he could have destroyed or disposed of the black Nikes. (RT 1393.) The prosecutor further urged that no Nike tennis shoes were seized, thus implying that petitioner must have had ample

time to destroy the inculpatory tennis shoes. (RT 1393.) The prosecutor argued:

> Also, counsel indicated that Valdez' Nike shoes were taken into evidence. They were not. On the booking slip, the blue Nikes were retained by the prisoner. There's no evidence before you that he was in custody at the time of May 4, 1989, when the search warrant was done at his house. There were no Nike tennis shoes matching the tread mark that Detective Terrio was looking for at his house. The defendant wasn't there. His tennis shoes were not there. So you don't have any knowledge - - or we have absolutely no evidence that he was in custody and that they were able to seize these things. (RT 1393.)
> . . . Isn't it a coincidence that there's a partial Nike or Addidas print and the defendant had a Nike tennis shoe on when he was arrested and it disappeared, it was not found in his house. (RT 1402.)

9. The prosecutor, however, well knew that a pair of Nike shoes were seized during the search of petitioner's house; she was also aware that the tread on the shoes did not match the print found at the murder scene. (SCT, vol. I of I, p. 6 [inventory of items taken during search].) Therefore, not only was there no evidence to support the prosecutor's gross speculation that petitioner destroyed or concealed evidence connecting him to the crime, there was concrete evidence directly establishing that petitioner's Nike tennis shoes were found during the search of his home, and that the soles of those Nikes did not match the imprint left at the murder scene.

Finally, the prosecutor knew that at the time petitioner was arrested on May 1, 1989 petitioner, he was a parolee and was not released from custody. A parole hold was placed on him immediately and the blue Nike shoes that he was wearing

at the time of his arrest were always available to law enforcement. (Exhibit I.) Thus, evidence in the state's possession clearly showed that petitioner did not destroy or conceal any tennis shoes.

10. The prosecutor's statements to the contrary were deliberately false and her invitation to the jury to convict petitioner of a capital crime and sentence him to death on the basis of these false statements deprived petitioner of his Fifth and Fourteenth Amendment rights to due process and Eighth Amendment right to a reliable penalty determination. As has been argued extensively in Claim, I, infra, and on direct appeal, petitioner's connection to this crime was at best tenuous. The jury may well have had a reasonable doubt which was dispelled by the false inferences that the blood on the pants belonged to Macias and that petitioner destroyed his tennis shoes to conceal his guilt.

B. The Prosecutor Deliberately Elicited Testimony Concerning Identification of Petitioner as a Suspect Which Made it Clear that Petitioner Had Committed Prior Offenses

As set forth in petitioner's briefing on direct appeal, during the prosecution's case in chief, the prosecutor intentionally elicited testimony from investigating officer John Holtzberger which made it clear that petitioner had suffered a prior conviction; this question and answer sequence was in direct contravention of the court's ruling bifurcating petitioner's prior offenses. Questions that "violate a previous ruling by the trial court are particularly inexcusable." (***People*** v. ***Johnson*** (1978) 77 Cal.App.3d 866, 873-874, citing

People v. *Glass* (1975) 44 Cal.App.3d 772, 781-782.) The prosecution's decision to deliberately elicit testimony revealing petitioner's prior criminal record thus permitting the jury to infer guilt, deprived petitioner of his Sixth Amendment right to a fair trial and Fifth Amendment and Fourteenth Amendment right to due process, as his Eighth Amendment Right to a Reliable Penalty Determination.

C. **The Prosecutor "Testified" (When Questioning Witnesses Concerning Serological and Fingerprint Evidence) to Facts Not in Evidence, Specifically that the Prints Could Not Have Been Made "Under the Blood" or Before the Blood was Applied**

1. Richard Catalani worked for the Los Angeles County Sheriff's Department Crime Lab in 1989, in the serology section, handling typing and identification of bodily fluids. (RT 917.) Catalani testified that he examined the gun found in the Monte Carlo on the day petitioner was arrested to remove and examine blood stains from the outside of the firearm, before the gun went to the latent print unit to be checked for fingerprints. (RT 920.) Catalani testified that the blood found on the left side of the grip could have come from the victim or 1.3 million people in Los Angeles County. (RT 932, 945.) During the prosecutor's direct examination of Catalani, the following exchange occurred:

> Prosecutor: In your examination of the weapon, did there appear to be any fingerprints in the blood?
>
> Catalani: There appeared to be areas where there could be fingerprints. I am not a fingerprint expert so - -

Prosecutor: Based on your expertise in the area of blood - - not so much of prints, but in your training and experience - - can a print of any kind be made while the blood is wet?

Catalani: Yes.

Prosecutor: Did those prints or whatever you saw that purported to be a print appear to have been made in this wet blood?

Defense counsel: I am going to interpose for lack of foundation an objection, assuming facts not in evidence [sic].

Court: Miss Chilstrom [prosecutor]?

Catalani: **Yes, it could be made while the blood was wet.**

Prosecutor: **Not under the blood or - - You can't make it under the blood** - -Okay. Thank you, no further questions. (RT 947-948 [emphasis added].)

2. As argued in petitioner's brief on direct appeal, the final statement by the prosecutor was not a question directed at Catalani, but rather constituted testimony based on her incorrect interpretation of Catalani's statement; Catalani testified that the print could be made while the blood was wet. He said nothing at all about the scenario alleged to be impossible by the prosecutor. The prosecutor deliberately extended a contrary inference from Catalani's testimony to fit the crucial argument that the prosecution was attempting to advance, namely, that the

print could not have been made under the blood, i.e., before the blood was applied. This is not what Catalani said. Catalani plainly testified that it was possible to make a print when the blood was wet. He made no comment whatsoever concerning the other possibilities. He did not testify that the print could not have been made under the blood. The prosecutor's statement was thus, an intentional misrepresentation of Catalani's testimony and constituted prosecutor testimony in violation of petitioner's Sixth Amendment right to confront and cross-examine his accusers.

3. The prosecutor's deliberate misstatement of Catalini's testimony on this crucial evidence was especially egregious misconduct when viewed in conjunction the facts set forth in Claim I and it supporting exhibits, and the other instances of misconduct set forth in subpart A of this claim. The prosecutor was in possession of the Cellmark report (Exhibit F.) excluding Macias as a donor of the blood on the pants which were found in the same passenger compartment as the gun. She, therefore, well knew it was highly likely that the blood on the gun was not the blood of Ernesto Macias, but in all likelihood belonged to the same individual whose blood was on the pants. Nevertheless, she urged that petitioner should be convicted of capital murder and sentenced to death based on a print that, according to her alone, had to have been made in the wet blood of the victim.

D. <u>During Her Closing Argument, in the Penalty Phase the Prosecutor Argued Facts Contrary to the Evidence and Not in Evidence When She Claimed that Petitioner's Sisters Testified Solely Out of Family Obligation</u>

and that His Sisters and Aunt Thought Petitioner Deserved No Mercy and Thus, Should be Sentenced to Death

1. During her closing argument at the penalty phase, the prosecutor completely disregarded the mitigating evidence and argued that petitioner's two sisters and his aunt thought that petitioner should be sentenced to death. (RT 1956-1958.) As petitioner argued on direct appeal, this offensive misleading argument was made despite the fact that evidence presented at trial clearly contradicted the prosecutor's argument.

2. In addition to the evidence adduced at trial it is apparent from the declarations of Graciela and Victoria (Exhibits R, W.) that they did not testify for "Mr. and Mrs. Valdez," as the prosecutor argued, but out of love for their brother. Victoria states that she is the middle child, one and a half years younger than petitioner. She and petitioner were close as children and always use to play together. (Exhibit W ¶ 4, ,12) She emotionally describes the abuse inflicted on Freddy by their father, and her own attempt to kill her father. (Exhibit W, ¶ 5,-13.) She also states that Freddy stayed with her and her family when he was last out of prison and was a good brother to her and her kids. (Exhibit W, ¶15.) Graciela,, who is seven years younger than petitioner also describes her abusive father and her memories of Freddy being the target of abuse. (Exhibit R, ¶ 2, 3.) She states that her brother is not a bad person, that he had problems with drugs which altered his behavior. (Exhibit R, ¶ 10.) According to Graciela, her brother Freddy is a

very loving person who is loving to all her children. (Exhibit R, ¶ 11.)

The prosecutor's unfounded remarks diminished the jury's sense of responsibility for their verdict because the prosecution suggested that petitioner's own family agreed with the ultimate penalty.

E. **The Prosecutor Committed Misconduct and Invited Jurors to Speculate that Petitioner was a Gang Member When She Questioned Victoria About the Meaning of Alleged Hand Signs in Petitioner's Picture, Even Though There was No Evidence to Support an Inference that the Depicted Hand Positions Had Any Meaning, Let Alone that they Were Gang Related And the Prosecutor Knew That Petitioner Was Not Associated With a Gang**

1. During her cross-examination of petitioner's sister Victoria, the prosecutor showed her pictures, People's 63 and 64, asked her to identify the people in the pictures and describe their conduct. (RT 1663.) The prosecutor identified People's 63 and 64 for the court and the jury and stated, 63, for the record, is a color photograph of a person appearing to be Alfredo Valdez holding a gun and doing some kind of stuff with his hands. And 64 is a color photograph of Alfredo Valdez and some other individual with a gun in their possession. (RT 1662.)

2. Victoria testified that People's 63 depicts petitioner holding a gun in the yard of a former family home and doing something with his hands. (RT 1662-1663.) People's 64 depicts petitioner and his brother Ricky holding a gun. (RT 1663.) During the cross-examination, the following exchange occurred:

Prosecutor: So this is a picture of your yard area with him doing

something with his hands [People's 63]? Do you see what's [sic] what's he doing with his hand there? Can you tell?

Victoria: I don't know.

Prosecutor: Okay.

Victoria: He's doing something like this (motioning.)

Prosecutor: Doing something with his hands, okay. (RT 1663.)

3 . Defense counsel objected to the admission of People's 63 and 64, saying that petitioner and his brother appeared to be making a gang sign. (RT 1898.) The prosecutor admitted outside the presence of the jury that she did not believe it was not a gang sign.(RT 1899.) However, her questioning of Victoria shows that she deliberately elicited this ambiguous and suggestive testimony for the purpose of inviting the jury to speculate that petitioner was a gang member even though she was well aware that the evidence did not support such an inference. The fact that the prosecutor knew that evidence did not support the inference, makes her use of the picture to foster the inference and her line of questioning all the more insidious and clearly in bad faith. She knew the inference was false, but presented the picture and the testimony precisely for this effect. In addition to her admission that she did not believe it was a gang sign, the prosecutor had petitioner's prison files in her possession which clearly indicate that he is not affiliated with a gang (See Exhibit 0.)

Nevertheless, the prosecutor subtly invited the jurors to speculate about

gang related violence, appealing to their passions and prejudices rather than, as required by the Eighth and Fourteenth Amendments, a rational weighing of the penalty alternatives.

4. The prosecutor's misconduct in this respect invited the jury to speculate that petitioner was in a gang. The jury was in turn, permitted to use this speculative "evidence" as a factor in aggravation despite its total unreliability.

F. The Prosecutor Committed Misconduct When She Argued that Petitioner Had Intimidated Potential Penalty Phase Witnesses

1. In an attempt to explain the absence of inmates or former inmates on the states witness list, namely William Robinson and William Copeland, the prosecutor, during her closing argument, invited the jury to infer that their absence was a result of intimidation by petitioner. The prosecutor argued,

> It goes without saying that, in a custodial setting like county jail, and perhaps even more so, state prison, no one wants to be labeled a rat. No one wants to inform on anyone, because the next time something happens to you, it will probably involve a lot more pain and suffering to you, the rat.
>
> Recall, if you will, counsel's questions about William Robinson to Deputy Whipple, and he's one of the people in county jail, he's the last act in county jail involving violence. . . . What I'm talking about is number 6 here, the William Robinson deadly weapon. Now, you

remember that Mr. Robusto asked Deputy Whipple about- - asked him if Mr. Robinson would testify, and he said, no, he didn't want to. Even the prison guards testified, and I think it was officer Valentine, but I'm not sure, testified that it's very common to have intimidation. (RT 1969-1970.)

2. The prosecutor then argued,

Now, let's talk about the stabbing of William Robinson, you saw him. He didn't want to testify. You saw how big and buffed out he was. Alfredo Valdez is nowhere near his size, but he stabbed him twice and he was causing him to back up in an intimidating fashion in front of deputies. (RT 1977.)

The prosecutor's argument and suggestion that the lack of witnesses at the penalty phase was that result of threats and intimidation by petitioner was clear misconduct. Mr. Copeland states that he was threatened by representative of the district attorney's office to testify that petitioner was the one who stabbed him, even though he had stated that he had no problems with petitioner and did not know who stabbed him. (See Exhibit P.) There was no evidence at all to support the inference that petitioner threatened or intimidated witnesses and that these threats or intimidation accounted for their notable absence at the penalty phase. The prosecution's suggestion to the contrary was a blatant attempt to prejudice the jury against petitioner and offer an explanation for its inability to produce key

witnesses. Additionally, the prosecution was able to fill evidentiary gaps in the aggravating evidence by arguing that the intimidation and threats leading to the absence of witnesses shows a consciousness of guilt, making it likely that petitioner committed those acts.

3. Deputy Whipple testified that he talked to William Robinson to see if he would be willing to testify at petitioner's penalty phase and Robinson said "no." (RT 1590.) Whipple did not testify that Robinson was afraid of, or expressed fear of, petitioner, nor did Whipple say Robinson had been intimidated by petitioner; he simply reported that Robinson did not wish to testify. Any inference concerning this refusal was sheer speculation. There could be various reasons why Robinson declined to testify: for example, he may not have wanted to contribute to another man's death sentence; may have been apprehensive about revealing grounds for the altercation; may not have wanted to be considered a "rat" by other prisoners in the correctional system, or had many other possible motives.

4. In regard to the Copeland incident, Correctional Sergeant Victor Onen testified that whether or not an inmate wants to prosecute has no bearing on the California Department of Corrections discipline reports. (RT 1512.) The prosecutor inferred from the statement that the prisoner declined to prosecute out of fear of petitioner. Nothing about Onen's statement indicates that petitioner intimidated or threatened any inmate or witness regarding his testimony in this or any other case. The inability of the prosecution to procure the victims' testimony

did not support an inference that petitioner threatened or intimidated witnesses. There was absolutely no evidence that petitioner attempted to, or did, intimidate or threaten any witnesses . Thus, the prosecution's invitation to infer that petitioner engaged in witness intimidation was clear misconduct with grave consequences. Not only did the prosecution's improper argument permit the jury to infer that petitioner was a bad man who threatened and intimidated prospective witnesses but also allowed the jury to infer guilt thereby filling the prosecution's evidentiary gaps. As a result of the prosecution's inherently prejudicial argument insinuating that petitioner intimidated and threatened witnesses, petitioner's due process rights and Eighth Amendment right to a reliable penalty determination were violated.

CLAIM IV

PETITIONER WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT AND PENALTY PHASE OF HIS TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION, AND THE COROLLARY STATE CONSTITUTIONAL PROVISIONS, TO DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE GUILT VERDICT AND PENALTY DETERMINATION

The facts supporting this claim among others to be presented after full investigation, adequate funding, research, analysis, discovery and hearing, include the following:

1. Petitioner refers to all of the allegations pled in Claims I through III, and

by this reference, incorporates them herein as if set forth in full.

petitioner's conviction and death sentence are illegal, unconstitutional and void under the California Constitution, article I, sections 1, 7, 15, 16, and 17 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, ***Strickland v. Washington*** (1984) 466 U.S. 668 [104 S. Ct. 2052, 80 L.Ed. 2d 674.], and the statutory and decisional law of the State of California because he was deprived of his right to effective assistance of counsel

A. <u>Counsel Unreasonably and Prejudicially Failed to Present DNA Evidence At His Disposal That the Blood Found on the Grey Pants in the Monte Carlo Did Not Belong to Ernesto Macias.</u>

1. On June 26, 1991 it was discussed on the record that a report had already been provided to the defense concerning the bloody pants being submitted to Cellmark on June 17, 1991 and that the results were anticipated by mid September at which time discovery would be provided to the defense. (.R.T. 3-2, 3-3, and again on July 3 .) Counsel represented on September 4, that the results of the DNA testing had been provided to him. (R.T. 12.) The DNA report, from Cellmark excludes Ernesto Macias a donor of the blood on the grey pants found in the Monte Carlo. (Exhibit F.) Counsel could have easily called a representative from Cellmark to testify that the blood on the pants in the Monte Carlo did not belong to Macias . Counsel could then have argued that it was reasonable to assume that if the blood on the pants did not belong to Macias the blood on the gun did not belong to him either.

2 As it was defense counsel elicited from Frank Terrio that when he searched the Monte Carlo, he found a pair of gray trousers in the passenger compartment of the Monte Carlo on which he observed traces of blood and noted the pants and the blood in his inventory report. (RT 1118, 1119.) Defense counsel mentioned in argument that the jury should consider the fact that the blood on the pants had not been tested and an analysis provided by the prosecution to show that the blood on the pants was consistent with the blood on the gun. (R..T. 1373, 1324.)

The prosecutor seized this opportunity to argue that if it was important the defense would have had the pants tested or called its own expert, that it was unknown what Terrio did with the pants and that defense counsel had not even asked him any questions about what he did with the pants.

B. Counsel Failed to Make An Adequate Offer of Proof and to Cite Appropriate Authority to the Court With Respect to the Admission of Third Party Culpability Evidence

1. Counsel wanted to introduce evidence that Liberato Gutierrez may have killed Macias or at least taken his wallet after he had collapsed in the street, he was unprepared to rebut the prosecutor's incorrect statements of law and fact with respect to the admissibility of this crucial evidence. Counsel also failed to request that the court at least admit the evidence at the penalty phase where relevant to lingering doubt. There was also ample evidence, as set forth more fully in Claim I, B, and in the police reports, to suggest that persons other than Gutierrez, such as

El Pato, or Arturo had killed Macias and conspired to blame it on petitioner. The discovery provided as set forth in Claim 1,B and in the police reports submitted as exhibits, strongly suggest that El Pato or Arturo killed Macias and conspired to blame it on petitioner. Counsel unreasonably failed to investigate or even attempt to introduce any of this evidence.

C. Trial Counsel Was Ineffective When He Unwittingly Elicited Testimony that Petitioner Was Allegedly Suspected of Another Homicide

1. Pomona Police officer Frank Terrio was in charge of the identification section of the crime scene analysis and assisted officers in the search of petitioner's house pursuant to a warrant obtained by Detective McLean. (RT 1027-1028.) During trial counsel's cross-examination of Terrio, trial counsel unwittingly elicited testimony that petitioner was suspected of another homicide. (RT 1082.) In trying to pinpoint the date of the search in which Terrio participated, trial counsel asked him when the search on West 9th Street was conducted and Terrio replied, "It was done between two separate homicide investigations. I can't remember which one came first." (RT 1082.) After explaining that he went along for the search and did not request the warrant, the following exchange occurred:

> Defense Counsel: Meaning that somebody else was in essence the person in control of the search, but you went there with the specific intent of looking for trace evidence or evidence that could be

associated with this particular crime and to connect Mr. Valdez with this particular crime; is that correct?

Terrio: At the time I don't recall if it was for this particular case or another prior case I'd been working. (RT 1082.)

2. During his cross-examination of Terrio, trial counsel, twice, elicited testimony that petitioner was a suspect in another, separate, homicide on which Terrio and the Pomona Police Department were also investigating and attempting to gather evidence. Counsel knew or should have known that cross examining Terrio in this manner would implicate petitioner in a second and distinct homicide and that such evidence would prejudice petitioner. The against petitioner was base on extremely tenuous circumstantial evidence. The jury hearing that petitioner may have committed another murder would naturally tend to make them think it was more likely that he committed the one for which he was on trial.

3. Counsel was aware of this distinct possibility prior to trial as is evident from his motion to bifurcate the priors and motion to sever the murder from the escape. However, the prejudice from these events would be far less than implied culpability for a second homicide. With these earlier tactical decisions in mind, there could be no plausible reason why counsel would tactically decide to inform the jury of the fact that petitioner was a suspect in an unsolved homicide. Thus, the only reasonable explanation for counsel eliciting this prejudicial response is that he failed to investigate Terrio's dual roles and failed to examine the facts. In

the instant case, if counsel wished to question Terrio about the search that was conducted at petitioner's house, he should have taken steps in advance to prevent him from volunteering such damaging information. There is little doubt that allowing a jury to speculate about another homicide or a defendant's prior criminality completely destroys the presumption of innocence and tips the scales toward the death penalty.

D. Trial Counsel Was Ineffective in Arguing That Petitioner Lacked Standing to Challenge the Seizure of the Gun at the Hearing on His Penal Code Section 1538.5 Motion

1. As petitioner argued in his briefing on direct appeal, defense counsel filed a motion pursuant to 1538.5 to suppress the alleged murder weapon on the ground that it was seized in violation of the Fourth Amendment and then erroneously told the court that petitioner lacked standing to bring the motion.

E. Trial Counsel Was Ineffective For Failing to Request Appropriate Jury Instructions.

1. In ***In re Cordero*** (1988) 46 Cal.3d 161, 189, this Court stated, "Adequate representation requires attorneys to research carefully all defenses of law that may be available to the defendant." (***Id.***) Counsel must prepare and request all jury instructions which in his judgment are necessary to explain all legal theories upon which his defense rests. (***Id.*** at 189.) Counsel in the instant case unreasonably failed to request a single instruction and played no role in any of the jury instruction discussions the court had with the prosecutor. (RT 1262-

1284.) Counsel unreasonably failed to request appropriate instructions.

(1) **Counsel Unreasonably and Without Justification Overlooked the Defense of After Acquired Intent With Respect to the Felony Murder Charge.**

1. The elements of robbery are (1) a taking of personal property; (2) from the person or immediate presence of another; (3) through the use of force or fear; (4) **with an intent to permanently deprive the owner of his property**. (***People*** v. ***Morris*** (1986) 46 Cal.3d 1, 19, disapproved of on other grounds in ***In re Sassounian*** (1995) 9 Cal.4th 535; ***People*** v. ***Kelly*** (1990) 220 Cal.App.3d 1358, 1366 [emphasis added].) To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. (***People*** v. ***Marshall*** (1997)15 Cal.4th 1, 34.) "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (***People*** v. ***Morris*** 1988 46 Cal.3d at 19; See also, ***People*** v. ***Bradford, supra,*** 14 Cal.4th at 1056; ***People*** v. ***Webster*** (1991) 54 Cal.3d 411, 443.) The wrongful intent and the requirement that the act of force or fear "must concur in the sense that the act must motivated by the intent." (***People*** v. ***Marshall***, ***supra***, 15 Cal.4th at 34, ***People*** v. ***Green*** (1980) 27 Cal. 3d 1, 52.)

A competent attorney acting as a diligent advocate would have requested an instruction on grand theft and an instruction on after acquired intent such as CALJIC 9.40.2:

To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time what the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed.

2. If property was taken from Macias as an afterthought, after the murder the crime was a theft and not a robbery, petitioner was, therefore, not guilty of felony murder. A similar concept applies to the special circumstance allegation; this was also overlooked by defense counsel.

(2) Counsel Unreasonably Failed to Request that the Court Fully Instruct on the Special Circumstance Allegation.

1. CALJIC 8.81.17 was read to the jury in a truncated form. (CT ; RT.) The court gave only the first paragraph as follows:

To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

1 a. The murder was committed while the defendant was engaged in the commission of a robbery.

Counsel did not object to the truncated form or request that the court read the second paragraph which was required at the time of petitioner's trial trial, as a

result of this Court's holding in ***People v. Green, supra,*** 27 Cal.3d at 59-62, and ***People v. Thompson*** (1988) 27 Cal.3d at 321-325. That second paragraph instructs the jury it must find an "independent purpose" for the underlying felony or, in the actual words of the instruction:

> "The murder was committed in order to carry out or advance the commission of the [underlying felony] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstances referred to in these instructions is not established if the [underlying felony] was merely incidental to the commission of the murder."

2. The omission of this critical language was prejudicial to petitioner. Since the court did not instruct on after acquired intent jurors did not understand that a theft of a wallet from a dead person would not be a robbery. Such a theft would not support a special circumstance, unless the intent to take the wallet was formed prior to the application of force. Petitioner's jury was not even instructed on grand theft, so that they could understand the difference between robbery and theft.

(3) Counsel Unreasonably Failed to To Seek Instructions On Lesser Included Offenses, Such Was Not a Reasonable or Informed Decision

1. As petitioner argued in his briefing on direct appeal, the court failed to sua sponte instruct on any non capital lesser offense. Counsel did not remind the

court that it had an obligation to do so. Furthermore, counsel, although requested by the court to submit lesser included instructions, inexplicably decided not to seek any. During the jury instruction discussion, defense counsel said he was going to ask for instructions on voluntary and involuntary manslaughter. (RT 1279-1280.) The trial court explicitly invited counsel to articulate a theory under which a manslaughter instruction should be given. (RT 1266.) Ultimately, counsel represented that he had decided not to request those instructions. (RT 1282.) No mention was, however, made of non capital premeditated first degree murder or second degree murder. There is no evidence in the record that counsel even remotely considered any of these lesser offenses, other than manslaughter. Deciding not to request a lesser instruction on manslaughter was not a reasonable informed decision. His failure to consider other options was likewise ineffective and not based on any reasonable trial tactic. Counsel specifically argued how weak the robbery was, but failed to ensure that the jury, if they believed his argument, had any alternatives but an acquittal. Counsel should have know that if the jury believed that petitioner killed Macias they would not be willing to acquit him.

2. Voluntary manslaughter is defined as, "The unlawful killing of a human being without malice upon a sudden quarrel or heat of passion." (Pen. Code § 192 subdivision (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. (***People*** v. ***Barton***, (1995)

12 Cal. 4th at 199.) Generally, the intent to unlawfully kill constitutes malice. (***In re Christian S.*** (1994) 7 Cal. 4th 768, 783.) But a defendant who intentionally kills lacks malice in limited, explicitly defined circumstances such as when the defendant acts in a sudden quarrel or heat of passion, or is sufficiently provoked. Because heat of passion and provocation reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, voluntary manslaughter is considered a lesser necessarily included offense of intentional murder. (***People*** v. ***Breverman*** (1998) citing ***People*** v. ***Barton, supra,*** 12 Cal. 4th at pp. 201-201.) This is not to say that heat of passion or sudden quarrel is a defense to felony murder. See for example ***People*** v. ***Barderas***, (1985) 41 Cal.3d 144, 196-197, where the defendant admitted the underlying robbery but claimed that the homicide was provoked by the victim's attack. Here, however, petitioner did ***not*** admit that he robbed Macias and evidence that anyone had robbed the victim was at best very weak and ephemeral. While the jury had already been instructed that if they found that the murder happened during a robbery it was first degree felony murder, alternatives to this theory which were supported by the evidence should have been provided

3. In fact, there was evidence, from which a reasonable jury could conclude that Macias was killed in a sudden quarrel or as a result of provocation. Macias was armed, the crime scene revealed a struggle, and there may have been an argument developing over whether petitioner was to wait outside. All of the

circumstances and facts supported an instruction on voluntary manslaughter such as CALJIC 8.42. Macias may have pointed his gun at petitioner even fired at petitioner and missed. Any doubts as to the sufficiency of the evidence to warrant an instruction should have been resolved in favor of the defendant. (***People*** v. ***Flannel*** (1979) 25 Cal.3d 668, 685.) Since it was unknown whether in fact anyone, let alone petitioner, robbed Macias, other alternatives supported by the evidence should have been presented to the jury.

4. The jury should have instructed not only on manslaughter but also on second degree murder and first degree premeditated murder. While a homicide had been committed, evidence that a robbery had been committed or that the homicide had robbery as its objective was virtually non-existent. It was never determined that any property was taken, let alone that petitioner took anything by force. Yet, felony murder, based on a supposed robbery and a robbery based special circumstance, was the only theory the prosecution presented and the only option given to the jury. The evidence developed at trial, while not as detailed as the facts set forth in Claim I, at least established that petitioner and Ernesto Macias were at least acquaintances or associates and that petitioner had some business at Macias' house and some reason to want to wait until Gerardo, Arturo and Rigoberto returned from El Pato's house. (RT 721, 745, 1223.) Even the prosecutor acknowledged that petitioner did not go to Macias' house in order to kill him (RT 1339.) There was no evidence that petitioner was armed when he

went to the Macias residence much less that he went there with the intention of committing a robbery. Macias was, however, undisputably and visibly armed with a Jennings .22 which could have been the murder weapon. (RT 699.) If, therefore, Macias was killed with the gun found in the Monte Carlo, it is more likely that the gun belonged to Macias, than to petitioner. In light of the circumstances presented by the evidence, it was unreasonable for counsel not to ensure that the jury considered non capital options. The jury should have considered, and would have considered these options, had they not been left with a choice between capital murder and acquittal. According to the prosecution's case, as the others were leaving, Macias told petitioner to wait for them outside. (RT 740.) Shortly thereafter, Macias sustained four gunshot wounds, and some scratches around the eye. Stippling was present on the shoulder and the top of the shoulder, indicating that at least some of the wounds were inflicted at less than 18 inches away. (RT 820-825.) There was evidence of a struggle inside the front door and a trail of blood leading out of the house. While there was blood in the house, only one expended casing was found, perhaps indicating that the struggle and the shooting may have continued outside. (RT 1052.)

5. It was stipulated that petitioner is right handed. (RT 1254.) It was, however, a partial left palm print that was found on the gun in a position consistent with him having placed his hand on top of the left side of the grip without gripping the weapon or holding the weapon . (RT 1092-1093.) There was, at least

according to the Frank Terrio, a likelihood that the print was placed on the gun when blood was fluid. (RT 1095.) This evidence would be consistent with a struggle over the gun and Macias continuing to struggle for the gun, after he was already wounded. In the aftermath, petitioner may have killed Macias in self defense, in anger, or for any reason ranging from first degree murder to justifiable homicide, none which had anything to do with an attempt to take property.

6. The relationship between the parties, the testimony of the prosecution's witnesses and the physical evidence, all indicated that the homicide was much more likely to have been the result of actions and circumstances other than capital murder. Nevertheless, counsel never requested or reminded the court of its obligation to instruct on non capital lesser offenses.

7. While counsel argued the weakness of the robbery theory, he failed to request instructions that would have provided the jury with any alternative non capital theories of how or why Macias was killed. (RT 1282.) This was not a reasonable decision since, under the instructions given, if the jury believed that petitioner killed Macias, but had doubt as to whether he robbed him, they would be left with no alternative but to acquit petitioner. Had the jury been given the opportunity they may well have chosen a lesser alternative than capital murder

F. Counsel Was Ineffective For Failing to Notify Petitioner of His Rights under the Vienna Convention to Consular Assistance and for Failing to Raise In the Trial Court the Fact that Petitioner had not Been Advised of his Right to Consular Assistance

1. Article 36 subdivision (1) subsection (b) of the Vienna Convention on Consular Relations an arresting government to notify a foreign national who has been arrested, imprisoned or taken into custody or detention of his right to contact his consul. (***Faulder*** v. ***Johnson*** (5th Cir. 1996) 81 F.3d 515, 520; See also, ***Breard*** v. ***Green*** (1998) 523 U.S. 371,377 [118 S.Ct. 1352, 1355, 140 L.Ed.2d 529]; ***Villafuerte*** v. ***Stewart*** (9th Cir. 1998) 142 F.3d 1124, 1125.) The authorities of the receiving state are required to inform the arrested foreign national of this right "without delay." (***LeGrand*** v. ***Stewart*** (9th Cir. 1998) 133 F.3d 1253, 1261.) The United States Court of Appeals for the Fourth Circuit in ***Murphy*** v. ***Netherland*** (4th Cir. 1997) 116 F.3d 97, 100 stated, "Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national." The ***Murphy*** court went on to say, "The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the applicability (if any) of the Vienna Convention."(***Id.***) Since as early as 1979, counsel representing foreign nationals has had no trouble locating and arguing claims based on the Vienna Convention. (See, ***Faulder*** v. ***Johnson***, ***supra***, 81 F.3d at 520; ***Waldron*** v. ***INS***, (2nd Cir. 1993) 17 F.3d 511, 518; ***United States*** v. ***Rangel-Gonzales***, ***supra***, 617 F.2d at 530; ***United States*** v. ***Calderon-Medina*** (9th Cir. 1979) 591 F.2d 529; ***United States*** v. ***Vega-Mejia*** (9th Cir. 1979)

611 F.2d 751, 752.) The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonable investigation by petitioner's attorney, and the factual predicate for the claim, that petitioner was a citizen of Mexico, was obviously within defense counsel's knowledge as his immigration status was apparent from discovery provided to counsel. (See for example Supplemental Clerk's Transcript II, p 120.) These consular officials are trained to and do give advice to and explain the criminal justice system of the United States to the individual, as well as contact family members for the individual. These services would have been provided to petitioner had he contacted his consulate. (Exhibit LL.)

G. Trial Counsel Was Ineffective for Failing to Object to Several Instances of Prejudicial Prosecutorial Misconduct

Counsel unreasonably failed to object to all of the incidents of prosecutorial misconduct set forth ante is Claim IV. Defense counsel is required to investigate all possible defenses, research applicable law, make proper objections, make informed recommendations to the client regarding an appropriate strategy and present that strategy on behalf of the client. (See e.g., ***People v. Ledesma*** (1987) 43 Cal.3d 171, 222; ***People v. Mozinga*** (1983) 34 Cal.3d 926.) Given the prejudicial nature of each of these incidents of prosecutorial misconduct and the constitutional violations which resulted, counsel could have had no tactical reason for failing to object.

H. Counsel Failed to Investigate, Consult with Competent Experts and Present Evidence in Mitigation Concerning the Severe and Unrelenting Emotional and Physical Abuse Petitioner Suffered Throughout His Childhood , His Resulting Mental State and Serious Resulting Substance Abuse Problem

1. Petitioner was born in Ciudad Juarez, Chihuahua, Mexico. He is the son of Antonio Valdez and Rosa Valdez. (RT 1760, 1761, 1748, 1771.) Petitioner has two sisters Graciela and Victoria and one brother Ricardo. His older brother Antonio Jr., died in an automobile accident, all but the youngest child , Graciela were born in Juarez. (RT 1762 ,1652, 1771, 1663, Exhibit U, ¶ 1.) The Valdez family moved from Mexico to Southern California when petitioner was a small child and at the time of trial had resided in Pomona for 20 years. (RT 1761.)

2. Petitioner's parents and sisters, his Aunt Leticia, as well as long term family friends, Enedina and Jose Luis Garcia and Carolin Reina testified at the penalty phase about petitioner's childhood, what it was like growing up in a poor immigrant family, his obedience to his parents, his devotion to his mother and sisters, his kindness to children and his embrace of Christianity While all of that was certainly true many more questions could have been asked which would have elicited the facts set forth in the post trial declarations of petitioner's sisters and family friends. (Exhibits R through X.) As it was, the portrait of petitioner as a poor but much loved child, growing up in a hard working ambitious family was grossly misleading. Petitioner's father, as the exhibits and court records appended to this petition demonstrate, was not the hard working family man he

portrayed himself to be at trial. Rather he was a vicious drunk, who made no effort to support his family, who beat his wife and children, especially petitioner for whom he had a special hatred, molested children and ultimately impregnated his own thirteen year old granddaughter.

3. Antonio, Sr. stated at trial that he was strict with his children even when they were small and that they had to do what he told them to do' Antonio admitted that petitioner was always obedient. (RT 1764- 1768.) Carolin Reina, who has been a close friend of Rosa's since petitioner was 12 years old, mentioned at trial that Antonio, Sr. was always yelling at petitioner. (RT 1164, 1768) .

This brief reference to Antonio, Sr. being strict with his children did nothing to inform the jury about the extreme, unrelenting physical and emotional abuse Antonio, Sr. inflicted on petitioner from the time petitioner was about four years old, until he was adulthood. This abuse as set forth more fully in the declarations attached hereto, (Exhibits R through X, included but was not limited to petitioner being struck with fists, with sticks, extensions cords or belts or belt buckles until he had bruises and welts all over his body. Petitioner was beaten for minor infractions like not listening and for no reason at all. On at least one occasion he was beaten with a two by four board suffering severe head trauma for which he never received medical care. (Exhibit U, ¶ 6., Exhibit W, ¶ 13, Exhibit R, ¶ 3, Exhibit X, ¶ 15.)

4. Carolin Reina could also have testified about how Antonio, Sr. repeatedly molested her preschool daughter Sabrina, and how on many nights the Valdez children would seek refuge in her house from their father's drunken abuse. (Exhibit T, ¶ 6,4.) Carolin, if asked, would have revealed how even in her presence, Antonio pushed and hit Rosa and that Rosa continually complained to her about Antonio beating her and the children. (Exhibit, ¶ 4, 6.) From the time he was a toddler petitioner witnessed Antonio, Sr., beating Rosa with closed fists. Antonio, Sr. also beat the petitioner, Ricky and Antonio, Jr. with closed fists and anything else he could get his hands on. (Exhibit, B, ¶ 9., Exhibit W, ¶ 7.)

5. Petitioner began to experiment with drugs and alcohol including sniffing gasoline when he was only thirteen. (Exhibit W, ¶ 12.) Antonio, Jr.'s untimely death in 1981 devastated petitioner and his brother Ricky. Antonio, Jr. used to try to protect the younger boys from their father. (Exhibit U, ¶ 8.11, Exhibit W, ¶ 3 .) Rosa will never forget hearing Freddy in his room, talking to Antonio, Jr. as if he were still there. (Exhibit X, ¶ 23.) By 1988 petitioner's drug problem was so serious that he always seemed to be under the influence. (Exhibit W, ¶ 15.) His sisters would find drug paraphernalia in his room and notice puncture marks on this arms. (Exhibit R, par, 10, Exhibit W, 15.) Discovery provided to counsel of petitioner's prior arrests show that in the year prior to the months prior to the death of Ernesto Macias, petitioner was arrested in September 1988, November 1988, and January 1989 for being under the influence of heroin

and PCP (Exhibits, HH, II, JJ.) Discovery reference infra in Claim one also showed that petitioner was attempting to buy cocaine from Ernesto Macias, that he was known as a heroin addict among his drug suppliers and was in fact arrested for being under the influence the influence on May1, 1989, the day after Ernesto was killed.

6. The abuse the family endured from Antonio, Sr.'s was interrupted when he went to jail for driving under the influence but resumed as soon as he returned. The last time that Antonio, Sr. threatened to kill Rosa, Victoria , "tried to kill her father." Victoria, then age twenty one, grabbed his knife and started swinging it at him. After that here mother and father separated. (Exhibit W, ¶ 18.) Graciela was fourteen at the time and believes that due to this separation, she did better in life than the other children. (Exhibit X, ¶ 13.) Graciela recalls opening a closed door and seeing Antonio, Sr. beating petitioner and Ricardo with a two by four board. He beat petitioner so badly on that occasion that petitioner could not get out bed and Graciela had to feed him cereal with a straw. Petitioner fled his home as soon as he was able to get out of bed. (Exhibit R, ¶ 3.) Victoria also remembers this incident, and recalls with horror petitioner's swollen face and lips as he lay in bed for a week until able to flee.(Exhibit, W., ¶ 13, 14.) Victoria recalls another occasion where petitioner was hung from the garage rafters and beaten with a belt buckle. (Exhibit W, ¶ 8) These are only examples of the horrific beatings petitioner endured.

7. Rosa Valdez testified at trial that due to the long hours she worked she did not have time to take care of the children. (RT 1773.) It was not developed that Rosa had to work harder than she would have because she was always the main bread winner. Antonio, Sr. contributed very little and very infrequently. (Exhibit W, ¶ 5.) Apparently much of the early abuse of petitioner took place while Rosa was gone from the house. (Exhibit W, ¶ 5 , Exhibit V, ¶ 10.)

8 . In addition to torturing his own children, while Rosa was away from the house, petitioner over a two year period continually molested his deceased friend's pre school daughter, Sabrina Zueck. (Exhibit T, ¶ 6 Exhibit V, ¶ 3, 7.)

9. Antonio, Sr. testified that when he worked for a janitorial service, he would delegate janitorial jobs to Rosa, and the children would have to go along and help her. (RT 1764.) It was not mentioned at trial that Antonio was usually too drunk to work and would sleep on the floor while Rosa and the children worked . (Exhibit V, ¶ 19.) Petitioner and his siblings would then be unable to stay awake in school after being forced to work all night. (Exhibit U, ¶ 6.) The Valdez boys suffered a dramatic decline in school grades during the period of 1977 to 1979 when both their father and mother were employed by Gibson Discount Janitorial Supply and the boys were forced to work all night. (Exhibit NN, OO.) Rosa during this period also always maintained at least one other job. (Exhibit OO, Exhibit W, ¶ 19) Most notable is Antonio Jr. who goes from being an average student receiving B's and C's the first semester of his freshman year, to fails and

only one C his second semester. His tenth grade year shows no improvement as he receives all F's. (Exhibit DD.) During this same period Freddy receives all F's with the exception of a C in art which he receives during his first semester of his ninth grade year. (Exhibit, BB.) (Exhibit X, ¶ 19.) Although Ricardo's grades are slightly better, his progress report from Simons Junior High School notes that he is frequently tardy to his first period class, daily assignments are neglected and poorly prepared and class work is not complete. (Exhibit CC.)

10. Antonio, Sr. apparently also enjoyed masturbating in front of the neighborhood children and was eventually arrested for this activity. He also engaged in the continuous sexual abuse of his nieces and ultimately was charged and convicted of continuous sexual abuse of his granddaughter whom he impregnated at age thirteen. (Exhibit V, Exhibit S, Exhibit Z , Exhibit Y .) He is currently serving a twelve year sentence in state prison for that crime. (Exhibit Y.)

11. Nancy Kaser Boyd, PH.D. reviewed petitioner's social history, and declarations R through X, as well as the defense and prosecution's penalty phase evidence, prior to interviewing and evaluating petitioner. Dr. Kaser Boyd opined that petitioner on multiple occasions experienced the specific traumatic stressor of sever child abuse, physical and psychological and as a result developed chronic Post Traumatic Stress Disorder. (Exhibit AA, ¶ 7.) The traumatic stress was compounded by the untimely death of his closest brother Antonio and the serious toxic effects of the many substances that petitioner ingested in an attempt to

assuage the pain. (Exhibit AA, ¶ 8,10.) Petitioner displays the clinical symptom of hypervigilence as a result of his long history of child abuse. (Exhibit AA, ¶ 6.) He learned to anticipate harm from his father and from others and developed a fighting stance to protect himself from anticipated harm. (Exhibit AA, par, 6.) For example, petitioner's hypervigilence explains why petitioner anticipated harm from Robinson, of whom he was admittedly afraid, or why in general he may have responded more rapidly than a person who had not experienced such abuse to actual or perceived threats to personal safety.

12. Petitioner's stress level which was already extreme after eighteen years of being beaten by his father and watching the beating of his mother was no doubt exacerbated by the fact that he had been incarcerated for the greater part of the 1980's in the state prison system. His fear for his life and personal safety in county jail and in state prison was expressed on the record during the Marsden Hearings, infra, and in Exhibit O. See also Trauma and Its Sequelae in Male Prisoners: Effects of Confinement, Overcrowding and, Diminished Services, Terry A. Kupers, M.D. (Exhibit KK.) An additional factor adding to petitioner's fear and stress, which known to counsel but unfortunately not to the jury was that petitioner, an apparent crime victim, suffered multiple stab wounds to the chest and abdomen and underwent emergency surgery on May 8 1988. (Exhibit GG.)

13. Petitioner's art work contains many of the themes of his life, addiction, entrapment, good and evil and fate. In clinical terms, according to Dr.

Kaser Body there is a dysphoric quality to his art that is often seen in individuals with similar histories. (Exhibit AA, ¶ 9, See Exhibit AA, attachment 2.) Petitioner has a history of physical and mental abuse which was inflicted on him by his father throughout his formative years. Dr. Kaser-Boyd, who examined petitioner, concluded that petitioner's father was a role model for violent behavior and criminal conduct, himself having been arrested for burglary and deported to Mexico, on several occasions. (Exhibit AA, ¶ 5.) Petitioner was badly battered by his father. His memories of the torment endured while living with his father are corroborated by the declarations of his siblings and close family friends who experienced and observed his father's violent conduct. Petitioner recalls that his father was very harsh both psychologically and physically. (Exhibit AA, ¶ 6.) Petitioner recalls being beaten by his father without reason so often that he got to the point of not even crying. (Exhibit AA, ¶6.) Specific incidents of physical abuse range from having his hand burned on the stove when he was only six years old, to being thrown through a window, to being hung by his feet from garage rafters while being beat by a belt, to being beaten with a two by four. (Exhibit AA, ¶6.) Petitioner's younger sister, Graciela, recalls opening a closed door and seeing their father beat petitioner and his younger brother with a two by four. (Exhibit R, ¶3.) Petitioner was so badly injured that he could not get out of bed the following day. (Exhibit R, ¶3.) Graciela remembers having to feed petitioner cereal through a straw for a week. (Exhibit R, ¶3.) It is unquestionable that petitioner's exposure

to such constant and intense abuse, at such an early age affected his psychological development, spawning a plethora of socio-psychological problems which interfered with his social conditioning and mental development.

14. It has been recognized that mental development is affected by experiences during childhood, it is a well known fact that developmental experiences determine the organizational and functional status of the mature brain. (Perry, BD, Pollard, R, Blakey, T, Baker, W, Vigilante, D. "Childhood Trauma, The Neuro Biology of Adaptation and 'use-dependent' Development of the Brain: How States Become Traits" *Infant Mental Health J.* 16 (4): 271-291, 1995.) The effect of extreme adversity on a child's psychological development can lead to the creation of psychiatric and behavioral disturbances. (Mc Farlane, A.C. (1987.) "Post-traumatic Phenomena in a Longitudinal Study of Children Following a Natural Disaster" *Journal of the American Academy of Child and Adolescent Psychiatry,* 30, 776-783.)

15. The human brain exists in its mature form as a byproduct of genetic potential and environmental history. (Perry, 5.) Experiences which are traumatic, which may cause sensation or learning in a mature brain will, during development determine the functional capacity of the fully developed brain. (***Id.*** 5.) Thus, Traumatic experiences in childhood, increase the risk of developing a variety of neuropsychiatric symptoms in adolescence and adulthood. (***Id.*** 2.) Among the many effects of early childhood trauma in adults is the presence of Post Traumatic

Stress Disorder (PTSD) resulting in dissociation as a learned response pattern.

16. The development of Post Traumatic Stress Disorder (Hereinafter, PTSD) has been formally recognized by the medical community since 1980. (Hamblen, Jessica Ph.D. "PTSD in Children and Adolescents" *National Center for Post Traumatic Stress Disorder.*) The development of PTSD in adults which have suffered from childhood trauma is a result of continued abuse. It is the effect that the abuse has on the development of the brain that, leads the traumatized child to develop certain response patterns to deal with the trauma being inflicted on him. (Perry, p. 5-6.) This response to the trauma becomes a learned response which is manifested whenever perceived threat is present. (***Id.*** 5.) Thus, PTSD becomes a type of defense mechanism which the child uses to compensate for his inability to cope with the perceived danger.

17. The human body and mind have deeply ingrained physical and mental responses to threat; the most familiar of which has been labeled the "fight or flight" reaction in which a threatened being responds to the perceived threat through various stages of psychological and physiological, hyperarousal; all of which prepare the person to either fight or run away from the perceived or sensed threat. (Perry, 23.) This becomes an unfortunate problem in the case of abused children such as petitioner, where the caretaker is the cause of the trauma. " Indeed, for many children, crying for help from potential trauma is doomed to fail, where the parent causes trauma." (***Id.*** 23.) Therefore, the only defense

mechanism available to the child is actually used against him. Research indicates that family dynamics are significant factors in the formation of PTSD in children. (Kiser, L., Heston, J., & Millsap, P. (1991.) "Physical and Sexual Abuse in Childhood: Relationship with Post-Traumatic Stress Disorder" *Journal of the American Academy of Child and Adolescent Psychiatry,* 30, 777.)

18. In petitioner's case, family dynamics were at best, volatile. His father, constantly tormented the entire family. The children would often leave their home in the late hours of the night and wait outdoors or in neighbor's homes until their drunken father fell asleep, for fear of what he would do to them. (Exhibit X, ¶ 14; Exhibit T, ¶ 4.) Petitioner's father would attack members of the family at any given time without reason, the boys would receive beatings for trivial things from referring to their father as "Pops" instead of "father" to not following directions exactly as their father wanted. (Exhibit R, ¶ 2-3; Exhibit T, ¶ 4; Exhibit U, ¶ 4; Exhibit W, ¶ 5-7.) Petitioner's family dynamics were further disrupted after the death of his older brother Antonio Jr., who was the only person who would stand up to their father, often receiving violent beatings himself, in order to defend the family from the ongoing abuse that they suffered at their father's hands. (Exhibit U, ¶ 7.)

19. Studies have shown that as many as 90% of children who have been physically abused for greater than five years suffer form PTSD. (Kiser, L., Heston, J., & Millsap, P., 780.) From a young age, petitioner developed symptoms

of dissociation, which are associated with PTSD. Dissociation is described by experts as simply disengaging from stimulit in the external world and attending to an internal world. (Perry, 9.) Petitioner is described by his siblings as being quiet and reserved, a loner who kept to him self and did not bother anyone. (Exhibit T, ¶ 3; Exhibit X, ¶ 10.) Petitioner finds refuge in his art work, a common recourse of persons exhibiting dissociation. Petitioner's art has be described in clinical terms as having a "dysphoric quality which is often seen in individuals who have suffered similar abuse." (Exhibit AA, ¶ 9.)

20.Petitioner has in the past found common avenues of dissociation such as drug use and alcoholism. Very often persons suffering from PTSD attempt to self -medicate with drugs and alcohol. (Baker, C., MSW, MPH, Alfonso, C., LCSW "PTSD and Criminal Behavior" *National Center for Post Traumatic Stress Disorder.* 2.) Research indicates that people with PTSD are more likely than others with similar backgrounds to have alcohol use disorders. (National Center for PTSD "Fact Sheet" *National Center for Post Traumatic Stress Disorder.*, 1.) Additionally, individuals with PTSD and alcohol use problems often have additional mental or physical health problems. (***Id.*** 3.) Up to fifty percent of adults with alcohol use disorders and PTSD also suffer from a variety of disorders including; mood disorders, addictive disorders (such as addiction to or abuse of street or prescription drugs) and chronic illness (such as diabetes, heart disease, or liver disease.) (***Id.*** 3.) Among the listed symptoms characteristic of all who suffer

from PTSD is a feeling of futurelessness. (Kiser, L., Heston, J., & Millsap, 776.)

21. Studies conducted in the 80's and early 90's indicate that children who have experienced physical abuse tend to show a heightened anxiety as evinced by among other things, self destructive behavior and delinquency. (Kiser, L., Heston, J., & Millsap, 776.) These studies further reveal that persons suffering from PTSD exhibit feeling of always needing to be "on guard" which often result in a tendency to misinterpret benign situations as threatening and result in perceived self-protective behavior. (Baker, C., MSW, MPH, Alfonso, C., LCSW. 2.) This increased baseline physiological arousal can then result in violent behavior that is out of proportion to the perceived threat. (***Id.*** 4.) Also, the feeling of guilt commonly experienced by trauma survivors can sometimes lead to the commission of crimes in which there is a near certainty of either being apprehended and punished or seriously injured or killed. (***Id.*** 2.)

22. Although further investigation, and research needs to be done, petitioner like all children beaten around the head also are at high risk of neurological damage, and had petitioner's counsel consulted Dr. Kaser Boyd prior to trial she would have recommended, based on her observation of his symptoms that petitioner undergo thorough neuropsychological evaluation, including a brain scan as his symptoms are consistent with organic impairment. (Exhibit AA, ¶ 7.)

23. Although counsel presented testimony regarding security conditions for

LWOP prisoners, he did not present any evidence that petitioner's capacity to focus on positive goals indicates that he would be able to make progress in a therapy-based program. (Exhibit. AA, ¶ 6.)

24. For all of the reasons counsel was ineffective in failing to present the above mentioned evidence to the jury As our Supreme Court has recognized, " 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' "***Visciotti v. Woodford***, (9th Cir 2002) 288 F. 3d 1097 citing ***Penry v. Lynaugh*** (1989) 492 U.S. 302, 319, [109 S. Ct. 2934; 106 L. Ed. 2d 256; 1989 U.S.] (quoting ***California v. Brown*** (1987) 479 U.S. 538, 545, [107 S. Ct. 837; 93 L. Ed. 2d 934], (O'Connor, J., concurring).) Petitioner bears the burden of showing that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." ***Strickland, supra,*** 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. A "reasonable probability" is less than a preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Id.*** As in ***Visciotti*** trial counsel's unreasonable false portrayal of the Valdez family, as

a loving happy family, his unreasonable failure to investigate and present extensive mitigating evidence about petitioner's background , his horrific childhood, his failure to consult with an expert develop and present expert testimony regarding petitioner's mental health, drug addiction and possible brain damage all render the result of this proceeding unreliable and unfair. (***Id.***)

Counsel was also ineffective for failing to present such evidence to the court at the automatic motion to modify the verdict. The court stated in denying the motion that "Mr. Valdez reacts with violence in all situations." (R.T. 2081.) Due to counsel's unreasonable failure to provide the court with any mitigating evidence, neither judge nor jury had any information to explain this perceived behavior.

I. Counsel Failed to Ask the Court to Reconsider Admission of Third Party Culpability Evidence at The Penalty Phase

1. Defense counsel requested and received an instruction on lingering doubt and argued lingering doubt to the jury. (RT 1823, CT 396 .) Yet, he failed to seek the admission of his best lingering doubt evidence; Detective Guenther's testimony about the arrest of Liberato Gutierrez . The fact that the evidence had been excluded pursuant to Evidence Code section 352 at the guilt phase, did not automatically mandate exclusion at the penalty phase. (***See In re Jackson*** (1992) 3 Cal.4th 578, 654.) Since the main focus of counsel's argument on why petitioner's life should be spared was lingering doubt there could be no tactical

reason for his not asking the court to reconsider its Guilt Phase ruling and at that point to at least attempt to introduce the evidence of other suspects, such as El Pato and Arturo Vasquez. (See Claim I, B.)

J. Counsel Failed To Object to the Introduction of Petitioner's Prior Felony Conviction for Aggravated Robbery.

1. The court records from Texas, Trial Exhibit 54, unequivocally showed that while Petitioner was indicted for aggravated robbery, the court following the hearing on the proposed guilty plea during which the evidence was read, specifically found petitioner guilty of the lesser included offense of robbery, because he did not use or display a weapon. (Supplemental CT 126.) Rather than calling this to the court's attention, counsel permitted the violent felony conviction to be introduced in aggravation, pursuant to Penal Code section 190 (c) (3) as an aggravated robbery. Counsel merely mentioned to the jury during argument that the paperwork from Texas indicated, that petitioner had not been found guilty of aggravated robbery. (RT 2014.) The fact that counsel so stated in argument to the jury did not undo the effect of this allegedly violent robbery on the jury. The jury viewed this as yet another reason to choose the death penalty. Counsel could have had no tactical choice for not ensuring that at least the term aggravated was deleted from the prior. Even more importantly, an effective advocate would have sought to exclude most of the Exhibit since it was not essential to the proof of the prior, and included a grand jury indictment, which alleged that Petitioner had used a

knife, a fact which the Texas court had explicitly found not to be true. (Trial Exhibit 54, Supplemental C.T. 126.)

K. Counsel Failed to Object to CALJIC 2.06 Referring to Intimidation of Witnesses.

1. There was no evidence that petitioner intimidated witnesses and giving CALJIC 2.06 was prejudicial error. Counsel failed to object or to point out to the court why the instruction was not justified by the evidence. (CT 370)

L. Counsel Failed to Investigate And Rebut Aggravating Evidence

1. As set forth more fully in Claim II, B, and infra. counsel admittedly failed to interview the prosecution's potential penalty phase witnesses, or to investigate and discuss with his client possible rebuttal to the prosecutor's evidence in aggravation.

M. Counsel Unreasonably Failed to Ask For Permission to Question Jurors or Even Request that the Court Ask Appropriate Questions to Uncover Jury Bias, and Protect His Client's Right to a Fair and Impartial Jury.

1. The voir dire in the instant case, from start to finish covered 351 pages of Reporter's Transcript. (R.T. 360-476, 477-593 ,594-682.) Although more research and investigation is required, the extremely cursory voir dire failed to uncover biased and impartial jurors.

2. Analyzing the voir dire procedures after Proposition 115, in ***People v. Taylor*** (1992) 5 Cal.App.4th 1299, the court stated that "bias is seldom overt and

admitted. More often, it lies hidden and beneath the surface." ***(People v. Taylor, supra,*** 5 Cal.App.4th at 1312.) The cursory voir dire conducte d by the trial judge and counsel failed to assure that the jury was free of bias, and thereby denied petitioner his right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 16 of the California Constitution, as well as his Eight and Fourteenth Amendment rights not to be condemned to death except on the basis of unbiased and reliable procedures. (***U.S. v. Baldwin*** (9th Cir. 1983) 607 F.2d 1295 at 1298; ***People v. Chapman*** (1993) 15 Cal.App.4th 136 at 141. ***See United States v. Saimiento-Rozo*** (5th Cir. 1982) 676 F.2d 146 at 148.)

3. "The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by 'the essential demands of fairness.'" (***Knox v. Collins*** (5th Cir. 1991) 928 F.2d 657, 66, citing ***Aldridge v. United States*** (1931) 283 U.S. 308, 310, [51 S. Ct. 470; 75 L. Ed. 1054].) "[T]he denial or impairement of the right to exercise peremptory challenges is reversible without a showing of ***prejudice." (Knox v. Collins (5th Cir. 1991) 928 F.2d 657, 661, citing Swain v. Alabama*** (1965) 380 U.S. 202, 219,[85 S. Ct. 824, 13 L. Ed. 2d 759.]) "[T]here is little doubt that if the court or prosecution deprives a defendant of his right to the effective exercise of peremptory challenges, it would, without more, be grounds for a new trial." (***Id.***, citing ***United States v. Vargas*** (1st Cir. 1979) 606 F.2d 341, 344.) "A voir dire procedure that effectively impairs the

defendant's ability to exercise his challenges intelligently is ground for reversal, irrespective of prejudice." (***Knox v. Collins, supra,*** 928 F.2d at 661.)

4. Because of the extremely limited voir dire, petitioner was subjected to a prejudicial jury, which resulted in the death sentence. Analyzing the voir dire procedures after Proposition 115, in ***People v. Taylor*** (1992) 5 Cal.App.4th 1299, the court stated that "bias is seldom overt and admitted. More often, it lies hidden and beneath the surface." ***(People v. Taylor, supra***, 5 Cal.App.4th at 1312.) The cursory voir dire conducted by the trial judge and counsel failed to assure that the jury was free of bias, and thereby denied petitioner his right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 16 of the California Constitution, as well as his Eight and Fourteenth Amendment rights not to be condemned to death except on the basis of unbiased and reliable procedures. (***U.S. v. Baldwin*** (9th Cir. 1983) 607 F.2d 1295 at 1298; ***People v. Chapman*** (1993) 15 Cal.App.4th 136 at 141. See ***United States v. Saimiento-Rozo*** (5th Cir. 1982) 676 F.2d 146 at 148.)

5. "The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by 'the essential demands of fairness.'" (***Knox v. Collins*** (5th Cir. 1991) 928 F.2d 657, 66, citing ***Aldridge v. United States*** (1931) 283 U.S. 308, 310.) "[T]he denial or impairement of the right to exercise peremptory challenges is reversible without a showing of prejudice." (***Knox v. Collins*** (5th Cir. 1991) 928 F.2d 657, 661, citing ***Swain v.***

Alabama (1965) 380 U.S. 202, 219.) "[T]here is little doubt that if the court or prosecution deprives a defendant of his right to the effective exercise of peremptory challenges, it would, without more, be grounds for a new trial." (Id., citing ***United States v. Vargas*** (1st Cir. 1979) 606 F.2d 341, 344.) "A voir dire procedure that effectively impairs the defendant's ability to exercise his challenges intelligently is ground for reversal, irrespective of prejudice." (***Knox v. Collins, supra***, 928 F.2d at 661.)

6. Because of the extremely limited voir dire, petitioner was subjected to a prejudicial jury, which resulted in a conviction based on insufficient evidence and the death sentence.

N. Counsel Was Ineffective in Failing to Challenge Admission of Petitioner's Prior Convictions on the Grounds that Petitioner was Incompetent to Plead and that Previous Counsel Was Ineffective for Not Recognizing it.

Although further investigation and research is necessary, trial counsel was additionally ineffective in failing to challenge admission of petitioner's prior convictions on the grounds that (1) prior counsel for those cases were ineffective, and (2) petitioner's guilty please to these charges were not knowing, voluntary or intelligent, due to his neurological and psychiatric deficits. Petitioner's attorneys for the legal proceedings regarding the alleged prior convictions were ineffective because they failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent conscientious advocate, neglected their obligations to adequately investigate and prepare a defense on petitioner's behalf, and unreasonably pled him guilty to the offenses at issue. (***In re Cordero*** (1988) 46 Cal.3d 161, 180; ***Evans v. Lewis*** (1988) 855 F.2d 631, 636-

638; ***Hill v. Lockert*** (1985) 474 U.S. 52, 56-57; ***Strickland v. Washington, supra.*** 466 U.S. 668, 694-698.)

O. <u>But For Counsel's Errors and Omissions It is Reasonably Probable That Petitioner Would Not Have Been Found Guilty of Capital Murder and Sentenced to Death.</u>

1. Since "investigation and preparation are the keys to effective representation," (***People*** v. ***Ledesma, supra***, 43 Cal.3d at 222) counsel has a duty to interview potential witnesses read the discovery provided to them, and "make an independent examination of the facts, circumstances, pleadings and laws involved." (***Von Moltke*** v. ***Gillies, supra,*** 332 U.S. at 721; ***Strickland*** v. ***Washington, supra***, 466 U.S. at 691.)

2. Had counsel insured engaged in appropriate investigation with respect to both the guilt and penalty phase evidence, put before the jury that the blood on the pants did not belong to Ernesto Macias, had he timely objected to misconduct by the prosecutor, requested appropriate instructions, cited appropriate legal authorities to the court for admission of third party culpability evidence, refrained from eliciting damaging evidence, consulted with and utilized appropriate experts and developed mitigation evidence, it is reasonably probable that petitioner would not have been convicted of capital murder or sentenced to death. (***Strickland*** v. ***Washington, supra*** 466 U.S. at 694.) All of the errors and omissions of counsel separately and collectively contributed to the guilty verdict, the true finding on the special circumstance and the death penalty verdict. As there could be no

explanation or excuse for not thoroughly reviewing the police reports, including the DNA report, there could be no excuse at the penalty phase for not discussing the evidence with petitioner, investigating the allegations and at least interviewing those whom petitioner indicated would provide facts impeaching the prosecutor's contentions; one such witness was William Copeland, who has in fact given a declaration as to what his testimony would have been. (Exhibit P.) Counsel had obviously conducted no independent investigation at all into any of the aggravating evidence and had simply taken the reports provided to him at face value. This was especially inexcusable since the prosecutions's information itself was hardly conclusive or even reliable. Copeland and Robinson did not testify. There was apparently insufficient evidence for petitioner to be criminally charged or even administratively disciplined in jail or in prison for any of the offenses. Given the fact that the court denied petitioner's ***Marsden*** motions, denied his motion for self representation and forced him to proceed to trial in the face of a total break down of the attorney client relationship, prejudice should be presumed.(***United States v. Cronic*** (1984) 466 U.S. 648, 659 [104 S. Ct. 2039, 80 L. Ed. 2d 657].)

3. Petitioner does, however, meet his burden under ***Strickland*** v ***Washington, supra,*** of demonstrating that it is reasonably probable that absent counsel's errors and omissions, he would not have been convicted or sentenced to death. Had the jury heard that the blood on the pants in the Monte Carlos did not

belong to Ernesto Macias. If they had heard about Liberato Gutierrez, El Pato and Arturo Vasquez, had they not been subjected to the prosecution's improper argument that petitioner's own family wanted him to die, had they not heard that he may have threatened witnesses, and had they heard about the extreme unrelenting mental and physical abuse he had suffered at the hands of this father, and the resultant post traumatic stress and neurological impairment he suffers to this day, they may well have decided that he did not deserve to die and voted for life instead of death.

CLAIM V

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN APPROPRIATE EXAMINATION BY A COMPETENT MENTAL HEALTH PROFESSIONAL

Petitioner's confinement, conviction, and sentence of death are unconstitutional and unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and Penal Code section 1473, because he was deprived of his federal constitutional right to an appropriate examination conducted by a competent mental health professional and the assistance of such a professional at his trial. The facts supporting this claim among others to be presented after full investigation, discovery, access to this

court's subpoena power, adequate funding and an evidentiary hearing, are set forth below and include but are not limited to, the following:

1. For the purposes of this claim, petitioner incorporates all the facts alleged in Claims I, through IV as if fully set forth herein.

2. The Due Process Clause of the Fourteenth Amendment guarantees that where mental health issues are a significant factor in a criminal case, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." (***Ake v. Oklahoma*** (1985) 470 U.S. 68, 83, [105 S. Ct. 1087, 84 L.Ed. 2d 53].) Another source of this right is found in the Sixth Amendment rights to confrontation and compulsory process. (See, e.g., ***Harris v. Vasquez*** (9th Cir. 1990) 949 F.2d 1497, 1531, Noonan, J. dissenting.)

3. Although the Supreme Court in *Ake* spoke in terms of a "psychiatrist," vindication of the right recognized in *Ake* focuses not on the title of the mental health professional involved but rather on the competence of the expert and the conduct of an appropriate examination. Thus, the Court of Appeals for the Fourth Circuit has held that the appointment of a competent *psychologist* satisfies the ***Ake*** requirement. (**Wilson v. Greene** (4th Cir. 1998) 155 F.3d 396, 401"the Supreme Court requires more than just a warm body with a prefix attached to his name; Ake provides a right to a 'competent expert' and an 'appropriate examination.' (**Ak***e*, at

p. 83.)"].) Similarly, although *Ake* itself concerned psychiatric assistance in the context of a sanity determination, other cases have clarified that the right extends to professional assistance regarding all mental health issues which may arise in the context of a capital case, including such matters as mental retardation and mental conditions relevant to penalty phase mitigation. (***Starr v. Lockhart*** (8th Cir. 1994) 23 F.3d 1280, 1288.)

4. Deprivation of the right to the assistance of a competent mental health professional and an appropriate mental health examination thus violates the Sixth and Fourteenth Amendments. (***Ake v. Oklahoma, supra,*** 470 U.S. at p. 83.) A criminal defendant may be deprived of this right either by the failure of the state to provide him with the assistance of a competent mental health professional, or by the failure of a mental health professional to conduct an appropriate examination. (*Ibid.*, see also pp. 76-77 [explaining that the right to a court-appointed psychiatrist is an extension of the reasoning of the right-to-counsel cases, recognizing that "meaningful access" to justice requires providing all the "tools" necessary for an adequate defense]; ***Starr v. Lockhart*, supra**, 23 F.3d at p. 1289

5. In the instant case, petitioner was deprived of the assistance of a competent mental health professional and his right to an appropriate examination because, no psychologist or neuropsychologist was appointed by the court or even requested by counsel for purposes of conducting an examination of petitioner.

6. Petitioner's social history, as set forth infra, manifests a number of well-known risk factors for serious mental illness and life-long brain damage. Moreover, his family history is a story of repeated cruelty and abuse. Petitioner's depressed and battered mother was unable to protect her children from the known pedophile with whom she shared a household. Petitioner's father brutalized the entire family, singling out petitioner for particularly cruel beatings which left him unable to eat or walk. He repeatedly humiliated and belittled petitioner while forcing him to work long hours without pay or sufficient sleep to focus on his school work.

7. Rosa's depression rendered her unable to protect petitioner and his siblings. Maternal depression is associated with poor outcome for children, and may be symptom of familially associated mood disorder. Finally, maternal depression is often combined with other, interrelated social, environmental, and medical factors that contribute to poor child development and behavior. (Quinton, D., & Rutter, M. (1985.) "Family pathology and child psychiatric disorder: A four year prospective study," in Nicol, A. R. (ed.), *Longitudinal Studies in Child Psychology and Psychiatry: Practical Lessons for Research Experience.* Chichester, England: Wiley, pp. 91-136.) See Exhibit X, Declaration of Rosa Ema Valdez. Available records do show that Rosa suffers from diabetes and was hospitalized in critical condition in 1987 suffering from severe dehydration, and septicemia. She had refused to seek medical attention although urged to do so by

her children. (Exhibit EE.)

8. It is well known that exposure to violence creates a range of mental health problems including psychic numbing, avoidant behavior, intrusive thoughts, dissociation, re-experience of original trauma, sleep disturbance, anxiety, and depression. It is also associated with substance abuse and addiction. (Gil, E. (1988), *Treatment of Adult Survivors of Childhood Abuse*, Walnut Creek CA: Launch Press; Pynoos, R.S. (1990), Post-traumatic stress disorder in children and adolescents. In *Psychiatric Disorders in Children and Adolescents*, Garfinkel, B.D., Carlson, G.A., Weller, E.B. (Eds.), W.B. Saunders Co.; Pynoos, R.S., Steinberg, A.M., & Goenjian, A. (1996), "Traumatic Stress in Childhood and Adolescence: Recent Developments and Current Controversies" *Traumatic Stress,* van der Kolk, B.A., McFarlane, A.C. (Eds.) New York: The Guilford Press.) In Petitioner's case, incarceration and psychic damage was piled on top of a history of abandonment, psychological abuse, and sexual molestation, augmenting his psychological symptoms. Not surprisingly, petitioner suffers from symptoms consistent with Post-traumatic Stress Disorder (PTSD.) The trauma he suffered as a child meets the threshold requirement for PTSD. The trauma he suffered may have had a greater impact on him due to the fact that his father was the abuser. Petitioner's early and frequent exposure to traumatic violence had a deep impact upon him in many ways.

9. The developing brain organizes in response to the pattern and intensity

of affective and sensory experiences. Because the brain develops sequentially, alterations during the perinatal period of the midbrain and brain stem will alter development later of the limbic and cortical areas. (Perry, *Aggression and Violence: The Neurobiology of Experience*, in The DevelopMentor (March 1996).) Thus, emotional neglect in childhood can impact the development of sub-cortical and cortical impulse-modulating capacity. (***Id.***)

10. The stress response in particular can affect permanently the development and functioning of the brain. The brains of traumatized children develop to be hypervigilant and focused on non-verbal cues, which are potentially related to threat. These children are in a persistent state of hyper arousal which is experienced as anxiety. This involves a complex set of interactive processes including the peripheral autonomic nervous system, the immune system, and various stress response neural systems. Constant exposure to trauma leads to a generalizing of the fear state. Individuals become extraordinarily sensitive, and misperceive cues as threatening when they are not. Essentially, what began as an adaptive response becomes a pattern.

11. Such a child (and later adult) moves very quickly from being mildly upset to feeling terrorized. Children develop a physiological fear-response -- with girls tending toward dissociation (related to a tendency to 'freeze') and boys toward 'fight or flight.' The tendency to 'freeze' in the face of a misperceived threat can be seen by teachers, parents and other adults as oppositional-defiant

behavior. In such a hyperaroused state, a person easily misperceives cues. In a state of fear, information retrieval is impaired -- test anxiety is an example of this. Thus, a person in a state of fear cannot access normal problem solving skills. While it is highly adaptive of a child to be hypervigalent, the result is a set of neurobiological adaptations which have a deep negative impact in an adult's emotional and cognitive functioning. (Perry, "Childhood Trauma, the Neurobiology of Adaptation and Use-dependent Development of the Brain: How States Become Traits" *Infant Mental Health Journal* (Nov. 27, 1995); and Perry, Neurodevelopmental Adaptations to Violence: How Children Survive the Intergenerational Vortex of Violence, in Violence and Childhood Trauma: Understanding and Responding to the Effects of Violence on Young Children (1996).) Further, this reactivity of response is profoundly exaggerated by the influence of alcohol and other drugs. (Perry, *Aggression and Violence: The Neurobiology of Experience*, in The DevelopMentor (March 1996), citing Shupe, *Alcohol and Crime*, Journal of Criminal Law, Criminology and Police Science (1954), Lindqvist, Criminal Homicide in Northern Sweden (1986), and Cordilla, Alcohol and Property Crime: Exploring the Causal Nexus (1985).)

12. Traumatic experiences are also frequently associated with unconscious splitting off. These are called disassociative episodes and they can last from a few seconds to several days. During such episodes conscious thought, emotion and behavior are uncontrollably fully or partially split off from conscious awareness.

Dissociative episodes create conditioned responses to flee from or destroy the perceived threats and can cause psychotic episodes during which the individual is not conscious of acting or acts without awareness. An individual tends to avoid stimuli or activities that remind him of the trauma.

13. Trial counsel utterly failed to investigate and present this compelling story of abuse as a mitigating factor at the penalty phase of petitioner's trial.

14. Had petitioner's trial counsel performed a reasonably competent investigation into petitioner's family history and background for purposes of the penalty phase, he would have found overwhelming evidence of abandonment, poverty, mood disorder, emotional, psychological and sexual abuse, as well as drug and alcohol abuse, and other risk factors for serious organic impairment. In fact, counsel had available in records he had obtained in discovery, evidence which strongly argued for mental health evaluation of his client. Yet counsel failed to investigate further, and further failed to present any of these facts either as foundational for an appropriate mental health evaluation, as relevant to the issue of the required mental state at guilt phase, or as mitigation in its own right at penalty phase. This evidence would have indicated to reasonably competent counsel that petitioner was likely to suffer from severe and lifelong mental impairments requiring the assistance of a competent mental health expert. See ***Wallace v. Stewart*** (9th Cir. 1999) 184 F.3d 1112.

15. Although more investigation and research is necessary, petitioner's

history and symptoms indicate organic impairment. Dr. Nancy Kaser-Boyd PH.D. has concluded that in petitioner's history, which includes closed head injuries, his long-term exposure to neurotoxins including PCP, Toulene and lead and chronic alcohol abuse and dependence, beginning while still in the developmental period, are very strong indicators of risk factors for neurological damage. It is well established, and has been for many years, that exposure to neurotoxins, including alcohol, may result in organic brain damage. The severity of mental dysfunction is correlative with amount and duration of the exposure. (Hartman *Neuropsychological Toxicology* (1988).)

16. Given petitioner's history of abandonment and abuse as a child and his mother's apparently depressed mental state, and her unknown prenatal care of his mother, it very well may be that he also suffered pre- or perinatal injury as well.

17. All of petitioner's serious impairments which would have been uncovered by a competent expert assessment should have been presented to the jury who decided petitioner's culpability for the crimes and in mitigation at the penalty phase. If the jury had been presented with accurate information on petitioner's impairments, it is likely the jury would not found him guilty of capital murder or sentenced him to death.

CLAIM VI

PETITIONER'S CONVICTION AND SENTENCE TO DEATH RESULTED FROM A TOTAL BREAKDOWN IN THE THE ADVERSARIAL PROCESS

The facts which, among others to be added after full and adequate funding, discovery, access to this Court's subpoena power, further investigation and an evidentiary hearing, support this claim are set forth in Cims I through V and incorporated herein by reference as if fully set forth herein.

1. Petitioner's conviction, sentence, and confinement are unlawful and were unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7, 14, 15, 16 and 17 of the California Constitution because they are the product of such a total breakdown in the adversarial process that a presumption that petitioner's conviction and sentence are unreliable is warranted. This global violation of petitioner's Sixth Amendment rights in turn violated petitioner's rights to compulsory process, to present a defense to confrontation, to a fair trial, to the presumption of innocence and to an accurate, reliable guilt and penalty assessment, not an assessment based on materially false and unreliable evidence and impressions.

2. All of the foregoing facts demonstrate that petitioner's judgment of conviction and sentence must be set aside because petitioner was effectively abandoned by counsel, and because his trial as a result, was fundamentally unfair. The failures of counsel variously set forth above led to a trial which trampled on petitioner's Sixth Amendment and Fourteenth Amendment rights. These facts demonstrate that the situation at trial went far beyond a simple lack of rapport or

isolated negligent acts or omissions by counsel. They represent a total lack of commitment to meaningfully test the prosecution's case. No showing of prejudice is required.

3. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. (***United States v. Cronic*** (1984) 466 U.S. 648, 659 [104 S. Ct. 2039; 80 L. Ed. 2d 657].) No showing of prejudice is required when counsel violates the Sixth Amendment by failing to function in any meaningful sense as the Government's adversary. (Id. at 661-666.)

CLAIM VII

ANY OF THE ISSUES IN THIS PETITION WHICH SHOULD HAVE BEEN RAISED IN THE DIRECT APPEAL WERE NOT RAISED THERE DUE TO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

1. Should this court find that any of the claims raised in this petition should have been but were not raised in the direct appeal in this case, the failure to raise these claims was the result of the ineffective assistance of appellate counsel. (***Evitts v. Lucey*** (1985) 469 U.S. 387, [105 S. Ct. 830, 83 L. Ed. 2d 821.] Any error of appellate counsel in failing to raise any of the above claims which should have been but were not raised on appeal was prejudicial and deprived petitioner of his rights to effective assistance of counsel on appeal, due process, and meaningful appellate review of his conviction and sentence of death in violation of the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. For that reason, petitioner must be allowed to raise those claims herein or in a new or supplemental appellate proceeding.

CLAIM VIII

PETITIONER IS ENTITLED TO DISCOVERY AND SUBPOENA POWER BEFORE ADJUDICATION OF THIS PETITION

1. This petition was prepared without access to discovery or the subpoena power of this court. Discovery is necessary in order for petitioner to obtain full and fair adjudication of his claims, in furtherance of his constitutional rights to due process and to reliable adjudication at all phases of a capital case. (U.S. Const., Amends. V, VIII, XIV.)

2. The discovery which is necessary prior to the adjudication of this petition includes, but is not limited to all reports and notes of serology testing by the Los Angeles County Sheriff's Department Crime Laboratory.

4. Further, it is necessary that petitioner have subpoena power in order to obtain verified statements regarding the matters covered in this petition.

5. The holding of ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1258-1261, that discovery orders are not appropriate in a habeas corpus matter prior to the issuance of an order to show cause, was predicated on the assumption that "if the People's lawyers have such [discloseable] information in this or any other case, they will disclose it promptly and fully." (*Id.* at 1261.) It is axiomatic that,

"[w]here the reason of a rule ceases, so should the rule itself." (Civ. Code, § 3510.) ***Gonzalez*** was also based on the conclusion that "there is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment." (***People v. Gonzalez, supra,*** 51 Cal.3d at p. 1259.) Petitioner's requests for discovery here are not a fishing expedition for new grounds of attack; they are focused requests for information relevant to known grounds of attack.

6. The law of federal habeas corpus presupposes that full factual development of habeas corpus claims will occur in the state courts. (***Keeney v. Tamayo-Reyes*** (1992) 504 U.S. 1, 9 [the State must afford the petitioner a full and fair hearing on his federal claim].) Discovery and other mechanisms for factual development of claims are limited in federal habeas corpus precisely because they are presumed to be available in the state courts. (See generally ***Calderon v. United States District Court (Nicolaus)*** (9th Cir. 1996) 98 F.3d 1102; see also 28 U.S.C. § 2254(e)(2) [limiting the right to an evidentiary hearing in federal habeas corpus if the prisoner has "failed to develop the factual basis of a claim in State court proceedings"].) In light of these rules of federal law, denial of discovery in state habeas corpus proceedings would wrongfully impede the right to petition for federal habeas corpus, in violation of Article I, section 9, of the United States Constitution. **Gonzalez** should therefore be reconsidered in light of the enactment of section 2254(e)(2) and the Ninth Circuit's decision in ***Nicolaus***.

7. In any event, petitioner sets forth in the present petition a prima facie

case on all the stated claims. He is therefore entitled to the issuance of an order to show cause, and to a full evidentiary hearing with access to this Court's subpoena power, to adequate funding and opportunity to investigate, and to conduct all the discovery relevant to each of his claims without regard to ***People v. Gonzalez, supra***.

CLAIM IX

THE METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT.

Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition against cruel and unusual punishment.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are as follows:

1. The State of California plans to execute petitioner by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Cal. Penal Code § 3604.) As amended in 1992, Penal Code § 3604

provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, § 3604 further provides that "if either manner of execution ... is held invalid, the punishment of death shall be imposed by the alternate means ...."

2 In 1996, the California Legislature amended Penal Code § 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . . , the penalty of death shall be imposed by lethal injection." (See 15 Cal. Code Regs. § 3349.)

3. On October 4, 1994, the United States District Court for the Northern District of California ruled in ***Fierro v. Gomez*** (N.D. Cal. 1994) 865 F.Supp. 1387, that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in Fierro, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." (***Fierro v. Gomez*** (9th Cir. 1996) 77 F.3d 301, 309, vacated (9th Cir. 1998) 147 F.3d 1138.) The Ninth Circuit also permanently enjoined the State of California from administering lethal gas. (Id.) Accordingly, lethal injection is the only method of execution currently authorized in California.

4. In 1996, the Ninth Circuit concluded in ***Bonin v. Calderon*** (9th Cir. 1996) 77 F.3d 1155, 1163, that because the use of lethal gas has been held invalid

by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code § 3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of execution leaves lethal injection as the sole means of execution to be implemented by the state. Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. (Id.)

5. The lethal injection method of execution is authorized to be used in thirty-five states in addition to California. Since 1976 there have been at least 579 executions by lethal injection.[5] Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

6. Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning this method of execution, the effects of lethal injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned men and women.

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5 This figure includes all lethal injection executions in the United States through November 15, 2001.

7. Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (***Robinson v. California*** (1962) 370 U.S. 660.)

8. The chemicals authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

9. Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the Fifth Century B.C. and requires the preservation of life and the cessation of pain above all other values.[6] Medical doctors may not help the state kill an inmate.[7] The American Nurses Association also forbids members from

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6 The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

7 During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member

participating in executions.

10. The first lethal injection execution in the United States took place in 1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989, for an execution in Missouri.

11. The dosages to be administered are not specified by California statute, but rather "by standards established under the direction of the Department of Corrections." (Cal. Penal Code § 3604(a).) The three drugs commonly used in lethal injections are sodium pentothal, pancuronium bromide and potassium chloride. As of December 12, 2001 the California Department of Corrections website confirmed that California prisoners are put to death with 5.0 grams of sodium pentothal, 50 cc of pancuronium bromide, and 50 cc of potastium chloride. (See http://www.cdc.state.ca.us/issues/ capital/capital4.htm.)

12. Sodium pentothal renders the inmate unconscious. Pancuronium bromide then paralyzes the chest wall muscles and diaphragm so that the inmate

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of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

can no longer breathe. Finally, potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, cardiac arrest.

13. The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate will not be executed humanely, so as to avoid cruel and unusual punishment. Specifically, death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making dosing decisions. Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result.

14. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel. As such, there is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily

extreme pain and suffering.

15. The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage and handling. Improperly selected, stored and/or handled chemicals will lose potency, and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process. Improperly selected, stored, and/or handled chemicals will be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering. California provides inadequate controls to ensure that the chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

16. Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures required to execute petitioner. Yet these non-medical death technicians will lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare him physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals, and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and do not infiltrate surrounding tissues, and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

17. Moreover, inadequately skilled and trained death technicians are

unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained death technicians may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

18. The use of unskilled and improperly trained death technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for the inmate in numerous cases across the United States in recent years.

19. In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed.

20. On March 13, 1985, Steven Peter Morin lay on a gurney for forty-five minutes while his Texas executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. (See also, Michael Graczyk, "Convicted Killer in Texas Waits 45 Minutes Before Injection is Given," Gainesville Sun, March 14, 1985; "Murderer of Three Women is Executed in Texas," New York Times, March 14, 1985.) Problems with the execution

prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. (*Id.*)

21. On August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. ("Texas Executes Murderer," Las Vegas Sun, August 20, 1986.)

22. Similarly, on June 24, 1987, in Texas, Elliot Johnson lay awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle. On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so that witnesses could not observe the intermission. (Michael Graczyk, "Landry Executed for '82 Robbery Slaying," Dallas Morning News, December 13, 1988; Michael Graczyk, "Drawn-Out Execution Dismays Texas Inmates," Dallas Morning News, December 15, 1988.)

23. On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Karen Zellars, the Houston attorney who represented McCoy and witnessed the

execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted that the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." ("Man Put to Death for Texas Murder," New York Times, May 25, 1989; "Witnesses to an Execution," Houston Chronicle, May 27, 1989.)

24. On January 24, 1992, in Varner, Arkansas, it took the staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help staff find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, as paraphrased by a newspaper reporter, "[T]he moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. (Joe Farmer, "Rector, 40, Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-Gazette, January 26, 1992.)

25. On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react

spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Tulsa World reporter Wayne Greene said, "The death looked scary and ugly." ("Witnesses Comment on Parks' Execution," Durant Democrat, March 10, 1992; "Dying Parks Gasped for Life," The Daily Oklahoman, March 11, 1992; "Another U.S. Execution Amid Criticism Abroad," New York Times, April 24, 1992.)

26. On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to a gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the lethal chemicals. ("Man Executed in '76 Slaying After Last Appeals Rejected," Austin American-Statesman, April 23, 1992; "Killer Executed by Lethal Injection," Gainesville Sun, April 24, 1992; Michael Graczyk, "Veins Delay Execution 40 Minutes," Austin American-Statesman, April 24, 1992; Kathy Fair, "White Was Helpful at Execution," Houston Chronicle, April 24, 1992.)

27. On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze...." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth

remained open." (Michael Graczyk, "Convicted Texas Killer Receives Lethal Injection," (Plainview, Texas) Herald, May 7, 1992; "Convicted Killer May Dies," (Huntsville, Texas) Item, May 7, 1992; "Convicted Killer Dies Gasping," San Antonio Light, May 8, 1992; Michael Graczyk, "Convicted Killer Gets Lethal Injection," (Denison, Texas) Herald, May 8, 1992.)

28. On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene, thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. (Rob Karwath and Susan Kuczka, "Gacy Execution Delay Blamed on Clogged T.B. Tube," Chicago Tribune, p. 1, May 11, 1994.)

29. On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Foster was not pronounced dead until 29 minutes after the executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins.

Several minutes after the strap was loosened, death was pronounced. The coroner entered the death chamber 20 minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed. ("Witnesses to a Botched Execution," St. Louis Post- Dispatch, May 8, 1995, at 6B.) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (***Id.***)

30. On January 23, 1996, in Virginia, Richard Townes, Jr. was killed by lethal injection. This execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes's right foot. ("Store Clerk's Killer Executed in Virginia," New York Times, Jan. 25, 1996, at A19.)

31. On July 18, 1996 in Indiana, Tommie J. Smith, was put to death by lethal injection. Because of unusually small veins, it took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes

before death was pronounced. (Sherri Edwards & Suzanne McBride, "Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution," Indianapolis Star, July 19, 1996, at A1; Suzanne McBride, "Problem With Vein Delays Execution," Indianapolis News, July 18, 1996, at 1.)

32. On May 8, 1997 in Oklahoma Scott Dawn Carpenter was pronounced dead some 11 minutes after the lethal injection was administered. As the drugs took effect, Carpenter began to gasp and shake. "This was followed by a guttural sound, multiple spasms and gasping for air" until his body stopped moving, three minutes later. (Michael Overall & Michael Smith, "22-Year-Old Killer Gets Early Execution," Tulsa World, May 8, 1997, at A1.)

33. On April 23, 1998 in Texas Joseph Cannon died by lethal injection. It took two attempts to complete the execution. After making his final statement, the execution process began. A vein in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon lay back, closed his eyes, and exclaimed to the witnesses, "It's come undone." Officials then pulled a curtain to block the view of the witnesses, reopening it fifteen minutes later when a weeping Cannon made a second final statement and the execution process resumed. ("1st Try Fails to Execute Texas Death Row Inmate," Orlando Sentinel, Apr. 23, 1998, at A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," Austin American-Statesman, Apr. 23, 1998, at B5.)

34. On June 28, 2000 in Missouri Bert Leroy Hunter had an unusual reaction to the lethal drugs, repeatedly coughing and gasping for air before he lapsed into unconsciousness. (David Scott, "Convicted Killer Who Once Asked to Die is Executed," Associated Press, June 28, 2000.)

35. On November 7, 2001 in Georgia Jose High was pronounced dead some one hour and nine minutes after the execution began. After attempting to find a useable vein for "15 to 20 minutes," the emergency medical technicians under contract to do the execution abandoned their efforts. Eventually, one needle was stuck in High's hand, and a physician was called in to insert a second needle between his shoulder and neck. (Rhonda Cook, "Gang Leader Executed by Injection Death Comes 25 Years after Boy, 11, Slain" Atlanta Journal Constitution, Nov. 7, 2001, p. B1.)

36. The Eighth Amendment to the United States Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (Cf. Estelle v. Gamble (1976) 429 U.S. 97, 106.) As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

37. The Eighth Amendment safeguards nothing less than the dignity of

man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. (Trop v. Dulles (1958) 356 U.S. 86, 100.)

38. To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (***Glass v. Louisiana*** (1985) 471 U.S. 1080, 1086, [105 S. Ct. 2159, 85 L. Ed. 2d 514.] (Brennan, J., dissenting); ***Campbell v. Wood*** (9th Cir. 1994) 18 F.3d 662, 709-11 (Reinhart, J., dissenting); see also ***Zant v. Stephens*** (1983) 462 U.S. 862, 884-85, [103 S. Ct. 2733; 77 L. Ed. 2d 235], (state must minimize risks of mistakes in administering capital punishment); ***Eddings v. Oklahoma*** (1982) 455 U.S. 104, 118, [102 S. Ct. 869; 71 L. Ed. 2d 1], (O'Connor, J., concurring).)

39. It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the individual factors which have to be accessed in each case. Petitioner should not be subjected to experimentation by the State of California in its attempt to figure out how best to kill a human being.

40. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks "unnecessary and wanton infliction of pain." (***Gregg v. Georgia*** (1976) 428 U.S. 153, 173 [96 S. Ct. 2909, 49 L.Ed. 859].) Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment to the United States Constitution.

CLAIM X

THE PENALTY OF DEATH CALIFORNIA IS ARBITRARILY AND CAPRICIOUSLY IMPOSED IN CALIFORNIA DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW.

Petitioner's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are as follows:

41. Petitioner incorporates herein by reference all arguments, contentions, submissions, and facts, set forth in Appellant's Opening Brief and Appellant's Reply Brief in ***People v. Valdez***, S026872 pending in this Court.

42. It is axiomatic that every person in the United States is entitled to equal protection of the law. (U.S. Const., 14th Amend.)

43. It is also true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and

allowed the states to vary in their statutory schemes for putting people to death. (***See Jurek v. Texas*** (1976) 428 U.S. 262. [96 S. Ct. 2950,49 L.Ed. 2d 929]; ***Proffitt v. Florida*** (1976) 428 U.S. 242 [96 S. Ct. 2960, 49 L.Ed. 2d 913,] ***Gregg v. Georgia*** (1976) 428 U.S. 153, [96 S. Ct. 2909, 49 L.Ed. 859], Cf. ***McCleskey v. Kemp*** (1987) 481 U.S. 279, [107 S. Ct. 1756, 95 L. Ed. 2d 262.]

44. Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, are essential. (***Bush v. Gore*** (2000) 531 U.S. 98, [121 S.Ct. 525, 530-532 148 L. Ed. 2d 388].) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (Id. at 532.) This principle must apply to the right to life as well as the right to vote.

45. In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code § 190.2 and § 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code § 190.2 or 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will face a potential lesser punishment.

46. This is not uniform treatment within the state. In some California

counties a life is worth more than in others, because county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder. If different and standardless procedures for counting votes among counties violates equal protection, as in the Bush case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law, as well.

47. If any additional showing is necessary to demonstrate the differing standards or lack of standards among the 58 California counties, petitioner requests that funds be made available for further investigation, that discovery be permitted, that the court issue subpoenas and process as necessary, and that a full evidentiary hearing be held further to develop the facts supporting this claim.

48. This Court must therefore reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment. (See e.g. ***People v. Anderson*** (2001) 25 Cal.4th 543, 622-623; ***People v. Williams*** (1997) 16 Cal.4th 153, 278; ***People v. Keenan*** (1988) 46 Cal.3d 478, 505.)

49. Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause, ***Bush v. Gore, supra***, and Article 1, section 7(b) and Article IV, section 16(a) of the California Constitution.

CLAIM XI

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.

Petitioner's death sentence and confinement are unlawful and unconstitutional. Execution of petitioner following his lengthy confinement under sentence of death (now more than eleven years since judgment) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 7, 15, 16, 17 and 24 of the California Constitution; and international law, covenants, treaties and norms.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are as follows:

1. Petitioner was sentenced to death on May 22, 1992 . (CT ; RT .) At the time of the present Petition, he has already been continuously confined for more than 11 years and under sentence of death for more than 10 years. His automatic appeal has been pending continuously during that time.

2. Petitioner's lengthy confinement on death row has been through no fault of his own. The appeal from a judgment of death is automatic (§ 1239, subd.

(b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." (***People v. Sheldon*** (1994) 7 Cal.4th 1136, 1139, citing ***People v. Stanworth*** (1969) 71 Cal.2d 820, 833-834.)

3. Furthermore, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record. (***Chessman v. Teets*** (1957) 354 U.S. 156, [77 S. Ct. 1127; 1 L. Ed. 2d 1253]; Pen. Code § 190.7; Cal. Rules of Court, rule 39.5 See ***People v. Barton*** (1978) 21 Cal.3d 513, 518; ***People v. Gaston*** (1978) 20 Cal.3d 476; ***People v. Silva*** (1978) 20 Cal.3d 489; ***In re Smith*** (1970) 3 Cal.3d 192; U.S. Const. 6th, 8th, 9th Amends.)

4. The delays in petitioner's appeal have been caused by factors over which he has exercised no discretion or control and are overwhelmingly attributable to the system that is in place, established by state and federal law. The delays have nothing to do with the exercise of any discretion on petitioner's part. (Compare ***McKenzie v. Day*** (9th Cir. 1995) 57 F.3d 1461, 1466-1467 (claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner), adopted en banc, 57 F.3d 1493.) The delays here have been caused by the state. (***Lackey v. Texas*** (1995) 514 U.S. 1045; [115 S. Ct. 1421; 131 L. Ed. 2d 304.](mem. of Stevens, J.).) The First Amended Information was filed on June 12, 1991. Petitioner's judgment of death was imposed on August 14, 1991. Appellate

counsel was appointed on October 24, 1996 The record on appeal was filed on. February 23, 2000.

5. Petitioner's non-waivable right to an automatic appeal remedy provided by state law does not negate the cruel and degrading character of his long-term confinement under judgment of death for over eleven years.

6. Execution of petitioner following confinement under sentence of death for this lengthy a period of time would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (***Lackey v. Texas, supra***, 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari.) See ***Knight v. Florida*** (1998) 528 U.S. 990 [120 S. Ct. 459; 145 L. Ed. 2d 370], (Breyer, J., respecting the denial of certiorari); ***Ceja v. Stewart*** (9th Cir. 1998) 97 F.3d 1246 (Fletcher, J., dissenting from order denying stay of execution).)

7. Carrying out petitioner's death sentence after this extraordinary delay violates the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects: first, it constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for this extremely prolonged period of time. (See, e.g., ***McKenzie v. Day*** (9th Cir. 1995) 57 F.3d 1461; ***Ceja v. Stewart***, ***supra*** (Fletcher, J., dissenting from order denying stay of execution).) Second, after the passage of so much time since his judgment of death, the State's ability to exact retribution and to deter other murders by actually carrying out a death

sentence is drastically diminished. (***Id.***)

8 Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row. Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

9. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." (***In re Medley*** (1890) 134 U.S. 160, 172.)

10. In ***Medley***, the period of uncertainty was just four weeks. As recognized by Justice Stevens, Medley's description should apply with even greater force in a case such as petitioner's, involving a delay that has lasted over eleven years. (***Lackey v. Texas, supra*** (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).)

11. This Court reached a similar conclusion in ***People v. Anderson*** (1972) 6 Cal.3d 628, 649: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and

medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

12, The penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. (***Ceja v. Stewart, supra*** (Fletcher, J., dissenting from order denying stay of execution); see also ***Furman v. Georgia*** (1972) 408 U.S. 238, 312 , 92 S. Ct. 2726, 33 L.Ed. 2d 346 (White, J., concurring).)

13. The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (***Furman v. Georgia, supra*** (White, J., concurring); see also ***Gregg v. Georgia, supra,*** 428 U.S. 153, 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").)

14. In order to survive Eighth Amendment scrutiny, "the imposition of

the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' ***Furman v. Georgia, supra*** at 280, (Brennan, J., concurring), then it is unnecessarily excessive within the meaning of the Punishments Clause."

15. The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." (***Gregg v. Georgia, supra*** at 183.) Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." (Id.)

16. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished in this case as a result of the extraordinary period of time that has elapsed since the date of petitioner's conviction and judgment of death. "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." (***Lackey v. Texas, supra*** (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); see also

Coleman v. Balkcom (1981) 451 U.S. 949, 952, [101 S. Ct. 2031; 68 L. Ed. 2d 334]; (Stevens, J., respecting denial of certiorari) ("The deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself.").)

17. Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement on death row for over eleven years, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

18 The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (***Pratt v. Attorney General for Jamaica*** (1993) 4 All.E.R. 769 (Privy Council); ***Soering v. United Kingdom*** 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights).) ***Soering*** specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

19. The developing international consensus demonstrates that, in

addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well.

20. Further, the process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. (United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

21. Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may only be inflicted

upon a person by a public official if the punishment is incidental to a lawful sanction. (Id.)

22. Petitioner's death sentence must be permanently vacated and/or a stay of execution must be permanently entered.

CLAIM XII.

PETITIONER'S CONVICTION AND JUDGEMENT OF DEATH VIOLATE INTERNATIONAL LAW

The facts supporting this claim among others to be presented after full investigation, adequate funding, research, analysis, discovery and hearing, include the following:

1. Petitioner refers to all of the allegations pled in Claims I through X,XIII, and by this reference, incorporates them herein as if set forth in full counsel failed to present the evidence at his disposal that would have been beneficial to his client.

A. Petitioners Was Deprived of His Rights under the Vienna Convention.

1. Petitioner, specially incorporates Claim IV, F (1)

2. The rights enumerated in subparagraph 36 subdivision (1) subsection (b) belong to the foreign national as an individual, and, therefore, the defendant himself has standing to object to the violation of his rights under the Vienna Convention. (***Id.***) Furthermore, the language of subparagraph 36 subdivision (1) subsection (b) is not precatory but rather is mandatory and unequivocal. (See ***INS*** v. ***Cardoza-Fonseca*** (1987) 480 U.S. 421, 441 [107 S.Ct. 1207, 94 L.Ed.2d 434].)

Accordingly, foreign nationals have rights under subparagraph 36 subdivision (1) subsection (b) of the Vienna Convention. See ***United States*** v. ***Rauscher***, (1886) 119 U.S. 407, 418-419 [7 S.Ct. 234, 30 L.Ed. 425]; See also, ***United States*** v. ***Alvarez-Machian*** (1992) 504 U.S. 655 [112 S.Ct. 2188, 119 L.Ed.2d 441].)

3. Recently the International Court of Justice voted fourteen to one that article 36, paragraph 1 creates an individual right to consular notification and access. On October 1, 1999, the Inter-American Court on Human Rights found that consular notification was one of the "minimum guarantees essential to 36, providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial." ***La Grand*** OC-16/99, para. 122, Inter-Am. Ct. H.R. (October 1, 1999) – a right embodied in article 14(3)(b) of the ICCPR.

4. Since the United States, and Mexico are all parties to the Vienna Convention, petitioner was protected by the Convention and should have been informed of his rights under the Convention "without delay." However, the record shows the United States acted in flagrant disregard of the Convention and as such. Petitioner was tried without the assistance of competent counsel, convicted of a capital crime of which he is not guilty and has been arbitrarily and unjustly sentenced to death. The errors set forth in this petition and in the briefing on appeal singly and in combination demonstrate that he has been prejudiced by being denied access to his counsel.

5. The purpose of the Vienna Convention is protecting the interests of the

foreign national in the receiving state, helping and assisting foreign nationals, and representing or arranging appropriate representation for foreign nationals before the tribunals and other authorities of the receiving state for the purpose of obtaining provisional measures for the preservation of the rights of foreign nationals in accordance with the laws and regulations of the receiving state. (Article 5 of the Vienna Convention, 21 U.S.T. 77.) The Vienna Convention clearly serves a purpose of benefit to the alien, and in this case would have benefitted petitioner. The deprivation of petitioner's rights under the Vienna Convention prejudiced petitioner because he was denied his right to consult with the Mexican consulate, who would have aided and assisted him with his defense and protected his interests within the court system of the receiving state.

6. In ***LaGrand***, the International Court of Justice, squarely rejected a prejudice standard when reviewing the Article 36 violation in that case. Germany argued that its consular officers would have been able to intervene and present a "persuasive mitigation case" at trial which "likely would have saved" the lives of the LaGrands. Germany's inability to provide consular assistance was directly attributable to the U.S. violation of article 36 (1)(b). Germany further argued that its later intervention could not remedy the "extreme prejudice" created by the [ineffective assistance of] counsel appointed to represent the LaGrands.

7. The Court accepted Germany's arguments, and rejected the United States' position that Germany's assertions were speculative and unfounded. (The

United States argued that some mitigating evidence had been presented at trial, and that Germany's intervention would not have persuaded the sentencing judge to be more lenient.)

8. The Court concluded that the rights set forth in article 36(1)(a) and 36(1)(c) are interrelated with the rights delineated in 36(1)(b). "It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay. . . the sending State has been prevented for all practical purposes from exercising its right under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen." Similarly petitioner and Mexico were in effect prevented by the breach of the United States from exercising the rights conferred on them by the Convention, had they so chosen.

B. **The Errors Set Forth in this Petition and in the Briefs on Appeal, Singly and in Combination, Deprived Petitioner of His Rights to a Fair Trial and Review by Independent and Impartial Tribunals, and to the Minimum Guarantees for the Defense under Customary International Law, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (Iccpr), Article 14. And the American Declaration of the Rights and Duties of Man (American**

Declaration), Article 26.

1. Infliction of the death penalty on petitioner in light of the errors identified would constitute arbitrary deprivation of life in violation of customary international law and article 6, section 1, of the ICCPR, and article 1 of the American Declaration.

2. Imposition and execution of the death penalty for a single-victim, single incident, ordinary felony murder, when evidence that the underlying felony was even committed is virtually non existent violates customary international law and article 6, section 2, of the ICCPR, which limits the death penalty to only the most serious crimes.

3. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the American Declaration. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable. As a result of these violations, petitioner's unlawful conviction and death sentence must be set aside.

CLAIM XIII

THE JUDGMENT MUST BE REVERSED FOR CUMULATIVE ERROR.

1. In this petition and in the briefing on direct appeal, petitioner has

set forth separate post-conviction claims and arguments regarding the numerous guilt-phase and penalty-phase errors, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may nevertheless be deprived of due process if the cumulative effect of all the errors in the case denied him fundamental fairness. (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 487, and fn. 15; [98 S. Ct. 1930, 56 L. Ed. 2d 468], ***People v. Holt*** (1984) 37 Cal.3d 436, 459; see also, ***People v. Ramos*** (1982) 30 Cal.3d 553, 581, rev's'd. on other grounds in ***California v. Ramos*** (1985) 463 U.S. 992; ***In re Rodriguez*** (1981) 119 Cal.App.3d 457, 469-470; ***People v. Vindiola*** (1979) 96 Cal.App.3d 370, 388; ***People v. Buffum*** (1953) 40 Cal.2d 719, 726; and ***see Harris v. Wood*** (9th Cir. 1995) 64 F.3d 1432, 1438-1439; ***United States v. McLister*** (9th Cir. 1979) 608 F.2d 785, 791.) Petitioner submits that the errors in this case require reversal both individually and because of their cumulative impact.

2. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the errors and their cumulative effect must be evaluated under the ***Chapman*** standard of review, and reversal is required unless respondent can prove them harmless beyond a reasonable doubt. (***Chapman v. California*** (1968) 386 U.S. 18, 24, [87 S. Ct. 824; 17 L. Ed. 2d 705].) Because of

the magnitude of the errors and other defects, including the presentation of false evidence, ineffective assistance of counsel, prosecutorial misconduct, respondent cannot make the requisite showing. Accordingly, the requested relief must be granted.

PRAYER FOR RELIEF

WHEREFORE, petitioner, Alfredo Reyes Valdez respectfully prays that this Court:

1. Take judicial notice of the certified record on appeal and all documents and pleadings on file in the cases of ***People v. Valdez*** S026872

2. Authorize petitioner to conduct discovery with respect to the claims pleaded herein;

3. Permit petitioner a reasonable opportunity to fully develop the facts and law relevant to the claims raised herein, and to amend this petition to include claims which become apparent from further investigation or from allegations made in the informal response or the return to the petition;

4. Issue an order to show cause, returnable before this Court, why petitioner 's conviction, special circumstance finding, and death judgment should not be set aside;

5. Grant an evidentiary hearing on the claims pleaded herein, and on any claims which are the subject of a supplemental or amended petition;

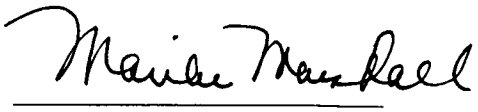
6. Provide an opportunity, including an evidentiary hearing if appropriate, to contest any claims of default that the respondent may make or that this Court may suggest on its own motion;

7. Upon final review of the cause, order that petitioner's convictions, special circumstance findings, and death sentence be set aside; and

8. Provide petitioner such other and further relief as may be appropriate in the interests of justice.

Dated: June 13, 2002

Respectfully submitted,



MARILEE MARSHALL
Attorney for Petitioner

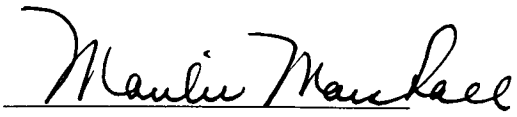
VERIFICATION

I, **MARILEE MARSHALL,** declare:

I am an attorney admitted to practice law in the State of California. I represent petitioner, Alfredo Reyes Valdez, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this petition for writ of habeas corpus on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. I have read the petition and know the contents of the petition to be true.

Executed under penalty of perjury at Pasadena California, this 12th day of June, 2002



MARILEE MARSHALL

DECLARATION OF SERVICE

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

I am over eighteen years of age, not a party to the within cause and employed at 48 North El Molino Avenue, Suite 202, Los Angeles, CA. 91101. On the date of execution hereof I served the attached document by depositing in the U.S. mail before the close of business a true copy thereof, enclosed in a sealed envelope with postage prepaid addressed to the following individuals :

Carl Henry
Deputy Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA. 90013

Counsel will serve petitioner personally by July 10, 2002

Mel Greenlee
California Appellate Project
One Ecker Place
Suite 400
San Francisco, CA. 94104

Executed at Pasadena, California, this 13th day of June 2002.

JAMI R. WILLIAMS