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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ERNEST DEWAYNE JONES,

Petitioner,

v.

KEVIN CHAPPELL, Warden of California State Prison at San Quentin,

Respondent

Case No. CV-09-2158-CJC

DEATH PENALTY CASE

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PRISONER IN STATE CUSTODY (28 U.S.C. § 2254)

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Petitioner Ernest Dewayne Jones, by and through counsel, respectfully petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. section 2254 et seq. and by this verified petition alleges the following facts and causes for issuance of the writ:

I. INTRODUCTION

Ernest Dewayne Jones ("petitioner") was born on June 27, 1964, in Memphis, Tennessee, the fourth child of Earnest Lee and Joyce Jones. Petitioner's parents possessed a genetic heritage of mental illness and familial violence, and were ill-equipped to raise a family as a result of their own mental illness. By the time petitioner was born, his parents had embarked on a violent, alcoholic lifestyle that would have tragic consequences for their children, and would deeply affect and scar each and every Jones child, but none more so than petitioner himself.

Petitioner was always "different" and his mental impairments were obvious from an early age. Raised in an atmosphere of brutal domestic violence, alcoholism, physical, sexual, emotional, and psychological abuse, petitioner dissociated as a response to the traumas he experienced. While still a preschooler, he experienced auditory and visual hallucinations, and exhibited signs of paranoid tendencies. Once he entered school, petitioner's cognitive impairments were recognized; testing in the mentally retarded range of functioning, petitioner struggled to keep up with his peers academically, even when he was placed in special education classes. Through his teenage years, he continued to struggle academically and symptoms of his severe mental illnesses further emerged. From about the time of the murder of his older brother, Carl, when petitioner was about nineteen years old, petitioner became more withdrawn and exhibited symptoms of depression, anxiety, hallucinations, paranoia, delusional thoughts, and suicidal ideation, and his dissociative episodes were more frequent and apparent. Petitioner did not have intellectual or social resources to get help for or understand his mental illness. As he grew older, and the symptoms worsened, petitioner began to self-medicate the symptoms of his developing thought

disorder with drugs and alcohol.

Petitioner's mental illness worsened as he grew into adulthood. His dissociative state was triggered when as a result of his past traumas and sexual abuse he believed he was being threatened, in situations in which no threat existed. Indeed, each of petitioner's crimes involved his irrational belief that he was being threatened and produced vivid descriptions of his dissociative state at the time of the crime. The capital case was the result of a major dissociative episode. Petitioner is able to recall the events that led up to the point at which he dissociated and after he "woke up." In the opinion of a prominent psychiatrist who examined petitioner after the crime, petitioner "was not in control of any of his actions" and had no ability to "appreciate the moral quality of his behavior, or distinguish right from wrong." (Ex. 154 at 2755.)[1]

Trial counsel was convinced that petitioner's actions on the night of the murder of Mrs. Julia Miller were the product of a serious mental illness, which was central to petitioner's defense. During pretrial proceedings, petitioner's behavior was so bizarre that trial counsel had serious doubts as to petitioner's competency. Jail medical staff at the Los Angeles County Jail prescribed psychiatric medications for petitioner, including a powerful antipsychotic, Haldol, to treat his symptoms of psychosis. Trial counsel's sole expert warned that petitioner was likely incompetent to stand trial and "should be treated until he was free of hallucinations and delusional thought." (Ex. 154 at 2754.)

Although trial counsel retained a mental health expert to opine on petitioner's sanity at the time of the offense, he presented no mental state evidence during the guilt phase. Evidence of petitioner's mental illness came solely from petitioner himself. As with his previous dissociative episodes, petitioner was unable to recall the events of that night and had no memory of having sexual intercourse with the victim. Trial counsel nonetheless conceded the rape charge during his closing arguments. With no

[1] Exhibits to the state petition for habeas corpus will be referred to as "Ex. ___."

explanation provided for why petitioner had acted the way he did on the night of the murder, the jury convicted petitioner of rape, felony murder rape, and found true the rape special circumstance.

Trial counsel's presentation in the penalty phase was similarly deficient. Petitioner's family; their medical, school, social service records; petitioner's friends; and mental health experts all possessed compelling, mitigating evidence. These people and records graphically set forth the abusive environment in which petitioner was raised. They explain how the trauma, sexual abuse, and physical and emotional neglect petitioner suffered made him noticeably different from other children his age. These people and social history records vividly demonstrate the progression of petitioner's mental illness.

Unfortunately, petitioner's jury did not hear this compelling evidence. The bits and pieces of information the jury received about petitioner's life failed to give the jury a sense of how petitioner's lifelong mental illness and intellectual disabilities profoundly affect his day-to-day functioning, including deficits in memory, attention, concentration, judgment, self-awareness, misperception of social expectations, problem-solving abilities, planning, organizing and sequencing; most important, the jury did not hear how his mental illness created two people: the person his friends and family knew to be kind, gentle, soft-spoken, and shy, and the other person his victims encountered when he entered a dissociative state. As a result, jurors were left with the impression that petitioner's childhood was "not that bad" (Ex. 127 at 2565), and that there was no compelling reason to vote for life over death (Ex. 133 at 2645).

Had trial counsel conducted a constitutionally sufficient investigation, the jury would have heard compelling mitigating evidence. Petitioner's parents were both raised in physically and sexually abusive environments by mentally ill parents. Petitioner's paternal grandfather, Ernest "Doc" Jones was a violent man who beat his wife and children whenever they disobeyed him and, at other times, for no reason at all. He sexually abused his daughters, raped his oldest daughter, and sexually

molested female workers while he transported them out to the fields. In the sharecropping community where the family lived, petitioner's paternal grandfather was renowned for his mean temper and sexual predation. During the early part of the 1960s, his behavior became so dangerous that he was committed to the State Hospital in Arkansas.

Petitioner's maternal grandmother, Vernice Talley Baldwin, "Miss Vernice," suffered from depression and anxiety. When she punished petitioner's mother, Joyce, she beat her with any household object that was available. Miss Vernice treated Joyce abominably, in part because Joyce was dark-skinned.

Petitioner's mother Joyce had been sexually abused as a girl, and was exposed to sex at an early age. She and Earnest Lee began having a sexual relationship when they were barely in their teens. Joyce became pregnant with petitioner's oldest sister, Gloria, when she was only fourteen. When Joyce became pregnant again with petitioner's second sister, Jean, the families agreed that the young parents should be married.

Around the time that Joyce became pregnant with petitioner, she was having an affair with another man. Later, she would taunt Earnest Lee that petitioner was not his son. Joyce drank and smoked while she was pregnant with petitioner, likely contributing to his brain impairments.

A short time after petitioner's birth, the Jones family moved to Los Angeles. Their drinking increased, which also increased the frequency and ferociousness of the physical violence between petitioner's parents. Numerous witnesses describe the brutal beatings Earnest Lee meted out to his wife, leaving her in pools of blood. On the other hand, Joyce was every bit as violent as her husband. She lay in wait and attacked Earnest Lee with a knife on more than one occasion. After these fights, when petitioner was still a little boy, he could be found trembling, hiding under a bed or a blanket with tears running down his face, but no other expression. Other times he did not make it to safety and, on at least one occasion, he was pushed into an item of

furniture by his father, suffering a head injury.

The defining moment for petitioner's parents' marriage happened in 1968, when petitioner's father found his wife in bed with his best friend. He beat her senseless and dragged her through the apartment complex where they lived. Petitioner's mother blamed petitioner for opening the door to let his father into the apartment that night. From that point on, petitioner was singled out for the most vicious of his mother's beatings. However, her abuse of her son did not stop there; she also sexually abused him.

Petitioner began to dissociate from an early age as a response to these traumas. He became afraid of the dark after he started sleeping in his parents' bed. Nightmares became an almost nightly occurrence and he was terrified that there were people in the closet. As he grew older, these sleep disturbances persisted, as did his fear of the dark.

Joyce had lived off welfare for many years, using her food stamps to buy alcohol. Petitioner was upset about the situation, how his mother abandoned her younger children and cared more about where her next drink was coming from than the welfare of her family. Often there was no food in the house and the electricity was turned off. Petitioner did a lot for his younger siblings during this time, getting them ready for school, and doing what he could to keep them clothed and to put food on the table.

Events took a tragic turn in July 1983 when petitioner's brother Carl was stabbed to death in the street. Petitioner wrongly believed that there was something he could have done to protect Carl. After Carl's death, petitioner's behavior changed dramatically; he began to act bizarrely. He began yelling things to people in the street, including verbally abusing known gang members who could easily have killed him. They did not retaliate, however, because they recognized that petitioner was clearly having some kind of mental problem. People who knew him did not recognize him: he shaved his head and eyebrows, wore a blank expression, and passed by people he had known for years without acknowledging them.

In early 1984, after a couple of years of dating, petitioner's girlfriend, Glynnis Harris, became pregnant. Around this time, Glynnis noticed that petitioner had begun to exhibit sudden mood swings and paranoia. When petitioner was released from jail in late 1984, he had nowhere to live. Glynnis's mother, Doretha Harris, let him stay in the garage at the back of her house. During this time, Glynnis noticed a marked deterioration in petitioner's mental condition; petitioner was experiencing dissociative episodes and auditory hallucinations. His depression and paranoia got worse. Mrs. Harris evicted him from the garage and, with nowhere to live, petitioner ended up sleeping on the floor of his uncle's auto shop. Petitioner spent many hours in the night just sitting and staring into space. In March 1985, petitioner attacked Mrs. Harris and, during a dissociative episode, raped her. Petitioner pled guilty to the charges against him and was sentenced to state prison. During a sentencing evaluation, law enforcement personnel observed that petitioner was suffering from emotional and mental problems. However, while in prison he did not receive the recommended, and much needed, treatment for his mental illness.

When petitioner was released from prison in late 1991, he was, at times, hopeful about his future and, at other times, depressed and anxious. From late April 1992, about the time of the Los Angeles riots, petitioner's paranoia was acute. He continued to experience the dissociative trances that had plagued him from the time he was a boy. He had thoughts of suicide. Just days before the murder, he acted bizarrely with his sister Gloria; he had a glazed expression and his voice was deep and strange. On the day before the murder, his conversations were nonsensical. On the day of the murder itself, petitioner used alcohol and smoked marijuana and crack cocaine. He had not used crack cocaine for some time. The combined effects of drugs and alcohol on petitioner's damaged brain, coupled with his psychosis and dissociative disorder overwhelmed his rational functioning. At the time of the crime,

> Ernest's actions in Mrs. Miller's apartment and afterwards leading up to his suicide attempt, resulted from overwhelming stress and fear

> that any reasonable person would experience if subjected to the same traumatic childhood through which Ernest had barely survived. . . .
>
> At the time of the offenses, Ernest's judgment and decisions were impaired by the impact of unrelenting trauma and mental illness he suffered, and not by reasoned, deliberate thought. He was unable to weigh and balance any of the consequences of his deeds, and he retained no capacity to control his behavior while in a dissociative state. In his confrontation with Mrs. Miller, the stress of his past and current circumstances, and the threat and danger he perceived, overwhelmed him, setting off a chain of events he neither intended, understood, nor even remembered in substantial part.

(Ex. 178 at 1356-57.)

This petition contains the many reasons why the jury did not hear this powerful evidence. The numerous constitutional violations that tainted petitioner's trial include defense counsel's failure to investigate potential guilt and penalty defenses, the prosecutor's withholding of exculpatory information and committing misconduct, and the trial court's erroneous rulings. These errors, individually and collectively, thwarted any semblance of a fair fact-finding process and reliable verdicts.

II. PROCEDURAL HISTORY AND BACKGROUND

A. Venue

1. Place of detention: San Quentin State Prison, San Quentin, California.

2. Place of conviction and sentence: Superior Court of Los Angeles County, California.

3. Date of judgment: April 7, 1995.

B. Conviction On Which The Petition Is Based

1. Nature of offenses and California Penal Code Sections: Special

Circumstances Murder (Cal. Penal Code § 187, § 190.2(a)(17)(C)); rape (Cal. Penal Code § 261(a)(2)); use of a knife (Cal. Penal Code § 12022(b)); and prior conviction (Cal. Penal Code § 667.5(a) & (b)).

2. Case number: BA063825.

3. Date of conviction: February 1, 1995.

4. Date of sentence: April 7, 1995.

5. Sentence: Death.

C. Pretrial Proceedings

1. On September 1, 1992, a felony complaint was filed in the Los Angeles County Municipal Court charging petitioner with several counts arising from events between August 24 and August 25, 1992. (1 Clerk's Transcript ("CT") at 87-90.) On December 10, 1992, a Preliminary Hearing was held before the Honorable Maral Injejikian in the Los Angeles County Municipal Court. (*Id*. at 1-86.)

2. An amended complaint was filed in Superior Court on December 11, 1992. (*Id*. at 91-94.) On December 23, 1992, a one-count Information was filed in the Los Angeles County Superior Court. (*Id.* at 95-97.)

3. On December 24, 1992, petitioner was arraigned before the Honorable Robert O'Neill. Petitioner pled not guilty and denied all allegations. (*Id*. at 131; 1 Reporter's Transcript ("RT") at 1-4.)

4. On September 1, 1993, the district attorney filed a First Amended Information. Count I charged petitioner with the murder of Julia Miller in violation of California Penal Code section 187(a) and alleged that the crime occurred while he was engaged in the commission of a burglary, rape, and robbery within the meaning of California Penal Code section 190.2(a)(17). It was further alleged that in the commission and attempted commission of the above offense, petitioner used a deadly and dangerous weapon within the meaning of California Penal Code section 12022(b), namely, a knife, causing the offense to be a serious felony within the meaning of California Penal Code section 192.7(c)(23). Count II alleged that petitioner committed

the crime of first-degree residential burglary in violation of California Penal Code section 459, with the intent to commit larceny and any felony. It was further alleged that the offense is a serious felony within the meaning of California Penal Code section 462(a). It was further alleged that petitioner used a deadly weapon in the commission of the offense within the meaning of California Penal Code section 12022(b), causing the offense to be a serious felony within the meaning of California Penal Code section 1192.7(c)(23). Count III alleged that petitioner committed the crime of forcible rape in violation of California Penal Code section 261(a)(2), an offense being a serious felony within the meaning of California Penal Code section 1192.7(c)(3). It was further alleged that, in the commission or attempted commission of this offense, petitioner used a deadly and dangerous weapon within the meaning of California Penal Code section 12022(b), causing the offense to be a serious felony within the meaning of California Penal Code section 1192.7(c)(23). Count IV charged petitioner with the crime of first-degree residential robbery in violation of California Penal Code section 211. It was further alleged that said offense is a serious felony within the meaning of California Penal Code section 1192.7(c)(19). It was further alleged that, in the commission and attempted commission of the above offense, petitioner used a deadly weapon within the meaning of California Penal Code section 12022(b), causing the offense to be a serious felony within the meaning of California Penal Code section 1192.7(c)(23). (1 CT 98-102.)

5. On September 1, 1993, petitioner pled not guilty to the First Amended Information and denied all allegations therein. (*Id*. at 166; RT at 40-43.)

6. On March 8, 1993, petitioner moved for the appointment of Doctors John Stalberg and John Mead pursuant to California Evidence Code sections 730 and 952 to examine petitioner regarding his mental condition. (1 RT 14.) Doctors Stalberg and Mead were appointed by order of the court on March 8, 1993. (1 CT 134; 1 RT 14-15.)

7. On October 15, 1993, the prosecutor filed a motion to allow the

introduction of other crimes in its case in chief pursuant to California Evidence Code section 1101(b). (Supp. II 1 CT 1-62.) On October 22, 1993, the court noted that the admissibility of prior crimes required an inquiry pursuant to California Evidence Code sections 1101(b) and 352. (1 RT 512.)

8. On October 20, 1993, petitioner filed a motion to set aside the Information pursuant to California Penal Code section 995. (Supp. II 1 CT 63-84.) The prosecutor opposed the motion on October 26, 1993. (*Id*. at 88-101.) The court denied the motion as to all counts on October 27, 1993.

9. Prior to trial, the parties litigated the admissibility of deoxyribonucleic acid (DNA) testing of samples taken from Mrs. Miller.

a. On December 15, 1993, petitioner filed a motion to oppose the introduction of DNA evidence. (*Id.* at 106-23.)

b. On February 4, 1994, pursuant to California Evidence Code section 452, the prosecutor filed a request that the court take judicial notice of the findings and order in *People v. Robert Smith, James Croom, and Bevin Graham*, Los Angeles Superior Court, Case No. PA 006349 (1993), the testimony of Dr. Patrick Conneally in that case, National Research Council, *DNA Technology in Forensic Science, Committee on DNA Technology in Forensic Science Board on Biology, Commission on Life Sciences* (NATIONAL ACADEMY PRESS, 1992), and Dr. Daniel Hartl's affidavit regarding the admissibility of the DNA Modified Ceiling Principle. (*Id.* at 175-82.)

c. On March 8, 1994, the prosecutor filed an opposition to petitioner's motion to exclude DNA evidence. (2 CT 430-44.)

d. On March 11, 1994, the court held a hearing and determined that two issues had been raised with regard to DNA evidence. Firstly, whether the DNA testing process was accepted within the scientific community; and secondly, whether the population frequency data were admissible. The court continued argument regarding the request for judicial notice to March 31, 1994. (1 RT at 547-54.)

e. On March 23, 1994, petitioner filed an opposition to the

prosecutor's request to take judicial notice of the materials regarding the admissibility of DNA evidence. (Supp. II 1 CT 135A-35J.)

f. On March 31, 1994, the court heard argument on the matter of judicial notice and determined that it would not take judicial notice of the ruling in the *Smith* case or Dr. Hartl's affidavit. The court did, however, take judicial notice of the report of the National Research Council and the testimony of Dr. Conneally. The DNA issue was once again continued to the next hearing. (1 CT 190; 1 RT 555-86.)

g. On April 7, 1994, the court heard argument from both sides about whether DNA evidence had gained acceptance within the scientific community. The court decided that the prosecution had met its burden of showing that the DNA Modified Ceiling Principle was generally accepted and shifted the burden to the petitioner to rebut that evidence. Petitioner requested and was granted a continuance to present such a rebuttal. (1 CT 191; 1 RT at 587-618.)

h. On May 27, 1994, the court heard in part motions in limine on the DNA issue. Petitioner requested that the court take judicial notice of argument and the decision in the case of *People v. Fountain*, Contra Costa Superior Court, Case No. 910267-4. The court rejected the testimony without reading it on the grounds that it refused to take judicial notice of the *Smith* case. The court continued the hearing to June 8, 1994. (1 CT at 194; 1 RT at 628-61.)

i. On June 8, 1994, the court found that there was general acceptance within the scientific community of the DNA Modified Ceiling Principle and ruled that the DNA evidence was admissible. (1 CT at 195; 1 RT at 662-65.)

10. On May 17, 1994, petitioner filed a motion to strike the special circumstances on the basis that the death penalty and special circumstance allegations had been superseded by California Penal Code section 667 as amended. (Supp. II 3 CT 565-80.) The prosecution filed its opposition on May 27, 1994 (Supp. II 3 CT 589-605), and the motion was denied on June 8, 1994 (1 CT at 195; 1 RT at 665-66).

11. On June 24, 1994, the district attorney filed supplemental authorities in

support of the introduction of other crimes in its case pursuant to California Penal Code section 1101(b). (Supp. II 3 CT 606-09.) Petitioner filed an opposition to the motion on June 27, 1994. On June 30, 1994, the court concluded that the evidence was admissible pursuant to Evidence Code section 1101(b), but deferred ruling on the section 352 issue at that time. (1 CT 196; 1 RT 675-95.)

12. On November 30, 1994, the prosecutor moved the court to amend the information, and the court ordered that the information be amended by interlineations as to the victim's name and the date of the crime. (1 CT 214.)

D. Petitioner's Jury Trial.

1. Petitioner was tried by a jury. Jury selection began on November 30, 1994 before the Honorable George Trammell (*id*.), and concluded on December 22, 1994, when a jury was impaneled and sworn (*id*. at 229).

2. On December 7, 1994, the prosecutor filed a Second Amended Information, adding allegations that petitioner had been previously convicted for serious and violent felonies, and served a term in state prison for those convictions within the meaning of California Penal Code sections 667(a), 667.5(a), 667.4(b), 1203.ef, 1203.085(a), and 1203.085(b).[2] Petitioner denied the allegations. (*Id*. at 219.)

3. On December 22, 1994, at the completion of jury selection, the trial was transferred to the Honorable Edward Ferns. (*Id*. at 230) The Honorable George Trammell had been transferred to the Pomona branch of the Los Angeles County Superior Court. (1 CT 230; 14 RT 2339-43.)

4. On January 9, 1995, the prosecutor filed another amended information, adding two prior convictions pursuant to Penal Code sections 667.5(a) and 667.5(b). Petitioner denied the allegations.[3] (1 CT 234.) The court struck the allegations,

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[2] The Amended Information filed December 7, 1994 is not contained in the Clerk's Transcript. Petitioner's certified record on appeal is incomplete. (*See* Claim 29, *infra*.)

[3] The Amended Information filed January 9, 1995 is not contained in the Clerk's

pursuant to Penal Code sections 667(a), 1203.ef, 1203.085(a) and 1203.085(b). (*Id*.)

5. On January 10, 1995 the prosecutor and trial counsel presented opening statements. (16 RT 2500-29)

6. On February 1, 1995, the jury returned its verdicts. The jury found petitioner guilty of the first-degree murder of Julia Miller. (2 CT 365.) Petitioner was further found guilty of the count of rape. (*Id*. at 367.) Petitioner was found not guilty of the count of burglary. (*Id*. at 366.) With respect to the murder and the rape count, the jury found true the personal use of weapon and prior conviction allegations. The jury further found true the allegation that the murder occurred during the commission of a rape. The jury found not true the allegations that the murder occurred during the commission of a burglary and that the murder occurred during the commission of a robbery. (*Id*. at 365, 367.)

7. On February 6, 1995, the jury was reconvened for the start of the penalty phase. (2 CT 379.) The prosecution presented opening statements. (28 RT 4126-29)

8. On February 9, 1995, the trial attorney presented opening statements. (29 RT 4224-33

9. On February 15, 1995, the jury began its deliberation. (2 CT 387.) On February 16, 1995, the jury returned a verdict of death. (*Id*. at 388, 428.)

10. On April 7, 1995, the court denied petitioner's motion for a new trial, declined to modify the sentence, and sentenced petitioner to death. (*Id*. at 504.)

E. Automatic Appeal (California Supreme Court Case No. S046117).

1. Petitioner's Notice of Appeal from Judgment of Conviction was timely filed on April 7, 1995. (*Id*. at 505.)

2. On April 13, 1999, the California Supreme Court appointed Harry Mitchell Caldwell as lead counsel and Jan Nolan as associate counsel to represent

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Transcript. Petitioner's certified record on appeal is incomplete. (*See* Claim 29, *infra*.)

petitioner in his automatic appeal before the California Supreme Court. Petitioner's opening brief was filed on June 19, 2001.

3. The issues raised in petitioner's automatic appeal were:

a. The trial court's dismissal of two prospective jurors based on "body language" was prejudicial per se and violated petitioner's Fifth and Sixth Amendment rights.

b. The court erred in admitting the prior crime pursuant to California Evidence Code section 1101(b) as it was marginally relevant while being destructively prejudicial.

c. Judicially noticed evidence in lieu of a *Kelly-Frye* hearing, over the objection of defense counsel, to prove that the DNA Modified Ceiling Principle was generally accepted in the scientific community, at a time when DNA evidence was not admissible, violated petitioner's federal and state constitutional rights under the Fifth, Sixth, and Fourteenth Amendments.

d. The court erred in refusing petitioner's demand for a full and complete *Marsden* hearing in violation of his state and federal constitutional rights to a fair trial, due process, the effective assistance of counsel, and reliable guilt and penalty verdicts.

e. The court improperly restricted petitioner from testifying as to his mental history, thus denying him the opportunity to present his only viable defense.

f. Petitioner was deprived from effective assistance of counsel before and during the guilt phase of his trial, requiring that his conviction and sentence be reversed.

g. The jury instructions regarding the intent required for felony-murder/rape, murder-rape special circumstances and rape, pursuant to Penal Code section 261, were conflicting, inaccurate, and confusing, thus violating petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution and the corresponding provisions in the California Constitution.

h. The jury's finding that "murder was committed in the commission of rape" is ambiguous because it cannot be determined whether the finding made "true" the "special circumstance" allegation within the meaning of California Penal Code section 190.2(a)(17), or made "true" that the murder was committed in the commission of the underlying crime of rape pursuant to Penal Code section 189 resulting in a first degree murder, thus violating petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

i. The court erred in ordering defense counsel to turn over statements made by petitioner to the psychiatrist who was called as a defense witness.

j. The testimony of petitioner's sister describing a statement made to her by petitioner, and interpreted and argued by the prosecutor as demonstrating a lack of remorse, should have been excluded, as it was irrelevant and more prejudicial than probative.

k. The court erred in permitting the prosecutor to cross examine the prison consultant expert on petitioner's non-violent prior prison conduct, and then compounded the error by precluding petitioner from eliciting the conditions of petitioner's confinement would obviate any future problems.

l. The prosecutor engaged in improper conduct in offering unwarranted implications that petitioner was a member of a prison gang.

m. The cumulative prejudice flowing from the numerous errors rendered petitioner's trial fundamentally unfair.

n. California's death penalty scheme is unconstitutional because it fails to require written findings with respect to aggravating factors and therefore prevents meaningful appellate review.

o. Constitutional error was committed in failing to instruct that the only facts jurors could consider aggravating were those the jurors unanimously agreed existed and unanimously agreed were aggravating.

p. The failure to instruct the jury on the presumption of life violated

the Fifth, Eighth, and Fourteenth Amendment to the United States Constitution.

q. California's death penalty statute as interpreted by the California Supreme Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty.

r. Because death serves no legitimate penological or societal purpose after the extraordinary delay between sentence and execution, and because of the resulting extensive suffering of the inmate, internationally recognized as the "Death Row Phenomenon," both largely the result of inadequate resources provided by the state to review death verdicts and the complexity of the review mandated by past abuses, the imposition of the death penalty is a violation of the norms of a civilized society and thus of the Eighth and Fourteenth Amendments.

s. The use of lethal injection would constitute cruel and unusual punishment in violation of petitioner's constitutional rights.

t. Violations of state and federal law also constitute violations of international law and require that petitioner's convictions and penalty be set aside.

4. Respondent's brief was filed on November 6, 2001. Petitioner's reply brief was filed on February 26, 2002.

5. On March 17, 2003, the California Supreme Court issued its opinion in petitioner's direct appeal, affirming the judgment in its entirety. *People v. Jones*, 29 Cal.4th 1229, 131 Cal.Rptr.2d 468 (2003).

6. On April 1, 2003, the Office of the Public Defender of Los Angeles requested a modification of the California Supreme Court's opinion.

7. On April 30, 2003, the California modified its opinion with no change in judgment.

8. Petitioner filed a timely petition for writ of certiorari on May 23, 2003 in the United State Supreme Court, which the Court denied on October 14, 2003. *Jones v. California*, 540 U.S. 952 (2003). .

F. State Habeas Corpus Proceedings (California Supreme Court Case No. S110791).

1. On October 20, 2000, the California Supreme Court issued an order appointing the Habeas Corpus Resource Center to represent petitioner in habeas corpus and executive clemency proceedings.

2. On October 21, 2002, petitioner filed a Petition for Writ of Habeas Corpus and Exhibits in the California Supreme Court.

3. The issues raised in petitioner's state post-conviction Petition for Writ of Habeas Corpus were:

a. Petitioner was deprived of his constitutional rights by the Superior Court's failure to create and preserve an adequate and reliable record of the proceedings resulting in his convictions and death sentence.

b. The jury's verdicts were unconstitutionally affected by unreliable DNA evidence.

c. Petitioner was deprived of his constitutional rights because his jury was encouraged to draw impermissible inferences from highly inflammatory propensity evidence in reaching its guilt verdict.

d. Petitioner was deprived of his right to effective assistance of counsel and to a fair and reliable determination of guilt and penalty by trial counsel's prejudicially deficient performance.

e. The trial court and trial counsel denied petitioner his due process right to be present at his trial and not to be tried when he was unable to comprehend critical portions of the proceedings or to communicate and cooperate with counsel.

f. Petitioner was deprived of his constitutional rights because he was medicated at the time of trial.

g. The prosecutor failed to disclose exculpatory evidence.

h. The prosecution's presentation of false testimony and false inferences at trial irreparably skewed the jury's decision-making process.

i. The prosecutor violated petitioner's constitutional rights by committing egregious acts of misconduct during the guilt phase.

j. Petitioner's constitutional rights were violated by the admission of a number of irrelevant and inflammatory photographs.

k. Petitioner was deprived of his constitutional right to due process because there was no evidence to support the rape conviction, rape felony murder conviction, and rape special circumstance.

l. The trial court abdicated its responsibility to ensure an effective inquiry into prospective jurors' biases.

m. Petitioner was deprived of his constitutional rights because the jury was given confusing and incomplete instructions during the guilt phase.

n. Petitioner was deprived of his rights to an impartial jury and due process because the jury was influenced by repeated outbursts by the victim's family.

o. Several instances of unconstitutional and prejudicial juror misconduct occurred during trial.

p. Improper, prejudicial, and false victim impact evidence violated petitioner's constitutional right.

q. The prosecutor violated petitioner's constitutional rights by committing egregious acts of misconduct during the penalty phase.

r. Petitioner was deprived of his constitutional rights because the jury was given confusing and incomplete instructions during the penalty phase.

s. Petitioner was deprived of his right to a jury determination of the facts necessary to sentence him to death.

t. Petitioner is ineligible for the death sentence because of his mental impairments.

u. Petitioner was deprived of his constitutional rights because the state failed to provide him with constitutionally mandated notice of evidence in aggravation.

v. Petitioner was deprived of the right to effective assistance of

counsel on appeal.

w. The assignment of Judge George Trammell to petitioner's case violated the constitutional guarantees to due process of law and a fair trial.

x. The state's death penalty statute fails to narrow the class of offenders eligible for the death penalty and results in imposition of death in a capricious and arbitrary manner.

y. Petitioner's death sentence is unconstitutional because it was selected and imposed in a discriminatory, arbitrary, and capricious fashion and was based on impermissible race and gender considerations.

z. Petitioner's death sentence is unlawful because customary international law binding on the United States bars imposition of the death penalty on mentally disordered individuals.

4. On April 17, 2003, respondent filed an informal response to petitioner's 2002 petition.

5. On December 8, 2003, petitioner filed an informal reply to the response.

6. On March 11, 2009, the California Supreme Court denied the petition, without issuing an order to show cause.

G. State Habeas Corpus Proceedings (California Supreme Court Case No. S131040).

1. While the first state habeas corpus petition was pending, on April 9, 2004, petitioner filed a motion for post-conviction discovery pursuant to California Penal Code section 1054.9 in the Los Angeles County Superior Court

2. In late May 2004, in an attempt to resolve the discovery dispute informally, petitioner reviewed portion of the District Attorney's files.

3. At a hearing on August 20, 2004, the Deputy District Attorney representing the state disclosed some materials requested in the discovery motion. As a result of the discovery motion, petitioner received material that gave rise to additional habeas corpus claims.

4. On October 16, 2007, petitioner filed a Petition for Writ of Habeas Corpus and Exhibits in the California Supreme Court.

5. The issue raised in petitioner's second state post-conviction Petition for Writ of Habeas Corpus was: The prosecutor failed to disclose exculpatory information

6. On March 11, 2009, the California Supreme Court denied the petition, without issuing an order to show cause.

H. CURRENT STATE HABEAS CORPUS PROCEEDINGS.

Petitioner believes that all claims contained in the instant Petition have been fairly presented to the California Supreme Court. Concurrent with the filing of this petition, however, petitioner has filed a third Petition for Writ of Habeas Corpus in the California Supreme Court and requested that informal briefing on the claims in the petition be deferred to allow respondent the opportunity to identify and claim it believes is not exhausted.

I. OTHER PETITIONS.

There are no other petitions currently pending in any court attacking the judgment at issue herein and none has previously been filed except for those set forth above.

III. JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 2241 and 2254. Any procedural bars invoked by the California Supreme Court do not and cannot preclude review by and relief from this Court for the following reasons:

1. Such procedural bars were unfairly and retroactively applied without notice to petitioner's trial or state habeas counsel of their applicability;

2. The application of such procedural bars was waived by respondent;

3. The application of such procedural bars was neither adequate (they were not clear, firmly established, and regularly followed), nor independent (the bars were

not applied independent of the assessment of the merits of the claims);

4. There was good cause for petitioner to raise his claims at the time and manner in which they were raised, and he would be prejudiced by the application of procedural bars in this case; and/or

5. The application of procedural bars in this case would constitute a fundamental miscarriage of justice.

For these reasons, preclusion of merits review of petitioner's claims and the granting of relief on those claims would deny petitioner his constitutional rights to due process of law and equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

IV. CLAIMS FOR RELIEF

A. CLAIM ONE: TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICIALLY DEPRIVED PETITIONER OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, to confrontation and compulsory process, to the enforcement of mandatory state laws, to a trial free of materially false and misleading evidence, and to due process of law as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because petitioner's trial counsel rendered constitutionally deficient representation at all critical stages of the criminal proceedings.

Trial counsel unreasonably failed to conduct a timely or adequate investigation of the potential guilt and penalty phase issues, did not develop or present a coherent trial strategy, and was unable to make informed and rational decisions regarding potentially meritorious defenses and tactics. Trial counsel's errors and omissions were

such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion. Reasonably competent counsel handling a capital case at the time of petitioner's trial knew that a thorough investigation of the prosecution's theories of guilt, and independent analyses of the physical evidence supporting those theories and potential defenses, were essential to the development and presentation of a defense at trial. Reasonably competent counsel also recognized that a thorough investigation of a defendant's background and family history, including the defendant's medical and mental health, academic, and social history, was essential to the adequate preparation of both the guilt and penalty phases.

Counsel's failures to investigate adequately and present defenses and protect petitioner's constitutional rights prejudiced the defense. But for counsel's unprofessional errors, the result of the proceeding would have been different.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims Three, Four, Five, Nine, Ten, and Twelve through Sixteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. During the guilt phase of petitioner's trial, trial counsel unreasonably and prejudicially failed to investigate, develop, and present compelling expert and lay witness testimony about petitioner's mental state.

a. Trial counsel recognized that petitioner's serious mental illness "had to be the crux of the defense to the charged crimes." (Ex. 12 at 107.) Despite this recognition, he failed to present to the jury any testimony from lay witnesses to describe petitioner's life-long struggle with brain dysfunction and mental illness; or present a mental health expert to explain petitioner's serious mental illnesses, their effects on his functioning, and the important connection between petitioner's mental health history and family background and his mental state at the time of the crime.

b. The only evidence of petitioner's severe and untreated mental illness the jury heard in the guilt phase of the trial came from petitioner's own psychosis-influenced testimony about the night of the offense.

(1) Petitioner tried to describe, as best he could, the events leading to a point where he entered a trance-like, dissociative state, after which he could no longer recollect or account for his actions.[4]

(2) He testified that at a moment of stressful confrontation with the victim, who had threatened him with a knife and a rifle, he heard someone say "give it to me." (22 RT 3333-35.) At that point, he experienced a flashback of seeing his mother in bed with another man. (*Id*. at 3335.)

(3) As petitioner wielded a knife, he blacked out and next awoke curled up in the fetal position, crying, next to the victim. (*Id.*)

(4) When petitioner drove up towards the hills later that evening, he heard voices telling him "they" were going to kill him. (*Id*. at 3344.)

(5) Petitioner attempted suicide by shooting himself point blank in the chest with a rifle, at which time he was apprehended and handcuffed by the police. (*Id*. at 3345-46)

(6) Petitioner could neither recollect further what had occurred, nor offer any insight into what had triggered this unusual series of events.

c. A reasonably competent attorney would have investigated, developed, and presented lay and expert witness testimony to corroborate and explain this seemingly isolated and tragic event against the backdrop of a lifetime of petitioner's compromised mental functioning and intensifying mental illness.

(1) Trial counsel was aware, or reasonably should have been

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[4] As discussed in Claim Four, *infra*, petitioner was incompetent to stand trial, and testify on his own behalf. Trial counsel rendered constitutionally ineffective assistance because he knew, or reasonably should have known, that petitioner was incompetent to stand trial and testify. (*See infra* Claim Four.)

aware, of petitioner's severe and longstanding mental illness. A reasonable and minimally competent investigation of petitioner's background would have revealed a family history of severe mental illness, family dysfunction and dislocation, severe physical, psychological, and sexual abuse, chemical dependency, community and school violence, psychological terror, and countless other traumas inside and outside of petitioner's family contributing to petitioner's compromised mental functioning and his dissociative, non-volitional mental state at the time of the crime.

(2) A reasonable and minimally competent investigation of petitioner's background would have further revealed petitioner's individual mental health history and symptomology.

(3) Beyond petitioner's own description of dissociation, flashback, auditory hallucinations, and suicide attempt at the time of the crime, lay witness testimony could have helped to present not only historical evidence of petitioner's dissociative states and his lifelong mental illness, but also his personality development, intellectual and cognitive deficits, problems in adaptive functioning, chemical dependency, and the numerous traumas suffered by petitioner.

d. Trial counsel unreasonably and prejudicially failed to locate, interview, and present compelling lay witness evidence of petitioner's deteriorating mental condition in 1992. Apart from petitioner's limited testimony, trial counsel presented no evidence in the guilt phase concerning petitioner's mental state at the time of the crime. Reasonably competent counsel would have presented lay witness testimony about petitioner's mental state at the time of the crime.

(1) Trial counsel had no informed strategic reason not to present lay witness testimony at the guilt phase to explain petitioner's mental state at the time of the crime, and to corroborate the nature, extent and plausibility of petitioner's version of events. Trial counsel admits "I did not consider requesting a continuance to find lay witnesses or employ another mental health expert to support Mr. Jones's critical testimony." (Ex. 12 at 110.) Trial counsel further admits that he "did not

consider putting lay witnesses on the stand to testify to Mr. Jones's background and to previous instances in which Mr. Jones had entered a similar trance-like state." (*Id*. at 107-08.)

(2) Trial counsel was aware, or reasonably should have been aware, of petitioner's severe and longstanding mental illness. A reasonable and competent investigation of petitioner's background would have revealed family, friends, and other witnesses who could attest to petitioner's compromised mental health and his increasingly deteriorating mental state around the time of the crime.

(3) Trial counsel, however, presented no lay witness testimony of any kind during the guilt phase of petitioner's trial.

(a) Following the erroneous ruling that petitioner was not permitted to testify as to his background and mental health history (22 RT 3358-60; *see infra* Claim Eleven), trial counsel failed to request from the trial court any clarification as to whether the ruling equally applied to the presentation of other lay witness testimony, and failed to move the trial court for a clarifying order permitting the presentation of such testimony. (22 RT 3353-58.)

(b) Following the trial court's further ruling that petitioner could testify to certain mental health events, including any prior counseling and medication, during 1992, trial counsel failed to request from the trial court any clarification as to the scope of the ruling; failed to request from the trial court any clarification as to whether the ruling equally applied to the presentation of other lay witness testimony to corroborate petitioner's permissible testimony; and, failed to move the trial court for a clarifying order permitting the presentation of such testimony relating to petitioner's mental functioning in 1992. (*Id*. at 3359-69)

(4) Numerous lay witnesses could have testified as to petitioner's deteriorating mental state from the time he was released from prison, towards the end of 1991, up to the day before the crime. (*See infra* Claim Sixteen at paragraphs 2.a. (15) – (16).)

e. Trial counsel unreasonably failed to present expert testimony to corroborate petitioner's testimony and assist the jury in understanding that petitioner's mental state precluded the necessary mens rea.

(1) The trial court's erroneous rulings limited petitioner's testimony, barring him from testifying about his "dissociative mental illness, [prior] mental health symptoms, and background," unless counsel also presented expert testimony to discuss petitioner's mental condition. (Ex. 12 at 107; *see also* 22 RT 3358.) The court made the single accommodation that petitioner could testify to mental health symptoms he experienced in the single year of 1992. (*Id*. at 3359.) Fully aware of this disadvantageous ruling, trial counsel unreasonably failed to present expert testimony to introduce this critical evidence, forcing petitioner to remain silent on the subject, in accordance with the trial court's erroneous ruling.

(2) Trial counsel hired a mental health expert to evaluate petitioner, with respect to his mental state at the time of the crime, among other things. That expert, Dr. Claudewell Thomas, testified only in the penalty phase of petitioner's trial.

(3) Trial counsel unreasonably failed to retain any mental health expert in the case until there was insufficient time to make an informed, strategic decision about the use of his sole mental health expert at the guilt or penalty phase.

(a) Trial counsel did not speak or meet with Dr. Thomas until August 1994. (Ex. 154 at 2748.) At that time, a trial date had already had been set, and jury selection in fact began on November 30, 1994. (1 CT 214.)

(b) Given the shortness of time, Dr. Thomas was able to interview petitioner only once – in September 1994 – before jury selection began; Dr. Thomas himself reported later in his testimony that there were many clinical issues with petitioner that one could not reach therapeutically in fifteen minutes. (30 RT 4426-27.)

(c) Dr. Thomas interviewed petitioner again on December

7, 1994, after jury selection began. He sent to trial counsel a written report of the same date. This second report expounded on petitioner's lack of insight into his own delusional beliefs, and his efforts to explain significant and traumatic events in his life by minimizing or normalizing them.

(d) It was not until after the guilt phase verdict was returned did trial counsel arrange for Dr. Thomas to re-interview petitioner. Trial counsel applied for additional funds for Dr. Thomas on February 6, 1995 (II Supp. 23 CT 6519-21), and Dr. Thomas re-interviewed petitioner in February 1995 (30 RT 4529). It was not until this third interview that petitioner was able to discuss with Dr. Thomas the flashback image of his mother and petitioner's entrance into a trance or dissociative state. (*Id*. at 4529.)

(4) Trial counsel unreasonably and prejudicially failed to provide his experts with materials and information relevant to their assessments. The facts in Claim Sixteen, *infra*, regarding counsel's failure to investigate, obtain, and provide social history documents to his experts, are incorporated by reference as if fully set forth herein.

(a) Trial counsel failed to provide the experts with basic social history documents and interviews critical to the evaluation of petitioner's mental state at the time of the crime. (Ex. 154 at 2750, 2756-57.)

(b) Additional social history documents and interviews would have helped to provide the mental health expert with a complete, accurate, and reliable description of petitioner's life history and background. (*Id*. at 2757.)

(5) Trial counsel unreasonably failed to retain and present the testimony of a competent neuropsychologist. Reasonably competent counsel would have employed a neuropsychologist and provided the expert with sufficient time and information upon which to complete a full evaluation of petitioner's cognitive functioning.

(a) After Dr. Thomas interviewed petitioner, he

recommended a battery of neuropsychological testing for petitioner. (Ex. 150 at 2732.)

(b) Trial counsel employed the services of William Spindell, Ph.D., but failed to provide him with sufficient time or information to conduct a full and adequate evaluation. (*Id*.) As a result, Dr. Spindell was able to complete only a partial battery of tests on petitioner and provide a report to trial counsel on November 11, 1994, just nineteen days before trial began. (30 RT 4429; Ex. 150 at 2732.)

(6) The court's legally erroneous ruling that petitioner could not testify about his own background and history to explain the events of that evening, (22 RT 3358-60), in no way affected trial counsel's duty or ability to investigate, develop, or present this crucial evidence through a mental health expert. In fact, in issuing the ruling, the trial court expressly noted that trial counsel was in no way precluded from presenting a mental health expert to corroborate and explain petitioner's description of the events of that evening.

(a) Trial counsel conceded in his closing that he had no strategic reason for this failure. (31 RT 4681.) Trial counsel's decision actually misled the jury into thinking there was no other explanation, or no helpful explanation, for petitioner's behavior.

(b) Trial counsel unreasonably failed to request a continuance to hire a different mental health expert to present critical mental state evidence during the guilt phase. Trial counsel's presentation of his only retained mental health expert at the penalty phase in no way foreclosed a decision to present another expert during the guilt phase.

f. Trial counsel unreasonably and prejudicially failed to investigate, develop, and present compelling lay and expert testimony about petitioner's drug and alcohol use at the time of the crime. The facts and allegations regarding petitioner's substance abuse and mental illness from Claim Sixteen, *infra*, are fully incorporated herein by reference.

(1) Although trial counsel was aware early in the case that petitioner had ingested substantial quantities of alcohol and street drugs on the day of the crime, and that petitioner had a history of aberrant behavior while under the influence of alcohol and drugs, he did not retain a substance abuse expert until January 1995, when he requested that the trial court appoint Dr. Ronald Siegel. (II Supp. 23 CT 6472.)

(2) Trial counsel's unreasonable delay in consulting with a substance abuse expert precluded an adequate evaluation.

(3) Trial counsel unreasonably limited Dr. Siegel's inquiry to that of cocaine ingestion and failed to provide him with a wealth of readily available information about petitioner's drug consumption and history of mental illness and brain dysfunction.

(4) Reasonably competent defense counsel would have timely consulted with a substance abuse expert in conjunction with a mental state investigation and evaluation. Trial counsel's unreasonable failure to do so prejudiced petitioner.

(5) Reasonably competent counsel would have presented expert witness testimony about petitioner's mental state at the time of the crime. Trial counsel had no informed strategic reason not to present this evidence during the guilt phase. Trial counsel admits "I did not consider requesting a continuance to find lay witnesses or employ another mental health expert to support Mr. Jones's critical testimony," (Ex. 12 at 110), and further explains:

> I did not present a mental health expert during the guilt phase in addition to Mr. Jones's testimony in spite of the court's severe and crucial curtailment of his testimony regarding his mental state during the sexual assault. I argued I had no legal obligation to do so. I had no second mental health expert ready or available to testify in the guilt phase. I had no strategic reason for failing to

have a second mental health expert ready to testify in the guilt phase.

g. (Ex. 150 at 2732.)

h. Had trial counsel performed in accordance with the constitutional standard of care, the jury would have been provided with compelling lay witness testimony about petitioner's mental impairments at the time of the crime and throughout his life. It is reasonably probable that the jury would have not convicted petitioner and sentenced him to death.

(1) The facts in Claim Sixteen, *infra*, regarding petitioner's personal and mental health history, are incorporated herein by reference.

(2) Lay witness testimony could have provided highly relevant evidence regarding petitioner's social and family history, including, but not limited to:

(a) Petitioner's family history of mental illness;

(b) The dysfunctional dynamics of petitioner's immediate, maternal and paternal families;

(c) The infliction of traumatic physical, psychological and sexual abuse on petitioner and others in his family;

(d) The widespread incidence of chemical dependency by petitioner and petitioner's family; and,

(e) The traumatic and chaotic environment outside the family home.

(3) Lay testimony also could have provided substantial accounts of petitioner's personal history of impaired functioning, paranoia, delusional beliefs, hallucinations, depression, and dissociative episodes.

(4) Evidence regarding petitioner's worsening mental state would have included, at a minimum, the following:

(a) Upon his release from prison in 1991, petitioner's mental condition had deteriorated, and he often behaved even more bizarrely.

(i) He needed mental health treatment, but he did not have the skills to cope with his problems on his own, and his family preferred to simply try to avoid upsetting him. (Ex. 135 at 2666.)

(ii) Sometimes, petitioner seemed the same as he had always been; polite, sweet, gentle, not bitter about prison, and eager to start out again and make his life better. (Ex. 149 at 2728-29.) Other times, he was depressed, constantly worried about what people thought of him, and convinced that people were out to get him. (Ex. 10 at 97.)

(iii) He reacted irrationally to everyday situations. (*Id*.)

(iv) There were times when his voice was flat, and his eyes had a glazed, faraway look. (*Id*.)

(v) Petitioner was unable to hold down a steady job, and he had trouble interacting with people. (*Id*. at 97-98; Ex. 21 at 226.)

(vi) Even though he was unable to learn the basics required of a car mechanic, his uncle Thomas gave him work at his transmission shop. Because petitioner lacked the mental capacity to repair cars, he performed janitorial jobs, ran simple errands, and drove home those customers whose cars were left at the shop. He was not given enough work to be around the shop full-time because too many of the shop employees thought he was too strange. (Ex. 21 at 226-27; Ex. 10 at 97-98.)

(b) Petitioner needed support and guidance, but his uncles who worked at the shop, as well as other employees, tried to avoid him by giving him a few dollars to make him go away. (Ex. 10. at 98.)

(c) During the Los Angeles riots, in the summer of 1992, his uncle asked him to help watch over the shop and gave him a gun. (Ex. 21 at 99.) Petitioner dressed up in military attire and marched around the store like a soldier. (*Id*. at 99.) He could not sit still, and when he let other employees in, he opened the gate

just a crack, peering around suspiciously to make sure they had not been followed. (*Id*.) He saluted as they entered, thinking he was at war. The employees in the shop mocked him, but petitioner did not grasp their teasing, and continued to behave as if he were on a military mission. (*Id*.) Each night of the riots, petitioner sat in the shop all night to make sure that the place was not looted or burned down. (*Id*. at 227.) Petitioner sat in the dark, for four to five hours at a time, staring out the window. *(Id*.)

(d) Petitioner's self-medication with alcohol increased significantly during this period. At one point during the riots, petitioner drank an entire fifth of whiskey, which seemed to have no effect on him, except that he appeared more withdrawn. (*Id*.)

(5) Up to the day before his arrest, petitioner's debilitating depression worsened, and he was noticeably suicidal. He told one acquaintance that he had no reason to live, did not care if he lived or died, and that his uncles did not care about him. (Ex. 10 at 99–100.)

(6) His paranoia increased, and he began taping telephone conversations. (Ex. 124 at 2544.) His sister Gloria recalls that he played her a conversation in which he had taped her talking to Pam Miller on the telephone. (*Id*.) When the tape finished, he instructed her that she was not to talk about him on the telephone. (*Id*.) Petitioner then sat mutely on her couch "staring right through [her] with blank scary eyes." (*Id.*)

(7) Petitioner's dissociative trances also increasingly plagued him. (*Id*. at 2544; Ex. 10 at 99.)

(a) Two days before he was arrested for the capital crime, he acted bizarrely with his sister Gloria, coming to her door and asking for her car keys with no conversation or explanation. He had a glazed expression and his voice was low, deep, and strange. (Ex. 124 at 2544.)

(b) The day before he was arrested, petitioner's conversations had become nonsensical. (Ex. 10 at 99-100.) When asked if he was

okay, petitioner "started talking about trees. He was mumbling to himself about how people were out to get him and that he did not want to go on. He did not care if he lived or died. From the look in his eyes and his babbling speech, it seemed like he was talking to someone other than me, but I was the only one there. I was afraid that he was going to kill himself." (*Id*.)

(8) On the day of the offense, petitioner drank two forty-ounce beers mixed with whisky, and smoked marijuana, as well as crack cocaine. (22 RT 3299-330, 3318; 24 RT 3594-96.)

(9) Beyond petitioner's own description of dissociation, the flashback, auditory hallucinations, and his suicide attempt at the time of the crime, lay witness testimony could have helped to present not only historical evidence of petitioner's dissociative states and his lifelong mental illness, but also his personality development, intellectual and cognitive deficits, problems in adaptive functioning, chemical dependency, and the numerous traumas he suffered.

(10) Had trial counsel developed and presented this evidence it would have helped the jury more fully understand petitioner's compromised mental functioning and his dissociative, non-volitional mental state at the time of the crime. The evidence and witnesses that could have been presented are discussed at length in Claim Sixteen, *infra*.

(11) The presentation of these multiple risk factors across petitioner's lifetime, and a comprehensive presentation of petitioner's mental health history and lifelong compromised intellectual functioning, would have demonstrated that petitioner's mental illness was genuine, not feigned. (Ex. 154 at 2757.) Such a presentation would have also greatly bolstered petitioner's credibility with the jury as to his mental state during the encounter with Mrs. Miller. This evidence would have provided the jury with a far more accurate and comprehensive account of the origin and etiology of petitioner's mental impairments, and a fuller context in which to place petitioner's account of the incident with Mrs. Miller than the one they were given. (*Id*.

at 2753.)

(12) As trial counsel concedes, the evidence concerning petitioner's mental health history "was vital to demonstrate that [petitioner] was incapable of forming the specific intent required for the rape special circumstance, which was my sole defense to the capital murder charge." (Ex. 12 at 107.)

i. Petitioner was prejudiced by trial counsel's unreasonable failure to develop and offer compelling expert testimony at the guilt phase. Had such evidence been presented, the jury would have received a coherent, compelling, and expert description of petitioner's mental functioning and impairments and the effects that those impairments had on his behavior at the time of the crime. It is reasonably probable that the jury would have not convicted petitioner and sentenced him to death.

(1) Had a reasonably competent expert been provided with the numerous lay witness accounts, pertinent documentation, and had sufficient time to interview and evaluate petitioner, that expert could have synthesized this information to testify, among other things that: petitioner suffered from a combination of serious mental disorders (Ex. 154 at 2750); petitioner's mental problems, including his dissociative status, had begun at a very early age (*id*. at 2757); petitioner's mental illnesses waxed and waned at different periods, but overall were worsening over time (*id*. at 2751); and most critically, at the time of the crime, petitioner had no conscious control over his actions or behavior, and lacked any premeditation or deliberation with respect to the rape and the death of Mrs. Miller (*id*. at 2754-55).

(2) Absent trial counsel's deficient performance, the jury would have learned that petitioner's mental impairments, which are of long-standing etiology and predated the crime, thwarted petitioner's ability to comprehend events, plan responses, and control his behavior, particularly during stressful situations. (*Id*. at 2754-55, 2757.) Such testimony would have convinced the jury that, as a result of his mental illness, petitioner was unable to form the requisite intent for the charged crimes.

(3) As petitioner's own mental health expert could have

explained, petitioner's mental impairments precluded the jury from understanding his actions that evening based on petitioner's testimony alone:

> Without the benefit of a mental health expert's explanation of his recollections and mental state, the jury had no context within which to understand that testimony. The reason for the flashback, its historical origins, and its nexus to the incident all were crucial aspects of a life story that [petitioner] was not equipped to tell.

(Ex. 154 at 2753.)

(4) A neuropsychologist would have presented compelling testimony that petitioner suffers from profound impairments, particularly to his frontal lobes. Moreover, the jury would have heard that petitioner has a full-scale IQ of no higher than 77 (Ex. 175 at 3063), which placed him only a few points above the mental retardation range (but within the range of consideration for mental retardation) with other intelligence instruments placing him within the mental retardation range (Ex. 125 at 2552).

(5) Had trial counsel adequately retained, prepared, and presented the testimony of a guilt phase mental health expert, he also would have been able to demonstrate that petitioner was incompetent to stand trial, and that the jail medical staff were inappropriately medicating petitioner's psychotic symptoms. The facts and allegations in Claims Four and Five, *infra*, are incorporated herein by reference.

(a) Trial counsel's decision to have petitioner testify regarding his mental state at the time of the crime was unreasonable and highly prejudicial because a substantial doubt existed as to petitioner's competence to stand trial. (Ex. 154 at 2754.)

(b) Jail medical records documented petitioner's decompensation while awaiting trial, and revealed that the jail psychiatric staff had placed petitioner on serious psychotropic medication prior to trial, which they abruptly

discontinued during a significant portion of the trial, exacerbating his deteriorating mental condition and further rendering him incompetent to stand trial.

(i) Petitioner's multiple mental impairments were evidenced, and exacerbated, by powerful medications prescribed by the Los Angeles County Jail medical staff, including Atarax, Cogentin, Haldol, Sinequan, and Theodrine, an anti-asthmatic that can actually produce psychosis. (Ex. 33; Ex. 34; *see also* Ex. 178 at 3150.)

(ii) Jail medical personnel prescribed these medications because petitioner exhibited symptoms of depression, paranoia, anxiety, and psychosis. (Ex. 178 at 3150.)

(iii) Immediately prior to trial, however, the Cogentin and Haldol – which had been regularly prescribed for sixteen months because petitioner was hearing voices – were discontinued. On the final day of petitioner's testimony, jail officials re-prescribed those two medications. (Ex. 33 at 663.)

(iv) This clinically inappropriate medication regimen exacerbated petitioner's fragile mental condition, causing him to suffer a severe psychotic break with reality. (*See* Ex. 154 at 2754.)

(c) Trial counsel presented no evidence related to the clinically inappropriate and dangerous administration of these medications to petitioner. In light of petitioner's serious mental illness, trial counsel's failure to do so was professionally unreasonable; and, because petitioner's mental disorders were the critical issue in the case, trial counsel's failure was extremely prejudicial.

(d) Trial counsel's failure to raise doubts about petitioner's competency constitutes prejudicial and deficient representation. The facts and allegations in Claims Four and Five, *infra*, are incorporated herein by reference. An adequately prepared mental health expert would have testified that petitioner had been prescribed antipsychotic medication by jail medical staff, and that there was a substantial doubt as to whether petitioner was competent to stand trial, particularly

when that medical regimen had been inappropriately and abruptly interrupted during petitioner's trial. (Ex. 154 at 2754.)

(6) Absent counsel's errors and omissions, the jury would have learned that petitioner was unable to form the intent required to render him eligible for the death penalty, and was not even competent to stand trial. Accordingly, had counsel performed competently, there is a reasonable probability that the result of petitioner's trial would have been different.

3. Reasonably competent counsel would have developed and presented a coherent and persuasive defense to the rape count, the rape felony murder theory, and the rape special circumstance. The facts and allegations in Claim Nine, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. From the early stages of the prosecution, trial counsel was, or reasonably should have been, aware the prosecution would charge petitioner with the crime of rape, first degree rape felony murder, and allege a rape special circumstance.

b. Prior to determining what defense was appropriate at trial, reasonably competent defense counsel would have undertaken minimal steps to ascertain the viability of any defenses individually and in conjunction with potential penalty phase defenses. In making this determination, reasonably competent defense counsel would have evaluated the potential strength of the prosecution's case.

(1) Reasonably competent trial counsel, preparing for trial, would have recognized that there were at least four potential defenses to the charged crimes: (1) petitioner did not engage in sexual intercourse with the victim; (2) petitioner and the victim engaged in consensual intercourse; (3) if penetration was forced, petitioner lacked the mental capacity to form the intent required for the charged crimes and/or special circumstance allegation; and, (4) penetration occurred after the victim was dead.

(2) Reasonably competent defense counsel would have recognized that the evidence to support the prosecution's theory relied on three sets of

facts:

(a) DNA testing of semen found on the victim;

(b) The state of the victim's clothing when her body was discovered; and,

(c) The state of the victim's body (bound and gagged) when found. (*See, e.g.*, 26 RT 3896.)

(3) Reasonably competent counsel would have investigated potential challenges for, and alternative interpretations of, each of these sets of facts.

c. Trial counsel unreasonably failed to conduct such an investigation into the prosecution's case and potential defenses.

(1) Prior to undertaking *any* investigation of potential defenses to these charges, trial counsel determined that the defense at trial would concede the charge of rape and attempt to defend against only the rape special circumstance. (Ex. 12 at 106-08.)

(2) This defense entailed soliciting testimony from petitioner that he raped the victim, despite his lack of memory of doing so. (22 RT 3336; Ex. 12 at 107.)

(3) During closing argument, trial counsel conceded that petitioner was guilty of rape. (26 RT 3927 ("There is no doubt in this case Mr. Jones is guilty of the rape.").)

(4) Trial counsel had no strategic reason for failing to investigate possible defenses to the charged offenses and challenge the rape and rape special circumstance charges based on the evidence provided in discovery and further developed through investigation. (*See* Ex. 12 at 107 (counsel did not investigate because he believed no defense existed for rape charge); Ex. 181 at 3161(counsel would have presented evidence attacking rape and special circumstance charge if he had it).)

d. Trial counsel unreasonably and prejudicially failed to investigate,

present evidence, and argue that no rape occurred because the victim had died prior to penetration, and that the prosecution failed to establish the victim was murdered in order to facilitate the rape, as is required for both felony murder and the special circumstance allegations.

(1) Trial counsel understood the importance of determining whether or not the victim was dead prior to any sexual contact. Trial counsel argued in his California Evidence Code section 995 motion to strike the rape special circumstance that "the law requires that the victim be alive at the time of the rape." (II Supp. 1 CT 83.)

(2) The extent of trial counsel's investigation of the rape charge, however, was to ask the medical examiner, who conducted the autopsy only two relevant questions.

(a) In November 1993, Dr. Scholtz informed trial counsel he could not tell whether or not the semen found in the victim had been deposited before or after her death; however, Dr. Scholtz warned trial counsel that he was not an expert in this area.

(b) In June 1994, despite the findings in his autopsy report, Dr. Scholtz informed trial counsel that he was unable to offer his opinion as to whether or not the victim's wrists and ankles were bound before or after she died. Dr. Scholtz failed to say why he was unable to offer this medical opinion. (*But see infra* Claim Fourteen (he falsely testified victim's left wrist was bruised from the bindings).)

(3) Despite recognizing the importance of when sexual intercourse occurred and Dr. Scholtz's admitted ignorance of the relevant subject matter, trial counsel failed to consult an independent expert. (Ex. 181 at 3161.)

(4) Had trial counsel conducted a reasonable guilt phase investigation, he would have had reason to believe that if any sexual penetration occurred, it did so only post-mortem. Trial counsel possessed evidence that strongly supported the theory of post-mortem penetration, including the crime scene

photographs and the coroner's report, all of which he received in discovery (*see* Ex. 177 at 3085), and petitioner's testimony. A reasonable guilt phase investigation would have included a thorough review and development of a defense based on this evidence.

(a) The state of the victim's clothing – her nightgown pulled above her abdomen – caused Detective Sanchez to request a rape kit be completed. (17 RT 2692.)

(b) In order for the victim to have been raped prior to death, her nightgown had to have been pulled up to accomplish the sexual act; pulled down during the stabbing, in order for the gown slashes to align with the victim's wounds; and, finally, pulled up again to leave her in the manner in which she was found. This necessary series of events lacks evidentiary support and is, at best, improbable.

(c) Photographs of the victim show she was found with her nightgown raised to approximately her abdomen. (III Supp. CT 8 (Trial Exhibit 5F).) There were numerous slashes in the victim's nightgown. (Ex. 171 at 3038.)

(d) Once the nightgown was pulled down, the slashes in the fabric align with the abdominal and chest stab wounds. (17 RT 2777-78; Ex. 171 at 3049 (the nightgown showed "multiple frontal wounds effectively corresponding in number and location to those on the body").) The medical examiner both documented and illustrated this important fact in the autopsy report. (Ex. 171 at 3038 (The gown "showing multiple frontal wounds effectively corresponding in number and location to those on the body"); *id.* at 3049 (illustration of same).)

(e) Together the placement and state of the nightgown demonstrated the prosecution's ante-mortem rape theory was untenable.

(f) Petitioner testified that prior to blacking out, his last memory was of swinging a knife toward the victim. (22 RT 3335.)

(g) Petitioner testified to having no memory of sexually penetrating the victim. (*Id*. at 3336.)

(h) Any sexual assault that occurred happened only after petitioner swung a knife at the victim and then blacked out. The physical evidence fully corroborated, and was most consistent with, petitioner's testimony. The victim's nightgown was clearly down before she was repeatedly stabbed. (*See* Ex. 171 at 3049.) Her body was found with the nightgown pulled up to her waist. (III Supp. CT 8 (People's Trial Ex. 5F).)

(i) Testimony elicited by the prosecution provided further corroboration that the victim had expired prior to any sexual penetration. During the direct examination, the medical examiner opined that given the small amount of blood loss at the scene of the crime, the aortal stab wound was among the first wounds suffered by the victim. (17 RT 2802-03.) The aortal stab wound alone was fatal. (17 RT 2783.)

(j) Together with petitioner's testimony that he only remembered swinging a knife before blacking out (22 RT 3335), and he did not remember engaging in sexual intercourse with the victim (*id*. at 3336), the medical examiner's testimony fully supported the theory that the victim had been stabbed to death prior to any sexual penetration. Alone, each of the documents listed above is strong evidence that no rape occurred, taken together they provide an unshakeable foundation for a reasonable doubt that any penetration of the victim could only have occurred after her death.

(5) Trial counsel failed to argue the improbability of the prosecution's theory or that petitioner's testimony was completely consistent with a post-mortem theory of sexual penetration in his closing statement. Instead, trial counsel unreasonably and prejudicially conceded that petitioner was guilty of the rape charge. (31 RT 4688.)

(6) Petitioner's jury never heard the strong evidence that the victim was stabbed to death before any sexual activity could have taken place, because trial counsel failed to conduct a reasonable guilt phase investigation.

e. Trial counsel's failure to investigate and present evidence that petitioner could not have raped Mrs. Miller or committed felony murder rape, especially in light of the fact that trial counsel could have presented this defense based on the materials he received in discovery, fell well below the standard of care and forced petitioner's jury to render guilt and penalty phase verdicts based on false and erroneous information. (*See, e.g.* Ex. 138 at 2690 ("The defense did not put on any evidence that Mr. Jones may not have raped the victim. In fact, we heard nothing about the rape charge except that he did it.").)

(1) Trial counsel had compelling evidence to rebut the prosecution's contention that because the victim was found with her wrists and ankles bound, she must have been alive at the time of the alleged sexual assault.

(a) Trial counsel was given numerous photographs of the crime scene in discovery. Several of these photographs showed the manner in which the victim was bound. (*See, e.g.,* III Supp. CT 3, 4, 6 (People's Trial Ex's. 5 A, B, and D show the wrist bindings); *id*. at 7, 8 (People's Trial Ex's. E and F show the ankle bindings).) Trial counsel also had access to the autopsy report that described the nature and effect of the bindings. (Ex. 103 at 2125; Ex. 171 at 3044.)

(b) Compelling evidence that any sexual penetration occurred prior to the victim's binding was demonstrated in the People's Trial Exhibit 5F. (III Supp. CT 8.) This photograph showed the manner in which the victim's ankles were bound together.

(i) Each ankle was bound with a single wrap of electrical cord that was knotted on the inside of the ankle. The ankles were connected by a blue nightgown that was knotted on the inside of each ankle, close to or on top of the electrical cord knot.

(ii) Under the binding that connected the victim's ankles together, and directly next to her skin, each ankle was wrapped with lengths of black electrical cord.

(iii) The knot on the left ankle contained the male electrical plug. The electrical cords did not connect the ankles.

(c) The ankle bindings allowed the victim's ankles to be separated no more than twelve inches.

(d) The coroner's report described the victim as grossly obese; she was 5'3" tall and weighed 224 pounds. (Ex. 171 at 3031.)

(e) As evident from People's Trial Exhibit 5F (III Supp. CT 8), the victim's physical size rendered sexual penetration of the type that would account for semen in her vaginal cavity – while she was bound in this fashion – nearly impossible. That the skin around her ankles suffered no damage from the electrical cord binding only increases the improbability the victim was penetrated while bound. (Ex. 171 at 3038 ("There is no disturbance on the skin in relation to the ankle binding."); *see* III Supp. CT 7, 8 (People's Trial Ex's. E and F show the ankle bindings).)

(2) The lack of injury to the binding sites, especially with the use of electrical cords, indicates the victim did not struggle while she was being bound, or at any time thereafter.

(3) The victim's wrists were snugly bound above her head with long lengths of a telephone cord and a purse strap. (Ex. 103 at 2125.)

(a) Her left wrist was wrapped a total of twenty times with the purse strap and telephone cord, and the right wrist was wrapped a total of sixteen times with these items.

(b) The purse strap was knotted only on the left wrist and the two male ends of the telephone cord were tucked under the other strands on the left wrist.

(4) Despite the use of all of this binding material, the victim's wrists and ankles sustained no abrasions or bruising. (Ex. 171 at 3038 ("The wrist bindings leave crease marks but no other disturbance on the skin. There is no

disturbance on the skin in relation to the ankle bindings.").)

(5) If petitioner bound the victim to prevent her from struggling and attempting an escape, the skin on her wrists would have appeared, at a minimum, irritated and abraded, if not bruised. (Ex. 177 at 3086.)

(6) The distinct lack of any abrasions, bruising, or minor irritation on the victim's wrists, demonstrates that that the victim was not raped.

(a) The medical examiner testified the victim suffered a "defense wound" on the victim's upper left forearm. (17 RT 2800.)

(b) A victim suffers a "defense wound" when she actively attempts to "fend off" her attacker. (*Id*. at 2801.)

(c) The prosecution's theory that the victim suffered a "defense wound," was further corroboration that the victim was bound post-mortem. To suffer a defense wound, the victim would have had to attempt to quickly move her arm to protect herself. Since the bindings were tight enough to crease the victim's wrists, the movement required to sustain a "defense wound" would have abraded, if not bruised, the victim's wrists.

(7) Another sign the victim was not alive when she was bound was the number of times the purse strap and telephone cord were wrapped around the victim's wrists.

(a) The prosecution argued the victim was bound to prevent her from further struggling. (26 RT 3902 ("If you killed her first, she's lying there dead, you don't need to tie her up.").)

(b) It is clear from the autopsy that Mrs. Miller did not struggle or fight during the time it would take to wrap a telephone cord and purse strap a total of twenty times around her right wrist and a total of sixteen times around her left wrist. Other than the cut on her forearm, Mrs. Miller's autopsy did not reveal any other "defense wounds" or evidence that she fought her attacker. The autopsy revealed no foreign material was found under fingernails, to indicate she had scratched her

attacker in an attempt to defend herself. The autopsy clearly indicated, despite the type, number of times wrapped, and tightness of the binding material Mrs. Miller's wrists suffered "crease marks" but otherwise, her wrists remained free of bruises or abrasions. (Ex. 171 at 3038.)

(8) Trial counsel had substantial and powerful evidence to challenge the rape charge. His failure to investigate any of it prior to conceding petitioner's guilt of rape and felony murder rape was deficient. (*See* Ex. 181 at 3161 (trial counsel would have presented this type of evidence if he had consulted an appropriate expert).)

(9) Had trial counsel conducted even a minimal review of the documents in his possession he would have been armed with sufficient evidence to prove beyond a reasonable doubt that petitioner was not guilty of rape, and thus not guilty of felony murder rape. (*See generally* Ex. 177 (expert medical examiner finds all the evidence most consistent with the theory that any sexual penetration and binding occurred post-mortem).)

f. Trial counsel unreasonably and prejudicially failed to consult with and present the testimony of medical experts who would have disproved the prosecutor's theory of the crime.

(1) Trial counsel failed to prepare for and rebut false testimony concerning the extent and nature of the victim's wounds and the timing of events.

(a) The medical examiner testified that the bindings may have caused an abrasion and bruise to the victim's left wrist. (17 RT 2775-76.)

(b) A medical expert could have directly rebutted, or given trial counsel the information with which to effectively cross-examine on this prejudicially false testimony. (*See* Ex. 177 at 3086, 3087.)

(c) With the assistance of a medical expert, in either capacity, trial counsel should have informed the jury that the medical examiner's opinion was contrary to his original findings. In his autopsy report, the medical

examiner stated "The wrist bindings leave crease marks but no other disturbance on the skin." (Ex. 171 at 3038.) With the assistance of a medical expert, trial counsel could have presented testimony either on direct- or cross-examination, that deference must be given to the original finding in the medical examiner's report, because that finding was based on an examination of the victim's body. (*See id*. at 3087.)

(2) A medical expert would have also deflected the prejudice that arose from the prosecution's inflammatory and erroneous description of one of the victim's wounds. (*See infra* Claim Fourteen.)

(a) During the direct examination of medical examiner, Dr. Scholtz, the prosecution described one of the wounds as a "vaginal wound." (17 RT 2804.)

(b) Dr. Scholtz failed to correct the prosecution's erroneous and inflammatory description of the wound. (*Id*.)

(c) In his closing argument, the prosecution argued "there's a knife into the vaginal area. These knives are part and parcel of the sexual attack." (26 RT 3892.)

(d) Relying solely on the prosecution's erroneous description of the wound, trial counsel also falsely accused petitioner of having stabbed the victim "in the vagina." (26 RT 3936.)

(e) The victim, however, sustained no "vaginal" wound; she sustained a wound to her peritoneum that penetrated the uterus. (17 RT 3033-34; Ex. 177 at 3087.)

g. Trial counsel unreasonably and prejudicially failed to consult with and present the testimony of an independent expert pathologist regarding these crucial issues or otherwise rebut this false testimony.

h. Reasonably competent trial counsel would have consulted with, hired, and presented the testimony of a qualified criminalist to support the theory that, based on the facts presented above, any binding and sexual penetration could have

only occurred post-mortem. (*See* Ex. 181 at 3161 (trial counsel would have presented evidence victim was dead prior to any binding and sexual penetration if he had consulted the appropriate experts).)

i. But for trial counsel's failures petitioner's jury would not have convicted him of the crimes of rape, rape felony murder, or found true the rape special circumstance allegation.

4. Trial counsel's closing argument impermissibly pled petitioner guilty to the crime of rape. The facts and allegations in Claim Nine, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Petitioner never pled guilty to the crime of rape. (1 CT 166; 1 RT 40.)

(1) Petitioner testified that he had no memory of engaging in sexual activity with the victim. (22 RT 3336.)

(2) Despite petitioner's plea of innocent to the rape charge, trial counsel planned to "concede the rape" well before trial started. (Ex. 12 at 107.)

(a) Trial counsel labored under the erroneous belief the admissibility of the DNA evidence foreclosed any defense to the rape charge. (Ex. 12 at 107.)

(b) In light of the admissibility of the DNA evidence and trial counsel's failure to adequately investigate and consult the necessary experts to defend against the charge of rape, trial counsel planned to have petitioner testify in the guilt phase and "admit the rape." (*Id*.)

b. Trial counsel's concession of guilt in his closing argument prevented petitioner from asserting a meritorious defense to rape and capital murder.

c. Trial counsel's closing argument permitted the prosecutor to tell the jury that "Mr. Manaster conceded the rape." (27 RT 3963.)

(1) Trial counsel argued petitioner "got up on the witness stand and told you he killed Mrs. Miller and he had raped her." (31 RT 4688.)

(2) Counsel's argument compounded the prejudice, because petitioner made no such admission regarding the rape.

(3) Petitioner testified, consistent with his mental state at the time, that he did not know what happened after he blacked out. (22 RT 3336.) Even with trial counsel pressuring petitioner to "change his story" (Ex. 19 at 208), petitioner truthfully testified that he had no memory of sexual intercourse with the victim, only that "I know that it had to be me." (22 RT 3336.)

d. Trial counsel's unnecessary and factually erroneous concession of the rape charge needlessly allowed the jury to find petitioner guilty on a first degree felony murder-rape theory and to find true the rape special circumstance.

5. Trial counsel failed to reasonably investigate and present potential challenges to the admissibility of the DNA testimony. The fact and allegation from Claims Thirteen and Fourteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Reasonably competent counsel would have obtained the services of qualified experts to assist in formulating potential challenges to the reliability and admissibility of the DNA results, including those based upon contamination of the samples, the reliability and scientific acceptance of the procedures used to test the samples, the reliability and scientific acceptance of the analysis used to interpret the result, the reliability of the application of those procedures in testing the samples and analyzing the results in this case, and the reliability and scientific acceptance of the probability analysis. In addition, reasonably competent counsel would have employed an expert to observe the testing process in this case.

b. Trial counsel was aware at an early stage of the proceedings that the prosecution intended to utilize DNA testing. (1 RT 30-31.) Trial counsel, however, unreasonably failed to employ and utilize the services of qualified experts to assist in the development of potential challenges or to develop alternative means of challenging the admissibility of the DNA test results and testimony. (Ex. 176 at 3083-84.)

(1) In March 1993, trial counsel retained the services of Carol Hunter, a criminalist at the California Laboratory of Forensic Science to review the documentation that he had received concerning the sexual assault kit and the testimony of William Moore at the preliminary hearing. (II Supp. 23 CT 6348-49 (Declaration of Counsel); *id*. at 6346-47 (Order).)

(a) Ms. Hunter informed trial counsel that the notes concerning the sexual assault kit he provided from the Los Angeles Police Department were incomplete, and that the accuracy of the results could be evaluated only with reanalysis. Ms. Hunter further indicated that either conventional analysis or DNA analysis could be performed on the samples.

(b) Although he did not obtain a complete set of the documents regarding the Los Angeles Police Department's analysis, on or about May 4, 1993, trial counsel filed another request for funds and permission to split the rape kit swabs to permit Ms. Hunter to analyze the samples using conventional means. (*See* II Supp. 23 CT 6352-53 (Declaration of Counsel); *id*. at 6350-51 (Order).)

(c) Prior to Ms. Hunter's conducting her analysis, trial counsel withdrew his request in light of the prosecution's DNA analysis. In his memorandum to the court, dated August 30, 1993, trial counsel stated that he intended "to have those results examined." (*Id*. at 6355.)

(2) Trial counsel unreasonably did not seek to have a defense expert present at the prosecution's DNA testing. The presence of such an expert would have permitted direct testimony concerning the unreliability of the testing process and the results obtained.

(a) In November 1993, following the prosecution's testing, trial counsel retained the services of Simon Ford, Ph.D., to evaluate the prosecution's DNA analysis. (Ex. 176 at 3078; *see also* II Supp. CT 6369-71 (Declaration of Counsel); *id*. at 6368 (Order).)

(b) In March 1994, Dr. Ford informed trial counsel of

numerous deficiencies in the prosecution's DNA analysis.

(c) Dr. Ford informed counsel that "Cellmark's procedures, as implemented in the Jones case, fail to meet some of the recommendations" of the National Research Council, including Cellmark's failure to use published testing procedures; use of ethidium bromide as a dye in petitioner's case; failure to use monomorphic probes; and Cellmark's failure to report its error rate. (Ex. 171 at 3080-83.)

(d) Dr. Ford informed trial counsel that Cellmark acknowledged it had a "very high error rate" of approximately one in two hundred. (*Id*. at 3081.)

(e) Dr. Ford also informed counsel that the testing in Mr. Jones's case was subject to challenge on numerous grounds, including the failure of the differential extraction procedure, the appearance of extra faint bands in the controls and samples, the inability of Cellmark to obtain an adequate DNA banding pattern from the reference samples, and inculpatory test results after Cellmark's unnecessary and unexplained manipulation of data. (*Id*. at 3081-83.)

(f) Dr. Ford "strongly suggest[ed]" that trial counsel consult with a statistician or population geneticist to determine the extent to which the statistical findings were undermined by these errors. (*Id*. at 3083.)

(g) In addition, Dr. Ford outlined challenges to the interim ceiling approach (ICA) and provided the names of numerous experts who could opine on the ICA. (*Id*. at 3079-80.)

(3) Despite the deficiencies noted by Dr. Ford, trial counsel unreasonably did not seek to have the samples retested by a defense expert. Nor did trial counsel follow up on the challenges and deficiencies suggested by Dr. Ford or otherwise investigate and develop potential expert testimony to challenge the prosecution's DNA analysis.

(4) In December 1993, trial counsel filed a motion to exclude the

DNA evidence on the limited grounds that the statistical probabilities evidence using the modified ceiling principle is not generally accepted by the scientific community and that the procedures used by Cellmark in arriving at that statistical probability were flawed. (II Supp. 1 CT 106-23.) Although the motion made reference to "accuracy of the methodology of the laboratory involved in this case" and to cases in which Cellmark had been criticized, and noted the need for a "hearing regarding the methodology of Cellmark in reaching its results," trial counsel did not present any evidence to support this basis for excluding the evidence. (*Id*. at 121, 123.)

(5) On February 8, 1994, the prosecution filed a motion requesting that, in determining whether the statistical calculation method for DNA testing was generally accepted in the scientific community, the court take judicial notice pursuant to California Evidence Code sections 452 and 453, of the findings and decisions in the case of *People v. Robert Smith, James Crooms, and Bevin Graham*, Los Angeles County Superior Court Case No. PA006349 (1993), along with excerpts from a publication of the National Research Council, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992), an affidavit of Daniel Hartl, and the testimony of Dr. Conneally, the DNA expert in the *Smith* case. (II Supp. 1 CT 124-31.)

(6) In opposing the prosecution's motion for judicial notice, trial counsel noted petitioner's rights to confront and cross-examine witnesses would be violated by the procedure. (*Id*. at 135A-135J.) Trial counsel further argued given the controversy surrounding the techniques and proposed testimony, "[t]his is not the type of area where judicial notice is appropriate." (*Id.* at 135J.)

(7) Nonetheless, trial counsel failed to present any witnesses in support of his motion to exclude the DNA testimony. At the hearing on the motion to exclude the DNA evidence, trial counsel unreasonably relied upon the general testimony provided in other cases regarding the unreliability of DNA analysis, rather than present readily available expert testimony tailored to the statistical procedures used in petitioner's case. (1 RT 619-20.)

(8) The judge hearing the motion acknowledged his unfamiliarity with DNA analysis and requested that the parties present expert testimony to assist the court. (*See, e.g., id*. at 507, 572-73.) The court repeatedly requested that the parties present witnesses at a formal hearing to allow the court properly to determine the admissibility of the DNA evidence. (*See, e.g., id*. at 573, 632.)

(9) The court agreed to take judicial notice of the testimony in the *Smith* case, and subsequently at the request of defense counsel, the testimony in the *Fountain* case. (*Id*. at 555 (*People v. Smith)*; *id*. at 626 (*People v. Fountain*).)

(10) On June 8, 1994, using an incorrect legal standard, the court ruled that the statistical calculation method met the *Kelly/Frye* standard of admissibility. (1 CT 195; 1 RT 664-65, 669-70.) Trial counsel failed to object to the trial court's incorrect legal standard used to determine admissibility of the testimony. Had trial counsel briefed the issue, the trial court would have applied the proper standard of admissibility and would have excluded the DNA testimony.

(11) Following the court's ruling, defense counsel informed the court that, prior to trial, the defense intended to challenge the accuracy of the particular procedures used to test the samples. (1 RT 666.)

(12) Prior to trial, defense counsel filed a "Motion to Reconsider the Court[']s Ruling on RFLP DNA Kelly-Frye Hearing on September 7, 1994." (II Supp. 3 CT 631-54.)

(a) The motion sought a hearing involving expert testimony about the unreliability of the ceiling principle, error rates, and methodological deficiencies used in the testing and analysis process. (*Id*. at 632-33)

(b) Defense counsel stated in the motion that the experts he intended to call as witnesses were unavailable at the time of the previous hearing. (*Id*. at 631.)

(c) To the extent that defense counsel could have presented the challenges to the DNA testimony, in the motion to reconsider at the

previous hearing, defense counsel's representations regarding the unavailability of the experts was deficient, petitioner was deprived of his constitutional right to effective representation guaranteed by the Sixth Amendment.

(13) On November 18, 1994, without an evidentiary hearing, the Superior Court denied the motion to reconsider. (1 CT 201; 1 RT 722-23.)

(14) Trial counsel unreasonably and prejudicially failed to present evidence at the California Evidence Code section 402 hearing regarding the particular procedures used to analyze the samples in this case.

(a) On January 17, 1995, the trial court heard testimony from Melissa Weber, an employee of Cellmark Diagnostics Laboratory, to determine whether she applied "the correct protocols at the lab and applied the correct statistical analysis." (19 RT 2906 *et seq*.)

(b) At the conclusion of the testimony and argument, the court denied the defense motion to exclude. (1 CT 239; 19 RT 3079.)

(15) Trial counsel unreasonably failed to present readily available expert testimony concerning the deficiencies in the procedure used in this case, although such testimony was readily available. (*See* Ex. 150 at 2731-32; Ex. 176.)

(16) Trial counsel unreasonably and prejudicially failed to move to exclude the improper testimony and inferences from Ms. Weber's statistical analysis. Had trial counsel undertaken reasonable steps to limit Ms. Weber's testimony, the jury would not have been misled by the inaccurate and false testimony concerning the DNA match. (*See* Ex. 176 at 3079-80.)

(a) Ms. Weber testified that the "DNA banding pattern of Ernest Jones did match the bands in the sample from the vaginal swabs." (20 RT 3129.)

(b) By informing the jury petitioner "matched" the samples taken from the victim, Ms Weber and the prosecution misled the jury into thinking that a comparison between the crime scene DNA and petitioner's DNA

excluded all other donors.

(c) Reasonably competent counsel would have objected to and moved to exclude the testimony. Had trial counsel done so, the jurors would have been told that a "match" means no more than that petitioner could not be excluded as the donor of the DNA, not that he is the donor or that he is the donor beyond a reasonable doubt.

(d) Ms. Weber testified that "the chance that a random individual might have the same DNA banding pattern as Ernest Jones is approximately 1 in 78 million." (20 RT 3130.)

(e) Reasonably competent counsel would have objected on the ground that Ms. Weber's testimony improperly and falsely conveyed to the jury that there was a 1 in 78 million chance that petitioner did not commit the rape. Had trial counsel done so, the jurors would not have been exposed to the prosecution's fantasy numbers.

(f) Reasonably competent counsel would have objected to the prosecutor's questions and Ms. Weber's answer that falsely conveyed to the jury that the different banding patterns were "identical." (20 RT 3130; *but cf* Ex. 176 at 3083 (Cellmark assisted the computer scoring by adding and deleting bands, and petitioner's sample exhibited faint bands similar only to the control sample).)

(g) Had trial counsel done so, the jurors would not have been misled about the meaning of the word "match."

(17) Had trial counsel fully investigated the admissibility of the DNA evidence and employed and followed the advice of qualified experts, he would have been able to develop compelling evidence of possible contamination of the samples, the unreliability of the testing procedures, the application of the testing procedures in this case, and the laboratory performing the testing, and the unreliability of the statistical analysis used to link the samples to petitioner. (*See* Ex. 176.)

(18) With such information, trial counsel would have been able to

present and litigate a motion to exclude this testimony as scientifically unreliable; be prepared to present such testimony before the jury; and, prevented the admission of this unreliable and prejudicial testimony concerning the statistical calculations used in the analysis.

c. Trial counsel unreasonably and prejudicially failed to investigate, develop, and present challenges to the use of blood analysis.

(1) Throughout his representation of petitioner, trial counsel knew that the prosecution's case would rely substantially on the testimony of blood analysis conducted on sperm and semen found on the victim's body. (*See, e.g.*, 1 RT 508.)

(2) On November 6, 1992, the prosecution moved the court for an order requiring petitioner to provide saliva and blood samples. (1 CT 125-30.)

(3) As early as December 31, 1992, trial counsel noted that initial blood typing identified petitioner as a potential donor of the sperm collected from the victim, and that the prosecution intended to conduct DNA analysis.

(4) On April 4, 1993, the prosecution informed trial counsel that DNA testing had been performed on the samples, but that results were not yet available. (1 RT 31.)

(5) On October 8, 1993, the prosecution informed trial counsel and the court that the DNA testing was complete and that the results linked petitioner to the sperm and semen samples found on the body. (*Id*. at 506.)

d. Cellmark Diagnostic Laboratory analyzed the samples using the DNA-Restriction Fragment Length Polymorphism (RFLP) technique and calculated the statistical frequencies of the match using the Modified Ceiling Frequency. (II Supp. 1 CT 106, 119; 1 RT 532.)

e. Trial counsel understood, or reasonably should have understood, the admissibility of the DNA analysis required an inquiry into several distinct areas, including the following:

(1) Whether the samples were collected, stored, and maintained in such a fashion to ensure their integrity and avoid contamination and degradation;

(2) Whether the procedures and techniques used to analyze the samples were scientifically acceptable and reliable;

(3) Whether the scientifically acceptable procedures and techniques were properly utilized in testing the samples in petitioner's case;

(4) Whether the results were properly analyzed in accordance with scientifically acceptable and reliable techniques

(5) Whether the statistical evaluation of the results was reliable; and,

(6) Whether admission of the test results, analysis, and statistical evaluation comported with petitioner's federal constitutional rights.

f. Although recognizing the importance of the DNA analysis, trial counsel failed to request and obtain materials relating to the DNA testing, including critical notes documenting the procedures used to conduct the tests. (*See* Ex. 176 at 3078, 3081-83 (expert consulted at trial only given Cellmark's report and underlying data).)

(1) Reasonably competent counsel would have obtained the necessary data prior to making a determination of whether the prosecution's proffered testimony was accurate and admissible, including the raw data and lab notes from the testing, the lab's protocols for each test, the Quality Control or Quality Assurance manuals, the protocols or manuals from the manufacturer for the kits used in the analysis, the validation studies of the tests, the technician's proficiency tests, and logs of contamination. (*Id*. (trial expert lacked, *inter alia*, raw data, lab and bench notes, proficiency tests, contamination logs).)

(2) Trial counsel failed to undertake reasonable effort to obtain this critical information from the prosecution.

(a) Counsel filed a standard discovery motion on May 18,

1993, seeking, inter alia, the results of "all laboratory tests concerning any examination of physical, photographic, oral or written evidence," but did not request any of the information relating to the manner in which the tests were conducted, the raw data from the testing, or any other information necessary to evaluate the accuracy, reliability, and admissibility of the DNA evidence. (1 CT 140-47.) Counsel informed the court he was filing the discovery motion, but he was not requesting the court take any "action on it at this point." (1 RT 30.) Counsel never sought to have the court rule on this discovery motion.

(b) Trial counsel noted during an appearance on September 1, 1993, that the prosecution had conducted DNA testing and that the defense was "planning to file a motion, discovery motion" with respect to that testing, given "the seriousness of the case." (*Id*. at 40-41.)

(c) On October 8, 1993, trial counsel again stated he intended to file a motion for discovery regarding the DNA testing. (*Id*. at 45.)

(d) Trial counsel did prepare and sign a motion for discovery. Although the discovery motion is contained in the Clerk's File,[5] it was not filed and the court did not rule on it. In the unfiled motion, trial counsel sought information relating to the DNA tests, including, inter alia, reports of the testing, chain of custody documents, X-ray film copies of the case autorads, photographic quality copies of the photographs of ethidium bromide stained gels, operating procedures, frequency tables, match rule, binning method, error rates, publications, studies, and computer files.

g. Trial counsel made the objectively unreasonable decision to rely on informal discovery in order to obtain crucial information relating to DNA testing counsel believed so significant, that he based his entire guilt phase litigation strategy

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[5] The discovery motion was one of many documents habeas counsel discovered had been misfiled and not made part of the Clerk's Transcript on Appeal. (*See infra* Claim Thirty.)

on its results.

h. The failure to file and litigate a formal discovery motion resulted in an inadequate basis on which to challenge the DNA evidence.

i. As a result of trial counsel's deficiencies, petitioner was deprived of his Sixth Amendment right to effective assistance of counsel.

j. Absent trial counsel's deficient performance, the discovery would have provided a wealth of information upon which a successful challenge to the evidence could have been fashioned. (*See, e.g.*, Ex. 176 at 3079-83 (trial counsel could have attacked, *inter alia*, the probability statistic employed as controversial and not generally accepted or the most conservative; data's reliability was questionable due to unexplained anomalous results; results obtained as a result of Cellmark's unnecessary and unexplained manipulation of data).)

6. Trial counsel unreasonably failed to enter a plea of not guilty by reason of insanity and to investigate and present such a defense. Counsel thereby withdrew a potentially meritorious defense to petitioner's prejudice.

a. Reasonably competent counsel, aware of the information possessed by trial counsel would have entered a plea of not guilty by reason of insanity pursuant to California Penal Code sections 25(b), 1016, and 1026.

b. Reasonably competent counsel would have investigated and developed substantial evidence of petitioner's insanity at the time of the crime and entered a plea of not guilty reason by insanity. The facts and allegation set forth in Claims Five and Sixteen, *infra,* are hereby incorporated by reference as if fully set forth herein.

(1) To the extent that trial counsel was unaware of the information concerning petitioner's mental illness and mental state at the time of the crime, trial counsel deprived petitioner of his Sixth Amendment right to effective representation.

(2) Substantial information concerning petitioner's mental

dysfunction at the time of the crime was either known or available to petitioner's trial counsel at the time of trial. (*See infra* Claim Sixteen at paragraphs 2.a.(15) –(16).)

(3) Expert medical opinions regarding petitioner's inability to know right from wrong at the time of the crime became available to trial counsel after the start of trial. (Ex. 154 at 2750, 2754-55.)

(a) Trial counsel's own mental health expert, Dr. Claudewell Thomas, submitted his initial report to trial counsel in December 1994, after the trial had begun. (*Id*. at 2754.)

(b) Trial counsel had conferred with petitioner about this portion of his testimony, including his flashback, at least some weeks prior, but failed to convey this information to Dr. Thomas. (*Id*. at 2753.) Thus, Dr. Thomas's report did not discuss petitioner's flashback - which led up to his dissociation on the night in question - with him until after trial had begun, and even after petitioner's own testimony regarding the flashback. (*Id*.)

(c) Had Dr. Thomas been retained in a timely manner and adequately prepared, trial counsel would have been in a position to enter a plea of insanity, and Dr. Thomas could have opined in support of this plea. (*Id*. at 2749, 2754-55.*)*

(d) Based on the limited information he was given, Dr. Thomas could have testified:

> Mr. Jones was not in control of any of his actions during this incident; at best, he was a spectator, watching someone else act, as if watching a movie of himself. He was therefore not in a position to appreciate the moral quality of his behavior, or distinguish right from wrong in those moments.

(Ex. 154 at 2754-55; *see also* Ex. 150 at 2731 (Dr. Thomas informed counsel petitioner in a dissociative episode at the time of the crime and could not predict, plan or control dissociative episodes).)

c. Had trial counsel timely retained appropriate mental health experts, and investigated and presented a plea of not guilty by reason of insanity, those mental health experts would have presented compelling testimony that petitioner "was incapable of knowing or understanding the nature and quality of his [] act and of distinguishing right from wrong at the time of the commission of the offense." (Cal. Penal Code § 25(b); *see* Ex. 154 at 2750, 2754-55; Ex. 178 at 3156-57 (petitioner was in a dissociative state at the time of the crime and "retained no capacity to control his behavior while in a dissociative state"); *see also* Ex. 175 at 3069, 3075-76 (petitioner's organic brain damage "contributed substantially and adversely to his behavior [and] functioning" throughout his life and at the time of the crime).)

d. Had trial counsel investigated and presented evidence of petitioner's mental illness at the time of the crime, this information could have further bolstered expert conclusions, petitioner "was incapable of knowing or understanding the nature and quality of his [] act and of distinguishing right from wrong at the time of the commission of the offense." (Cal. Penal Code § 25(b).)

e. Trial counsel had no tactical reason for failing to offer this potentially successful defense on behalf of petitioner, and instead recklessly and unnecessarily exposed him to a first degree murder conviction, a true special circumstance finding, and a death sentence. (*See, e.g.*, Ex. 12 at 107 (trial counsel understood petitioner's crimes resulted from his mental illness and "classically dissociative behavior").)

7. Trial counsel unreasonably and prejudicially failed to conduct an adequate voir dire of potential jurors and ensure the selection of a jury capable of a fair and reliable determination of guilt and penalty. Trial counsel's constitutionally deficient representation in this regard includes, but is not limited to, the following:

a. Trial counsel unreasonably conducted a superficial and constitutionally inadequate voir dire examination of all prospective jurors.

b. Trial counsel failed to object to a voir dire process that failed to

assess prospective jurors' ability to set aside their personal views on the death penalty and determine the appropriate sentence.

(1) Trial counsel did not properly question jurors about their views on the death penalty in a manner consistent with controlling decisional law.

(2) He did not object to the trial court's use of a defective juror questionnaire, for which critical questions on the death penalty were drafted by the prosecutor.

(a) The jury questionnaire asked prospective jurors whether they automatically would impose a death sentence or life without the possibility of parole for "intentional, deliberate" first degree murder cases. (*See, e.g.*, II Supp. 4 CT 1091; II Supp. 7 CT 1767; II Supp. 8 CT 2343 (Juror Questionnaires, Questions 60 and 61).)

(b) Relying on the wording in the questionnaire, trial counsel failed to voir dire prospective jurors with a correct view of the law and the facts of the case. (7 RT 1458-59, 1462.) Trial counsel incompletely stated the law as to first degree murder in an attempt to reflect the poorly drafted juror questionnaire questions 60 and 61. (*Id*.)

(c) Trial counsel unreasonably abdicated responsibility for drafting questions regarding first degree murder (Questions 60 and 61) to the prosecutor. (*Id*. at 1462.)

(d) Trial counsel unreasonably failed to ensure the questionnaire contained the more relevant question of whether they had similarly strong views with respect to felony murder, the predominant theory in this case.

c. Trial counsel failed to conduct a meaningful examination of prospective jurors for potential biases, even when given the opportunity to do so.

(1) Due to the nature of the evidence that would most likely be presented, trial counsel included a question, in the juror questionnaire, asking whether or not proof of a prior sexual offense would cause the potential juror to automatically

vote for guilt. (*See, e.g.*, II Supp. 12 CT 3340 (Juror Questionnaire, Question 34A).)

(2) Numerous jurors failed to answer this important question, and others simply stated that such evidence was irrelevant. (*See, e.g.*, II Supp. 6 CT 1736; II Supp. 7 CT 1761; II Supp. 8 CT 2138 (Juror Questionnaires, Question 34A).)

(3) Under questioning by the trial court, these jurors stated that if instructed to consider evidence of a prior sexual assault for a limited purpose they could do so.

(4) Trial counsel failed to take the next step and ask the question the prospective jurors failed to adequately answer in the questionnaire: If such evidence became relevant, would they automatically vote for guilt if presented with proof that petitioner had committed a prior sexual offense? (*See, e.g.*, 5 RT 1262 *et seq.*; 8 RT 1633 *et seq.*; 10 RT 1918 *et seq.*; 12 RT 2247 *et seq.*)

(5) Despite being given the opportunity to do so, trial counsel failed to determine whether their biases would cause these prospective jurors to automatically vote for guilt.

d. Trial counsel failed to conduct a meaningful and constitutionally adequate examination of jurors to determine whether their views would impair their ability to consider potential mitigation and return a sentence of life without the possibility of parole.

(1) Trial counsel failed to rebut the prosecution's for-cause challenge of potential juror Okamuro. (7 RT 1450-60.)

(2) Instead of demonstrating her impartiality and ability to follow the law through further voir dire, trial counsel stipulated to her excusal for cause. (*Id*. at 1460.)

e. When questioning potential jurors, trial counsel failed to ensure the prospective jurors were provided with only accurate statements of the law.

(1) Trial counsel misstated the governing law to the prospective jurors.

(a) Trial counsel misinformed prospective jurors when he informed them the lack of mitigating evidence "would be aggravating." (8 RT 1638-39 ("You understand also even if we didn't put on any evidence in that stage that would be an aggravating thing.").)

(b) When questioning prospective juror Surprenant, among others, trial counsel stated that if the prospective juror found substantial aggravation, but no mitigation, the prospective juror would be compelled to vote for a death sentence. (5 RT 1244.) Ms. Surprenant sat as an alternate juror on petitioner's capital trial. (Ex. 23 at 239.)

(2) Trial counsel failed to object to the trial court's prejudicial misstatements of the governing law during voir dire.

(a) During jury selection, the trial court told the prospective jurors there "may be an instance where one juror will look at a particular piece of evidence and say, I think that's a factor in aggravation. And another juror will say, no, no. I think that's a factor in mitigation. And there's nothing wrong with that." (11 RT 2036; *see also id*. at 2138.)

(b) This statement is clearly erroneous and unconstitutional.

(i) The factors contained in California Penal Code sections 190.3 e through h and k may only be considered as mitigating evidence.

(ii) Only specified sections of Penal Code section 190.3 may be considered aggravating.

(c) No tactical reason existed for trial counsel to unreasonably and prejudicially fail to object to this misstatement of the law.

f. Trial counsel's deficient performance during voir dire was constitutionally prejudicial and requires relief. Had trial counsel undertaken minimal competent steps to ensure an adequate voir dire process, the jurors chosen to determine petitioner's guilt and penalty would have been impartial.

8. Trial counsel unreasonably and prejudicially failed to investigate the criminal background and the status of pending cases against critical prosecution witnesses. Reasonably competent counsel would have challenged the credibility of Shamaine Love and Pam Miller based on their expectation and receipt of deals in exchange for testimony that would incriminate petitioner. The facts and allegations in Claim Fourteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Ms. Love was a key prosecution witnesses who provided damaging testimony about petitioner's drug use and the effects of those drugs.

(1) Petitioner's defense, that he was unable to form the intent necessary for the charged crimes, was premised on the unusually strong effect that drugs and alcohol had on him the day of the crime, due to several years of abstinence. (26 RT 3925-27.)

(a) There was virtually no other evidence presented that petitioner's drug and alcohol use the day of the crime, after his prolonged abstinence, produced such unusual effects in his behavior and cognition that he was unable to form specific intent.

(b) Ms. Love testified, contrary to petitioner's testimony, that he had been using large quantities of drugs well before the day of the crime; this testimony seriously undermined petitioner's mental health defense. (16 RT 2621.)

(2) Trial counsel knew, or should have known, that Ms. Love, one of the prosecution's key witnesses, was impeachable because of her on-going criminal activity. Ms. Love was a drug dealer, a fact that the prosecution admitted. (*Id*. at 2502 (opening statement); 26 RT 3914 (closing statement).) She also readily testified to this fact as well as to her own extensive illegal drug use. (1 CT 5; 16 RT 2621.)

(3) On October 26, 1992, two months before she was to testify at petitioner's preliminary hearing, Ms. Love was arrested for the unlawful possession of a controlled substance, rock cocaine, and marijuana. The police had obtained a search

warrant and upon execution of the warrant, they found illegal drugs and a .12 gauge shotgun in Ms. Love's home. (Ex. 120 at 2467.) During the booking process, it was noted that she was an affiliate of the Rollin' 60's Crips street gang. (*Id*. at 2469.)

(4) Despite her possession of a quantity of cocaine (approximately 6 grams) and marijuana (approximately 38 grams) of sufficient size to merit felony charges, the same District Attorney's Office that was preparing to prosecute petitioner dismissed all charges against her. Instead, her case was allegedly referred to the City Attorney's office for a simple misdemeanor prosecution. (*Id*. at 2474.) Two months prior to her testimony at petitioner's preliminary hearing, it appears that Ms. Love was not even charged with misdemeanor possession.

(5) Trial counsel knew, or reasonably should have known Ms. Love's arrest and the dismissal of her felony drug possession charges prior to her testimony. (1 RT 528-531) (trial counsel obtain Ms. Love's rap sheet).)

(6) Despite trial counsel's knowledge of these facts, he failed to investigate the distinct possibility that Ms. Love's case was dismissed in exchange for her cooperation and testimony against petitioner. In addition, trial counsel unreasonably failed to even question Ms. Love regarding any deal she may have made in exchange for her testimony, while she was still under oath.

b. Ms. Miller testified that during the entire time they were together, petitioner never acted like he heard voices, including the night her mother was killed. This testimony was especially damaging because the defense presented little evidence to corroborate that petitioner experienced psychotic mental health symptoms prior to, and the night of, the crime.

(1) Trial counsel knew, or reasonably should have known that a minimal investigation would uncover an abundance of impeachment evidence on Ms. Miller.

(a) Ms. Miller testified that she regularly purchased and consumed cocaine. (16 RT 2601.)

(b) Trial counsel was informed that a witness told the police when interviewed, that Ms. Miller "lies." (21 RT 3199.) This witness, Johnnie Anderson, ultimately testified to the softened Ms. Miller "had a reputation for dishonesty." (22 RT 3240.)

(c) Trial counsel also had information that despite his arrest, Ms. Miller continued to publicly confess her love for petitioner. (Ex. 21 at 227.)

(2) Despite trial counsel's knowledge of these facts, he failed to investigate and inquire of Ms. Miller while she was under oath about her contacts with the police and prosecution.

(3) In light of Ms. Miller's lifestyle, and her continued confessions of love for petitioner, it was patently unreasonable for trial counsel to fail to inquire into the pressures put on her by the prosecution and police to testify falsely against petitioner.

c. On December 12, 1993, in pretrial proceedings, trial counsel specifically requested "rap sheets" for Ms. Love and Ms. Miller, among others. (1 RT 527-28.)

(1) The prosecution informed the trial court he was prevented from giving the rap sheets directly to trial counsel and would instead provide them to the court to determine if they contained any discoverable material. (*Id*. at 528.)

(2) Trial counsel quickly informed the trial court that recent case law held that "even an arrest and not necessarily a conviction even on a misdemeanor might be relevant if it shows a morally lax character." (*Id*. at 529.)

(3) Trial counsel further informed the court "I would like to indicate that the credibility of two of the witnesses in particular Pamela Miller and Shamaine Love are very important in the case and any impeachments of them by their prior record would be important." (*Id*.)

d. Trial counsel's failure to investigate and present impeachment evidence of the prosecution's key witnesses fell below the standard of care. Counsel

knew, and acknowledged on the record, the vital importance of attacking the credibility of these witnesses, yet he failed to undertake even a minimal investigation. Trial counsel's failure to impeach Ms. Miller and Ms. Love allowed petitioner's jury to give their testimony undue weight. But for counsel's failure to investigate and present readily available impeachment evidence petitioner would not have been convicted of felony murder rape and sentenced to death.

9. Trial counsel unreasonably and prejudicially failed to investigate petitioner's prior crimes, develop a strategy for addressing the prosecution's use of the prior crimes, and ensure that the jury was not impermissibly influenced by the prior crimes. The facts and allegations set forth in Claims Ten, Fourteen, Fifteen, and Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Although trial counsel was aware, or reasonably should have been aware, that the prosecution intended to use petitioner's prior crimes at trial, he unreasonably and prejudicially failed to adequately investigate the constitutionality, admissibility, and potential defenses to the prior crimes. Had trial counsel undertaken such an investigation, he would have been prepared to challenge the admissibility of the prior crimes and, if admitted, should have been able to restrict their use at trial and offer mitigating aspects of the prior crimes to the jury.

b. In light of trial counsel's concession to the admission of the facts of the Doretha Harris ("Harris") case at the guilt phase (2 RT 724), he had a duty to investigate the prior convictions in an effort to mitigate their effect on the jury.

c. Trial counsel had no reason for failing to investigate the facts surrounding petitioner's prior convictions since he believed that they, and the present charges, strongly indicated that petitioner suffered from a serious mental illness. (Ex. 150 at 2731.)

(1) Trial counsel failed to obtain easily discoverable facts about petitioner's deteriorating mental state just prior to the Harris crime.

(a) Had trial counsel interviewed petitioner's friends and

family, he could have presented compelling evidence of petitioner's mental deterioration just prior to the crime, which includes, but is not limited to important testimony about petitioner's increased drug use, homelessness, increasingly irrational behavior, inability to hold a job, and increased paranoia. (*E.g.*, Ex. 14 at 136-37.)

(b) As a result of trial counsel's inexcusable failure to investigate, the jury was deprived of a vital piece of information that helped explain petitioner's mental state at the time of this crime.

(i) Immediately after her attack, Mrs. Harris told the police she was in her kitchen making lunch when she heard glass breaking. (Ex. 136 at 2669.)

(ii) When she first reported this crime to the police, Mrs. Harris said that petitioner asked her to kill him with a knife he picked up near the bedroom's hallway door. (*Id*. at 2670.)

(iii) At no time did Ms. Harris report or testify that petitioner entered her home armed. (Ex. 136 at 2669; 20 RT 3163-64, 3176.)

(iv) The vital fact that Mrs. Harris was armed with a nine inch knife when she first encountered petitioner was not included in her trial testimony at petitioner's trial. (*See* 20 RT 3163, 3170-72.)

(v) The addition of this critical fact makes clear petitioner's psychotic break was triggered when he felt his life was threatened – when he was confronted with Mrs. Harris in her hallway holding a nine inch kitchen knife. (*See* Ex. 136 at 2669-70.)

(2) Had trial counsel investigated the Kim Jackson ("Jackson") incident, he would have obtained facts that mitigated the crime and corroborated his mental state defense.

(a) Similar to the instant crime, petitioner was not initially threatened during the Ms. Jackson incident. It was only during the course of smoking marijuana and drinking alcohol with Ms. Jackson that petitioner misperceived a threat,

and as a result of a psychotic break, became completely unaware of his actions.

(b) Ms. Jackson began talking about petitioner's brother Carl who had been killed recently. Notwithstanding the fact that the topic was too difficult for him, Ms. Jackson continued making comments about Carl, while petitioner became increasingly agitated. (Ex. 178 at 3146.)

(c) As he became more unstable, petitioner felt that he had to leave. Ms. Jackson then left the room to retrieve his coat. (*Id*.)

(d) Despite his longstanding friendship with Ms. Jackson, petitioner was affected by the drugs and alcohol he had consumed, and misperceived Ms. Jackson's comments and abrupt departure to retrieve his coat as threats to his safety. (*Id*. at 3156-57.) As discussed in Claim Sixteen, *infra*, petitioner's severe brain damage makes him highly susceptible to misperceiving social cues. (*See, e.g.*, Ex. 175 at 3065.)

(e) Already in a compromised mental state, petitioner's tenuous grasp on reality disintegrated and he again experienced a psychotic episode he later would never be able to truly recall. (Ex. 178 at 3155-56.)

(f) Trial counsel was impressed with the victim's strong sense of empathy and compassion for petitioner after his arrest, and her preference that his obvious mental illness be treated in lieu of punishment. (Ex. 12 at 107.) Trial counsel, however, made only a token unsuccessful attempt to contact and interview this aggravation witness victim who could have given compelling mitigating evidence.

d. The facts in the cases of Ms. Harris and Ms. Jackson provide further support for Dr. Thomas's diagnosis that petitioner suffered from severe mental illnesses and additional evidence that petitioner was suffering from these disorders at the time the victim was murdered.

(1) Dr. Thomas testified that at the time of the instant crime, petitioner was suffering a psychotic break. (30 RT 4428, 4442.)

(2) Trial counsel should have presented this evidence in the guilt

phase of the trial.

(3) Had he done so, trial counsel could have presented the jury with expert mental health evidence that, as with each of his other two offenses, petitioner's psychotic break, prior to the incident with Mrs. Miller, was preceded by a perceived threat to his safety. (Ex. 178 at 3156.)

(4) In light of such evidence, the jury would have been unable to find that petitioner was able to form the requisite intent for any of the charged crimes.

e. Trial counsel's failure to investigate the facts surrounding the Harris conviction also led him to incorrectly and prejudicially argue that petitioner went to the Harris household with the intention of raping Mrs. Harris.

(1) Trial counsel argued in closing that "there is no doubt that when Mr. Jones entered Mrs. Harris's house about ten years ago there was a burglary … There is no question about that and Mr. Jones admits that." (26 RT 3925.)

(2) This concession was unnecessary, erroneous, and highly prejudicial.

(a) Contrary to trial counsel's argument, petitioner testified that he did not enter the Harris household with the intent to commit a crime; he went there to talk to the mother of his son. (22 RT 3371.)

(b) Petitioner's "heightened paranoia" led him to the delusion that Glynnis Harris and her mother "were out to get him" and were plotting to keep his son Tristan from him. (Ex. 178 at 3147.)

(3) Trial counsel's failure to investigate the Harris case, or even to listen to his client's trial testimony, allowed the prosecution to argue that even according to his attorney, petitioner was lying about the facts of the Harris case. (27 RT 3976.)

(a) Trial counsel's concession also gave greater weight to the prosecution's argument that the Harris case was essentially a roadmap for this case, except for the fact that only Mrs. Harris was not killed. (*E.g.*, 26 RT 3891, 3897, 3901-

02; 27 RT 3969, 3976, 3977; 31 RT 4658.)

(b) Shortly after the prosecution argued "[a]nd in this case that is to reject the voluntary intoxication and mental disorder, to accept that he formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with the first-degree murder," the jury convicted petitioner of rape, felony murder rape, and found true the rape special circumstance.[6] (27 RT 3991-92.)

f. Trial counsel's failure to investigate prevented petitioner's jury from hearing compelling facts that not only mitigated the prior offenses and supported petitioner's sole guilt phase defense, but also provided persuasive mitigation evidence in the capital case. But for trial counsel's unreasonable failure to conduct a reasonable investigation of petitioner's prior offenses, petitioner would have possessed a powerful factual predicate for a cohesive defense strategy that encompassed both the guilt and penalty phases.

10. Trial counsel failed unreasonably and prejudicially to advise petitioner about possible ramifications stemming from his testimony and failed to prepare petitioner for testifying. The facts and allegations set forth in Claims Four, Five, and Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Without investigating any other potential defense, trial counsel based his entire guilt defense on petitioner's testimony. "I planned to have Mr. Jones testify in the guilt phase about what happened at the time of the crime. Because we had no defense to the rape charge, *I needed Mr. Jones to admit the rape*." (Ex. 12 at 107 (emphasis added).)

(1) Trial counsel's entire mental state defense was based on "Mr. Jones testify[ing] about his dissociative mental illness, mental health symptoms, and background as evidence that he was incapable of forming the required intent for the

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[6] The prosecution also conducted prejudicial misconduct by conflating the general intent required for the substantive crime of rape with the specific intent crime of felony murder rape. (*See infra* Claim Fourteen.)

rape special circumstance." (*Id*.)

(2) Trial counsel unreasonably persuaded petitioner to alter his version of events when his mental illness and delusional beliefs prevented him from being able recall events.

(a) Throughout the pretrial proceedings, petitioner was unable to recount accurately or completely the events on the night of the crime. (Ex. 154 at 2752.)

(b) As a result of his mental impairments and suggestibility, although he had no memory of the events, petitioner adopted a version of events that trial counsel suggested to him. (Ex. 19 at 208.)

(3) Petitioner testified under questioning by trial counsel that he had no recollection of most of the attack on Mrs. Miller:

Q: After the first few stab wounds, do you remember the rest?

A: No.

Q: But you know you killed her?

A: Yes.

Q: And she was tied up?

A: Yes, she was.

Q. Other than grabbing the scarf, do you have any memory of tying her up?

A: No.

Q: And you know somebody had sex with her?

A: Yes.

Q: And do you have any memory of doing that?

A: No, but I know that it had to be me, though.

(22 RT 3336.)

(4) As a result of his testimony, petitioner was severely prejudiced by essentially admitting his guilt when in fact he was unable to genuinely

state that he knew what he had done.

b. Prior to calling petitioner as a witness, trial counsel knew, or reasonably should have known, that petitioner was incompetent to stand trial, and therefore incompetent to testify.

(1) After interviewing petitioner, Dr. Thomas informed trial counsel:

> [I]n my professional medical opinion, Mr. Jones was not mentally fit to testify on his own behalf. The unique characteristics and manifestations of his mental disorders made him a poor candidate for testimony. Because of Mr. Jones's frank dissociation at the time of the events in question, the Mr. Jones in the courtroom was not the same person as the Mr. Jones who had acted that evening. Anything he could remember, he would remember as a spectator, watching as if from outside his body, with no emotions to call upon to seem credible to the jury.

(Ex. 154 at 2752.)

(a) Dr. Thomas further stated that "The emotional encounter with Mrs. Miller . . . set[] off the dissociative process and psychosis after which he had no control over either his thoughts or actions." (*Id*. at 2755.)

(b) Even though trial counsel premised the mental state defense on petitioner's testimony, which included the flashback to petitioner's childhood, "With no corroboration and no context, Mr. Jones's clipped memory of a flashback would make little sense to the jury." (*Id*. at 2753; *see, e.g*., Ex. 140 at 2694 (trial juror found petitioner's testimony regarding flashback "didn't make sense" and required corroborative evidence); Ex. 138 (juror needed information about petitioner); Ex. 9 (juror concerned about lack of explanation for petitioner's behavior).)

(2) Despite Dr. Thomas's expressed opinion on petitioner's competence, and his further opinion to trial counsel that petitioner was not able

competently to testify, trial counsel proceeded to have petitioner testify.

(a) Although Dr. Thomas was readily available, trial counsel unreasonably failed to use his mental health expert to determine whether, and under what circumstances, petitioner was capable of being adequately prepared to testify on his own behalf.

(b) Trial counsel recklessly proceeded without a clear understanding of the extreme psychological difficulties that petitioner would, and did, experience as a result of being forced to confront the events during his dissociative break on the night of the crimes.

(3) Prior to calling petitioner as a witness, trial counsel was informed by Dr. Thomas that petitioner's psychosis would interfere with his ability to comprehend and answer, in a rational manner, questions posed to him.

c. Trial counsel knew or reasonably should have known that petitioner's testimony and behavior on the witness stand would be controlled, and adversely affected, by his long-standing mental impairments and the drug regimen that the Los Angeles County Jail medical staff had prescribed. (*See infra* Claim Five.)

(1) Reasonably competent counsel would have ensured that petitioner's mental condition did not affect his ability to testify. However, trial counsel was not accurately aware of petitioner's medication regimen, and its effects on petitioner.

(a) The Los Angeles County Jail staff prescribed petitioner an inappropriate and fluctuating medication regimen.

(b) Trial counsel was unaware of petitioner's inappropriate medication regimen because he failed to request and/or review petitioner's jail medical records that revealed this problem. (Ex. 150 at 2733.)

(c) Trial counsel failed to adequately interview and prepare the jail psychiatrist, Dr. Kunzman, to testify. Had he done so, trial counsel would have uncovered the problems with petitioner's medication regimen. (*Id.*)

(2) Trial counsel was aware, or reasonably should have been aware, that petitioner was also ingesting an anti-asthmatic, Theodrine, which could produce psychosis. (Ex. 154 at 2754.)

d. Trial counsel prejudicially failed to timely retain, consult, and heed the advice of his own mental health expert.

(1) Trial counsel recklessly proceeded without a clear understanding of the extreme psychological difficulties that petitioner would, and did, experience as a result of being forced to confront the events that transpired during his dissociative break on the night of the crimes.

(2) Although Dr. Thomas was readily available, trial counsel unreasonably failed to use his mental health expert to determine the force and affect of petitioner's delusional beliefs.

(3) Had trial counsel conducted a timely, adequate investigation into petitioner's background and mental health history, Dr. Thomas's professional medical opinion would have been further confirmed; trial counsel was equally deficient for failing to conduct such an investigation.

e. Counsel's errors and omissions were unreasonable, not based on a sound tactical strategy, and violated petitioner's constitutional rights to the effective assistance of counsel, due process of law, confrontation, present a defense, and reliable guilt and penalty verdicts.

11. Trial counsel unreasonably and prejudicially failed to request necessary jury instructions and verdict forms during the guilt phase. The facts and allegations set forth in Claim Twelve, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. Trial counsel failed to request appropriate and necessary jury instructions limiting the use of the prejudicial other crimes evidence and to request instructions that only a living person can be raped.

b. Trial counsel failed to seek an instruction limiting the use of the

prior crimes in accordance with California Evidence Code section 1101.

(1) Trial counsel knew that the prosecution was going to introduce evidence regarding one of petitioner's prior crimes.

(2) In fact, because the trial court refused to rule on whether such evidence was more prejudicial than probative, in violation of California Evidence Code Section 352, trial counsel withdrew his objection to the admission of this evidence. (2 RT 724.)

(3) The jury received a modified CALJIC 2.50. (2 CT 270.)

(a) CALJIC 2.50 was modified by deleting a critical sentence: "You are not permitted to consider such evidence for any other purpose." (*Id*.)

(b) As modified this jury instruction impermissibly allowed petitioner's jury to consider the inflammatory propensity evidence in determining virtually every facet of the case: motive, intent, identity, and common scheme or plan.

(c) The modified instruction failed to prevent the jury from drawing improper propensity inferences. The instructions specifically informed the jurors that the prior crime evidence could be used to determine the issues before them; however, the jurors had no ability to make the legal distinction that would have been required to recognize that the prior crime actually served as propensity evidence that should *not* have been considered in evaluating the elements of the instant crime.

(4) Further instruction according to modified CALJIC 17.18 compounded the broad impermissible use of propensity evidence by repeating the prior crime information and again instructing the jury to consider it for improper purposes. (2 CT 323.) CALJIC 17.18 was not permissible in the circumstances of petitioner's trial in the first place and was erroneously given to the jury.

(5) Trial counsel's failure to argue for greater limitations on the prior crime evidence instructions, failure to fully challenge all of the bases for the

introduction of prior crime evidence, and failure to object to the prosecutor's arguments in favor of a wide range of impermissible propensity inferences constituted ineffective assistance of counsel.

(6) Trial counsel's unreasonable and prejudicial failure to argue for greater limitations on the prior crime evidence instructions, failure to fully challenge all of the bases for the introduction of prior crime evidence, including its prejudicial effect on a fair and reliable sentencing determination, and his failure to object to the prosecutor's arguments in favor of a wide range of impermissible propensity inferences constituted ineffective assistance of counsel.

c. Trial counsel failed to seek an instruction that for the crime of rape to occur, the perpetrator must harbor the intent to rape while the victim is alive.

(1) Once the trial court held the DNA evidence was admissible under the first prong of *People v. Kelly*, 17 Cal. 3d 24 (1976), trial counsel erroneously believed "we had no defense to the rape" and only "planned to defend against the rape special circumstance." His only planned defense was to concede that petitioner had engaged in sexual contact with the victim, but to challenge the intent requirement for the special circumstance allegations. (Ex. 12 at 107; Ex. 150 at 2730.)

(2) Trial counsel knew, or reasonably should have known, the importance of thoroughly instructing the jury on every element of each charged crime.

(3) The guilt phase instructions failed to inform the jurors that to find that the crime of rape occurred, they had to first determine that the victim was alive at the time the attempt to rape was initiated. Trial counsel requested, and was granted, a similar instruction on robbery, which explained that the taking of property from a dead body cannot be robbery. (26 RT 3803-05; 2 CT 318.)

(4) Despite the wealth of evidence that pointed to the death of the victim prior to any sexual penetration (*see infra* Claim Nine), trial counsel unreasonably failed to even attempt to clarify this confusing area of law for petitioner's jury. Trial counsel's failure to request this vital instruction stemmed from his

unnecessary and prejudicial decision to concede that petitioner raped the victim, despite the weight of the evidence strongly indicating that no rape could have occurred. (Ex. 12 at 107; Ex. 150 at 2730.)

(5) Trial counsel was acutely aware of the high potential for juror confusion caused by the differing intent standards for the crime of rape and the felony murder allegation and special circumstance of rape. (22 RT 3361-62.) Trial counsel warned the court "it is so confusing to tell a jury rape is a general intent crime, but felony murder rape is a specific intent crime." (*Id*.)

(6) Trial counsel did request clarifying instructions on the special circumstances, including the rape special circumstance. (2 CT 352-54.) His failure to request an instruction of equal, if not greater, importance is inexcusable, and particularly egregious in light of his valid concern for juror confusion.

(7) Trial counsel's failure was not strategic. Trial counsel's concession that his client raped the victim, in the absence of sufficient evidence to prove rape beyond a reasonable doubt, coupled with the concession's unnecessary exposure to felony murder rape, makes clear that any decision to concede rape was clearly deficient, as was his failure to request all necessary instructions on the crime of rape.

(8) This failure is all the more prejudicial in light of the fact that the appellate record suggests that the trial court would have granted such an instruction. When trial counsel requested an instruction stating that the crime of robbery requires that property be taken from a living victim, the trial court agreed that it was necessary and granted it. (26 RT 3803-04; 2 CT 318.)

(9) As a result of trial counsel's failure to ensure that the jurors were properly instructed, the state of the instructions allowed the jury to conclude that, unlike robbery, a dead victim can be raped. In light of the overwhelming evidence that the victim was dead prior to any sexual contact and the jury's finding that no robbery occurred, had trial counsel requested that the jury be properly instructed as to the crime

of rape, given the state of the evidence, petitioner would not have been convicted of rape, felony murder rape, nor the rape special circumstance found true, and he would not have been exposed to a sentence of death. Petitioner's conviction and sentence must be reversed because they were obtained as a result of trial counsel's failure to request all necessary jury instructions.

d. Trial counsel had no strategic reason for failing to request these vital instructions. As a result of this failure, left woefully unguided and urged to do so by the prosecution (*e.g.*, 26 RT 3902; 27 RT 3977-78, 3992), petitioner's jury inappropriately used the prior crimes evidence as highly improper propensity evidence. The lack of instruction on the question of whether or not the victim even could be raped left the jury without sufficient guidance to understand that a dead body cannot be legally raped, and that petitioner, therefore, could not be guilty of rape or felony-murder rape.

e. Trial counsel was ineffective for failing to ensure that the verdict forms were accurate, complete, and actually provided for each of the charged offenses, allegations, and special circumstance allegations.

(1) After being improperly instructed on the rape special circumstance (*see infra* Claim Twelve), petitioner's jury received no verdict forms for special circumstance findings.

(2) The jury was instructed, in relevant part:

(a) Count one charged petitioner with murder. (2 CT 287; 26 RT 3840.)[7]

(b) There were four possible verdicts as to count one (26 RT 3875): not guilty; guilty of manslaughter; guilty of involuntary manslaughter; and, guilty of murder.

[7] In fact the jury was repeatedly instructed count one was the murder charge. (*See, e.g.*, 26 RT 3823, 3846, 3874.)

(c) "Each count charges a distinct crime." (2 CT 325 (CALJIC 17.02); 26 RT 3873.)

(d) "Your finding as to each count must be stated in a separate verdict." (2 CT 325 (CALJIC 17.02); 26 RT 3874.)

(e) "You will state your special findings as to whether or not this special circumstance is or is not true on the form that will be supplied." (2 CT 307 (CALJIC 8.80.1, revised 1993); 26 RT 3860.)

(3) Trial counsel reviewed the verdict forms and erroneously informed the court "they appear to be accurate" even though they were incomplete. (27 RT 4005-06.)

(a) The guilty-murder verdict form only determined that the jury found petitioner guilty of first degree murder. (2 CT 365.)

(b) There were no verdict forms that asked the jury whether or not the special circumstances were true, so the jury never made a special circumstance finding.

(4) Along with the confusing instructions, the murder verdict form served only to deepen the jurors' confusion.

(a) The form was titled "Verdict (Guilty) Count One," and bore a footer that read "Verdict (Guilty)." (2 CT 365.)

(b) The murder verdict form contained a blank space for the jury to write in the degree of murder and to check boxes titled "True," or "Not True" regarding the allegations of burglary, rape, murder, and whether or not petitioner had sustained a prior conviction within five years. (*Id*.) The term "special circumstance" appeared nowhere on the verdict form.

(5) The jury indicated on the "murder" verdict form it found petitioner guilty of felony murder rape.

(6) The jury was given no verdict form for any of the special circumstances. The jury, therefore, made no special circumstance findings. (2 CT 307

("You will state your special findings … on the form that will be supplied").)

(7) Once the trier of fact has found a defendant guilty of first degree murder, California Penal Code section 190.4 requires the jury to make a finding on the truth of each alleged special circumstance. The case cannot proceed to a capital penalty phase unless the jury specifically finds true at least one special circumstance.

(8) Trial counsel's performance was deficient and unreasonable for allowing the court to erroneously accept the jury's felony murder rape verdict as a true finding on the rape special circumstance, and failing to object to the verdict as insufficiently specific to meet the requirements of the statute.

(9) Trial counsel's failures were prejudicial. Without a special circumstance finding, petitioner would not have been subjected to an unnecessary and unconstitutional penalty phase proceeding.

12. Trial counsel unreasonably and prejudicially failed to protect petitioner's statutory and constitutional rights by objecting to numerous instances of prosecutorial misconduct in the guilt and penalty phases. The facts and allegations set forth in Claims Three, Nine, Ten, Fourteen, and Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. The blatant prejudicial misconduct trial counsel failed to object to in the guilt phase of the trial included: closing arguments rife with misstatements of both the evidence and the law; statements of facts that were not in evidence; and, blatant appeals to the jury to base its verdicts on emotion and passion rather than the evidence and the law.

(1) Several times, the prosecution incorrectly stated the law that governed the case.

(a) In his first closing the prosecution improperly and prejudicially argued that if the jury convicted petitioner of one of the lesser-included offenses, this necessarily meant that the jury believed petitioner's story. (26 RT 3907.)

(b) This argument is a patently incorrect statement of the

law and lightened the prosecution's burden of having to prove each and every element of the charged offenses beyond a reasonable doubt. Nevertheless, trial counsel failed to object and request that the jury be correctly informed that they could find petitioner guilty of a lesser-included-offense because the prosecution failed to prove that petitioner was guilty of committing a first-degree murder beyond a reasonable doubt. During closing arguments, the prosecutor prejudicially and erroneously equated the intent requirement for the crime of rape with the intent requirement for both felony murder rape and the rape special circumstance.

(i) The prosecution finished his rebuttal closing argument with an attempt to lighten his burden of having to prove that petitioner harbored the specific intent necessary for a first-degree felony murder rape. (27 RT 3992.)

(ii) Disparaging petitioner's mental state defense, the prosecution argued, "[a]nd in this case that is to reject the voluntary intoxication and mental disorder, to accept that he formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with first-degree murder." (*Id*. at 3991-92.)

(iii) By erroneously equating the Harris case to the capital crime, the prosecution told the jury that the general intent for the substantive crime of rape is all that is required for a first-degree felony murder rape conviction.

(iv) Inexplicably, trial counsel failed to object to this egregious misstatement of the law.

(c) Trial counsel had no strategic reason for failing to object to these misstatements of law. These misstatements not only served to remove the burden of proving every element of each offense beyond a reasonable doubt, but they also rendered irrelevant petitioner's mental state defense, his only defense to the crimes charged.

(d) Trial counsel's unreasonable failure to object is

exacerbated by the timing of these statements. The misstatements of law in the final closing were made at the end of the prosecution's argument – the argument that took away the element of specific intent came just before the jury was to retire and start their deliberations. (27 RT 3992.)

(2) The prosecution challenged vital parts of the defense case by arguing facts that were not in evidence.

(a) The prosecution admitted that Pamela Miller and admitted drug dealer Shamaine Love were inconsistent in their testimony regarding the timing of events that involved petitioner. When the prosecution attempted to vouch for the credibility of these witnesses by arguing that their inconsistency was a result of their not wearing watches, trial counsel unreasonably failed to object, despite the lack of any such evidence in the record. (27 RT 3973.)

(b) Trial counsel admits that he believed his only defense in the guilt phase was based on petitioner's mental health. (Ex. 12 at 109; Ex. 150 at 2730, 2731.) Even specious and improper attacks on this defense, however, went unchallenged by trial counsel.

(i) Despite testimony that a qualified and licensed medical doctor felt it necessary to prescribe the powerful anti-psychotic Haldol, the prosecution argued, without evidentiary support, that due to budget cuts jail doctors were routinely "fooled" into prescribing anti-psychotic medications. (27 RT 3970-71.)

(ii) Knowing the falsity of the specious allegation because he successfully withheld from the jury evidence to rebut it, the prosecution suggested in his closing argument "Is it possible he is getting these pills and palming them or giving them to another inmate." (*Id*. at 3972.)

(iii) These arguments were particularly prejudicial because they painted petitioner as a conniving con artist who wanted to be medicated only to help with his mental health defense. Trial counsel's failure to object to these prejudicial and improper attacks on his only guilt phase defense is indefensible.

(c) During closing arguments, trial counsel unreasonably failed to object to the prosecution's repeated and improper argument that petitioner's failure to call an expert witness to verify or diagnose a mental disorder from which petitioner suffered, and which affected his ability to form the requisite intent, necessarily meant that petitioner did not suffer a mental disorder. (26 RT 3905; 27 RT 3972.) Trial counsel's failure to object was all the more egregious because he predicted the prosecution would take advantage of the trial court's erroneous ruling, which prevented petitioner from testifying about his mental health symptoms, and make such a knowingly erroneous, unfair, and prejudicial argument. (22 RT 3363; Ex. 12 at 110; Ex. 181 at 3162.)

(d) Another harmful and improper attack on trial counsel's sole guilt defense resulted in no objection or request for a curative instruction. The prosecution argued that petitioner suffered from no mental illness. (27 RT 3969, 3973; *see generally id*. at 3969-73.) Given that this was the basis for his entire guilt phase defense, and trial counsel had predicted that the prosecution would make this improper argument, trial counsel's failure to object is unjustifiable. (Ex. 12 at 110; Ex. 181 at 3162.)

(e) The prejudice petitioner suffered as a result of counsel's failure to object to the prosecution's argument including extra-record facts, was compounded since most of these extra-record facts were demonstrably false.

(f) Trial counsel's failure to object and to request that the jury be instructed to disregard the non-record facts and to request that the false facts be corrected, served only to help secure petitioner's conviction.

(3) The prosecution improperly and prejudicially challenged petitioner's testimony without any good faith basis for his inflammatory questions.

(a) The prosecution questioned petitioner about the route of the bus he testified he was waiting for (22 RT 3320-21) prior to going to the Miller residence (23 RT 3432-33).

(i) The prosecution's questions included false and misleading information, such as "Now would it surprise you to know the 40 doesn't go past Market on Florence, doesn't go east on Florence past Market Street?" (23 RT 3232.)

(ii) Trial counsel failed to object, even though the prosecution improperly and erroneously called petitioner a liar.

(iii) Trial counsel knew petitioner's testimony was correct because, after petitioner's testimony, he obtained evidence specifically confirming petitioner's testimony regarding the bus route. (Ex. 144 at 2707.)

(iv) Despite possessing evidence of the prosecutor's bad faith questioning, trial counsel failed to object to the prosecution's introduction of false evidence.

(v) In light of his knowledge that the prosecution's argument was false, trial counsel's failure to object is inexcusable.

(4) Trial counsel unreasonably failed to object to the prosecutor making improper victim impact arguments that were nothing more than blatant appeals to the jury's emotions.

(a) The prosecution unnecessarily invoked the victim by stating "I asked Mr. Jones pointed questions to try to get at the truth in this case. Do you think if Julia Miller were here she would have a few questions to Mr. Jones [sic], a few pointed questions for Mr. Jones when he says she attacked him?" (27 RT 3975.) By failing to object to this improper argument, trial counsel allowed the prosecution to make up for its failure to adequately challenge petitioner's version of events.

(b) At the end of his rebuttal statement, the prosecution again attempted to cloud the issue by invoking the victim:

> He comes into this courtroom, two and a half years later and attempts to steal her dignity and her reputation, that she's the one that precipitated this – these heinous acts of violence. Don't let

him get away with that last theft, ladies and gentlemen. It's a first degree murder and the special circumstances are true.

(*Id*. at 3992.)

(i) Despite the obvious fact that this statement has absolutely no relevance to the issues to be decided, trial counsel failed to object.

(ii) Trial counsel failed to mitigate the prejudice from this argument by requesting that the trial court inform the jury that the victim's dignity and reputation are issues that have no bearing on the issues to be decided in the guilt phase of a trial.

b. The blatant prejudicial misconduct trial counsel failed to object to in the penalty phase of the trial included closing arguments replete with misstatements of both the evidence and the law, statements of facts not introduced into evidence, and improper and false victim impact evidence.

(1) The prosecution urged the jury to consider non-statutory aggravating evidence, and again, trial counsel failed to object.

(a) The prosecution argued:

> Now either he refused to go along with the treatment, or they couldn't treat him. He didn't really have a problem, and that this was something that he went along with in order to get a reduced sentence of a battery. *And I want you to think about that and his lack of participation in the program*.

(31 RT 4640-41 (emphasis added); *see generally id*. at 4640-42.)

(b) When he made this statement the prosecution was ostensibly discussing the legitimate factor of age at the time of the crime. (*Id*. at 4640, 4642.)

(c) Even though this argument asked the jury to improperly consider petitioner's alleged failure to take advantage of mental health resources as non-statutory aggravation, trial counsel failed to object and to ensure the

jury was properly instructed that this alleged failure on the part of petitioner could not be considered as aggravating evidence.

(2) Trial counsel's repeated failures to object allowed the prosecution free reign to argue facts that were not in evidence. There was no objection to the false argument that as a result of the stab wounds, the victim may have experienced blood pooling in her mouth. (31 RT 4661.) Not only was this argument false (Ex. 171 at 3034-35), it was highly improper as it was nothing but a highly prejudicial appeal to the jury's emotions. Trial counsel unreasonably failed to object on either ground.

(3) The prosecution committed several acts of misconduct regarding the presentation of prison consultant James Parks's testimony that petitioner would do well in prison, to which trial counsel failed to object.

(a) The prosecution falsely informed the trial court and trial counsel that if Parks testified, since petitioner had gotten into a fight while previously in prison "over Crip business," he would like to "bring out the fact that the gangs have a potential violen[ce] problem while in prison." (29 RT 4215.)

(b) Despite the lack of any evidence to support it, and contrary to how he said he would use this evidence, the prosecutor prejudicially and inaccurately characterized petitioner as a gang member predisposed to commit violent acts. (*Id*. at 4307-08.)

(c) Despite this attack on a vital part of his penalty phase defense - that petitioner would do well in prison - the interjection of impermissible factors into the sentencing decision, trial counsel failed to object.

(d) Instead of objecting to the prosecution's base misconduct or presenting evidence to wholly rebut the mischaracterization of petitioner, trial counsel told the jury he "resents the implication Mr. Jones is a gang member." (31 RT 4684.)

(4) Had trial counsel conducted an adequate investigation into

petitioner's background, he would have discovered that the prosecution's argument was not merely improper, but that it was also demonstrably false.[8]

(5) The prosecution made several highly inflammatory arguments regarding the victim, under the guise of victim impact; however, trial counsel failed to object to any of them.

(a) The prosecution improperly urged the jury to ignore the law and sentence petitioner to death based solely on the fact that the jury had convicted him of murdering the victim.

(b) After discussing California Penal Code section 190.3(k), the prosecutor argued:

> [A]nd I would suggest to you that you show the same sympathy to the defendant that he showed to Mrs. Miller, if you are going to think about sympathy in this case.
>
> (31 RT 4643; *see also id*. at 4657 [same argument].)
>
> There were police officers out there who saved the defendant, and he came in here to stand trial. Who saved [the victim]?
>
> (31 RT 4661.)

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[8] Trial counsel only asked Herman Evans if he and petitioner were ever involved in gangs; Evans testified they were not. (29 RT 4252.) Numerous declarants confirm that throughout his life – not just the few years he and Mr. Evans were close friends – any allegation that petitioner was a member of any gang, was patently and demonstrably false. In fact, despite living in a dangerous neighborhood ruled by the Rollin' 60s Crips, petitioner never joined a gang. (Ex. 142 at 2700 ("Neither Carl nor Meso were gang members… Meso was not the type of person a gang would want. Meso was not streetwise."); Ex. 153 at 2744 ("Even though there were a lot of gang members around, I never knew Meso to be in any gang."); Ex. 134 at 2648-51 ("One of the most notorious gangs in California dominated our neighborhood; they were called the Rolling 60's…I thought well of Meso because, unlike most of the guys in the neighborhood, Meso was not into drugs or gangs."); Ex. 124 at 2525 (He was short, shy, and not a big fighter. And he was not one to join a gang, so he was at risk.").) Trial counsel's failure to conduct an adequate investigation into petitioner's life is addressed further in paragraphs 1 and 2, *supra*, and Claim Sixteen, *infra*.

(c) Petitioner was again effectively left without counsel, because trial counsel failed to object after each of these obvious requests for the jury to ignore the law and the evidence and sentence petitioner to death, on the sole basis that the victim's death requires petitioner's death.

c. Trial counsel had no strategic reason for failing to object to these prejudicial instances of prosecutorial misconduct. By failing to do so, trial counsel allowed the prosecution to violate petitioner's constitutional rights to a fair trial, due process of law, confrontation, a reliable guilt and penalty verdict, and the effective assistance of counsel.

13. Trial counsel rendered ineffective assistance of counsel as a result of his disabling conflict of interest.

a. At the time of petitioner's trial, it was the policy and practice of the Los Angeles County Public Defender's Office ("LACPD") to assign a single lawyer to special circumstance cases. The staffing assignment was not changed once it was determined the prosecution would seek a death sentence. (*See* Ex. 12 at 105.)

b. The LACPD knew, or reasonably should have known, that the complex scientific, forensic, and mental health issues involved in petitioner's case could not be adequately researched, investigated, developed, and presented at trial by a single lawyer.

c. Petitioner's capital guilt phase defense was decided by default: once the DNA evidence was held admissible, trial counsel believed the only viable defense was a mental state defense. (Ex. 150 at 2739; *see also* Ex. 12 at 107; Ex. 181 at 3163.) Trial counsel's decision was neither well reasoned nor arrived at after research and investigation; petitioner's guilt phase defense was the product of trial counsel's ignorance of the issues and failure to investigate.

(1) Trial counsel did not understand DNA very well. In fact, he sought the assistance of the LACPD's forensic consultant. (Ex. 12 at 106-07.)

(a) The LACPD consultant failed to adequately consult

and utilize the DNA expert the LACPD hired to assist trial counsel. (Ex. 176 at 3078-79, 3083-84.)

(b) The LACPD consultant failed to adequately challenge the DNA evidence in pretrial hearings. (*See supra* paragraph 5; *see also infra* Claim Thirteen.)

(c) Trial counsel failed to challenge the DNA evidence at trial, and instead allowed petitioner's jury to believe the testing was performed accurately and reliably.

(2) Trial counsel conducted virtually no investigation into the actual crime.

(a) Despite strong physical evidence, trial counsel failed to investigate whether or not the victim was alive when she was bound and had sexual contact. (*See supra* paragraph 3; *see also infra* Claim Nine.)

(b) Trial counsel unreasonably conceded the rape in his closing argument, essentially pleading petitioner guilty to a crime to which he pled innocent and did not legally commit. (*See supra* paragraph 4; *see also infra* Claim Nine.)

(3) Trial counsel conducted virtually no investigation into petitioner's mental state at the time of the crime; the sole defense to the charged crimes was that petitioner was unable to form the requisite intent for the charged crimes. (*See supra* paragraph 1; *see also infra* Claims Four and Sixteen.)

(a) Even though he was warned against doing so by his own mental health expert, trial counsel "decided that Mr. Jones *would have to* testify on his own behalf during the guilt phase" (Ex. 150 at 2732 (emphasis added)) and called petitioner to testify as the primary guilt phase witness. (Ex. 154 at 2754 (Dr. Thomas warns trial counsel that petitioner is not competent to testify).)

(b) After the trial court ruled petitioner could not testify to his mental health history prior to 1992 (22 RT 3359), trial counsel failed to call a

continuance so that he could find and prepare lay and expert witnesses to testify to petitioner's mental state at the time of the crime.

d. At the time of petitioner's trial, trial counsel not only carried a full felony case load, the LACPD continued to assign new cases to him "up to the time I announced ready for trial." (Ex. 150 at 2730.) Trial counsel's schedule caused him to be unavailable to experts. (*See* Ex. 154 at 2749.)

e. The LACPD knew, or reasonably should have known, that a capital murder case that involved so many complex scientific, forensic, and mental health issues could not be adequately and competently investigated and tried by a single attorney.

f. The LACPD's arbitrary and harmful policy and practice of appointing only one attorney to petitioner's capital murder case was greatly prejudicial as it robbed petitioner of, among other things, not being tried while incompetent to stand trial (*see supra* paragraph 10; *see also infra* Claim Four); a defense to the charged crimes based on a full investigation (*see supra* paragraph 3; *see also infra* Claim Nine); and, non-conceded pleas of innocence (*see supra* paragraph 4). The implementation of the LACPD's one-attorney-per-capital-case policy created a direct and irreconcilable conflict of interest with petitioner's right to the effective assistance of counsel.

14. Individually and cumulatively, the foregoing errors by counsel were objectively unreasonable under prevailing professional norms at the time of petitioner's capital trial, and rendered trial counsel's performance constitutionally deficient at both the guilt and penalty phases of petitioner's trial. But for trial counsel's unprofessional errors, considered individually and cumulatively, petitioner would not have been convicted or sentenced to death.

B. CLAIM TWO: AN IRRECONCILABLE CONFLICT BETWEEN PETITIONER AND HIS DEFENSE ATTORNEY RESULTED IN VIOLATIONS OF PETITIONER'S RIGHT TO A FAIR TRIAL, DUE PROCESS, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND RELIABLE GUILT AND PENALTY PHASE VERDICTS.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, and to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court improperly denied petitioner's motion for new counsel after an inadequate hearing into the nature of the conflict between petitioner and trial counsel and whether counsel was rendering constitutionally deficient representation. Although the trial court and trial counsel were aware that petitioner and trial counsel had been unable to communicate effectively from the onset of the case, neither took any action to inquire into the extent of the conflict until petitioner formally raised the issue on April 14, 1993. Without conducting an adequate inquiry, the trial court perfunctorily dismissed petitioner's request for the appointment of new counsel. Because an irreconcilable conflict did in fact exist which led counsel to render deficient performance that prejudiced petitioner at trial, petitioner was denied the right to a fair trial, due process, the effective assistance of counsel, and reliable guilt and penalty phase verdicts.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Four, Sixteen, Twenty-three, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. In the months leading up to the hearing at which he moved the court for new counsel pursuant to *People v. Marsden*, 2 Cal. 3d 118 (1970), petitioner

unequivocally expressed to the court deeply-rooted problems with trial counsel. The record reveals a severe disruption in the attorney-client relationship from the outset of the criminal proceedings to the extent that no effective attorney-client relationship was ever formed.

3. In a court appearance on January 25, 1993, approximately three months prior to the *Marsden* hearing, petitioner expressed his distrust of trial counsel to the court, indicating ongoing and potentially fatal problems with the attorney-client relationship. His protests were ignored by both his counsel and the court.

a. During the pretrial conference on January 25, 1993, the disruption in the relationship between trial counsel and petitioner was apparent:

> Mr. Manaster: . . . There are some pretrial matters that have to be disposed of. I think the ruling on the 995 might be helpful -
>
> The Defendant: Leave me alone. Leave me alone.
>
> The Court: All right. You waive time for trial, Sir, Monday, February -
>
> The Defendant: I said no.
>
> Mr. Wojdak: Has the defendant been arraigned? I have copies of the information here. But I thought we arraigned him last time.
>
> The Court: He was arraigned in my absence on the 24th.
>
> Mr. Wojdak: Does the Court have an information?
>
> The Court: Yes, I do.
>
> Mr. Wojdak: All right. That's what I thought.
>
> The Court: All right. I'll try once more. Mr. Jones, do you waive time for trial until -
>
> The Defendant: No.
>
> The Court: All right. I'm going to set this matter for pretrial February 22nd, if that's satisfactory with you, Mr. Manaster?

(1 RT 6.)

b. This dialogue made clear that petitioner was not able to communicate with his counsel, and that the judge was unconcerned about this obvious breakdown in the attorney-client relationship.

4. At the pretrial conference on April 14, 1993, petitioner again refused to waive time and made a demand to be heard on the conflict issue.

a. Petitioner declared a conflict of interest between himself and trial counsel and attempted to inform the court of his concerns. (1 RT 18.)

(1) Petitioner told the judge that he was unable to communicate with his attorney, and that the two were "getting into it" at the jail. (*Id*.) Petitioner further informed the court that the officers at the county jail could be called to verify the arguments between the two of them. (*Id*.)

(2) Petitioner stated that his attorney had not been visiting him to keep him informed of case developments nor had trial counsel visited him prior to the preliminary hearing. (*Id*. at 19.)

(3) Petitioner was also upset because trial counsel had refused to address a long list of his concerns. (*Id*.)

(4) Petitioner went further to arrange for the presence of another attorney who was willing to accept the appointment as replacement counsel. (*Id*. at 19-20.)

b. In response to petitioner's concerns, the court curtly responded, "He's not a mouthpiece. He's your attorney." (*Id*.)

c. These grievances would be sufficient to trigger a proper *Marsden* hearing in the most basic of criminal cases, and especially in a potentially capital case.

d. In lieu of judicial intervention, trial counsel was forced to suggest to the court that a *Marsden* motion was being made by the defendant and that it was inappropriate for the prosecutor to be present. (1 RT 20.)

e. Once trial counsel's request triggered a *Marsden* hearing, at a minimum the court was required to make appropriate inquiries of petitioner so that it

could determine the nature of, and resolve, the conflict of interest claimed by petitioner.

f. What actually occurred fell far short of a constitutionally adequate inquiry to ensure petitioner was receiving effective representation.

(1) The judge began by asking, "What else is wrong with Mr. Manaster's representation . . . ?" (1 RT 21.)

(2) Petitioner started to explain that counsel made a statement to him about his guilt and innocence, and "hinted around for me taking a 15 to life deal." (*Id*.)

(3) The judge interrupted immediately, berating petitioner for getting "mad at him because he's the messenger" of the plea offer, and then refused to allow petitioner to explain further. (*Id*.)

(4) When petitioner attempted to clarify his initial statement, the judge interrupted again, and gave a lengthy summary of his own views as to the nature of the conflict. (*Id*.)

(5) Trial counsel then explained to the court his position on petitioner's concerns. Trial counsel first explained that, in fact, no plea bargain had been offered; he merely attempted to discuss a range of sentencing options with petitioner (*Id*. at 22). Trial counsel explained that he had visited petitioner, and even continued the preliminary hearing in order to do so. (*Id*.) Trial counsel saw no reason why he could not continue to represent petitioner despite their prior disagreements. (1 RT 23.)

g. After this exchange, the trial court "most emphatically denied" the *Marsden* motion. (1 RT 23.) The sealed transcript of the hearing consists of eighty-one lines of dialogue: only five and one half of these lines were spoken by petitioner. (*Id*. at 21-23.)

h. After the motion was denied, petitioner repeatedly informed the judge that he absolutely could not communicate with his lawyer. The judge ignored

petitioner's protests, and again denied him the opportunity to explain the nature of the conflict and how that conflict was adversely affecting trial counsel's representation. (*Id*. at 23-24.)

5. The trial court failed to conduct a proper inquiry into petitioner's conflict with trial counsel and the effect it had on his relationship with petitioner and the preparation of his defense.

6. As a result of the trial court's failure to conduct an adequate inquiry, and indeed depriving petitioner of the opportunity to speak, the court failed to ascertain the nature and extent of the conflict between counsel and petitioner.

7. The judge continued to be dismissive of petitioner's concerns following the denial of the *Marsden* motion.

a. In another display of the court's willful disregard with respect to the existence of a conflict between petitioner and trial counsel, the judge commented, "I can't get a rational [time] waiver from defendant, who appears to be not too happy this morning . . ." (*Id*. at 26.)

b. The judge then added: "Mr. Jones, you are in a spot. I don't want to hear any more talk from you this morning. You want to rap next time, we'll do a little bit of rapping. We're not rapping anymore this morning. I'm cool, you be cool." (*Id*. at 27.)

8. Although petitioner was not permitted to present his concerns and grievances regarding his attorney's representation in any meaningful sense that would have allowed the court to evaluate the merits of the conflict, the breakdown of the attorney-client relationship was acute and irreconcilable. As a result, trial counsel labored under a conflict of interest that severely and adversely prejudiced petitioner because it prevented trial counsel from presenting adequately investigated guilt and penalty defenses at trial.

a. Petitioner's representations to the court that his attorney was visiting infrequently and was not engaging with him about his case are confirmed by

trial counsel. During his representation of petitioner, trial counsel admits he not only retained his full felony caseload, but was assigned new cases up until the time he announced ready for petitioner's trial. (Ex. 150 at 2730.)

b. Trial counsel unreasonably failed to adequately investigate petitioner's case before deciding upon a trial defense. (*See supra* Claim One.)

c. Trial counsel unreasonably failed to investigate the sole guilt defense he unreasonably settled upon as a result of his inadequate investigation. (*See supra* Claim One at paragraph 2.)

d. Trial counsel unreasonably failed to investigate and present compelling penalty phase evidence. (*See infra* Claim Sixteen.)

9. The trial court and trial counsel prejudicially failed to ensure that petitioner had an adequate opportunity to present his *Marsden* motion to the court.

a. Trial counsel knew, or reasonably should have known, that petitioner was incapable of making an adequate and persuasive presentation to the trial court.

(1) Trial counsel knew that petitioner was seriously mental ill and potentially incompetent to stand trial. The facts in Claim One, *supra*, and Claims Four, Five, and Sixteen, *infra*, regarding petitioner's mental health are incorporated herein by reference.

(2) Trial counsel knew or reasonably should have known that petitioner's intellectual functioning was significantly below average and, in fact, in the range of mental retardation. The facts in Claims Four, Sixteen, and Twenty-three, *infra*, regarding petitioner's intellectual functioning are incorporated herein by reference.

b. Soon after the *Marsden* hearing, the trial court knew, or reasonably should have known that petitioner might not be competent. (1 RT 14 (court agreed to appoint mental health experts to determine petitioner's competence); *id*. at 26-27 (court noted petitioner's irrational behavior).)

c. In light of their knowledge of petitioner's compromised functioning, the trial court and trial counsel had a duty to ensure that petitioner was afforded the necessary accommodations to ensure that his Sixth Amendment right to counsel was fully protected, including, but not limited to, appointment of counsel to assist petitioner with the marshalling of facts for, and presentation of, his *Marsden* motion.

10. The trial court's failure to give petitioner a true and adequate opportunity to raise his concerns regarding trial counsel's competence, diligence, and their deteriorating working relationship and replace counsel, in light of the irreconcilable breakdown in the attorney-client relationship and trial counsel's apparent conflicting interests, denied petitioner the protections and guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

11. This deprivation of petitioner's fundamental federal constitutional rights was sufficiently prejudicial to render the trial proceedings void. It also had a substantial and injurious effect or influence on the jury's determination of the verdicts at the guilt and penalty phases, which requires the granting of habeas corpus relief from the judgment of convictions and the sentence of death.

12. To the extent that additional support for this claim should have been raised at trial or on direct appeal, petitioner's trial and appellate counsel rendered prejudicially ineffective assistance in violation of his Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection in failing to do so.

C. CLAIM THREE: THE PROSECUTOR FAILED TO DISCLOSE EXCULPATORY EVIDENCE.

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, a reliable and accurate

guilt and penalty assessment based on accurate rather than false testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and to be free of the imposition of a cruel and unusual punishment were violated by the prosecutor's failure to disclose material, exculpatory, and impeaching evidence, including evidence of threats and deals with material witnesses.

The prosecutor unconstitutionally failed to disclose material, exculpatory medical records of petitioner, including portions of medical records documenting his mental health treatment while he was held in the Los Angeles County Jail; impeachment evidence on key witnesses; and, materials documenting the flaws and unreliability of the DNA laboratory employed to conduct the DNA testing.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Four, Five, Nine, Ten, and Twelve through Sixteen, and the accompanying exhibits, are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The prosecution withheld material, exculpatory evidence from the defense. Had the prosecution obeyed its constitutional duty to disclose all relevant and material evidence to the defense, petitioner could have successfully challenged the state's case by supporting his mental state defense with compelling documentary evidence, impeached the testimony of key prosecution witnesses, and fully challenged the DNA evidence.

3. Petitioner's sole defense to the rape felony murder charge and rape special circumstance allegation rested entirely on his inability to form the specific intent to commit the charged crime and special circumstance. (Ex. 12 at 106, 107.)[9] (*See supra*

[9] Trial counsel challenged the robbery and burglary charges, independent of the mental state defense. Trial counsel presented evidence that Shamaine Love came into

Claim One at paragraph 2.) Trial counsel planned to prove that petitioner suffered from a long-standing mental illness, in large part, through the testimony of petitioner regarding his actions on the night of the crime. (Ex. 12 at 107.)

a. Petitioner testified that he began stabbing the victim, at which point he experienced a traumatic flashback to his childhood, and then blacked out. (22 RT 3335.)

b. Petitioner's next memory was of being curled in a ball and crying. (*Id*.) Petitioner testified that he had no memory of what happened from the time he blacked out until he woke up crying. (*Id*. at 3335-36.)

c. Petitioner testified that he began to experience auditory hallucinations soon after the crime (*e.g*., *id*. at 3338); the auditory hallucinations continued until petitioner shot himself point blank in the chest as a result of a voice in his head telling him "[t]hey're going to kill you." (*Id*. at 3344.)

d. While in Los Angeles County Jail, awaiting trial, a jail psychiatrist prescribed anti-psychotic medication for petitioner because he continued to experience auditory hallucinations. (*See, e.g.,* Ex. 33 at 622.)

4. The prosecution possessed, and unconstitutionally failed to disclose to the defense, a medical record that documented the longstanding nature of petitioner's serious mental illness. This medical record corroborated petitioner's testimony regarding his blackouts, and fully supported his guilt phase mental state defense.

a. Petitioner was taken into custody as a suspect in the rape of Kim Jackson on May 29, 1984 at 12:30 a.m. (Ex. 179 at 3158.)

b. During the booking process, the police observed that petitioner exhibited severe psychiatric symptoms, requiring immediate medical attention.

c. As a result, within ninety minutes of his arrest, law enforcement

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possession of Mrs. Miller's jewelry before the crime and that petitioner went to the Miller household to ask for a ride home, not to commit a felony. The jury acquitted petitioner on both the robbery and burglary charges. (2 CT 366, 368.)

officials transported petitioner to the emergency room at the Beverly Hills Medical Center, where he was examined by Dr. Strom, at approximately 1:50 a.m. (Ex. 180 at 3159.)

d. After noting that petitioner had a history of "transient memory loss," Dr. Strom diagnosed petitioner as suffering from a "transient lapse [of] memory." (*Id*.)

e. Despite being aware of petitioner's psychiatric condition, which was documented in his jail medical records (*see infra* at paragraph 5), and possessing Dr. Strom's opinion and report, the prosecution unlawfully failed to disclose evidence of petitioner's mental disorder or Dr. Strom's observations or report. (Ex. 181 at 3161.)

(1) Prior to state habeas corpus counsel obtaining Dr. Strom's report, neither petitioner nor anyone who previously represented him or worked on his case had any indication that the report existed.

(2) Petitioner obtained this report from the District Attorney only during state court post-conviction discovery proceedings, conducted pursuant to California Penal Section Code section 1054.9.

(3) Prior to petitioner receiving this exculpatory medical record from the District Attorney's office in state court post-conviction discovery proceedings, trial counsel was unaware of its existence. (*Id*.)

f. The prosecution's failure to disclose this vital evidence was highly prejudicial at both stages of petitioner's trial. The observations of law enforcement officials and Dr. Strom, as reflected in the medical record, were directly relevant to petitioner's defense at both the guilt and penalty phases of his capital trial. (*Id*. at 3162-63.)

(1) Petitioner's guilt phase defense was predicated on his mental illness preventing him from being able to form the specific intent to commit the charged crime and rape special circumstance. (Ex. 12 at 106, 107; *see supra* Claim

One at paragraph 2.)

(2) Consistent with this strategy, the defense presented evidence that during the crime petitioner dissociated and was unaware of, and thus unable to, govern his actions. (22 RT 3335-36.)

(3) The undisclosed medical report corroborated petitioner's testimony regarding the existence of his dissociative disorder and provided compelling evidence to disprove the prosecution's theory of the crime.

(4) In the penalty phase, Dr. Claudewell Thomas testified that petitioner suffered from a dissociative disorder, and that at the time of the crime, he was in a dissociative state unaware of, and unable to control, his actions. (30 RT 4435.) If Dr. Strom's report had been properly disclosed to trial counsel, Dr. Thomas would have been able to provide the jury with historical medical evidence that supported his diagnosis of petitioner's dissociative disorder. (Ex. 181 at 3162, 3163.)

(5) As a direct result of the unlawful failure to disclose the 1984 medical report, the prosecution was permitted to falsely imply, during cross-examination and closing arguments, that petitioner did not suffer from a dissociative disorder. The prosecution's unlawful withholding of this material, exculpatory evidence permitted him knowingly to falsely argue that petitioner, attempting to avoid a capital murder conviction, blatantly lied about blacking out at the time of the crime. (*See, e.g.*, 27 RT 3969 ("He only blacks out the times that he can't – he has no other explanation for").)

g. If this exculpatory medical record had been properly disclosed, trial counsel would have used it to rebut, or even prevent, the prosecution from implying and arguing that the mental health defense, which was centered on petitioner's story about blacking out, was a "sham" that petitioner fabricated in order to avoid greater legal responsibility. (Ex. 181 at 3163.)

5. The prosecution unconstitutionally withheld material, exculpatory portions of petitioner's Los Angeles County Jail medical record, thereby handicapping

petitioner's defense and permitting the prosecutor falsely to portray petitioner as a manipulative, lying con artist who feigned psychotic symptoms to avoid a capital conviction. The facts and allegations set forth in Claims Four and Five, *supra*, and Sixteen, *infra*, are incorporated by reference as if fully set forth herein.

a. Trial counsel requested petitioner's complete jail medical record to document petitioner's profound psychiatric condition and to corroborate petitioner's testimony. (Ex. 150 at 2733.) The state failed to disclose a complete set of jail records and instead, intentionally withheld documents, including those that detailed an evaluation of petitioner's mental health functioning and the clinical basis for prescribing Haldol, a powerful antipsychotic medication, to treat symptoms of psychosis.

b. The state failed to disclose those jail medical records that contained descriptions of petitioner's symptoms, the reasons why the antipsychotic drug Haldol was prescribed, and the date of that occurrence. The state continues to withhold relevant and material documents, as repeated attempts to obtain these critical records have been ineffective.

(1) The jail medical records provided to trial counsel show Haldol first being prescribed at the end of June of 1993. (23 RT 3570.) The gap in the medical records, however, made it impossible for trial counsel to establish the initial circumstances under which Haldol was prescribed; the symptoms petitioner was experiencing at the time it was prescribed; the diagnostic basis for the prescription; and, the expertise of the individual recommending the prescription. (23 RT 3562.)

(2) The prosecution capitalized on its intentional failure to disclose petitioner's complete jail medical history. The prosecutor knowingly argued falsely, in both the guilt and penalty phases, that the anti-psychotic drug Haldol was prescribed at petitioner's behest (27 RT 3971-72); prescribed much later than petitioner testified it had been (27 RT 3971 (guilt closing); 31 RT 4652 (penalty closing)); and, was specifically requested by petitioner in order to fake a mental illness (27 RT 3971-

72 (guilt closing); 31 RT 4652 (penalty closing)).

c. The prosecution's failure to disclose this material, exculpatory evidence prejudiced petitioner. Petitioner was unable to corroborate his testimony with admissible documentary evidence, lend material credence to his mental state defense, and enhance his credibility. Moreover, by intentionally withholding this information, the prosecutor knowingly was able to falsely characterize petitioner's defense as fabricated and petitioner as a lying, manipulative con artist. Petitioner was denied the right to a fair trial and a reliable guilt and penalty determination, and, but for this misconduct, the jury would not have convicted petitioner and sentenced him to death.

6. The prosecution unconstitutionally and prejudicially withheld exculpatory impeachment material for key prosecution witnesses Pamela Miller and Shamaine Love. Both of these witnesses were known drug users; Ms. Love was also a drug dealer. At no time was trial counsel furnished with information regarding deals made with either witness in exchange for their inculpatory testimony. Those facts set forth in Claim One at paragraph 8, *supra*, are hereby incorporated by reference as if fully set forth herein. The prosecution's failure to provide this impeaching information prejudiced petitioner by depriving him of information to challenge the prosecution's case, discredit two of the prosecution's main witnesses, and bolster his own testimony. Had the prosecution provided this information to trial counsel, the jury would not have convicted petitioner or sentenced him to death.

a. On July 11, 1993, Ms. Love signed a statement telling the prosecution, essentially, that she would alter her testimony to ensure the conviction of petitioner. Ms. Love wrote, in part, "if I'm wrong on any account which I don't think I am I'll add it during the testimony at court. Other than that he guilty [sic.]." (Ex. 169.) The prosecution failed to disclose this exculpatory statement made by this key witness.

(1) Part of petitioner's mental state defense involved the strong effect he experienced from his use of cocaine and marijuana the day of the crime; the

effect was heightened because petitioner had not used drugs in a long time. (22 RT 3300 (petitioner last used drugs in 1985), 3303 (it had "been a very long time since" petitioner used cocaine), 3301 (the effect of the drugs he bought from Shamaine, "was like speed. It has your mind racing, you know. Your mind is racing, paranoid.").)

(2) Ms. Love testified that in August of 1992, she regularly sold petitioner between $40-$60 worth of cocaine every week. (16 RT 2621.) Ms. Love's testimony – if believed – meant that there was no reason for petitioner to have reacted as strongly to the drugs as he said he did, and that petitioner lied on the witness stand, regarding his drug use, if not their effect. Ms. Love's biased, deal-induced testimony helped destroy a vital part of petitioner's mental state defense.

b. On December 7, 1994, the police and prosecution interviewed Mrs. Johnnie Anderson, who provided strong impeaching evidence against Pamela Miller. (21 RT 3203.) During the interview, Mrs. Anderson stated that she "loves Pam very much, [but] Pam lies." (*Id*. 3213; *see also id*. at 3199.)

(1) The prosecution intentionally excluded this statement from the police report detailing this interview provided to trial counsel. Trial counsel only learned that Mrs. Anderson considered Ms. Miller a liar when the prosecution verbally relayed the impeaching information to him. (*Id*. at 3199-3200.)

(2) Mrs. Anderson was the victim's good friend and Ms. Miller's godmother. She unequivocally refused to assist petitioner or his defense, refusing to talk to his investigator. (*Id*. at 3220.)

(3) The prosecutor intentionally restricted Mrs. Anderson's initial testimony so as to protect Ms. Miller's veracity. (22 RT 3242.) When ultimately confronted with the question of Ms. Miller's reputation for truthfulness, Mrs. Anderson claimed that she could not remember characterizing Ms. Miller as a liar to the prosecution even though she had been interviewed approximately a month prior. (21 RT 3203-06.)

(4) The lack of an official written statement prevented trial

counsel from fully confronting Mrs. Anderson and using the full force of her statement to impeach the credibility of a major prosecution witness.

(5) Ms. Miller provided highly prejudicial testimony as to petitioner's supposed behavior post-crime, including, but not limited to, his mental state and his state of intoxication. She was the lynchpin to the prosecution case, and the prosecutor used her testimony to discredit petitioner's defense and portray petitioner as a liar and a manipulator.

c. Had trial counsel been properly provided with the exculpatory evidence of Ms. Love's admission and the information that Ms. Miller's godmother considered her a liar, he effectively would have been able to impeach both Ms. Love and Ms. Miller. Failure to disclose this material, exculpatory impeachment evidence prevented the defense from revealing exactly why these important prosecution witnesses lack credibility, and why the jury should, therefore, discount their testimony. But for the prosecution's failure to disclose this damning impeachment evidence petitioner would not have been convicted or sentenced to death.

7. The prosecution unconstitutionally withheld material, impeaching information relevant to the DNA testing. Those facts set forth in Claim Thirteen, *supra*, are incorporated by reference as if fully set forth herein.

a. The prosecution conducted DNA testing in an attempt to establish that petitioner had sexual intercourse with the victim. Cellmark Laboratories conducted the testing using the DNA-Restriction Fragment Length Polymorphism (RFLP) technique for the analysis of the sperm and semen samples and the modified ceiling principal to calculate the statistical frequency. (*See, e.g.*, II Supp. 2 CT 6275.)

b. The prosecution failed to disclose any materials that would assist trial counsel in successfully demonstrating the flaws in the methods and procedures employed by Cellmark Laboratories.

c. The exculpatory materials withheld included, but were not limited to, the Los Angeles County Police Department's criminalist William Moore's bench

notes and reports documenting Cellmark's fallibilities and the unreliability of the methodology and procedures used to analyze the samples in this case.

d. Had trial counsel been provided with this information, he effectively would have been able to impeach the DNA expert and discredit the prosecution's theory of the case. As a result, petitioner would not have been convicted and sentenced to death.

8. Petitioner's conviction and sentence of death were obtained in gross violation of his constitutional rights and must be reversed. Had the withheld exculpatory, material information, described above, been properly disclosed the defense would have been able to create substantial doubt about petitioner's culpability for the crime and the special circumstances alleged. Had the prosecution lawfully disclosed the highly corroborating, mitigating, and exculpatory medical records, as well as the material and damning impeachment materials petitioner would not have been convicted of first degree murder, the special circumstance found true, or received a sentence of death. In addition, the prosecutor's false statements about the state of the evidence had a substantial and injurious effect on petitioner's constitutional rights.

D. CLAIM FOUR: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO BE PRESENT AT HIS TRIAL AND NOT TO BE TRIED WHEN HE WAS UNABLE TO COMPREHEND CRITICAL PORTIONS OF THE PROCEEDINGS OR TO COMMUNICATE AND COOPERATE WITH COUNSEL.

The convictions and sentence of death were rendered in violation of petitioner's rights to be present and to comprehend the nature and content of all pre-trial and trial proceedings, to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, and to due process of law as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because petitioner was unable to comprehend the nature of the proceedings against him or to communicate and cooperate with his counsel. Both the nature and extent of

petitioner's mental impairments were readily evident to the trial court, defense counsel, prosecutor, and other state officials who had custody and control of petitioner as a pre-trial detainee; and said individuals and officials unreasonably and intentionally failed to inquire into the need for or to employ readily available remedies to enable petitioner to comprehend and participate in the proceedings.

Petitioner was deprived of his constitutional rights to participate in the development and presentation of his defense because he was incompetent to stand trial. There is a wealth of background information relating to petitioner's life history, his functioning before and during the trial, including medical evaluations, witness accounts, and numerous other documents directly relevant to petitioner's mental functioning. This information, of which the trial court, trial counsel, and representatives of the state were aware or reasonably should have been aware, documents that petitioner has exhibited lifelong symptoms of delusional thought patterns, affective disorders, psychotic disorders, including schizophrenia, and the sequelae of severe trauma typically found in those suffering from Posttraumatic Stress Disorder.

Petitioner's multiple mental impairments were evidenced by the Los Angeles County Jail medical staff's prescribing powerful medication, including Atarax, Cogentin, Haldol, and Sinequan. Petitioner's mental defects and impairments were exacerbated by the regimen employed by jail medical personnel. Jail medical personnel prescribed these medications to treat petitioner's depression, paranoia, anxiety, and psychosis. Immediately prior to trial, the Cogentin and Haldol – which had been prescribed for sixteen months because petitioner experienced auditory hallucinations, including hearing voices – were abruptly discontinued. On the final day of petitioner's testimony during the guilt phase, however, jail officials re-prescribed those two medications, and petitioner was under the influence of these drugs throughout the remainder of the proceedings. The abrupt withdrawal and then reinstitution of the Haldol and Cogentin, coupled with the rest of the drug treatment

and his longstanding mental impairments, thwarted petitioner's participation at critical junctures of the criminal proceedings. Thus, petitioner was incompetent to understand the nature of the proceedings against him, to aid and assist his counsel in a rational manner, and to effectuate knowing, intelligent, and voluntary waivers of his constitutional rights.

The trial court's failure to declare a doubt *sua sponte* as to petitioner's competency to proceed, as well as trial counsel's failure to bring the matter to the trial court's attention, deprived petitioner of his procedural due process rights and his right to effective assistance of counsel guaranteed by the federal and California constitutions and state statutes.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Five, Sixteen, Twenty-three, and the accompanying exhibits are hereby incorporated by reference as if fully set forth herein to avoid unnecessary duplication of facts.

2. At all times relevant to this claim, petitioner suffered from a myriad of mental impairments that prevented him from comprehending or participating in any and all pre-trial and trial proceedings.

a. Petitioner exhibited lifelong symptoms of organic brain impairment, delusional thought patterns, affective disorders, psychotic disorders, including schizophrenia, sleep disorders, and the sequelae of severe trauma typically found in those suffering from Posttraumatic Stress Disorder. Petitioner possessed a history of suicide attempts and suicidal ideation from an early age, including a suicide attempt immediately prior to his arrest for the instant offenses. (Ex. 154 at 2750-52, 2757, 2760-61; Ex. 178 at 3152-55; *see also* Claim Sixteen, paragraphs 2.a.(15)-(16), *infra*.)

b. Petitioner's familial history is replete with instances of mental

illness, including psychosis, delusional beliefs, hallucinations, obsessive compulsive disorders, depression, suicidality, hyperactivity and chronic alcoholism. (Ex. 154 at 2759; Ex. 178 at 3151, *see also* Claim Sixteen, paragraphs 2.a.(1)-(11), *infra*.)

3. Although aware that petitioner exhibited signs of mental illness, the trial court, trial counsel, and state authorities failed and refused to take reasonable steps to evaluate petitioner's mental impairments, and conducted critical pre-trial and trial proceedings that they were aware petitioner could not comprehend. This information included, but was not limited to the following:

a. Petitioner had a history of suicide attempts and suicidal ideation. (Ex. 178 at 3147, 3149; 16 RT 2504; 20 RT 3172; 22 RT 3343-45.)

b. Petitioner's behavior prior to and during trial revealed his mental impairments.

(1) Petitioner was admitted to Los Angeles County Jail on September 7, 1992, following treatment at USC and UCLA Medical Centers for a self-inflicted gunshot wound. (Ex. 33 at 637.)

(2) Petitioner had periods of dizziness and blackouts while in custody. On September 18, 1992, medical personnel at the Los Angeles County Jail responded to a "man down" call involving petitioner. Jail personnel found petitioner on the floor of the jail elevator. Petitioner stated that he had passed out. (*Id*. at 651.)

(3) Jail medical personnel, noting that petitioner suffered from paranoia, depression, and anxiety, placed petitioner on a drug regimen that they determined would control his mental condition.

(a) On November 5, 1992, medical personnel observed that petitioner was "paranoid," displayed "agitation," and experienced sleep disturbances. (*Id*.) Medical personnel prescribed 200 milligrams of Sinequan once a day. (*Id*. at 674.)

(b) On November 6, 1992, the Municipal Court entered an order directed to the Sheriff of the County of Los Angeles and Medical Services Los

Angeles County Jail that petitioner was "suffering from extreme stress and need[ed] to be examined by a psychologist or psychiatrist." (1 CT 116.)

(c) On January 21, 1993, medical personnel continued the Sinequan prescription for petitioner's "disturbed sleep" and "depression." (Ex. 33 at 649, 671.)

(d) Medical personnel reviewed petitioner's Sinequan treatment on several subsequent occasions, concluding each time that the medication was medically indicated. (Ex. 33 at 663, 669 (entries for August 3, 1993, and September 21, 1993); *see also id.* at 647-48, 669-71.) Thus, petitioner took Sinequan continuously from November 5, 1992, though trial and sentencing. (*See, e.g.*, *id.* at 596, 600, 602-604, 606, 608, 610, 613, 616, 618, 620, 622, 624-25, 628, 630, 632, 634; Ex. 34 at 678, 680, 682, 685.)

(e) On June 8, 1993, petitioner was examined by Dr. E. Eugene Kunzman. Petitioner stated that he wanted vitamins; Dr. Kunzman determined that petitioner required Atarax for "nerves." (Ex. 33 at 648, 670.) Petitioner received 50 milligrams of Atarax two times a day through August 3, 1993, when the Atarax was discontinued. (*Id.* at 622, 647, 669-70.)

(f) On June 30, 1993, petitioner began taking 10 milligrams of Haldol two times a day. (*Id*. at 622.) On August 3, 1993, Dr. Kunzman continued the prescriptions for Haldol and Cogentin because petitioner was hearing "voices," but changed the dosage of Haldol to 5 milligrams once a day, and the dosage of Cogentin to 2 milligrams once a day. The prescription for Atarax was discontinued. (*Id.* at 647, 669.)

(g) On September 21, 1993, petitioner's anxiety was noted and the prescription of Atarax was reinstated at 50 milligrams three times per day. (*Id.* at 647, 669.) Petitioner continued to receive the Atarax three times a day through December 27, 1994. (*See*, *e.g.*, *id.* at 596, 600, 602, 604, 606, 608, 610, 613, 616, 618, 620; Ex. 34 at 678, 685.)

(h) On August 17, 1994, petitioner was seen by Dr. Kunzman, who noted his erratic behavior and the need to further evaluate petitioner for a possible underlying mental disorder. (Ex. 33 at 641.)

(i) On November 1, 1994, Dr. Kunzman reviewed petitioner's medical history with defense paralegal, Rhonda Cameron, and explained the reasons for the medication. (*Id.* at 640.) Dr. Kunzman concluded that no action was required with respect to petitioner's treatment at that time. (*Id.*)

(j) Without any change in medical condition or the need for the medication, petitioner abruptly was taken off of the Haldol and Cogentin on November 2, 1994. Petitioner continued to receive Sinequan, but the dosage was changed to 200 milligrams in the evening and 50 milligrams in the morning. (*Id.* at 663.) However, the order for changing the dosage of Sinequan does not appear to have been followed, and petitioner continued to receive 200 milligrams of Sinequan, as per the original orders. (Ex. 34 at 678.)

(k) On January 24, 1995, the day that petitioner concluded his testimony in the guilt phase of the trial, he again was placed on the regimen of Haldol, which continued through sentencing and until April 15, 1995. (*Id*. at 682, 690, 693.)

c. Petitioner's bizarre behavior in the courtroom, including evidence that he dissociated at critical times, raised serious doubts about his ability to understand the proceedings and assist his counsel and to testify on his own behalf.

(1) Some of the most telling signs of petitioner's inability to understand and follow the proceedings, and assist counsel occurred just after the preliminary hearing.

(a) At a hearing on December 24, 1992, petitioner was asked if he consented to setting the matter for the following month. Petitioner did not seem to follow the exchanges between the prosecutor, the judge, and trial counsel because he stated that he was agreeable to setting the matter for the following month,

as long as he was not waiving time. However, since waiving time was not an issue because 60 days had not elapsed since the preliminary hearing on December 10, 1992, neither the trial court nor trial counsel had asked petitioner to do so. (1 RT 3-4.)

(b) At the next hearing, on January 25, 1993, petitioner interjected "leave me alone, leave me alone," when no one appeared to be addressing him at the time. (*Id*. at 5-6.) Petitioner refused to waive time even though trial counsel was not prepared to defend the case, as there was still "quite a bit to be done." (*Id*. at 6-7.)

(c) On April 14, 1992, petitioner declared a conflict with his attorney which was construed as a motion brought pursuant to *People v. Marsden*, 2 Cal.3d 118 (1970). (*Id*. at 18.) Petitioner misapprehended that his trial attorney was encouraging him to agree to a plea bargain of fifteen to life. (*Id*. at 21.) In fact, no offer had been made in the case, and trial counsel explained that he was simply explaining to petitioner possible sentences for first- and second-degree murder, and manslaughter. However, at that time, he also had explained to petitioner that this was a special circumstance case, and that petitioner was facing life without parole or the death penalty. (*Id*. at 22.) After the judge denied petitioner's request to replace trial counsel, following what the judge referred to as petitioner's "outbursts," petitioner refused to speak to the judge. (*Id*. at 25, 27.)

d. During the course of his pretrial detention, jail medical personnel prescribed Atarax, an anti-anxiety medication, Cogentin, an anticholinergic medication used to control extrapyramidal disorders caused by neuroleptical drugs, Haldol, an antipsychotic medication, and Sinequan, an antidepressant.

(1) Petitioner received 50 milligrams of Atarax two times a day through August 3, 1993, when the Atarax was discontinued. (Ex. 33 at 622, 647, 669-70.) On September 21, 1993, the Atarax was reinstated at 50 milligrams three times per day. (*Id.* at 647, 669.) Petitioner continued to receive the Atarax three times a day through December 27, 1994. (*See, e.g.*, *id.* at 596, 600, 602, 604, 606, 608, 610, 613,

616, 618, 620; Ex. 34 at 678, 685.)

(2) Petitioner received 2 milligrams of Cogentin once a day from at least as early as June 30, 1993, through November 1, 1994, when the prescription was discontinued. (*See, e.g.*, Ex. 33 at 596, 600, 602-04, 606, 608, 610, 613, 616, 618, 620, 622; Ex. 34 at 680, 682, 685.) On January 24, 1995, the day that petitioner concluded his testimony in the guilt phase of the trial, he again was placed on the regimen of Cogentin, which continued through sentencing and until April 15, 1995. (Ex. 34 at 680, 682, 690, 694.) Adverse effects of Cogentin include toxic psychosis, confusion, disorientation, and an exacerbation of preexisting psychotic symptoms. Because the effects of Cogentin are rapid and cumulative, the recommended therapy is gradual initiation and gradual withdrawal of the drug. Such a therapy was not followed in the abrupt withdrawal of the drug in November or its reinstitution in January 1994.

(3) Petitioner received 5 milligrams of Haldol once a day from at least as early as June 30, 1993, through November 1, 1994, when the prescription was discontinued. (*See, e.g.*, Ex. 33 at 596, 600, 602-04, 606, 608, 610, 613, 616, 618, 620, 622; Ex. 34 at 680, 682, 685.) On January 24, 1995, the day that petitioner concluded his testimony in the guilt phase of the trial, he again was placed on the regimen of Haldol, which continued through sentencing and until April 15, 1995. (Ex. 34 at 680, 682, 690, 693.)

(4) Petitioner received 200 milligrams of Sinequan once a day from at least as early as November 5, 1992, through trial and sentencing and until April 15, 1995. (*See generally* Ex. 33 at 596-634; Ex. 34. at 678-85.) Sinequan was prescribed to petitioner to "counter symptoms of depression and facilite[] sleeping." (23 RT 3560.)

e. Petitioner's mental condition was such that trial counsel informed the court in the spring of 1993 that a competency evaluation was necessary. On March 8, 1993, trial counsel requested the appointment of two psychiatrists to evaluate petitioner "regarding his present sanity and competency to proceed with the trial." (1

RT 14.) The court appointed Dr. John Stalberg and Dr. John Mead to examine petitioner and report their findings to trial counsel. (1 RT 14-15.)

(1) Drs. Stalberg and Mead examined petitioner, reviewed only a portion of the material relating to petitioner's mental functioning, and concluded that he was competent at that time.

(2) The materials provided to Drs. Stalberg and Mead did not include petitioner's jail records or medical records (apart from the treatment records from Kedren Community Health Center), school records, or any of the other readily available social history records, which would have alerted Dr. Stalberg and Dr. Mead to the need for further evaluation and would have raised in their minds a doubt about petitioner's then mental competence.

(3) The evaluations also did not include any information from the Los Angeles County Jail medical staff. More importantly, the evaluations predated jail staff's observations of petitioner's psychosis in June 1993.

f. Evaluations conducted immediately before and during trial by defense mental health experts confirmed that petitioner's mental state had deteriorated to the point that he was incompetent to stand trial.

(1) In the fall of 1994, petitioner was examined by Dr. Claudewell S. Thomas, Professor Emeritus of Psychiatry at UCLA School of Medicine. After reviewing petitioner's medical and school records and interviewing petitioner, Dr. Thomas concluded that he suffered from a lifelong schizoaffective disorder, was paranoid and psychotic, and experiencing auditory hallucinations and referential thinking. Dr. Thomas communicated his findings to trial counsel orally and in a report dated December 7, 1994. (Ex. 154 at 2750, 2752.) Following Dr. Thomas's conclusions, trial counsel informed the court, by way of a request pursuant to California Penal Code section 987.9, that petitioner suffered from a "major dissociative process as part of a chronic schizophrenic disorder." (II Supp. 23 CT 6520.)

(2) In November 1994, William Spindell, Ph.D. administered an

abbreviated battery of psychological and neuropsychological tests to petitioner. Although Dr. Spindell's evaluation was truncated due to time constraints, he too concluded that petitioner suffers from a "severe mental disorder." Dr. Spindell further stated that his testing supported a "diagnosis of chronic schizophrenia." (30 RT 4432.)

g. Where patients, such as petitioner, exhibit serious manifestations of psychosis, competent psychiatric care permits the gradual reduction of medication only after an extended period of remission. The withholding of medication from petitioner would have been expected to produce an inevitable course of decompensation. During decompensation, an impairment of one's thought processes to a degree that one is incompetent to stand trial occurs before the onset of overt symptoms. This in fact happened in petitioner's case so that he was mentally incompetent before the outward patent symptoms of such incompetence were fully revealed.

h. Petitioner suffered significant prejudice to his trial rights due to being involuntarily medicated with Atarax and Sinequan at the guilt phase of the trial. Petitioner's medications during the guilt phase precluded his ability to communicate with defense counsel in a meaningful manner to assist in developing his capital defense. He was unable to testify persuasively about his mental state prior to, or at the time of the crimes. His demeanor was adversely affected by the medically unsound manner in which medication was given and withheld.

4. Petitioner's mental impairments remained an ongoing condition throughout the pre-trial, trial, and sentencing proceedings. Trial counsel was personally aware that petitioner could not communicate effectively with him or assist him in the preparation and presentation of a defense. As petitioner's mental condition deteriorated following the brief competency evaluations in the spring of 1993, trial counsel undertook no efforts to evaluate petitioner's competency to proceed to trial. Trial counsel unreasonably failed to move for a stay of the proceedings and/or to conduct a competent and reliable evaluation of petitioner's ability to comprehend and attend the proceedings.

a. Trial counsel also knew, or reasonably should have known, that notwithstanding any preliminary determination of the issue, and regardless of his own untrained observations, it was critical to monitor the issue of petitioner's competence constantly.

b. Petitioner's flat affect, eagerness to please, and constant efforts to appear "normal" to others, tended to mask other signs of his serious mental illness. (Ex. 154 at 2751 ("Mr. Jones devotes a great deal of energy to appearing 'normal' to others, and is anxious about how others will perceive him. . . . In conversation, Mr. Jones was generally non-reactive, and a concrete thinker. His affect was depressed and relatively flat, and at times inappropriate . . .").)

c. Significantly, trial counsel also was aware, through his own mental health expert, that petitioner's psychiatric disorders of major dissociative status and schizoaffective disorder or schizophrenia, by their nature, waxed and waned, and needed to be evaluated based upon petitioner's symptomatology and behavior over time, not at any one particular moment. (*Id.* ("Mr. Jones's psychiatric condition waxes and wanes, and can be more or less apparent or active at any given time.").)

d. Based upon his review of documents relating to petitioner and his own evaluation of petitioner, Dr. Thomas concluded, in his report dated December 7, 1994, that competence was indeed an issue. Material to this conclusion was not only petitioner's social and medical history prior to the crime, but also his consistent mental health problems while at the Los Angeles County Jail, awaiting trial, including paranoia, depression, anxiety, hallucinations, agitation and sleep disturbances. (*Id*. at 2754.)

e. Consistent with his competency finding, Dr. Thomas opined that petitioner should not testify in his own defense. Dr. Thomas cautioned trial counsel that petitioner was "not mentally fit to testify," and was surprised to learn of petitioner's testimony during the guilt phase only when the District Attorney cross-examined him during the penalty phase. (*Id.* at 2753.) In Dr. Thomas's opinion, "[t]he

reason for the flashback, its historical origins, and its nexus to the incident all were crucial aspects of a life story that [petitioner] was not equipped to tell." (*Id.*)

5. The trial court heard testimony that petitioner reported hearing voices that were consistently and insistently intruding into his thinking.

a. During petitioner's testimony during the guilt phase, trial counsel informed the court that petitioner had been prescribed Haldol, "a strong antipsychotic drug for people that hear voices." (23 RT 3542.)

b. At the guilt phase, Dr. Kunzman of the Los Angeles County Jail medical staff testified that petitioner was taking Haldol for "voices." (*Id*. at 3547.) Dr. Kunzman testified that Haldol, "one of our most potent medications," "is used for people who are describing primarily auditory hallucinations, may additionally be delusional and have paranoia." (*Id*. at 3549.)

c. In the penalty phase, Dr. Thomas testified that petitioner suffered from schizoaffective schizophrenia, "a major psychiatric disorder of a psychotic nature." (30 RT 4413-14.) Dr. Thomas described this disabling disorder as "progressive." (*Id.* at 4418.) Petitioner's disorder "is characterized by psychotic responses, either as a usual sort of thing or as an intermittent and unpredictable pattern such that an individual's customary reality-oriented judgment is disrupted." (*Id*. at 4433.) Dr. Thomas also informed the court that petitioner has experienced auditory hallucinations. (*Id.* at 4460.) Dr. Thomas also testified about petitioner taking Haldol, Cogentin, and Sinequan and Theodrine (an anti-asthmatic) while in custody. He testified that Haldol was a very powerful drug, Sinequan was an anti-depressant, and Cogentin was prescribed to combat the side effects of Haldol. (*Id.* at 4453.) Theodrine, which he did not testify about, can sometimes "produce psychosis," the opposite of the intended effect of the anti-psychotic medication Haldol. (Ex. 154 at 2754.) Ingestion of the Theodrine would have been one more indication of petitioner's potential competency problems; without an appropriate medication regimen, petitioner was not competent either to stand trial or to testify. (*Id.*)

d. The information the court received was sufficient to reasonably have raised a doubt in the mind of the trial judge whether petitioner was sufficiently mentally alert for the trial to proceed. People who are psychotic, by definition, experience periods during which they are out of touch with reality and unable to distinguish real from imaginary events. Based on the facts known to the trial judge, or which he reasonably should have apprehended, the trial judge had a duty to suspend the trial and conduct a hearing in order to determine whether Mr. Jones was able to attend to the external reality of his trial sufficiently to meet the requirement that he be mentally present.

6. Both trial counsel and the court incorrectly believed that petitioner was properly medicated during the guilt phase.

a. During petitioner's testimony and in closing argument, trial counsel informed the trial court that petitioner was receiving Haldol and Cogentin to control his auditory hallucinations and psychosis. (*See, e.g.*, 23 RT 3542.) Dr. Kunzman also believed that his patient was being medicated during the time of trial. (*Id.* at 3550, 3552, 3559, 3564.)

b. In fact, petitioner had been abruptly taken off of the Haldol and Cogentin in November 1994, prior to the start of the trial. (Ex. 33 at 640, 663.)

c. As a result, petitioner's psychosis was not being treated during the guilt phase. Dr. Kunzman, who prescribed the medication, explained to the trial court that proper titration is important to ensure treatment of the psychosis and to avoid harmful side effects: "[With an insufficient dosage], [t]he individual might demonstrate the paranoia and suspiciousness and may not be able to attend to what is going on and appear to [be] responding to voices from someplace else." (23 RT 3550; *see also id*. at 3565.) In addition, an insufficient dosage could produce concentration difficulties and impair a person's ability to answer questions. (*Id*. at 3551; *see also id*. at 3565.)

d. Petitioner experienced the very effects described by Dr. Kunzman.

The abrupt withdrawal and then reinstitution of the Haldol and Cogentin, coupled with the rest of the drug treatment and his long-standing mental impairments, thwarted petitioner's participation at critical junctures of the criminal proceedings. "The lack of appropriate medication not only distorted Mr. Jones's appearance and demeanor, but also adversely affected his ability to attend, concentrate, assist his attorneys, and testify." (Ex. 154 at 2762.)

e. Petitioner's difficulties concentrating were especially evident during his testimony when he was "straining his brain" to remember events and could not follow the prosecutor's line of questioning, admitting "you lost me there." (23 RT 3481.)

f. Petitioner's unusual demeanor in the courtroom was observed by the jury, (*see, e.g.*, Ex. 138 at 2689), and the paralegal working with trial counsel and seated everyday at counsel table who noted, "Mr. Jones also displayed dissociative symptoms during his trial. During both the guilt and penalty phases, there were times when I noticed that Mr. Jones had that blank expression and faraway look in his eyes that reminded me of a closed curtain." (Ex. 144 at 2707.) When he paid attention to petitioner on the stand, trial counsel as well "notice[d] that Mr. Jones was very fatigued during his testimony, especially during the district attorney's cross-examination. He seemed more than normally tired, and had more trouble responding to the district attorney's questions than one would expect." (Ex. 150 at 2733.) Wanda Keith, who visited petitioner in the jail after testifying in the penalty phase, noted that he did not talk much, and "seemed like he was really climbing the walls, and was not actually understanding all of what was going on." (Ex. 24 at 246.)

7. The trial court and counsel unreasonably and prejudicially failed to make appropriate inquiry and determinations as to whether the nature and severity of petitioner's mental dysfunctions impaired his ability to comprehend the proceedings, and to take reasonable steps to ensure that petitioner's ability to comprehend the proceedings met minimal constitutional standards.

a. The trial judge was aware that during the pre-trial proceedings and the trial itself, petitioner exhibited signs of bizarre behavior, which should have raised a doubt about whether petitioner was competent to follow and comprehend the proceedings and to participate, assist, and communicate with counsel during the course of the proceedings.

(1) In the face of this mounting evidence, the trial court's failure to institute competency proceedings, or even raise the issue with counsel, constituted an abdication of its judicial responsibility, and a deprivation of petitioner's fundamental constitutional rights.

(2) Despite the evidence of petitioner's incompetence, and the trial court's own ability to observe petitioner's courtroom demeanor, the trial court improperly and prejudicially failed to declare a doubt *sua sponte* as to petitioner's competency.

(3) The trial court was aware of Dr. Thomas's findings, aware of petitioner's serious mental illnesses, including psychotic breaks, aware of the powerful medications prescribed to petitioner, based upon the testimony of both Dr. Thomas and Dr. Kunzman, and aware that one other expert, Dr. Spindell had conducted testing which supported "a diagnosis of chronic schizophrenia." (*See* Ex. 154 at 2752-55.)

8. The trial court's and trial counsel's failings unreasonably and impermissibly prevented petitioner from attending, comprehending, and participating in the proceedings and consulting and assisting counsel in the presentation of his defense.

9. Trial counsel's failure to request the trial court to declare a doubt as to petitioner's competence to stand trial was professionally unreasonable.

a. Dr. Thomas had informed trial counsel in his December 7, 1994 report:

> I noted the necessity of his medication regimen at the County Jail and cautioned Mr. Manaster in my report of December 7, 1994,

about the serious competency issues: "In order to be sure that [Mr. Jones] is competent to stand trial under the provisions of 1368 P.C., he should be treated until he is free of hallucinations and delusional thought."

b. (Ex. 154 at 2754.)

c. Dr. Thomas "had genuine doubts that Mr. Jones was able to cooperate with counsel and rationally assist in the preparation of his case for trial." (*Id.*) Dr. Thomas never had the opportunity to present this information to petitioner's jury during the penalty phase, because trial counsel did not question him on the topic of competency. Dr. Thomas's professional medical opinion is clear, however: "If Mr. Manaster had asked me, I would have opined that Mr. Jones was not competent to stand trial." (*Id.*)

d. Trial counsel unreasonably failed to request a further inquiry into petitioner's competence following the disturbing findings from his own psychiatric expert. Trial counsel deficiently and prejudicially overlooked this critical issue by (1) failing to follow up on his own expert's findings (*id*. at 2754, 2761-62); (2) failing to conduct a thorough investigation into petitioner's life history and lifelong mental impairments, which also would have placed him on notice of the need to monitor the competency issue closely, and alerted him to the possibility of petitioner's fluctuating mental conditions; (3) failing adequately to request and/or review petitioner's medical records revealing the inappropriate medical regimen petitioner endured at the hands of jail psychiatric staff; (4) failing to alert his own expert to this problem, and accordingly failing to present this information to the jury through Dr. Thomas; (5) failing to adequately interview or prepare Dr. Kunzman, the jail psychiatrist, to testify on petitioner's behalf, because any minimally competent witness preparation would have revealed that Dr. Kunzman was responsible for the clinically inappropriate medication regimen and would have precluded any misleading and inaccurate testimony on the topic; and, (6) failing to monitor petitioner's courtroom demeanor at any time other

than his testimony. (Ex. 150 at 2733.)

e. Most damaging of all, trial counsel, who was aware or reasonably should have been aware of petitioner's incompetence, instead offered to stipulate to petitioner's competence immediately preceding the testimony of Dr. Thomas. (30 RT 4404-05.)

10. The resulting deprivation of petitioner's fundamental federal constitutional rights was prejudicial. The jury was affirmatively misled as to petitioner's true mental condition, and as to the medications influencing and impairing his conduct in the courtroom. The jury was also prejudicially misled about petitioner's conduct outside the courtroom. For example, the jury heard during the penalty phase that on New Year's Eve, 1994, petitioner and his sister spoke on the telephone, had an argument, during which petitioner allegedly stated, "I don't give a f--- about Pam or her family." (28 RT 4149-65.) The jury was led to believe that at this time, petitioner was drugged with anti-psychotic medication and that the effects of his paranoia, psychosis, delusional thought processes and hallucinations were controlled, and that petitioner's comments were the product of intentioned and purposeful behavior. Had they instead realized that no anti-psychotic medication was being administered to keep his psychosis in check, they would have been far more likely to discount petitioner's comments as the product of his mental illness. More importantly, had trial counsel been able to raise this issue with the trial court prior to any testimony concerning this telephone call, it is reasonably likely that he would have been able to exclude it entirely. Accordingly, these errors and omissions rendered the trial proceedings void, had a substantial and injurious effect or influence on the jury's determination of the verdicts at the guilt and penalty phases, and require the granting of habeas corpus relief from the judgment of convictions and the sentence of death.

E. CLAIM FIVE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BECAUSE HE WAS MEDICATED AT THE TIME OF HIS TRIAL.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, and to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the Los Angeles County Jail medical staff medicated petitioner during his trial, which affected his cognitive functioning and his appearance to the jury. Throughout his trial, petitioner was involuntarily under the medical treatment of personnel employed by the Los Angeles County Jail. The jail medical staff prescribed powerful medication throughout his custody in the jail. During trial, petitioner was medicated involuntarily with Atarax, Cogentin, Haldol, and Sinequan.

1. Those facts and allegations set forth in Claims One, Four, and Sixteen, and the accompanying exhibits are hereby incorporated by reference as if fully set forth herein to avoid unnecessary duplication of facts.

2. During the course of petitioner's pretrial detention, jail medical personnel prescribed Atarax, an anti-anxiety medication; Cogentin, an anticholinergic medication used to control extrapyramidal disorders caused by neuroleptic drugs; Haldol, an antipsychotic medication; Sinequan, an antidepressant medication; and Theodrine, an anti-asthmatic.

a. Petitioner received 50 milligrams of Atarax two times a day from at least as early as June 8, 1993, to August 3, 1993, and 50 milligrams of Atarax three times a day from September 21, 1993 through December 27, 1994. (Ex. 33 at 622, 647, 648, 669, 670; Ex. 34 at 678, 685.)

b. Petitioner received 2 milligrams of Cogentin once a day, from at least as early as June 30, 1993, through November 1, 1994, when the prescription was

abruptly discontinued with no clinical basis for the discontinuation indicated. (Ex. 33 at 622, 640, 663, *see also* 596, 600, 602, 604, 606, 608, 610, 613, 616, 618, 620.) On January 24, 1995, the day that petitioner concluded his testimony in the guilt phase of the trial, his prescription for Cogentin was renewed, and it continued through sentencing until April 15, 1995. (*See, e.g.*, Ex. 34 at 680, 682, 685, 690, 693.) Adverse effects of Cogentin include toxic psychosis, confusion, disorientation, and the potential exacerbation of preexisting psychotic symptoms. Because the effects of Cogentin are both rapid and cumulative, the recommended therapy is for gradual initiation, as well as gradual withdrawal, of the drug. This therapy was not followed in the administration of Cogentin to petitioner. Although the jail placed petitioner on a regimen of daily doses of these drugs for more than a year, the drugs were suddenly no longer prescribed to petitioner in November 1994; just as abruptly, the regimen was renewed, full strength, in the middle of petitioner's capital trial, in January 1995.

c. This same pattern of abrupt discontinuation and abrupt renewal also occurred with respect to petitioner's prescription for the antipsychotic medication Haldol. Petitioner received 5 milligrams of Haldol once a day, from at least as early as June 30, 1993, through November 1, 1994, when the prescription was discontinued, again without any clinical basis. (Ex. 33 at 640, 663; *see also id*. at 596, 600, 602, 604, 606, 608, 610, 613, 616, 618, 620, 622.) Once more, on January 24, 1995, the day that petitioner concluded his testimony in the guilt phase of the trial, he again was placed on the regimen of Haldol, which continued through sentencing and until April 15, 1995. (Ex. 34 at 680, 682, 685, 690, 693.)

d. Petitioner received 200 milligrams of Sinequan once a day from at least as early as November 5, 1992, through trial and sentencing and until April 15, 1995. (Ex. 33 at 663, 669, 674; Ex. 34 at 678, 680, 682, 685.)

e. Petitioner received Theodrine from approximately October 1993 through April 15, 1995. (Ex. 33 at 596, 600, 602, 604, 606, 608, 610, 613, 618, 620; Ex. 34 at 678, 680, 682, 685.) Theodrine can cause psychosis. (Ex. 154 at 2754.)

3. Petitioner's drug-induced demeanor at his guilt and penalty phases, and his altered demeanor resulting from the effects of severe interruptions in his medication regimen, inaccurately caused the jurors to perceive him negatively. (*See e.g.*, Ex. 138 at 2689.) In addition, it rendered the jurors more receptive to and more willing to believe the prosecutor's argument that petitioner was exaggerating his mental health symptoms of schizophrenia, was not mentally ill, and was fabricating the defense at trial that he had blacked out on the night in question. (*See, e.g.*, Ex. 23 at 239 ("the defense tried to make it sound like Mr. Jones had some kind of serious mental illness . . . but he looked fine to me.").) The jurors' view of petitioner was particularly influenced by petitioner's confused behavior during cross-examination.

4. By drugging petitioner, and severely interrupting his medication regimen, the state impaired his ability to testify and assist in his defense. Further, because petitioner was drugged during his trial, his defense was adversely affected not only because of his distorted appearance, but also by his inability to follow the proceedings and communicate effectively with counsel.

a. The State's unpredictable and abrupt changes in petitioner's medication regimen included the abrupt discontinuation of antipsychotic medications immediately after jail psychiatric staff consulted with a member of the defense team, and the equally abrupt reinstitution of these medications immediately following petitioner's testimony in the guilt phase. (Ex. 33 at 640, 663; Ex. 34 at 690.)

b. As trial counsel's mental health expert, Dr. Claudewell Thomas explains:

> If I had been asked, I could have testified that it was extremely important for someone with Mr. Jones's mental impairments to receive regular and proper medications, particularly to decrease psychotic symptoms as much as possible. Haldol is a difficult drug to take, and often has significant side effects, so it is not prescribed unless an individual is severely impaired.

(Ex. 154 at 2754.)

c. Prior to these alterations, petitioner did not receive the lowest dosage of the drug that can be prescribed, 1.25 milligrams or 2 milligrams; instead, he received the much higher dosage of 5 milligrams at a time, (*id*.), ensuring that the clinically inappropriate fluctuations would have an even more deleterious impact.

5. Moreover, the prejudice caused by the creation of a negative demeanor is not simply that petitioner appeared indifferent and cold. The medication inhibited petitioner's capacity to react and respond to the proceedings and to demonstrate remorse or compassion.

6. Petitioner also suffered significant prejudice to his trial rights at his penalty trial due to the involuntary administration of antipsychotic drugs during the proceedings and the effects of the severe interruptions in his medication regimen. The prejudice to petitioner from being administered antipsychotic drugs was acute during the sentencing phase of the proceedings. The jurors necessarily assessed his mental state before, during, and after the commission of the offenses in reaching their determination of penalty. (*See infra* Claim Twelve.) However, as a result of the medication, petitioner conveyed to the jurors the impression that he lacked remorse and that he did not care whether the jury imposed a sentence of life or death.

7. In addition, as a result of the antipsychotic medication, and the effects of the severe interruptions in his medication regimen, petitioner could not assist defense counsel meaningfully, rationally, and fully in developing mitigating evidence to present during his penalty trial or in participating in the development of a defense at trial.

8. Further, because petitioner was heavily drugged and also suffering the effects of severe interruptions in his medication regimen, he was unable to present to the jurors evidence of his mental condition without the masking and distorting effects of medication. The central mitigating fact defense counsel attempted to present to the jury was the reality of petitioner's mental illness and its disabling effect upon his

mental faculties and behavior. To the extent that the jurors empathized with petitioner's mental illness, they would have viewed him also as a tragic victim in this case. But petitioner was unable to demonstrate the reality of his underlying mental dysfunction in its most convincing form - the unfettered presentation of himself to the jurors in an unmedicated state, which was the state he had been in prior to and at the time of the offenses. (*See, e.g.*, Ex. 138 at 2689 (petitioner's behavior led a juror to inform other jurors petitioner was medicated with antidepressants).)

9. Petitioner was effectively barred from presenting to the jury significant mitigating evidence, i.e., the closest possible replication of his mental state and outward appearance as it existed at the time of the offenses. Physically, petitioner looked very different at trial than he had at the time of the offenses, due to side effects of the antipsychotic medication he was being administered and the effects suffered by the interruption of his medication regimen.

10. Petitioner is entitled to have his guilt and penalty verdicts invalidated, even if the administration of antipsychotic drugs were indicated in order to render petitioner competent to stand trial. Assuming, arguendo, that the prosecution could have established or did establish that it was necessary to administer antipsychotic drugs to petitioner, such justification is insufficient to overcome the violation of his right to due process caused by his having been administered antipsychotic drugs during his capital murder trial.

11. Petitioner is entitled to have the guilt and penalty verdicts invalidated even if he is deemed to have consented to being medicated with antipsychotic drugs during his trial proceedings. Even if petitioner were to be deemed to have assented to the administration of antipsychotic drugs during his criminal proceedings, his then current mental state prevented such acquiescence from constituting an informed and valid consent, and rendered his competency and capital trials fundamentally unfair.

12. The prosecution of petitioner while he was taking antipsychotic medication, whether voluntarily or involuntarily, violated petitioner's right to counsel

under the Sixth Amendment; his right to due process of law under the Fifth and Fourteenth Amendments; and his rights to a reliable death judgment rendered by a jury supplied with accurate record information, rather than misinformation, and to be free from cruel and unusual punishment under the Eighth Amendment. Petitioner was impermissibly forced to choose between his constitutional right to medical treatment and his constitutional rights to effective assistance of counsel and a reliable death judgment, in violation of his right to due process under the Fourteenth Amendment to the United States Constitution. In addition, prosecuting petitioner while he was medicated with antipsychotic drugs violated his constitutional rights to present witnesses, to present defenses, and to compulsory process.

13. The administration of antipsychotic medication to petitioner during his capital murder trial, whether done involuntarily or with petitioner's consent, prevented petitioner from being mentally present at his guilt and penalty trials, and therefore violated petitioner's rights to counsel and to confront witnesses under the Sixth Amendment; his right to due process of law under the Fifth and Fourteenth Amendments; his rights to a reliable death judgment and to be free from cruel and unusual punishment under the Eighth Amendment. In addition, his rights to present witnesses, to present a defense, and to the use of compulsory process were violated. Moreover, petitioner's mental absence at each phase of his capital trial was a structural defect in each of those proceedings within the meaning of *Arizona v. Fulminante*, 499 U.S. 279 (1991), such that prejudice must be presumed, inasmuch as it cannot be quantified.

14. In violation of petitioner's Sixth Amendment right to effective assistance of counsel, trial counsel unreasonably and prejudicially failed to object to the drug regimen, object to the capital murder trial proceedings on the ground that petitioner could not obtain a fair trial while being medicated with antipsychotic drugs, even if he consented to being so medicated, or take other steps to protect petitioner's rights. Trial counsel had no strategic reason for failing to object to petitioner's drug regimen. In

fact, trial counsel was deficient for failing even to be aware of the improper treatment of his client, and requesting no change in his client's medications. (Ex. 150 at 2733.)

> Mr. Manaster never asked me to request that Mr. Jones's psychiatric medications be discontinued at any time. Mr. Jones knew that Mr. Manaster and I recognized that he required, and was taking, these strong psychiatric medications. In fact, Mr. Jones also understood that Mr. Manaster and I firmly believed that he should continue taking them because they helped alleviate some of the symptoms of his mental illness.

(Ex. 144 at 2706.)

15. Trial counsel further unreasonably and prejudicially failed to assert petitioner's constitutional right to present himself to the jury in an unmedicated state in order that the jurors could observe his demeanor while in that state.

F. CLAIM SIX: THE CONDUCT AND RULINGS OF FORMER JUDGE GEORGE TRAMMELL TO PETITIONER'S CASE VIOLATED THE CONSTITUTIONAL GUARANTEES TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Petitioner's death sentence and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process of law, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to be free of cruel and unusual punishment, and to effective assistance of counsel because the judge who ruled on virtually all of the pretrial motions and empanelled petitioner's jury had a conflict of interest and disabling psychological condition that prevented him from being an unbiased decision-maker. Former Judge Trammell was tried and convicted in federal court for coercing a defendant to have sex with him in exchange for a more lenient sentence for her husband, conduct which occurred soon after petitioner's trial. The judge's conduct and impairments denied petitioner access to a fair tribunal and a fair trial, undermining and

rendering unreliable the guilt and penalty phase verdicts.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims Seven, Eight, Ten, Eleven, and Thirteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Former Judge George W. Trammell, III, who presided over the majority of petitioner's pre-trial hearings, suffered from a disabling pathology that prevented him from fulfilling his duties as an unbiased decision-maker in petitioner's case.

a. The former judge's condition left him wholly incapable of sitting objectively on a case involving a charge of sexual assault.

b. The judge's behavior included, but was not limited to, coercing a defendant to have sex with him in order to obtain a more lenient sentence for her husband, a sentence which resulted from the judge's refusal to sign a negotiated plea agreement and biased treatment of defense motions. (Ex. 137 at 2674-80.)

c. The coerced sexual relationship, which underlay charges for which Former Judge Trammell was convicted and sentenced to federal prison, began shortly after he presided over petitioner's trial. The same pathology led Judge Trammel to make favorable factual and legal decisions in petitioner's case that favored the prosecution in an attempt to avoid suspicion of his criminal behavior, curry favor with the authorities, and rationalize and distance himself from his own criminal behavior to prevent any allegation he was being "soft" on crime in cases where he was not extracting sexual favors in exchange for leniency.

3. Former Judge Trammell presided over most of petitioner's pretrial hearings, including hearing and ruling on the most important, outcome-determinative motions in the case. (*See supra* Claim Two, *infra* Claims Seven, Eleven, and Thirteen.) These rulings remained binding even after Judge Ferns was assigned to the

case.

a. Former Judge Trammell presided over jury selection and rendered illogical, benighted, and erroneous rulings,[10] including but not limited to, the following:

(1) Despite the importance of the question, and having allowed otherwise similar questions, former Judge Trammell refused to permit trial counsel to ask whether or not evidence of a prior sexual assault would cause the prospective juror to automatically vote for death. (2 RT 726.)

(2) Former Judge Trammell's rulings on for-cause challenges were irrational and improper, excusing at least two jurors based on their "body language." (9 RT 1792 (prospective juror Rich), 11 RT 2200 (prospective juror Uzan).)

(3) During his colloquy to the prospective jurors, he misstated settled law. (See, *e.g.*, 11 RT 2036 (jurors may consider mitigating evidence as aggravation).)

b. Former Judge Trammell inexplicably acquiesced to the prosecutor's preferences in dealing with deoxyribonucleic acid (DNA) evidence, despite having expressed desire to proceed differently.

(1) Despite having ruled in favor of the prosecution's motion to proceed via judicial notice in lieu of live witness testimony at the DNA hearing, former Judge Trammell repeatedly complained about the absence of live witnesses. (1 RT 573, 664-65.)

(2) Former Judge Trammell refused to appoint an expert to assist the court, despite repeatedly acknowledging his own limitations in understanding the DNA evidence. (*Id*. at 574-75.)

(3) Former Judge Trammell ruled that the DNA evidence met the

[10] These erroneous ruling are more fully set forth in Claims Seven and Eight, *infra*, and incorporated herein by reference as if fully set forth.

Kelly-Frye standard for admissibility despite recognizing that the complexity of the evidence required expert explanation for him to render a reasoned ruling. (*Id*. at 665.) Former Judge Trammell should have sought the expert advice that the complex scientific evidence required. The lack of such evidence left former Judge Trammell unable to make a reasoned ruling on whether the evidence met the *Kelly-Frye* standard. (*Id.*)

c. Former Judge Trammell ruled that the prior crime involving Mrs. Harris satisfied the requirements of California Evidence Code section 1101, and subject to a relevance finding to be made at trial, the prosecution could present evidence of petitioner's rape of Mrs. Harris to show intent, motive, common plan, or scheme. The facts alleged in Claim Ten, *infra*, are hereby incorporated by reference as if fully stated herein.

d. Former Judge Trammell deferred a complete ruling on the admissibility of the DNA and prior crimes evidence until trial, even though trial counsel requested earlier rulings so that he could adequately prepare for trial. The facts alleged in Claims Ten and Thirteen, *infra*, are hereby incorporated by reference as if fully stated herein.

4. Former Judge Trammell also made factual and legal decisions favorable to the prosecution for a variety of motives, including but not limited to, currying favor with the authorities and avoiding suspicion that might otherwise be generated by his planned and actual conduct, thereby avoiding investigation and detection of his activities; and, as a means of potentially securing lenient treatment in the event his misconduct was discovered and prosecuted by the authorities. His rulings favoring the prosecution, as a means of rationalizing or otherwise reducing his own moral and legal guilt for his actions, unfairly impeded his ability to preside impartially.

5. Former Judge Trammell's disabling psychological impairment and conflict of interest denied petitioner a fair trial and a reliable determination of guilt and penalty. The denial of an impartial tribunal automatically requires the granting of

habeas corpus relief. The effects of Judge Trammell's partiality had a demonstrably substantial and adverse effect and influence on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial. Absent former Judge Trammell's biased and self-interested conduct and rulings, petitioner would have obtained a more favorable result at the guilt and penalty phases of his capital trial.

G. CLAIM SEVEN: THE TRIAL COURT PREVENTED AN EFFECTIVE INQUIRY INTO PROSPECTIVE JURORS' BIASES.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair trial, an impartial jury, and a reliable, rational, and non-capricious determination of penalty, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, because the trial court permitted an improper and one-sided voir dire of the jurors and failed to ensure that the prospective jurors' biases were revealed. Among other errors, the trial court failed to oversee the process of jury selection, did not permit the defense to ask questions necessary to detect juror bias, made prejudicial misstatements of law, and failed to correct trial counsel's legal misstatements. As a result, the jury that was seated in petitioner's case violated his right to a trial by an impartial jury.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Eight, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The trial court failed to fulfill its duty to ensure that information provided by the jurors, both in the questionnaires and during voir dire, was sufficient to permit the informed exercise of peremptory challenges as well as challenges for cause.

3. The trial court failed to ensure that the voir dire was conducted in a fair

and impartial manner, resulting in questioning that did not address the major theory of the case.

a. The juror questionnaire served as the basis for voir dire and for cause challenges. The trial court failed to oversee the jury questionnaire process and failed to review the final questionnaire adequately to ensure it was fair and accurate.

b. Because of the trial court's failures, vital questions were omitted. For example, the questionnaire failed to address the jurors' automatic predisposition to impose a death sentence under the primary theory presented by the prosecution. The prosecutor advanced two theories of first degree murder: premeditated and deliberate murder and felony murder. The questionnaire only addressed jurors' predisposition on the premeditation and deliberation theory. (*See, e.g.*, II Supp. 4 CT 1091.)

c. The court, the prosecution, and trial counsel understood that felony murder was the theory most likely to deliver a first degree murder conviction. Moreover, the jurors were instructed on felony murder (2 CT 291) and they convicted petitioner of felony murder rape (*Id.* at 365).

d. The trial court clearly erred in failing to ensure that any prejudice a potential juror might have, that would render the juror incapable of following the court's instructions regarding the primary theory of capital murder, would be uncovered.

4. The trial court further prejudicially violated petitioner's constitutional rights by refusing to permit reasonable questions designed to detect juror bias, on the basis that the questions asked the jury to "prejudge the case."

a. The trial court refused to allow defense counsel to ask prospective jurors, "[I]f you find out or the evidence shows that the defendant has previously been convicted of an offense or a sexual offense, would that automatically cause you to vote for death." (2 RT 725-26.)

b. Explaining why it believed such questions were improper, the trial court offered a distinction without a difference. The judge explained that if it had been

a multiple murder case, then similar questions about multiple murder would be permissible because "the jury has to have an open mind" regarding the multiple murder special circumstance; whereas, he "reasoned" this case involved a prior conviction for a sexual offense. (*Id*. at 727-28.) The trial court failed to explain why it was more important for the jury to "have an open mind" about a special circumstance, which would determine whether or not petitioner was eligible for a death sentence as opposed to a factor in aggravation in the penalty phase that assists in determining whether or not petitioner lives or dies.

c. Trial counsel's efforts to explain that rape was alleged as a special circumstance and would be used as a factor in aggravation, in any necessary penalty phase, were unavailing. (*Id.* at 728.)

d. The trial court's faulty reasoning prevented trial counsel from asking basic questions about bias from the jurors who would decide whether petitioner would live or die.

e. The trial court further improperly and prejudicially violated petitioner's constitutional rights by inconsistently applying the prejudging rationale. Questions by defense counsel deemed as asking a potential juror to prejudge the case were not permitted; whereas, "prejudging questions" offered by the prosecution were permitted. (*See, e.g*., 5 RT 1211(would potential juror always vote for life without parole sentence); 10 RT 1989; 12 RT 2232.

5. The trial court also made significant, prejudicial misstatements of governing law.

a. The trial court informed prospective jurors that one juror could consider some evidence mitigating while another juror might consider the same evidence aggravating. (*See e.g.*, 11 RT 2036.)

b. To the contrary, much of the penalty phase evidence may only be considered for its mitigating value or lack thereof, not as aggravation. These misstatements of law were prejudicial to petitioner.

6. The trial court failed to correct misstatements of the law offered by trial counsel.

a. During his explanation of the penalty phase, trial counsel incorrectly stated that if the jury found substantial aggravation and no mitigation, then the death penalty was mandatory. (*E.g.*, 5 RT 1250.) Trial counsel also explained that a lack of mitigating evidence is aggravating. (*E.g.*, 5 RT 1250; 8 RT 1638 ("if we didn't put on any evidence in that stage that would be an aggravating thing").)

b. The trial court failed to correct either of these blatant prejudicial misstatements of law.

7. The individual and cumulative effect of the trial court's failures to supervise jury selection adequately had a substantial and injurious influence or effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

8. Trial counsel's failure to object to the trial court's erroneous statements of law, failure to oversee the jury selection process adequately, and failure to state the law correctly during voir dire constituted prejudicial ineffective assistance of counsel.

9. Similarly, petitioner was deprived of his Sixth Amendment and Fourteenth Amendment rights by appellate counsel's unreasonable and prejudicial failure to litigate the trial court's failure to protect petitioner's rights to an impartial jury and a reliable, rational, and non-capricious determination of penalty.

H. CLAIM EIGHT: THE TRIAL COURT VIOLATED PETITIONER'S RIGHTS TO A FAIR AND IMPARTIAL JURY WHEN IT UNREASONABLY DENIED CAUSE CHALLENGES.

The sentence of death was rendered in violation of the petitioner's right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court unreasonably sustained and denied for-cause challenges, thus ensuring a death-prone jury. Specifically, the judge excused prospective jurors for

cause that were pro-life and denied for-cause challenges for prospective jurors who were pro-death. In the absence of an adequate factual basis and record to justify these rulings, the judge attributed his decisions to the jurors "body language." The trial court's unreasonable decisions were apparent from the prospective jurors' questionnaires and the record on appeal.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One and Seven, and the accompanying exhibits, are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The trial court determined prospective jurors were unfit, or fit, to sit as jurors based upon a personal, arbitrary, and purposefully unreviewable standard. The trial court's factual findings were not fact-based and, therefore, not entitled to deference.

3. Prospective jurors completed a twenty-five page questionnaire, regarding, *inter alia*, their opinions on the death penalty. Following Judge Trammel's individual voir dire, both counsel were given an opportunity to further inquire into each prospective juror's personal feelings, beliefs, and attitudes regarding capital punishment.

4. The prosecution successfully moved to have prospective jurors Rich and Uzan removed for cause. Having demonstrated that both prospective jurors were qualified to sit on a capital case, trial counsel objected to the trial court's erroneous finding of substantial impairment and sustaining of the prosecution's for-cause challenges. (*See* 9 RT 1792 (Rich); 11 RT 2200 (Uzan).)

5. These jurors were improperly disqualified, in violation of petitioner's constitutional rights, because their voir dire clearly indicated that neither juror possessed views that would "substantially impair the performance of his duties as a

juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 419-422 (1985) (internal citation omitted).

a. The answers in prospective juror Rich's juror questionnaire and his responses during individual voir dire did not form a basis for Judge Trammell's erroneous and improper dismissal.

(1) Prospective juror Rich indicated in his juror questionnaire that: he believed the death penalty should only be used when there was "no doubt as to defendant[']s guilt" (II Supp. 10 CT 2918); he "strongly disagreed" with the statement "the death penalty should never be used" (*id*. at 2923); and, whether or not he would vote for the death penalty would depend on "the individual situation and the circumstances of each case." (*Id*.)

(2) During individual voir dire, Mr. Rich stated that he believed that the death penalty had a place in society as a punishment for a "special circumstance murder," and that he could "personally vote" to impose the death penalty. (9 RT 1780.) When the prosecutor asked him about "beyond all possible doubt," Mr. Rich said that he "was thinking he meant reasonable . . . you know, beyond a reasonable doubt. The terminology is a little confusing to tell you the truth." (*Id*. at 1789.) Mr. Rich further stated that the prosecutor did not have to prove his case to an "absolute certainty" because it was "impossible to prove something 100 percent." (*Id*. at 1790.) He then explained that he understood making factual determinations as a juror required listening to the evidence and "weigh[ing] things out." (*Id.*)

(3) Despite these unambiguous statements, the trial judge granted the prosecutor's motion for cause on the basis that he had a "feeling from the body language the way the questions were answered [and] something that doesn't come out in the transcript that [Mr. Rich] was trying to tailor his answers . . ." (*Id*. at 1792.)

b. Judge Trammell's improper dismissal of prospective juror Uzan similarly was not properly based on either the answers Mr. Uzan gave in his juror

questionnaire or during individual voir dire.

(1) Prospective juror Uzan stated in his juror questionnaire that he disagreed "somewhat" with the statement that the death penalty should always be used when someone intentionally killed another. (II Supp. 14 CT 3925.)

(2) In individual voir dire, Mr. Uzan stated that his views on the death penalty weren't "black and white," that his "feet weren't in cement," about the issue (11 RT 2194, 2196); and, if the facts of the case warranted the death penalty he could impose it. (*Id.* at 2198.)

(3) In granting the prosecutor's for cause challenge, Judge Trammell mused:

> My feeling, and I think some of this is based on body language, watching him answer and the manner of answering as well as the words, I believe there is substantial impairment. I believe that he could perhaps under the worst circumstances, but my feeling is that this is a good example of substantial impairment short of absolutely never voting for it.

(*Id.* at 2199-200.)

6. The trial judge employed his unique, arbitrary, unreviewable, and wholly unconstitutional method of determining fitness to find that the body language of pro-death prospective jurors indicated their pro-death views would not "substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath." *Wainwright v. Witt*, 469 U.S. at 433 (internal citation omitted).

a. Prospective juror Labbee should have been dismissed for cause, as requested by trial counsel; her questionnaire and individual voir dire indicated that her pro-death penalty views made her a classic and proper candidate to be dismissed because her views would substantially impair her ability to follow the law and be fair and impartial.

(1) In her questionnaire, prospective juror Labbee stated that she supported the death penalty (II. Supp. 7 CT 1840); believed a defendant's background was "irrelevant" to whether he should get the death penalty (*id*. at 1843); and clarified that not all intentional murders warranted the death penalty because the crime may have been committed for reasons of self-defense. (*Id*. at 1845.)

(2) During voir dire by trial counsel, Ms. Labbee stated that a defendant's background or his problems growing up would not factor into her penalty assessment. (7 RT 1343). Upon questioning by the prosecutor, Ms. Labbee confirmed that she would follow the judge's instructions (*id.* at 1344), but also that she was "thinking just how myself in my own mind would be looking at the case," not about it having anything to do with the court's instructions (*id.* at 1344-45). The court observed that Ms. Labbee gave two conflicting answers depending on who was asking the questions. (*Id*. at 1344.) With much coaching from Judge Trammell, Ms. Labbee then agreed that she would consider information on a defendant's background. (*Id.* at 1345.)

(3) Trial counsel's motion to dismiss Ms. Labbee for cause was denied, because although her voice informed the parties and the court that she would not consider evidence in mitigation should the trial reach the penalty phase, her "body language" informed the trial court otherwise. As Judge Trammell explained, "[my] feeling, yes, she did get rehabilitated and I did it. I tried not to do it in a Ramseyer atmosphere. It's a judgment call and I – the body language I feel is an honest answer." (*Id*. at 1346.)

(4) As a result of the trial court's improper ruling, trial counsel was forced to exercise a peremptory challenge on Ms. Labbee. (*Id.* at 2319.)

b. The trial court improperly denied trial counsel's motion to dismiss prospective juror Okamuro for cause because of her pro-death penalty views.

(1) In her questionnaire, Ms. Okamuro stated that she believed in the death penalty because "if a person has intentionally taken another person's life,

then that person should have to pay" (II Supp. 7 CT 2016); and the causes for crime in today's society were a "lack of respect for other people and their property and a lack of discipline." (*Id*. at 2012.)

(2) During individual voir dire, Ms. Okamuro admitted that she would have "a lot of sleepless nights" thinking about the appropriate penalty. (7 RT 1457.)

(3) Even though trial counsel joined the prosecution's motion to excuse Ms. Okamura, the trial court denied the agreed-upon, uncontested challenge, deciding that Ms. Okamuro's "body language" told him she could impose a death verdict. (7 RT 1460.) Nothing in Ms. Okamuro's juror questionnaire or voir dire indicated that she could not return a death verdict; the prosecution's concern was that her ability to perform her duties as a juror would be impaired because she would "have a lot of sleepless nights." (*Id.* at 1457).

7. The trial judge improperly exercised his discretion in an arbitrary, unreviewable, and wholly unconstitutional fashion that resulted in an unconstitutional death-prone jury sitting in judgment of petitioner. The trial court relied on the highly subjective factor of a prospective juror's "body language" as a basis for determining whether or not a prospective juror's views and opinions would substantially impair her ability to follow the law. By employing this highly subjective, irrational, arbitrary, and wholly unreviewable factor, the trial court violated petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

8. Individually and cumulatively, the effect of the trial court's improper dismissal and retention of prospective jurors had a substantial and injurious influence or effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

9. To the extent trial counsel and/or appellate counsel failed to challenge the trial court's erroneous dismissal of qualified prospective jurors and refusals to dismiss unqualified prospective jurors, on any and all of the foregoing grounds, trial counsel

and/or appellate counsel were constitutionally and prejudicially ineffective.

I. CLAIM NINE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE RAPE CONVICTION, RAPE FELONY MURDER CONVICTION, AND RAPE SPECIAL CIRCUMSTANCE.

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, conviction upon proof beyond a reasonable doubt, the presumption of innocence, a reliable and accurate guilt and penalty assessment based on accurate, rather than misleading or false, testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and be free of the imposition of a cruel and unusual punishment were violated when he was held to answer and convicted of crimes for which the prosecution failed to marshal sufficient or any evidence of his guilt on key charges and a critical special circumstance.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Four, Five, and Twelve through Sixteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Petitioner was charged with the crimes of murder, rape, burglary, and robbery, as well as special circumstance allegations of rape, burglary, and robbery. On December 10, 1992, after he was held to answer on the murder charge and the robbery special circumstance allegation, the court granted trial counsel's motion to set aside the information, pursuant to California Penal Code section 995, and struck the rape and burglary special circumstance allegations for lack of evidence. (1 CT 84.)

3. On September 1, 1993, the prosecution filed an amended information, re-charging the murder, with the rape, burglary, and robbery special circumstance

allegations, as well as separate charges of rape, robbery, and burglary. (1 CT 98-102.) Despite the earlier ruling, trial counsel's motion to strike the information was denied by Judge Trammell. (1 RT 521-22.)

4. At trial, the prosecution attempted to prove that petitioner "went to the home of Julia Miller with the intent to steal, rape, and rob her." (26 RT 3897; *see also* 16 RT 2500 (opening statement).) The prosecution attempted to prove that upon entering her home, petitioner attacked the victim, and then stabbed the victim to death after completing the sexual assault. According to the prosecutor, after petitioner killed Ms. Miller, he allegedly stole only a few pieces of the victim's jewelry, which he exchanged for drugs. (26 RT 3902-03, 3897.)

5. At the time of the preliminary hearing, the prosecution possessed insufficient evidence that petitioner raped the victim and this circumstance remained unchanged throughout trial. Petitioner should never have been forced to defend against a rape charge at trial. As a result of the confusing and inconsistent jury instructions (*see* Claim Twelve, *infra*), petitioner was convicted of rape, rape felony murder, and the rape special circumstance was found true, despite the lack of any evidence, let alone sufficient evidence.

6. No evidence adduced at trial supported petitioner's rape and rape felony murder convictions and the true finding for the rape special circumstance. (*See supra* Claim One at paragraph 3.) Minimally, the legally competent evidence was insufficient on these charges. Petitioner's conviction on these charges violated his fundamental constitutional rights to due process of law and must be overturned.

J. CLAIM TEN: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BECAUSE HIS JURY WAS ENCOURAGED TO DRAW IMPERMISSIBLE INFERENCES REGARDING PETITIONER'S CULPABILITY AND SPECIFIC INTENT FROM HIGHLY INFLAMATORY PROPENSITY EVIDENCE INTRODUCED DURING THE GUILT PHASE.

Petitioner's conviction and death sentence were rendered in violation of his

federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fair trial, a non-arbitrary and capricious determination of guilt, freedom from cruel and unusual punishment, and effective assistance of counsel as a result of the trial court's erroneous admission and failure to properly instruct the jury on the facts and circumstances surrounding petitioner's prior rape conviction. Defense counsel was ineffective for failing to properly limit the impact of the highly inflammatory evidence once improperly admitted. Finally, the prosecutor used the evidence of the prior crime as improper propensity evidence to impermissibly alleviate the burden of proof on the state for the felony murder charge and rape special circumstance. A jury may not base its determination of guilt on an inference that the defendant has a propensity to commit the crime charged because of prior crimes or other acts, because of the inflammatory nature of such evidence and its irrelevance to disputed facts. During petitioner's trial, invitations for the jury to draw propensity inferences from prejudicial evidence of prior crimes and other acts gravely undermined the fundamental fairness of the trial.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Twelve, Fourteen, Sixteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. At trial, the prosecutor argued the 1986 prior crime that petitioner committed and the Julia Miller homicide were unique, distinctive crimes and admissible as identity, intent and a common plan or scheme pursuant to California Evidence Code section 1101(b). (1 RT 681-82.) Over petitioner's objection, the court concluded that the 1986 crime was relevant to intent, common plan and design, and identity, but reserved ruling on whether to exclude it based on Evidence Code section 352. (1 RT 688; *see also* 14 RT 2377.) When the trial court later refused to rule on

the admissibility of the 1986 crime, trial counsel withdrew his objection. (14 RT 2382-83.)

3. Evidence of prior acts introduced against petitioner during the guilt phase was not probative of the disputed issues in his trial.

a. The facts of the 1986 prior crime involving Mrs. Doretha Harris demonstrated a chaotic and disturbed series of events. Petitioner's mental illness precluded any ability to plan, thus his spontaneous actions could not be indicative of a common scheme or plan in his capital trial.

(1) In March 1985, petitioner was homeless and experiencing extreme stress and mental turmoil. (Ex. 8 at 88; Ex. 14 at 137.) He went searching for his ex-girlfriend, Glynnis Harris, and their son, Tristan, at the home of Glynnis's mother, Mrs. Harris. Petitioner was motivated by the paranoid belief that Glynnis and her mother would never allow him to see his son again. (Ex. 178 at 3147.) As Petitioner stood outside the residence, he fell into a trance-like state and began to hear voices. (*Id.*) Though he had decided not to enter the home just moments earlier, the voices were overwhelming; along with voices in his head, petitioner "felt an overwhelming force driving him to go into the house." (*Id.*) Petitioner felt as though he was watching a movie where he could view, but not control his actions. The tragic encounter that took place that day was the direct result of petitioner's psychosis, paranoia, and stress and fear induced dissociation. (*Id.*) Those facts regarding petitioner's mental state, immediately preceding and on, the day of the Harris incident set forth in Claim One *supra*, and Claim Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

(2) Petitioner's inability to plan a crime at this time is evidenced by the rash and erratic nature of his encounter with Mrs. Harris.

(a) In broad daylight, he smashed a bedroom window and crawled through (20 RT 3162-63); when he saw Mrs. Harris in the hallway with a knife, he engaged in an abrupt, disjointed, and out-of-control assault on her. (*Id*. at

3163-69.)

(b) Following the assault, he curled up on the bed and fell asleep rather than try to leave (Ex. 136 at 2670; 20 RT 3169); later he sat with Mrs. Harris and cried while viewing a picture of himself with Glynnis and Tristan. (20 RT 3171.)

(c) Petitioner did not arm himself before the encounter and did not wield a weapon against Mrs. Harris (*see id*. at 3172); the only time petitioner handled a weapon was when he pressed a knife to his stomach, and pleaded with her to kill him. (*Id*.; *see also* Ex. 136 at 2669-70.)

(3) Those who contemporaneously observed petitioner's actions following his arrest recognized that, indeed, the confusing, disordered, and bizarre events were the product of mental illness rather than methodical thought. The investigating officer regarded Mr. Jones as mentally ill (Ex. 104 at 2184), and an in-custody evaluation of petitioner concluded that the offense reflected "underlying mental and emotional problems" (*id*. at 2177).

(4) In 1986, petitioner pled guilty and was sentenced to twelve years in prison for the burglary, rape, sodomy, and robbery of Doretha Harris. (20 RT 3148-49.)

(5) To the extent that this information was not developed and argued during trial, petitioner's counsel performed ineffectively. Had such an investigation been undertaken, trial counsel would have found evidence of petitioner's extremely disordered mental state at the time of the prior crime, and the introduction of the prior crime evidence to prove a common scheme or plan theory during the guilt phase of petitioner's capital trial would have been precluded. (*See supra* Claim One at paragraph 9.)

b. The plan or scheme supposedly represented by the prior crime was not sufficiently similar to the facts of the capitally charged crime to be probative of the disputed issues at trial.

(1) Petitioner had a friendly relationship with Julia Miller, and was involved in a casual relationship with her daughter, Pam Miller, at the time of the crime. In contrast, Mrs. Harris and petitioner had a strained, distrustful relationship, and petitioner was estranged from her daughter, Glynnis, at the time of the attack.

(2) The Harris crime involved petitioner entering the home without permission, and the assault ensued almost immediately upon entry. In the latter case, petitioner was invited into Mrs. Miller's home, the two socialized and Mrs. Miller prepared food for petitioner. (26 RT 3904.)

(3) At the time of the Harris crime, petitioner had no job and no source of income. (Ex. 14 at 136-37.) He took forty dollars from the victim's purse, but he did not take jewelry or other items. (Ex. 136 at 2670.) At the time of the capital crime, petitioner was receiving over $150 monthly from the county General Relief program. (22 RT 3381; Ex. 8 at 89.) He was not charged with taking money, credit cards, or checks from the victim despite the availability of these items in Mrs. Miller's purse. (17 RT 2719.)

(4) Most significantly, the different nature of the crimes themselves negated any probative value from the Harris crime to the capital crime. The prior crime did not involve a killing. There was no weapon used or even brandished by petitioner; there was no evidence of semen, and the victim was sodomized. Rape was the primary issue in the Harris case. By contrast, the pivotal factual issues in the second crime were intent and timing. Mrs. Miller was attacked and killed before she was ever penetrated sexually. Those facts set forth in Claim One at paragraph 3, *supra*, are hereby incorporated by reference as if fully set forth herein.

(5) To the extent that this information was not developed and argued during trial, petitioner's counsel was ineffective in failing to investigate the details of the prior crime in order to prevent the introduction of prior crime evidence to prove a common scheme or plan during the guilt phase of petitioner's trial.

c. The Harris crime was not probative on the issue of whether

petitioner did, or could have, formed the specific intent required for the counts charged in his capital trial.

(1) The Harris rape was a general intent crime; the requisite elements consisted of the commission of particular acts. The formation of specific intent is required for felony murder, and the sequence of events was of crucial importance for the jury to convict petitioner of felony murder rape and to find true the rape special circumstance. Thus, the prior rape had no probative value on the sole disputed issues involved in petitioner's capital case.

(2) The fact that petitioner pled guilty to a prior crime involving burglary, rape, and robbery is impermissible propensity evidence that may not be introduced to prove the crimes and special circumstances charged in the later capital trial. (*But see, e.g.,* 27 RT 3977 ("He pled to all those charges, and what he did there was the same thing he did here.").)

d. The Harris crime was not probative of any alleged motive. Because no evidence was presented to suggest a connection between the prior crime and a motive for the capital crime, the prior crime by itself could not have been relevant to a purported motive for the latter.

e. The Harris crime was not probative of petitioner's identity. Identity was never a disputed issue in petitioner's trial. Prior to the admission of evidence regarding the prior crime, the court had already ruled that DNA evidence identifying petitioner as the perpetrator would be admitted in the capital case. (1 RT 686.)

f. The Harris crime was not probative of whether petitioner was out of custody for the prior offenses less than five years before the commission of the capital crimes charged. Petitioner admitted his prior conviction and time served; introduction of the prior crime was neither permissible nor necessary to establish that issue.

g. Evidence that the prosecutor elicited from petitioner of a tattoo of a knife on his arm was not probative of any disputed issue.

4. Once the trial court erroneously found that the prior conviction had

probative value, the court refused to timely rule on whether the evidence would be excluded based upon its prejudicial effect, and then applied the incorrect legal standard when doing so, in violation of petitioner's due process rights.

a. Both trial judges, to consider the issue of prejudice, properly expressed serious concerns about the prejudicial impact of the admission of the prior crimes on the jury. (*Id*. at 688, 689-90; 14 RT 2379.)

b. Despite repeated requests from trial counsel, both the first and second judges decided to refrain from ruling on the prejudicial impact of the evidence and chose to instead "wait and see what the evidence is in the case." (14 RT 2382; *see also* 2 RT 725.) When faced with these adverse rulings, trial counsel opted to withdraw his objection to the admissibility of the prior crimes evidence "because of the court's ruling." (2 RT 725; *see also id. at* 723-25; 14 RT 2376-83; Ex. 12 at 108.) Had the trial court properly and timely determined that the evidence was inadmissible, the prejudicial and inflammatory evidence would not have been introduced at the guilt phase of petitioner's trial.

c. A misunderstanding of the applicable legal standard may have led the second judge, Judge Ferns, to improperly defer his ruling. In discussion with trial counsel, the judge stated "obviously your biggest concern on behalf of your client in a setting of discussion would be whether the prejudicial effect *totally* outweighs the probative value. . . . But under the 352 weighing process, it is my intention to wait to make a determination on whether or not I would permit it." (14 RT 2377 (emphasis added).) Had the trial court applied the proper test - whether there was *substantial* prejudice as weighed against *substantial* probative value - the court would have been compelled to conclude at that time the prior crimes evidence was inadmissible.

5. The trial court's erroneous ruling that the evidence was admissible under Evidence Code section 1101 violated petitioner's due process rights because the evidence was irrelevant and its admission rendered the trial fundamentally unfair. The subsequent introduction of the evidence misled the jury, clouded its deliberations, and

otherwise distracted it from carefully analyzing relevant evidence.

a. The sole disputed issues involving the rape at trial were whether or not petitioner could have formed the specific intent to commit a rape in the context of felony murder and the special circumstance, and when any sexual conduct occurred in relation to the time of the victim's death. (*See* Ex. 12 at 106-07 (entire guilt phase defense rested on attacking petitioner's ability to form specific intent); Ex. 150 at 2730 (same); Ex. 181 at 3161(trial counsel would have challenged rape charge had he properly investigated); *supra* Claim One at paragraphs 2 and 3.) As a result of the trial court's improper ruling, the jury improperly decided these questions by relying on evidence that suggested petitioner had the propensity to rape his girlfriend's mothers.

b. In addition, the jury's decision making was improperly influenced by the testimony from Mrs. Harris. The jury was exposed to the poignant testimony of a highly sympathetic victim, a victim with whom the middle-aged mothers of daughters on the jury readily identified. (Ex. 23 at 239). Mrs. Harris was in her sixties when she provided her graphic and emotional testimony. (20 RT 3178.)

6. The judge further violated petitioner's due process rights by failing to properly instruct the jury on the limited purpose for which the prior crimes evidence was admitted.

a. The modified jury instruction, CALJIC 2.50 allowed petitioner's jury to consider the propensity evidence in determining virtually every facet of the case: motive, intent, identity, and common scheme or plan. (2 CT 270.) The instruction absolutely failed to prevent the jury from drawing improper propensity inferences because the instruction specifically informed the jurors that the prior crime evidence could be used to determine the issues before them. Without the appropriate limiting instruction, the jurors were not able to make the crucial legal distinction that the prior crimes should not have been considered in evaluating the elements of the capital case.

b. The judge also erroneously instructed the jury according to

modified CALJIC 17.18, which again repeated the prior crimes evidence and instructed the jury to consider such evidence for improper purposes. (*Id*. at 323-24.)

7. To the extent that trial counsel waived petitioner's objection to the admission of the prior crimes evidence at the guilt phase, trial counsel acted unreasonably.

a. Reasonable counsel would have understood the importance of precluding an improper jury determination based upon inflammatory evidence suggesting petitioner had the propensity to rape his girlfriend's mothers. Had trial counsel stood firm in his opposition to the erroneous trial court rulings, he could have controlled the introduction of evidence by presenting it to the jury in the context of petitioner's mental impairments and vulnerabilities at the time of the prior crimes. The facts regarding petitioner's mental state at, and around, the time of the crime in Claim 16, *infra*, are incorporated by reference herein.

b. Because of counsel's unreasonable actions, the evidence of the prior crimes was presented in the most prejudicial manner possible: through the testimony of the victim, Mrs. Harris.

8. The prosecutor committed misconduct in violation of petitioner's constitutional rights to due process and a fair trial by continually encouraging the jury to draw impermissible conclusions that effectively shifted the burden of proof from the prosecution by way of the repeated and unjustified references to petitioner's conviction for the prior crimes.

a. While the prosecutor justified the admission of prior crime evidence to the trial court primarily by arguing a common scheme or plan theory, what he argued to the jury again and again was simply that, "he pled to all those [prior] charges, and what he did there was the same thing he did here." (27 RT 3977.)

(1) The prosecution had the burden of proof on the issue of specific intent to rape as part of the felony murder theory. However, the last request the prosecutor made to the jury at the close of the guilt phase was, "to accept that

[petitioner] formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with the first degree murder." (*Id*. at 3991-92.) Such a request was deliberately misleading and dishonest as specific intent was not an element of the prior crimes.

(2) The prosecution compensated for the lack of evidence as to petitioner's specific intent to rape, and the lack of evidence countering petitioner's defense of mental disturbance and intoxication, by improperly and prejudicially referring to prior crimes to which petitioner had plead guilty.

(a) As to the timing of the sexual contact, which the jury would have had to find occurred prior to the murder to convict petitioner of rape, felony murder rape and find true the special circumstance allegation, the prosecutor argued that petitioner, "tied her up just like he tied up Mrs. Harris, … [h]e did that first." (26 RT 3902.)

(b) The prosecutor argued that the jury could find evidence of intent from the assertion that the prior crime and the capital crime were "[t]he same thing except this time she is killed." (27 RT 3978.)

(c) The occurrence of the rape charged at trial could be inferred from the prior crime, the prosecution argued, because "[h]e had done it, the same thing, to his prior girl friend's mother." (26 RT 3902.)

(d) The prosecution urged the jury not to believe petitioner's defense because, "you find out that he has been out of prison for less than a year for committing an almost identical offense, but for the fact that he killed her." (27 RT 3991.)

(e) Discussing the prior guilty plea to burglary, the prosecutor also improperly suggested the jury consider that "people who do similar acts often harbor similar intents when they commit those acts." (*Id*. at 3976.)

9. The trial court's failure to protect petitioner from the unlawful consideration of propensity evidence in the guilt and penalty phase deliberations had a

substantial and injurious influence or effect on the jury's determination of those verdicts, and deprived the proceedings of fundamental fairness.

10. Trial counsel's failure to argue for greater limits on the prior crimes evidence instructions, failure to fully challenge all of the bases for the introduction of prior crimes evidence, and failure to object to the prosecutor's arguments in favor of a wide range of impermissible propensity inferences constituted ineffective assistance of counsel.

11. To the extent that appellate counsel failed to raise or present with sufficient constitutional support on appeal any of the grounds in this claim, appellate counsel's failures constitute unconstitutionally deficient representation that prejudiced petitioner. Absent the unreasonable deficient performance, it is reasonably probable that the result would have been more favorable to petitioner.

K. CLAIM ELEVEN: PETITIONER WAS DEPRIVED OF THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT REFUSED TO PERMIT HIM TO TESTIFY ABOUT HIS MENTAL HEALTH HISTORY.

The convictions and sentence of death were rendered in violation of petitioner's right to present a defense, the right to compulsory process, the right to testify in his own defense, to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, and to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because petitioner was denied the right to testify on his own behalf regarding his inability to form specific intent to the crimes charged.

The trial court deprived petitioner of his constitutional rights to testify and to present a defense when it arbitrarily restricted petitioner's testimony to whether or not he was receiving counseling or taking medication in 1992, the year of the crime. As a result of the trial court's error, the jury's determination of guilt and penalty were based on incomplete and unreliable evidence. Had the trial court not erred in restricting

petitioner's testimony, the jury would not have found petitioner guilty of the crimes charged, would not have found the special circumstance true, and would not have fixed the punishment at death.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts set forth in Claims One and Three and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The trial court excluded critical evidence regarding petitioner's inability to form specific intent: his prior history of blackouts, delusional thoughts and auditory hallucinations; his history of trauma and dissociation; his history of cognitive impairments dating back to his early school years; his history of drug use; his history of neglect and physical and emotional abuse; his history of exposure to his mother's promiscuity; and his genetic predisposition to mental illness; thus, leaving the jury with the erroneous impression that petitioner conveniently blacked out during the attack on Mrs. Miller, and that his testimony that he could not remember the specific details of the attack, or that he had sexually assaulted Mrs. Miller, was self-serving and disingenuous.

3. Petitioner's inability to form specific intent to the crimes charged and the special circumstances was central to his defense. (Ex. 181 at 3162.)

a. Trial counsel incorrectly believed that once the deoxyribonucleic acid (DNA) evidence was admitted he had to concede the rape charge.[11] (Ex. 12 at 106.)

(1) Prior to the commencement of trial, the trial court ruled that

[11] The evidence does not support the prosecution's theory the victim was raped. (*See supra* Claim Nine.)

the DNA evidence was admissible. (1 CT 195.)

(2) Trial counsel erroneously believed that the DNA evidence demonstrated that sexual intercourse had occurred, leaving petitioner with no defense to the rape charge. (Ex. 12 at 107.)

(3) Once trial counsel reviewed the reports of petitioner's prior offenses, he was convinced that his offense was the result of a serious mental illness. (*Id.*)

(4) Because trial counsel mistakenly believed that he could not defend the rape charge, he planned to defend the rape felony murder and rape special circumstance – both of which require specific intent – by having petitioner testify. Trial counsel planned to have petitioner testify about his dissociative mental illness, his other mental health symptoms, and his background to demonstrate that he was incapable of forming specific intent at the time of the crime. (*Id.*)

b. The only evidence of petitioner's debilitating and severe mental illness presented to the jury was petitioner's own testimony about the night of the offense. (22 RT 3297-309, 3314-46.)

(1) Petitioner, to the extent that he was able, testified to the events leading up to the evening of August 24, 1992, and his encounter with Mrs. Miller. He tried to describe the stressful confrontation with Mrs. Miller, when she threatened him with a knife (*id.* at 3330, 3332) and then with a rifle (*id.* at 3333). In the struggle that ensued, Mrs. Miller dropped the rifle and fell to the ground, and petitioner heard a voice, which he attributed to the victim, say "give it to me." (*Id.* at 3334-35.)

(2) Petitioner testified that this triggered a childhood memory; and petitioner went on to describe visualizing walking in on his mother with another man when he was a child. He then recalled picking up the knife that was on the floor and stabbing the victim a few times. (*Id.* at 3335.)

(3) The next memory petitioner had was that of being curled up

in a ball, crying. He looked over at Mrs. Miller and saw her lifeless body tied up. (*Id.*)

(4) Petitioner had no memory of raping the victim, but surmised that it had to have been he who had raped her. (*Id.* at 3336.)

(5) Petitioner then took a rifle from the house and the keys to Mrs. Miller's car. (*Id.* at 3338.)

(6) After that, petitioner described experiencing things he had not experienced for a while. (*Id.*)

(a) Petitioner described hearing "little things in his head" and thinking that someone was coming to kill him. (*Id.*) Convinced that someone was coming to get him, he locked all the doors and windows as soon as he returned home. (*Id.* at 3339.)

(b) Petitioner's head began to hurt. (*Id.* at 3340)

(c) Petitioner wanted to take his own life, and planned on driving to a remote area to drive off a cliff. (*Id.* at 3338, 3343-44.) When he got in the car, he saw bright headlights shining towards him, and heard a voice in his head say "they're going to kill you." (*Id.* at 3344.)

(d) A car chase ensued with petitioner being pursued by the police. When the car he was driving came to a stop, petitioner again heard a voice say "they're going to kill you, they're going to kill you." He took the gun, put it to his heart area, and shot himself in the chest. (*Id.* at 3345.)

(7) After educing the above testimony, trial counsel questioned petitioner as to whether he had received psychiatric treatment in prison following his conviction for the incident involving Mrs. Harris. The prosecutor objected to this line of questioning, and the trial court sustained the objection. (*Id.* at 3347.)

4. At trial counsel's request, the trial court held a hearing outside the presence of the jury. Trial counsel informed the court that he intended to question petitioner about "his background, his problems in school, his family problems, the past times when he heard voices, and also ask him whether he got any psychiatric treatment

in the state prison." (*Id.* at 3353). He also planned on introducing evidence, through petitioner, that petitioner had been receiving psychiatric medication in the county jail for over two years. (*Id.* at 3354.)

5. The prosecution objected to the introduction of testimony regarding petitioner's mental health history and symptomatology on grounds of relevance and lack of foundation. (*Id*. at 3349-50, 3355-56.)

6. The trial court sustained the prosecutor's objections and ruled that petitioner could not testify as to his background and mental health history, unless trial counsel had "something coming in or somebody does come in and testify." (22 RT 3358.) With regard to the medications that petitioner was prescribed at the jail, the trial court instructed trial counsel that he would have to have somebody come in and explain the effects of those medications. (*Id.*)

7. The trial judge stated that evidence about petitioner's childhood and "what have you" would only become relevant in the penalty phase. (*Id.* at 3359.) The trial court ruled that petitioner could testify to certain mental health events, including any prior counseling and medication that occurred during 1992. (*Id.* at 3359.) However, all the corroborating evidence and symptoms that trial counsel had intended petitioner to testify about occurred long before 1992.

8. The trial court incorrectly sustained the prosecutor's objection.

a. Evidence of petitioner's mental health history was relevant and material and vital to his defense.

(1) Petitioner's mental state at the time of the crime was a fact of consequence.

(a) Petitioner's prior history of flashbacks or dissociation and hallucinations were relevant to the issue of intent. When petitioner dissociates, he is not in control of his actions, and is not in a position to appreciate the moral quality of his behavior. (Ex. 154 at 2755.)

(b) Had petitioner been permitted to corroborate his own

testimony with his past mental health symptoms, the testimony would have set what appeared to be an isolated occurrence against the reality of what was, in fact, petitioner's deteriorating mental illness.

(c) Petitioner's testimony that he blacked out on the night of the murder was likely viewed by the jury as self-serving; however, had they heard that petitioner had dissociated at other times of extreme stress, and that this was a lifelong condition, it would have added to his credibility. (Ex. 140 at 2694 (hearing about the flashbacks occurring throughout petitioner's life may have made a difference).)

(d) Similarly, petitioner's prior history of hallucinations co-occurring with dissociation, such as that he experienced on the night of the murder, would have given weight to his testimony that this was not a onetime occurrence. (Ex. 138 at 2690 (jury did not have a clue why he would have done such a thing); Ex. 9 at 94 (jury left still wondering why Mr. Jones had done the things he did).)

b. Petitioner's symptoms of mental illness were within his own personal knowledge.

(1) The prosecutor's foundational objection arose out of his belief that petitioner would attempt to self-diagnose his symptoms and testify as to his own mental condition and the reason he was receiving psychiatric medication. (22 RT 3355-58.) The prosecutor also argued that testimony regarding petitioner's history of mental impairments was only relevant if expert testimony explained the significance of those symptoms to the jury. (*Id.* at 3356.)

(2) Petitioner's cluster of symptoms was evidence of a mental condition that affected petitioner's ability to form specific intent. Petitioner's experiences of flashbacks and hearing voices at other times were all facts within his personal knowledge to which he could have testified. Any expert who might have testified on his behalf would have been relying, at least in part, on petitioner's reporting of those symptoms to him.

(3) Moreover, petitioner's evidence regarding his flashbacks and subsequent memory loss in times of great stress was reliable. The prosecutor knew that there was independent evidence to support and corroborate petitioner's testimony, as the prosecutor had in his possession an emergency room report documenting those exact same symptoms just eight years earlier. However, the prosecution had unconstitutionally withheld this material evidence until petitioner obtained it in post-conviction discovery. (*See supra* Claim Three.)

9. The trial court's ruling denied petitioner the right to testify in his own defense and the right to present a defense, which included complete and accurate information concerning his mental state, his inability to form the specific intent to the rape special circumstance or felony murder and, thereby, reduce his criminal culpability of the crimes charged. Thus, petitioner's Fifth, Sixth and Fourteenth Amendments rights were violated.

10. The trial court's erroneous ruling was prejudicial.

a. Trial counsel conceded that petitioner was guilty of rape in his closing argument. (26 RT 3927.) Therefore, since the act of rape itself was not in issue, the only issue for the jury to decide was whether petitioner formed the specific intent for the rape special circumstance.

b. Even as the prosecutor objected to the introduction of petitioner's testimony, he knew that petitioner had independent, substantiated history of blackouts, coupled with ensuing memory loss, but withheld that evidence from the defense. (*See supra* Claim Three.)

c. Petitioner was only permitted to present a partial account of the circumstances leading up to the incident involving Mrs. Miller. (22 RT 3347.) Without context for petitioner's behavior that night, the confluence of his intensifying mental illness, his prior history of dissociation during stressful situations, and subsequent memory loss, the jury was left with an incomplete and misleading depiction of petitioner's mental state at the time of the crime.

d. Had the jury heard about petitioner's lifelong history of dissociation and flashbacks, it is likely that they would have believed his testimony and not found the rape special circumstance true. (Ex. 140 at 2694 ("Maybe if I had heard that these flashbacks occurred throughout his life it would have made a difference but we did not hear any of that.").)

11. Trial counsel's unreasonable and prejudicial failure to present expert witness testimony about petitioner's mental state in the guilt phase, and trial counsel's failure to prepare for the eventuality that the trial court might exclude petitioner's testimony (Ex. 12 at 109), constituted ineffective assistance of counsel in violation of petitioner's constitutional rights. Trial counsel unreasonably did not believe there was any requirement for an expert to present testimony that petitioner heard voices. (22 RT 3356-57; Ex. 12 at 109.) Moreover, trial counsel had no strategic reason for failing to put on a mental health expert at the guilt phase. (Ex. 12 at 109.) Any expert conducting a competent mental health evaluation would have developed evidence of, and testified about, petitioner's social history, including his upbringing, his history of neglect, physical, emotional and sexual abuse and exposure to sexuality, his education history and difficulties in school, his medical history, a history of any prescribed medications that he was taking, his personal drug use, and family history of medical complaints, mental illness, and chemical dependency. (*See*, e.g., Ex. 154 at 2756-57.)

L. CLAIM TWELVE: THE GUILT PHASE JURY INSTRUCTIONS AND VERDICT FORMS VIOLATED PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The convictions and sentence of death were rendered in violation of petitioner's rights to due process and a fair trial by an impartial jury as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the guilt phase jury instructions for prior crimes evidence, the crime of rape, rape felony murder and special circumstance intent requirements, and the guilt phase verdict forms were conflicting, confusing, inaccurate, and incomplete. During

petitioner's trial, conflicting, confusing, and inaccurate guilt phase jury instructions allowed the jury to consider impermissible propensity evidence and prevented the jury from taking into consideration petitioner's defense to the rape felony theory of first-degree murder and the rape special circumstance. The jury instructions also left the jury with the mistaken impression that specific intent for rape felony murder and the rape special circumstance was either presumed or not required. Among other errors, the guilt phase verdict forms given to the jury were incomplete, containing no special circumstance verdict forms.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Nine, Ten, and Twenty-one, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Petitioner's conviction is the result of inaccurate, confusing, misleading, and incomplete instructions on prejudicial prior crimes evidence; the substantive crime of rape; first-degree murder and special circumstance intent requirements; and defenses to specific intent.

3. No instruction was given limiting the use of the prior crimes evidence in accordance with California Evidence Code section 1101. The facts in Claim Ten, *supra*, are incorporated herein by reference.

a. The jury received a modified CALJIC 2.50, "Evidence of Other Crimes." (2 CT 270.)

(1) CALJIC 2.50 was modified by deleting a critical sentence: "You are not permitted to consider such evidence for any other purpose." (*Id*.)

(2) As modified, this jury instruction impermissibly allowed petitioner's jury to consider inflammatory propensity evidence in determining virtually every facet of the case: motive, intent, identity, and common scheme or plan.

(3) As modified, the instruction permitted the jury to draw improper propensity inferences. The instruction specifically informed the jurors that the prior crime evidence could be used to determine the issues before them. It did not provide the legal distinction required to recognize that the prior crime, presented as propensity evidence, should not have been considered in evaluating the elements of the instant crime.

b. Further instruction according to modified CALJIC 17.18 compounded the broad, impermissible use of propensity evidence by repeating the prior crime information and again instructing the jury to consider it for improper purposes. (2 CT 323.) Instructing the jury with CALJIC 17.18 was impermissible given the circumstances of petitioner's trial.

c. The lack of proper jury instructions gave the prosecutor great latitude to make highly prejudicial, impermissible propensity inferences.

d. The lack of an appropriate limiting instruction, which was compounded by the use of other wholly inappropriate instructions, violated petitioner's constitutional rights.

4. The jury was not instructed that the perpetrator must harbor the intent to rape while the victim is alive in order for the crime of rape to occur.

a. Petitioner's only guilt phase defense was based on mental state – whether or not he was able to form specific intent. The defense, therefore, attempted to challenge all specific intent crimes and allegations.

(1) In light of petitioner's sole defense, it was imperative the jury be thoroughly instructed on every element of each charged crime.

(2) The guilt phase instructions failed to inform the jury that to find that the crime of rape occurred, they had to first determine the victim was alive at the time the attempt to rape was initiated.

(3) Despite the wealth of evidence that pointed to the death of the victim prior to any sexual penetration (*see infra* Claim One at paragraph 3), there

was no attempt to clarify this confusing area of law.

b. The jurors properly received an instruction stating that the crime of robbery requires that property be taken from a living victim. (26 RT 3803-04; 2 CT 318.) However, they received no similar instruction for the crime of rape.

c. As a result of the improper, confusing, and incomplete guilt phase instructions, the jury was allowed to erroneously and prejudicially conclude that, unlike robbery, rape can be inflicted on a dead victim.

5. Petitioner's jury was not adequately instructed that a specific intent to rape must be found before they can find petitioner guilty of felony murder rape or the rape special circumstance true.

a. The jury was instructed with CALIIC 8.10 regarding felony murder, which instructed, in part, "[e]very person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of Burglary, Rape and/or Robbery is guilty of the crime of murder . . ." (2 CT 287.) This instruction was silent as to the specific intent required for the named crimes.

(1) The jury received instructions that clearly set forth the specific intent requirements for the crimes of robbery (*id*. at 315) and burglary (*id*. at 311). Petitioner's jury also received CALJIC 3.31, which instructed that murder, burglary, robbery and the lesser included crimes of voluntary manslaughter, grand theft auto, and grand theft rifle required specific intent. (*Id*. at 280.) Moreover, several of the instructions the jury received repeated the specific intent requirements for those crimes. (*See*, *e.g.*, *id*.; *id*. at 282 (CALJIC 3.32); *id*. at 284 (CALJIC4.21.1).)

(2) The jury was instructed that rape is a general intent crime, pursuant to CALJIC 10.00. (*Id*. at 314.) Petitioner's jury was also specifically reminded of the general intent requirement for the crime of rape when the court read CALJIC 3.30 (*id*. at 279) which defined general intent, and CALJIC 4.21.1 (*id*. at 284), which instructed them that voluntary intoxication or a "mental disorder" could negate the specific intent required for, *inter alia*, the crimes of robbery and burglary.

(3) Petitioner's jury was never instructed that only the *substantive* crime of rape requires general intent; whereas, rape as an underlying felony to felony murder requires a finding of a specific intent to rape.

(4) The first degree felony murder instruction the jury received, CALJIC 8.21, failed to inform the jury it had to first find that petitioner possessed the specific intent to rape before it could find him guilty of felony murder rape. (*Id*. at 291.)

(5) Neither CALJIC 8.21 nor any other instruction received by petitioner's jury correctly instructed the jurors that specific intent to commit the underlying felony must be found beyond a reasonable doubt before petitioner could be found guilty of felony murder.

b. The jury received no instruction that informed it of the intent requirement for the rape special circumstance.

(1) Petitioner's jury received special circumstance instructions CALJIC 8.80.1 (1993 Revision); 8.81.17 (1991 Revision); and 8.83.1. (2 CT 307, 308, 309, respectively.)

(2) None of these instructions set forth the intent required to find the rape special circumstance true.

(3) The omission of the rape special circumstance specific intent requirement was not cured by the inclusion of CALJIC 8.83.1, "Sufficiency of Circumstantial Evidence to Prove Required Mental State." (*Id*. at 309.)

(a) Although CALJIC 8.83.1 mentions the term "specific intent" five times, it does not define the required specific intent for any of the charged special circumstances.

(b) The force of the other instructions rendered the fact that this instruction is about mental state wholly meaningless.

(4) As alleged above, the jury instructions only described rape as a general intent crime; no instructions were modified or included that properly made

exceptions for felony murder and special circumstance rape, both of which require a specific intent.

(5) Without the necessary and proper jury instructions, petitioner's jury was unable to make a constitutionally valid finding on the rape special circumstance. Petitioner's jury believed that it only had to find petitioner guilty of the general intent crime of rape[12] in order to find the rape special circumstance true. (Ex. 122 at 2475 ("Since we found Mr. Jones guilty of rape, he was also guilty of the rape special circumstance making him eligible for the death penalty.").) Without a valid special circumstance conviction, petitioner was ineligible for a sentence of death.

6. The jury was not instructed that petitioner's impaired mental state and intoxication could negate the felony murder and special circumstance requirement for the specific intent required to rape.

a. Petitioner's jury received instructions on mental disease, pursuant to CALJIC 3.32 (1992 Revision) and voluntary intoxication, CALJIC 4.21.1 (1992 New), as defenses to specific intent crimes. (2 CT 282, 284.)

b. The jury was properly instructed that these defenses should be taken into consideration if it was necessary to determine whether or not petitioner had the specific intent to commit murder, burglary, and robbery.

c. The jury did not know it was allowed to – and, therefore, did not – consider these defenses for the specific intent required for felony murder rape and the rape special circumstance.

(1) Petitioner's jury was only instructed that rape is a general intent crime. (2 CT 314.)

(2) The jury did not receive a third instruction stating that the instruction on general intent was solely applicable to the substantive charge of rape and

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[12] The jury did not have to deliberate, in the true meaning of the word, to convict petitioner of the substantive crime of rape, because trial counsel prejudicially conceded his guilt in closing argument. (*See supra* Claim One at paragraph 4.)

was inapplicable to the underlying rape for felony murder rape and the rape special circumstance, as they both required a finding of specific intent.

7. The jury was not instructed that if it found petitioner possessed the requisite intent to rape, and there were two reasonable interpretations of the evidence of the specific intent to rape, it must adopt the interpretation that points to the absence of the specific intent.

a. In the guilt phase, the jury received a modified CALJIC 2.02, "Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State." (2 CT 261.) The instructions named only the charged specific intent crimes of murder, robbery, burglary, voluntary manslaughter, grand theft automobile and grand theft rifle.

(1) Petitioner's jury received no instruction that mandated they adopt the interpretation that points to the absence of specific intent to rape if there are two reasonable interpretations of the evidence.

b. Penalty phase instructions included CALJIC 8.83.1, "Special Circumstances - Sufficiency of Circumstantial Evidence to Prove Required Mental State." (*Id*. at 309.)

(1) The instruction fails to mention any special circumstances and instead refers to "the required" or "such" specific intent. (*Id*.)

(2) As alleged above, by vaguely alluding to specific intent crimes, the instruction failed to account for the fact that rape was only defined as a general intent crime. (*See, e.g.*, 2 CT at 284, 314.)

c. The failure to adequately instruct petitioner's jury allowed it to find the rape special circumstance true even if the evidence of intent to rape was (1) never specifically found by the jury; (2) not consistent with the theory that petitioner had the specific intent to rape; and, (3) not irreconcilable with any other reasonable interpretation of the evidence.

d. Petitioner's jury was asked to decide his fate with "instructions [that] were worded in such [a] way that made them hard for [the jury] to understand;"

instead of determining the facts and then applying the law to those facts, the jurors "talked about how the instructions did not make sense." (Ex. 138 at 2690.) After receiving little guidance from the trial court on the faulty, confusing, and incomplete instructions, "[u]ltimately, the jurors stated that Mr. Jones's confession meant that he was guilty of rape, felony murder, and the special circumstance." (Ex. 139 at 2693.) The jury's guilt and penalty phase verdicts are wholly unreliable because jurors were admittedly confused by the competing and complex intent requirements. (Ex. 127 at 2564 ("There was no doubt about Mr. Jones's guilt because he admitted to the crimes during his testimony."); Ex. 133 at 2644 ("Mr. Jones's guilt was not in question. Mr. Jones essentially confessed to his crimes when he testified.").) If the jury had been properly instructed regarding the different intent requirements for the crime of rape versus felony murder rape and the rape special circumstance, petitioner would not have been convicted of felony murder rape nor exposed to a death sentence by virtue of a true special circumstance finding.

8. The guilt phase verdict forms were incomplete because they failed to provide for any of the special circumstance allegations.

a. The verdict forms the jury received were confusing. This was in large part because an entire set of verdict forms were missing. Petitioner's jury heard arguments about and instructions on the special circumstances, but did not receive any special circumstance verdict forms.

(1) The jury received separate guilty and not guilty verdict forms for: murder (2 CT 365, 369 (not guilty form generally stated "murder")); voluntary manslaughter (*id*. at 370); involuntary manslaughter (*id*. at 371); and, the substantive crimes of burglary (*id*. at 366, 372), rape (*id*. at 367, 373), and robbery (*id*. at 368, 374). The jury received no verdict forms on which to indicate whether or not the special circumstances were true.

(2) These were the only verdict forms the jury received to indicate whether or not petitioner was guilty of murder, manslaughter, each substantive

crime, and if guilty of first degree murder, whether or not any special circumstance was true.

b. The jury was instructed in relevant part:

(1) Count one charged petitioner with murder. (2 CT 287; 26 RT 3840.)[13]

(2) There were four possible verdicts as to count one: not guilty; guilty of manslaughter; guilty of involuntary manslaughter; and guilty of murder. (26 RT 3875.)

(3) The jury was instructed that "[e]ach count charges a distinct crime." (2 CT 325; 26 RT 3873 (CALJIC 17.02).)

(4) It was also instructed that "[y]our finding as to each count must be stated in a separate verdict." (2 CT 325; 26 RT 3874 (CALJIC 17.02).)

(5) The jury was instructed to "state your special findings as to whether or not this special circumstance is or is not true on the form that will be supplied." (26 RT 3860; 2 CT 307 (CALJIC 8.80.1, revised 1993).)

c. The guilty verdict form for murder only determined that the jury found petitioner guilty of first degree rape felony murder. (2 CT 365.)

d. During deliberations the jury gave several notes to the trial court with questions about specific intent and felony murder.

(1) The jury asked "[t]o find the defendant had the specific intent to commit rape, is it necessary to believe that he had the intent when he entered the house?" (1 CT 249; 27 RT 4013, 4021.)

(a) After consulting with both counsel, the trial court answered that "[f]or purposes of the rape, the answer is no. If it is as to burglary, the answer is yes. Okay. And I am going to read to you 8.21. [Instruction read]." (27 RT

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[13] The jury was repeatedly instructed regarding count one. (*See, e.g.*, 26 RT 3823, 3846, 3874.)

4021.)

(2) The jury next asked the trial court, "[w]hat is the definition of felony murder? Are all first degree murders felony murders?" (1 CT 249; 27 RT 4015, 4022.)

(a) The trial court responded to the jury, after a discussion with both counsel, that,

> 8.21 defines what felony murder is. All right? There are two ways to arrive at felony murder – excuse me – at first degree murder. There are two approaches. One is felony murder as defined in 8.21, or an intentional killing with malice aforethought, that is willful, premeditated, and deliberate. So there are two theories or two approaches to arrive at first degree murder.

(*Id*. at 4022.)

e. At this point in the deliberations, petitioner's jury was deliberating whether or not he was guilty of felony murder.

(1) The jury's questions makes it apparent they were not considering a manslaughter conviction, either voluntary or involuntary. (1 CT 249, 250.)

(2) The jury's questions would have been unnecessary if they were considering a premeditated theory of first degree murder.

(3) The trial court, the prosecution, and trial counsel all agreed the jury's questions indicated the jury was focused on whether or not petitioner was guilty of felony murder. (27 RT 4014, 4016-17.)

(4) No evidence supported a conviction of premeditated and deliberate first degree murder. (*See supra* Claim One at paragraphs 1 and 6.)

f. It was clear from the face of the form that the murder verdict form served to indicate a murder verdict and nothing more.

(1) The murder verdict form was titled "Verdict (Guilty) Count

One," and bore a footer that read "Verdict (Guilty)." (2 CT 365.)

(2) The murder verdict form contained a blank space for the jury to handwrite in the degree of murder and to check boxes titled "True" or "Not True" regarding the allegations of burglary, rape, murder, and whether or not petitioner had sustained a prior conviction within five years. (*Id*.)

(3) The term "special circumstance" appeared nowhere on the verdict form. (*Id*.)

(4) The form required the jury to make findings on "allegations," pursuant to California Penal Code sections 12022(b), 1192.7(c)(23), and 667.5(a)-(b), which were printed on each of the guilty verdict forms.

(a) In specified boxes titled "True" and "Not True," the jury was to indicate the truth of "the allegation" that petitioner had personally used a knife in the commission of the murder. (*Id*.)

(b) In specified boxes titled "True" and "Not True," the jury was to indicate the truth of "the allegation" that petitioner had sustained a prior conviction within the last five years. (*Id*.)

g. Following the confusing instructions, the jury returned a verdict finding petitioner guilty of felony murder rape.

(1) As instructed, the jury used the murder verdict form for count one – murder.

(2) As instructed, the jury handwrote in the degree of murder for which they found petitioner guilty, i.e., "FIRST."

(3) As instructed, the jury indicated that the first degree murder was a felony murder, finding beyond a reasonable doubt that the underlying felony was a rape. The jury indicated they found no other underlying felonies by marking the "Not True" boxes for burglary and robbery. (*Id.*)

(4) Other than finding petitioner guilty of felony murder rape and the two allegations true, as instructed, the jury made no other finding on the Count One

verdict form. (*See* 2 CT 325; 26 RT 3874 ("Your finding as to each count must be stated in a separate verdict.").)

(5) The jury was unable to make any special circumstance findings because it was given no verdict forms for special circumstance findings. (2 CT 307 ("You will state your special findings … on the form that will be supplied.").)

(6) The jury did not realize it was making a felony murder rape special circumstance finding because on the penalty phase verdict form the jury indicated that it found multiple special *circumstances*. (2 CT 428.)

h. Once the trier of fact has found a defendant guilty of first degree murder, California Penal Code section 190.4 requires the jury to make a finding on the truth of each alleged special circumstance. The case cannot proceed to a capital penalty phase unless the jury specifically finds true at least one special circumstance.

i. Without a special circumstance finding, petitioner was unnecessarily and cruelly subjected to an unconstitutional penalty phase proceeding.

9. The erroneous instructions alleged herein, individually and collectively, and the failure to obtain a special circumstance verdict violated petitioner's constitutional rights, rendered the trial proceedings fundamentally unfair, had a substantial and injurious effect or influence on the determination of the jury's guilt and penalty verdicts, and unconstitutionally deprived petitioner of a fair and reliable determination of guilt and penalty.

10. The confusing and incomplete instructions and verdict forms had a substantial and injurious effect or influence on the jury's determination in both the guilt and penalty phases of the trial. According to one juror, "[t]he guilt deliberation was a difficult process because the instructions were very confusing. We all had our differing interpretations of them. *I never really understood them*." (Ex. 9 at 94 (emphasis added).) The instructions prevented petitioner's jury from considering constitutionally relevant evidence and the confusing verdict forms obscured the jury's failure to find true any special circumstance. The trial was thus rendered

fundamentally unfair.

11. To the extent that this Court concludes that trial counsel failed to request and/or appellate counsel failed to object to the confusing instructions or request proper clarifying instructions, or object to the confusing verdict forms and missing special circumstance verdict forms and/or raise these claims on direct appeal, despite the non-record facts presented in support of this claim, such inaction and failures constitute deficient and prejudicial representation in violation of petitioner's right to the effective assistance of counsel.

M. CLAIM THIRTEEN: UNRELIABLE DNA EVIDENCE UNCONSTITUTIONALLY AFFECTED THE JURY'S VERDICTS.

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, a reliable and accurate guilt and penalty assessment based on accurate, rather than misleading or false, testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and be free from the imposition of a cruel and unusual punishment were violated by the introduction of unreliable and prejudicial testimony regarding deoxyribonucleic acid (DNA) testing of semen found on the victim.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Nine, Ten, and Twelve through Sixteen and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The prosecution retained Cellmark Diagnostic Laboratory ("Cellmark") to conduct DNA analysis of semen found on the victim. After obtaining the results from Cellmark, the prosecution announced its intention to offer the testimony at trial.

a. On November 6, 1992, the prosecution successfully moved the court for an order requiring petitioner to provide saliva and blood samples. (1 CT 125-30.)

b. On October 8, 1993, the prosecution informed trial counsel and the court that the DNA testing had been conducted and that the results linked petitioner to the sperm and semen samples found on the body. (1 RT 501, 506.) Cellmark analyzed the samples using the DNA-Restriction Fragment Length Polymorphism (RFLP) technique and calculated the statistical frequencies of the match using the modified ceiling frequency principle.

3. During pre-trial proceedings, the parties litigated the admissibility of the testimony pursuant to *People v. Kelly*, 17 Cal. 3d 24 (1976), and *Frye v. United States*, 293 F. 1013-14 (D.C. Cir. 1923). After considering the defense motion to exclude the introduction of the DNA evidence and taking judicial notice of documents, but without taking any testimony from witnesses, on June 8, 1994, the Superior Court ruled that the prosecution would be permitted to present the results of the DNA analysis at trial. (1 CT 195; 1 RT 664-65.)

a. On December 23, 1993, trial counsel filed a motion to exclude the DNA evidence on the grounds that the statistical probabilities evidence using the modified ceiling principle is not generally accepted by the scientific community and that the procedures used by Cellmark in arriving at that statistical probability were flawed. (II Supp. 2 CT 106-23.)

b. On February 4, 1994, the prosecution filed a motion requesting that, in determining whether the statistical calculation method for DNA testing was generally accepted in the scientific community, the Superior Court take judicial notice, pursuant to California Evidence Code sections 452 and 453, of the findings and decisions in the case of *People v. Robert Smith, James Crooms, and Bevin Graham*, Los Angeles County Superior Court Case No. PA006349 (1993), along with excerpts from a publication of the National Research Council, *DNA Technology in Forensic*

Science (1992) (hereafter "NRC I"), an affidavit of Daniel Hartl, and the testimony of Dr. Conneally, the DNA expert in the *Smith* case. (II Supp. 1 CT 124-31.)

c. On March 8, 1994, the prosecution filed an opposition to the motion to exclude the DNA evidence. (2 CT 430-44; II Supp. 1 CT 134A-4O.)

d. On March 23, 1994, defense counsel filed an opposition to the prosecution's request for judicial notice. (II Supp. 1 CT 135A-5J.)

e. At several hearings on the motion to exclude the evidence, the judge acknowledged his unfamiliarity with DNA analysis and requested that the parties present expert testimony to assist the court. (*See, e.g.*, 1 RT 572-73, 632.) The court repeatedly requested that the parties present witnesses at a hearing to allow the court properly to determine the admissibility of the DNA evidence and expressed its dissatisfaction with the process being used to litigate the issue. (*See, e.g.*, *id*. at 573, 628-29, 632; *see also id*. at 664-65; 2 RT 722-23.)

f. The court agreed to take judicial notice of the testimony in the *Smith* case, and subsequently, at the request of defense counsel, portions of the testimony in *People v. Jamal Barteau Fountain*, Contra Costa Superior Court Case No. 910267-4 (1994).

g. On June 8, 1994, the court ruled that the statistical calculation method met the *Kelly*/*Frye* standard of admissibility. (1 CT 195; 1 RT 665.)

h. Following the court's ruling, defense counsel informed the court that, prior to trial, the defense intended to challenge the accuracy of the particular procedures used to test the samples. (1 RT 666-67.)

4. Prior to trial, on September 7, 1994, defense counsel filed a Motion to Reconsider the Court[']s Ruling on RFLP DNA Kelly-Frye Hearing. (II Supp. CT 631-56.) The motion sought a hearing involving expert testimony about the unreliability of the ceiling principle, error rates, and methodological deficiencies used in the testing and analysis process. Defense counsel stated in the motion the experts that he intended to call as witnesses were unavailable at the time of the previous

hearing. On November 18, 1994, without an evidentiary hearing, the Superior Court denied the motion to reconsider. (1 CT 201; 2 RT 722-23.)

5. On January 8, 1995, without conducting an evidentiary hearing pursuant to *Kelly/Frye*, the court found the DNA modified ceiling principle generally accepted throughout the scientific community. The Court stated that a further hearing on the admissibility of the DNA evidence in light of the particular procedures used to test the samples would be conducted at a later date outside the presence of the jury. (14 RT 2375; 1 CT 233.)

6. On January 17, 1995, the trial court heard testimony pursuant to California Evidence Code section 402. (1 CT 239.) The prosecution presented the testimony of Melisa Weber, employed by Cellmark. (19 RT 2905-3038, 3042-47.) The prosecution presented the testimony of Ms. Weber to establish that she followed "the correct protocols at the lab and applied the correct statistical analysis." (*Id*. at 3017.) At the conclusion of the testimony and argument, the court denied the defense motion to exclude. (1 CT 239; 19 RT 3079.)

7. Thereafter, the prosecution presented the testimony of Melisa Weber to the jury. (20 RT 3091-130). Ms. Weber testified about the procedures used to analyze the blood samples and found that the "DNA banding pattern of Ernest Jones did match the bands in the sample from the vaginal swabs." (*Id*. at 3129.) She concluded that the "chance that a random individual might have the same DNA banding pattern as Ernest Jones is approximately 1 in 78 million." (*Id*. at 3130.)

8. The process by which the trial court determined the admissibility of the DNA testimony and the testimony before the jury irreparably deprived petitioner of his constitutional rights.

a. The trial court unconstitutionally failed to conduct a full hearing on the reliability and admissibility of the DNA evidence.

b. In addition, the trial court's unreasonable refusal to reconsider its June 1994 decision in light of petitioner's September 1994 proffer violated petitioner's

constitutional and statutory rights.

c. Had the court employed a sufficient process to assess the admissibility of the evidence, it would have been provided with testimony and evidence necessary to make a full and fair decision regarding the admissibility of the DNA evidence.

d. Had the trial court conducted a full and fair hearing, it necessarily would have had to exclude the DNA testimony. As a result of the trial court's failure, the jury improperly heard the DNA evidence. Moreover, the trial court's ruling thwarted the presentation of an effective defense that the prosecution had failed to establish the elements of rape and capital murder based on a rape felony murder theory and petitioner's eligibility for a death sentence based on the rape special circumstance.

e. The trial court improperly issued rulings from the bench without providing any explanation for its decisions to admit the DNA testimony. As a result, petitioner, the California Supreme Court, and this Court do not know the bases for the trial court's decisions, including why it concluded that the methodology used in this case satisfied the requirements of *Frye* and the United States Constitution.

f. A full and fair hearing is necessary to resolve the reliability and admissibility of the DNA testimony. Even if this Court determines that the information before the trial court was sufficient to demonstrate the reliability and the admissibility of the DNA testimony, the allegations presented in this petition demonstrate the unreliability of the testimony.

9. The trial court unconstitutionally and erroneously admitted the DNA testimony based on the evidence that was presented. The particular method (RFLP) used to test the samples in petitioner's case has been controversial and has been held inadmissible for lack of compliance with procedures recommended in 1992 by the NRC I for determining the statistical probability of a random match.

10. Federal constitutional law imposes a requirement of reliability before the trial court could have admitted the DNA evidence.

a. Due process guarantees that a conviction will not be based on unreliable evidence or procedures. A trial court's failure to ensure that evidence presented to the jury is trustworthy renders a defendant's trial fundamentally unfair. A defendant's right to due process is further violated when improper evidence impairs or usurps the jury's evaluation of facts and credibility, as well as its final determination of guilt or innocence.

b. A trial court violates these basic precepts of due process when it improperly admits unreliable expert opinion testimony. Moreover, expert opinion testimony is precisely the type of evidence that is likely to have a strong impact on the jurors. Thus, allowing unreliable expert opinion on a crucial issue before the jury deprives the capital defendant of due process in two ways: unreliable information is placed before the jury, and its presentation through an expert improperly usurps the jury's role.

c. Prior to 1993, the admissibility of scientific evidence was governed by the standards set forth in *Frye v. United States*, 293 F. 1013-14 (D.C. Cir. 1923), which focused on whether the particular scientific technique in question is "generally accepted" in the scientific community. The *Frye* test was the prevailing standard of admissibility of scientific evidence in federal court until the United States Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under *Daubert*, DNA testimony is particularly suspect. *See, e.g., United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994) ("Notwithstanding *Daubert*'s express preference for exposing novel scientific theories and methodologies to the glare of the adversarial process, *Daubert* enjoins watchful assessment of the risk that a jury would assign undue weight to DNA profiling statistics even after hearing appellant's opposing evidence, the testimony of Government witnesses under vigorous cross-examination and the careful instructions of the district court on burdens of proof.").

11. In applying these principles to the DNA testimony in petitioner's case, the trial court was obligated to analyze each distinct step of the DNA process.

Deficiencies at any step of the process negated the reliability of the testimony. At a minimum, the steps that the trial court should have analyzed are the (1) processing of the DNA samples to produce DNA profiles, (2) comparison of the profiles to determine whether there is a "match," and (3) estimating the statistical significance of the match, i.e., probability a match would be declared between samples from different people.

a. A critical step for every DNA testing procedure is the exact methodology used to determine the various DNA types within each testing system. Discussions of prong one did not focus on a particular locus or even on a generic methodology such as RFLP, but rather on the general scientific acceptance of the RFLP methodology used in the case.

b. Statistical computation is a critical step for every DNA testing procedure that purports to find a "match" between samples with respect to their genetic characteristics. A statistical procedure is constitutionally unacceptable unless it addresses the probability of two events that could cause a "match" to be reported between samples from different people: (1) a coincidental match between different individuals who happen to have the same genetic characteristics, and (2) a false positive (false match) due to laboratory error. The probability of a coincidental match is typically estimated by determining the frequency of matching genetic characteristics (genotypes) in a suitable reference population (or populations). The probability of a false positive is estimated by determining the laboratory's rate of errors in proficiency tests. *See generally* L. Mueller, *The DNA Controversy And NRC II*, in STATISTICAL METHODS IN THE HEALTH SCIENCES: GENETICS (M.E. Halloran & S. Geisser eds., 1999); D.H. Kaye, *DNA, NAS, NRC, DAB, RFLP, PCR, and More: An Introduction to the Symposium on the 1996 NRC Report on Forensic DNA Evidence*, 37 JURIMETRICS: THE JOURNAL OF LAW, SCIENCE, AND TECHNOLOGY 395 (1997).

12. In determining whether the prosecution satisfied its burden, the trial court was required to look beyond forensic science for evidence of general acceptance.

a. The general acceptance test of the Constitution cannot be met by showing that promoters and practitioners of the method accept it to be reliable. The test is not whether a method is accepted by those who have a personal or professional stake in its acceptance.

b. Thus, when applying this standard, the court must look to experts who are impartial and objective; these are experts who have virtually nothing to gain if the method is or is not accepted by the court. Employees of forensic labs "have a clear pecuniary interest in the acceptance of DNA evidence by the courts. The success of their employers and the stability of their own employment depends upon continued use of DNA testing." Dan L. Burk, *DNA Identification: Possibilities and Pitfalls Revisited*, 31 JURIMETRICS: THE JOURNAL OF LAW, SCIENCE, AND TECHNOLOGY 53, 79-80 (1990).

c. In this case, the only witness presented by the prosecution to validate the methodology used was Melisa Weber, a Cellmark employee. Moreover, her testimony was limited to the Cellmark protocols and statistical calculations. No independent testimony was presented to validate the reliability and acceptability of the methodology used in this case.

13. An overriding principle established by the scientific community is that "[f]orensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation." NRC I, *supra*, at 52; *see also* National Research Council, *The Evaluation of Forensic DNA Evidence* 75 (1996) (hereafter "NRC II") ("It is important that forensic laboratories use strict quality-control standards to minimize the risk of error."). These strict standards were first widely publicized in the NRC I. The NRC I takes no position on the validity or scientific acceptability of any particular forensic DNA test, but sets forth a set of requirements that it regards as "essential" for assuring the reliability of any forensic DNA test. The NRC II follows the same approach and specifically recommends that "[l]aboratories should adhere to high quality standards (such as those defined by TWGDAM (Technical Working

Group on DNA Analysis Method (hereinafter, "TWGDAM")) and the DNA Advisory Board (hereinafter "DAB"))." NRC II, *supra*, at 88. Thus, a new technique is not generally accepted in the scientific community unless it meets the "essential" requirements established by the NRC Reports, the TWGDAM Guidelines, and the DAB Standards. The NRC Reports, TWGDAM Guidelines, and DAB Standards establish what constitutes scientifically acceptable procedure for conducting DNA testing. Compliance with these and other guidelines, including the laboratory's own testing protocols, is, accordingly, a prerequisite to admissibility of DNA evidence in this case.

14. One crucial requirement established by all of these guidelines and standards is that forensic DNA tests must be developmentally validated through extensive empirical studies.

a. TWGDAM Guideline 4.1.5. sets forth the minimal requirements that must be met in order to satisfy the requirement of developmental validation, including studies in the following areas: standard specimen studies, consistency studies, population studies, reproducibility studies, mixed specimen studies, environmental studies, matrix studies, nonprobative evidence studies, nonhuman studies, minimum sample studies, and on-site evaluation studies. *See also* DAB Standard 8.1.

b. The key validating studies must not only be done, but also published and peer-reviewed before a laboratory can claim that its methods are generally accepted. NRC I, *supra*, at 56 ("If a new DNA typing method (or a substantial variation on an existing one) is to be used in court, publication and scientific scrutiny are very important. Extensive empirical characterization must be undertaken. Results must be published in appropriate scientific journals. Publication is the mechanism that initiates the process of scientific confirmation and eventual acceptance or rejection of a method."); *see also* TWGDAM Guideline 4.1.5.12 ("It is essential that the results of the developmental validation studies be shared as soon as

possible with the scientific community through presentations at scientific/professional meetings. It is imperative that details of these studies be available for peer review through timely publications in scientific journals.").

15. A second fundamental requirement is internal validation, which requires that the laboratory gain "a solid base of experience in forensic application" before it uses a new DNA typing method. NRC I, *supra*, at 55; DAB Standard 8.1.3 ("Internal validation shall be performed and documented by the laboratory."); TWGDAM Guideline 4.5 ("Prior to implementing a new DNA analysis procedure or an existing DNA procedure...the forensic laboratory must first demonstrate the reliability of the procedure in-house.").

a. According to NRC I, internal validation involves five separate steps: Gain familiarity with the system using fresh samples (i.e., fresh blood); test marker "survival" in dried stains (i.e., blood); test the system on simulated samples that have been exposed to various environmental conditions; establish "basic competence" in the use of the system by blind trials; test the system on nonprobative evidence samples in which the origin is known, to check reliability. NRC I, *supra*, at 55. The NRC I recommends that when a DNA technique is initially developed, all five steps should be carefully followed. *Id.*

b. The 1995 TWGDAM Guidelines are even more rigorous. Guideline 4.5 provides that internal validation "must" include the following:

16. 4.5.1 The method must be tested using known samples.

17. 4.5.2 If a modification which materially affects the results of an analysis has been made to an analytical procedure, the modified procedure must be compared to the original using identical samples.

18. 4.5.3 Precision (e.g., measurement of fragmented lengths) must be determined by repetitive analysis to establish criteria for matching.

19. 4.5.4 The laboratory must demonstrate that its procedures do not introduce contamination which would lead to errors in typing.

20. 4.5.5 The method must be tested using proficiency test samples. The proficiency test may be administered internally, externally, or collaboratively. DAB Standard 8.1.3 also requires internal validation and adds requirements not found in TWGDAM. For instance, Standard 8.1.3.1 requires that the "procedure shall be tested using known and nonprobative evidence samples," and that the "laboratory shall monitor and document the reproducibility and precision of the procedure using human DNA controls." Standard 8.1.3.3 adds the requirement that "[b]efore the introduction of a procedure into forensic casework, the analyst or examination team shall successfully complete a qualifying test." *Id*.

21. In addition to requiring both developmental and internal validation, the NRC Reports, the TWGDAM Guidelines, and the DAB Standards recommend other measures to ensure a minimum level of quality assurance. NRC I states that "courts should require that a proponent of DNA typing evidence have appropriate accreditation – including documentation of external, blind proficiency testing (as well as other accreditation that might be mandated by government or come to be generally accepted in the profession) – for its evidence to be admissible." NRC I, *supra*, at 106-07.

22. The NRC I also recommends the requirement of "rigorous external proficiency testing via blind trials" as a prerequisite to admissibility of DNA evidence. In fact, NRC I emphasizes this requirement above all others.

23. Most important, there is no substitute for rigorous proficiency testing via blind trials. Such proficiency testing constitutes scientific confirmation that a laboratory's implementation of a method is valid not only in theory, but also in practice. No laboratory should let its results with a new DNA typing method be used in court, unless it has undergone such proficiency testing via blind trials. NRC 1, *supra*, at 55.

24. The NRC II and TWGDAM Guidelines also indicate the importance of regular proficiency testing, including blind proficiency testing. *See* NRC II, *supra*, at 88 ("Regular proficiency tests, both within a laboratory and by external examiners, are

one of the best ways of ensuring high standards. To the extent that it is feasible, some of the tests should be blind."); TWGDAM Guideline 9.2 ("It is highly desirable that the DNA laboratory participate in a blind proficiency test program, and every effort should be made to implement such a program."). The DAB Standards are somewhat less emphatic on the requirement of blind trials, but still it is clear that rigorous external proficiency testing is a prerequisite to reliable DNA testing under the Standards. *See* DAB Standard 13.1 ("Examiners...who are actively engaged in DNA analysis shall undergo, at regular intervals of not to exceed 180 days, external proficiency testing in accordance with these standards.").

25. Another requirement established in all the reports, guidelines, and standards is the absolute necessity of controlling for the problem of contamination in testing. The NRC I Report expressed its most "serious concern" about the problem of "contamination of evidence samples with other human DNA," and warns that "[e]ven the simple act of flipping the top of a plastic tube might aerosolize enough DNA to pose a problem." NRC I, *supra*, at 65.

26. The NRC Reports, the TWGDAM Guidelines, and the DAB Standards stress the need for regular external audits and the need to take corrective action in response to any deficiencies uncovered in the audit process. *See* NRC I, *supra*, at 106 (recommending periodic on-site inspections of accredited labs); NRC II, *supra*, at 78-80 ("Proficiency-testing and audits are key assessment mechanisms in any program for critical self-evaluation of laboratory performance. . . . Regular audits of laboratory operations complement proficiency-testing in the monitoring of general laboratory performance."); TWGDAM, *supra*, Guideline 10 ("Audits are an important aspect of the Q[uality] A[ssurance] program . . . . Audits or inspections should be conducted at least once every 2 years by individuals separate from and independent of the DNA testing laboratory . . . Records of each inspection should be maintained and should include . . . remedial action taken to resolve existing problems . . ."); DAB, *supra*, Standard 14 (The laboratory shall establish and follow procedures for corrective

action), Standard 15 (The laboratory shall conduct audits annually and once every two years, a second agency shall participate in the annual audit).

27. The prosecution did not establish conformance with any of these general principles with respect to the DNA testing in this case. The prosecution did not establish by independent evidence that the methodology used in this case comported with the scientifically recognized elements of developmental validation, internal validation, proficiency testing, contamination control, and external audits.

28. Equally deficient was the prosecution's attempt to establish that the probability of a "match" was accurate. The lack of a generally accepted method for statistical computation precluded the admissibility of the prosecution's DNA evidence.

a. The prosecution's DNA evidence was inadmissible because there are no generally accepted statistical methods that address both the probability of a coincidental match between two people who share common genetic characteristics and the probability that a match would mistakenly be reported due to laboratory error.

(1) Evidence of a DNA "match" between two samples is impossible to evaluate without reliable information on the likelihood that a match would be declared if the samples are from different individuals. The ability to express this probability is crucial to the admissibility of DNA-derived evidence: "without being informed of such background statistics, the jury is left to its own speculations." McCormick, EVIDENCE 655 (Cleary Ed.).

(2) A false "match" between samples can occur in two ways. Interpretation of DNA typing results depends not only on population genetics, but also on laboratory error. Two samples might show the same DNA pattern for two reasons: two persons have the same genotype at the loci studied, or the laboratory has made an error in sample handling, procedure, or interpretation. NRC I, *supra*, at 88.

(3) To evaluate DNA evidence, the jury needed statistics that addressed the probability of both events that could cause a false match. To provide statistics that reflect the probability of one event that could cause an innocent person to

match, while not providing the other, permitted the jury to speculate about the meaning of DNA evidence:

> Especially for a technology with high discriminatory power, such as DNA typing, laboratory error rates must be continually estimated in blind proficiency testing and must be disclosed to juries. For example, suppose the chance of a match due to two persons having the same pattern were 1 in 1,000,000, but the laboratory had made one error in 500 tests. The jury should be told both results; both facts are relevant to a jury's determination.

NRC I, *supra*, at 89; *see also* Richard Lempert, *Comment: Theory and Practice in DNA Fingerprinting*," 9 STATISTICAL SCIENCE 255, 257 (1994).

(1) The potential for false positives due to laboratory error in DNA testing is beyond dispute. "Laboratory errors happen, even in the best laboratories and even when the analyst is certain that every precaution against error was taken." NRC I, *supra*, at 88-89; *see also* J. Koehler, *DNA Matches and Statistics*, 76 JUDICATURE 222 (1993), 229 ("[B]ased on the little evidence available to date, a reasonable estimate of the false positive error rate is 1-4 percent."); J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial* 34 JURIMETRICS: THE JOURNAL OF LAW, SCIENCE, AND TECHNOLOGY 26 (1994) (proficiency testing shows error rate of 1-4%); D. Berry, *Comment*, 9 STAT. SCI. 252, 253 (1994) ("Only the frequency and type of errors are at issue."); R.C. Lewontin, *Comment: The Use of DNA Profiles in Forensic Contexts*," 9 STAT. SCI. 259 (1994) (discussing sources of error); W. Thompson, "*Comment*," 9 STAT. SCI. 263, 265 (1994) (discussing data on laboratory error); *Cf.* D. Burk, *DNA Identification: Possibilities and Pitfalls Revisited*, 31 JURIMETRICS: THE JOURNAL OF LAW, SCIENCE, AND TECHNOLOGY 53, 80 (1990) ("Bald statements or broad hints that DNA testing is infallible . . . are not only irresponsible, they border on scientific fraud.").

(2) Even experts who support current forensic methods for

computing the frequency of matching DNA profiles acknowledge that the rate of false positive errors must also be considered when evaluating DNA evidence. *See, e.g.*, B. Weir, *Population Genetics in the Forensic DNA Debate*, 89 PROC. NATL. ACAD. SCI. 11654, 11658 (1993).

(3) Most experts believe that having an accurate estimate of the false positive rate is more important than having an accurate estimate of the probability of a coincidental match because the rate of false positives is likely to be much greater than the rate of coincidental matches, at least for RFLP-based tests. P. Hagerman, *DNA Typing in the Forensic Arena*, 47 AM. J. HUM. GENET. 876 (1990) (high false positive rate makes probability of coincidental match irrelevant); R. Lempert, *Some Caveats Concerning DNA As Criminal Identification Evidence: With Thanks to the Reverend Bayes*," 13 CARDOZO L. REV 303, 325 (1991) (probability of a coincidental match between people who have the same DNA profile "is usually dwarfed by the probability of a false positive error"); L. Mueller, *supra*, at 58 (exact probability of a coincidental match "should hardly matter" to jury given much greater likelihood of false positive); R. Ostrowski & D. Krane, *Unresolved Issues in Forensic Use of DNA Profiling*, 3 ACCOUNTABILITY IN RESEARCH 47 (1993).

(4) DNA evidence cannot be evaluated without knowing the rate of false positives due to laboratory error; error rates must, therefore, be estimated and these estimates must be disclosed to the jury.

b. In petitioner's case, the failure of the testing laboratories to use a generally accepted method for determining the probability of a coincidental match rendered the prosecution's DNA evidence inadmissible. At the time of petitioner's trial, there was no generally accepted method for determining the frequency of multi-locus RFLP-based DNA profiles.

(1) After determining that two DNA samples match, forensic analysts estimate the statistical frequency of such matches in a reference population. The purpose of the statistical estimates is to provide meaning to the match by showing

the likelihood that an unrelated person in the reference population would match by chance.

(2) To estimate the frequency of a DNA profile in a reference population, forensic analysts first estimate the frequency of each allele (band) in the DNA profile by determining its frequency in a data base containing DNA profiles of a number of individuals. These databases consist of convenience samples drawn primarily from blood banks, with separate databases for major racial and ethnic groups (Hispanics, non-Hispanic Caucasians, African-Americans, Asians). Analysts then combine the estimated frequencies of the individual alleles to determine the overall frequency of the DNA profile, using the product rule that works only if the alleles are statistically independent. Statistical independence means that the likelihood of a person having a particular allele is not affected by what other alleles the person has. The probability of a series of independent events is the product of their frequencies, and hence will be quite low when all the frequencies are low.

(3) These procedures are unreliable, *inter alia*, because forensic laboratories underestimate the frequency of matching alleles in their databases, and thereby greatly underestimate the overall frequency of DNA profiles. *See* Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons From the 'DNA War'*, 84 J. OF CRIM. LAW & CRIMINOLOGY 22, 65-68 (1993) (reviewing scientific literature and relevant court opinions).

(4) These procedures also fail to take into account the possibility that there is significant variability among population subgroups in the frequency of alleles. Within major groups, such as non-Hispanic Caucasians, Hispanics, African-Americans, and Asians, the frequency of alleles may differ among various ethnic, religious or geographic subgroups, a phenomenon known as population substructure. If such variability exists, there are two important implications. *See generally* NRC I, *supra*, Chapter 3. First, the convenience samples used by the forensic laboratories may be unrepresentative of the population in particular locales. Second, the assumption that

the frequency of alleles is statistically independent would be invalid.

(5) In April 1992, the NRC panel found existing empirical data insufficient to resolve the substructure question. The Report further concluded that the concerns were sufficiently serious that the statistical estimation methods developed by the forensic laboratories should not continue to be used. These methods, the NRC felt, might greatly underestimate the frequency of DNA profiles. Instead, the NRC proposed an alternative method that it dubbed "the ceiling principle."

(6) The procedure by which laboratories calculate the frequency of matching RFLP-DNA profiles in a reference population involves three steps. First, the frequency of each single band in the DNA profile is determined. Then the joint frequency of the two bands associated with a given probe is calculated. Finally, an overall frequency across all matching bands is calculated.

(7) To determine the frequency of each band (allele) in the DNA print, forensic analysts estimate the percentage of bands in a database that would "match" the band in question. Typically, the laboratory counts all bands in the data base that fall within a range of sizes; this range is designated a "bin." Some laboratories use "floating bins" keyed to the band in question. For example, to estimate the frequency of a band of 1000 base pairs, Lifecodes counts all bands that fall within +/- 1.8% of its size — that is, all bands in the data base which have an estimated size between 982 and 1,018 base pairs. Because all of these bands fall within Lifecodes's match criteria, they all are bands that potentially could be "matched" with the band in question. Other laboratories use "fixed bins" which are established in advance and used in each case. For example, the Federal Bureau of Investigation divides the full range of band sizes into 31 fixed bins. The frequency assigned to each band is determined by counting all the bands in its bin. The laboratory that analyzed the samples in this case, Cellmark, uses a floating bin based on what it calls "resolution limits."

(a) One deficiency in this process is that forensic

laboratories underestimate the frequency of matching bands, which cause the frequency of the DNA print to be understated, making the DNA evidence appear more significant than it is.

(b) Another flaw is that forensic laboratories may underestimate allele frequencies by failing to take into account sampling error - that is, the tendency for the allele frequency observed in a sample to differ from the true frequency due to the operation of chance in the selection of a sample.

(8) After determining the frequency of each band, the second step is to determine the frequency of genotypes. A genotype is the pair of alleles (bands) produced by a given probe. One of these alleles is inherited from the mother and one from the father. To determine the frequency of heterozygous (two band) genotypes, forensic DNA laboratories use the formula 2pq, where p and q are the frequency of the two alleles (bands) in the genotype. For example, if the frequency of band A is .03 and the frequency of band B is .05, the laboratory will multiply .03 x .05 x 2 and conclude that the frequency of the genotype AB is .003 (three in 1000). This formula assumes the frequencies of band A and band B are statistically independent, and may significantly underestimate the frequency of genotypes if the allele frequencies are not independent.

(9) When alleles at any genotype are statistically independent in a particular population, the population is said to be in Hardy-Weinberg equilibrium. The Hardy-Weinberg equilibrium may not hold due to endogamous mating patterns.

(10) The final step in the statistical procedures is to determine the frequency of the entire DNA profile, which is sometimes called a multi-locus genotype. Forensic DNA testing laboratories do this by multiplying together the frequencies of the genotypes. If four probes were used, the laboratory would, during the previous step, have computed four genotype frequencies. The product of these frequencies would be presented as the frequency of the entire DNA print. The use of the product rule (i.e., multiplication) to compute the frequency of multi-locus

genotypes assumes that the frequencies of the genotypes are statistically independent and significantly underestimates the frequency of the multi-locus genotype of the individual genotypes that are not independent.

(11) When the genotypes at different loci are statistically independent in a given population, the population is said to be in linkage equilibrium. NRC I, *supra*, at 78-79. The validity of Cellmark's and other forensic laboratories' assumptions, however, has not been established. Whether the major racial groups in the United States population are in linkage equilibrium is another major issue. Linkage equilibrium and Hardy-Weinberg equilibrium are closely related issues because endogamous mating patterns among heterogeneous groups could undermine both. "Once a population is known to be heterogeneous, one also cannot assume linkage equilibrium even for loci on different chromosomes; if an individual possesses an allele common among Puerto Ricans at one locus, it is more likely that he will do so at a second locus as well." E. Lander, *DNA Fingerprinting on Trial*, 339 NATURE 501, 504 (1989). Hence, the possibility of endogamous mating among heterogeneous groups, which is also called population structure, is a key underlying issue in the debate over the validity of the forensic laboratories' statistical estimation methods.

(a) One test for substructure compares the total number of homozygotes observed in a sample (data base) with the number expected if the sample is in Hardy-Weinberg equilibrium. Because substructure entails endogamous mating within subgroups, it increases the likelihood that mating pairs will share the same allele (band) and thereby produce homozygous offspring (who have only one band, rather than two at a given loci). Hence, if the number of homozygotes observed in a data base exceeds the number expected to occur by random mating (by an amount unlikely to occur by chance), it is evidence of substructure. Tests for "excess homozygosity" were first performed on forensic data bases by experts retained by defendants in criminal cases. They reported spectacular deviations from Hardy-Weinberg equilibrium and argued that these findings raised serious concerns about the validity of

the statistical procedures of the forensic laboratories.

(b) Another way to test for substructure is to compare the distribution of allele frequencies in various subgroups. However, there has been controversy about which subgroups allow relevant comparisons. For example, FBI scientists argued against the possibility of substructure based on data showing that within major groups (non-Hispanic Caucasians, African-Americans, and Hispanics) similar allele frequencies were found in samples drawn in Texas and Florida. Lander disagrees: "One might analogously conclude that blond hair, blue eyes, and fair skin are not correlated because such traits show similar frequencies in Florida and Texas; examining average frequencies in mixed populations sheds no light on substructure." Lander, *Invited Editorial: Research on DNA Typing Catching up with Courtroom Application*, 48 AM. J. HUM. GENET. 819, 821 (1991). According to Lander and other experts, what is needed is direct comparison of distinct ethnic subgroups; differences among such groups are difficult to detect in mixed populations. The NRC I, *supra*, at 80-82, adopted this position.

(c) There may be significant genetic variation among ethnic subgroups that goes undetected because members of discrepant subgroups are not included in the data bases, or because they appear in numbers too small for their differences to be noticed. Most databases consist of blood bank or hospital data from a narrow region and therefore may fail to capture the genetic diversity of the total population.

(12) Data suggesting significant variation among distinctive population subgroups already exist.

29. The prosecution failed to establish the necessary scientific consensus on the reliability of the NRC's "modified ceiling principle," as applied in this case.

a. The NRC report acknowledged the existence of the scientific dispute over population structure and proposed a compromise, the Ceiling Approach. NRC I, *supra*, Chapter 3. The danger of population structure is sufficiently serious, the

NRC concluded, that then-existing approaches should not be used. The NRC Report declared that additional empirical studies of ethnic subgroups are needed to determine the extent of population structure.

b. Pending the completion of the population studies, the NRC recommended an approach to statistical calculation that has been dubbed "the modified ceiling principle." According to this principle, the laboratory should first check to determine whether the DNA print observed in casework matches any DNA prints in existing databases. The frequency of such matches (and the size of the databases) should be reported to the trier-of-fact. Second, the laboratory should estimate the frequency of the DNA print by applying the product rule to "modified ceiling frequencies" consisting of the 95 percent upper confidence limit of the highest frequency observed in an existing data base or 10 percent, whichever is higher. NRC I, *supra*, at 91-93, 95.

c. The modified ceiling principle is scientifically indefensible and inadequate. *See, e.g.*, J. Cohen, *The Ceiling Principle Is Not Always Conservative In Assigning Genotype Frequencies For Forensic DNA Testing*, 51 AM. J. HUM. GENET. 1165 (1992); J. Slimowitz & J. Cohen, *Violations of the Ceiling Principle: Exact Conditions and Statistical Evidence*, 53 AM. J. HUM. GENET. 314 (1993) ("Before the ceiling principle is implemented, more research should be done to determine whether it may be violated in practice."); S. Geisser & W. Johnson, *Testing Independence of Fragment Lengths within VNTR Loci*, 53 AM. J. HUM. GENET. 1103 (1993) (even with conservative correction, product rule impermissible). "Slimowitz and Cohen demonstrated the 'ceiling principle' is not a ceiling, as others have shown that it is not a principle. Reflective courts find the choice of samples arbitrary, the calculations capricious, and the 'expert' testimony indefensible. Like the flat-earth theory, the 'ceiling principle' should be buried, not bounded." N. Morton, *Genetic Structure of Forensic Populations*, 55 AM. J. HUM. GENET. 587 (1994). "[T]he interim-ceiling principle is an example of data-driven, interest-ridden, pseudo-statistical, ad hoc

methodology to which no statistician (or scientist) should be a party." Expert Report of Dr. Elizabeth Thompson, in *State v. Hollis* (Sup. Ct. King. Co., Wash, No. 92-2-04603-9), Feb. 28, 1994.

30. Failure of the testing laboratories to use a generally accepted method for determining false positive error rates rendered the prosecution's DNA evidence inadmissible.

a. The scientific community recognizes that evidence of a DNA match cannot meaningfully be evaluated without knowing the rate of laboratory error. Thus, evidence of a DNA match cannot be admitted without statistics on the error rate. To comply with constitutional requirements, the method used to determine the error rate must be generally accepted as reliable within the relevant scientific community.

(1) To be accepted as reliable by the scientific community, the method for determining error rate must involve externally administered blind proficiency testing on samples that replicate casework. *See, e.g.*, NRC I, *supra*, at 89 ("laboratory error rates must be continually estimated in blind proficiency testing"); *id*. (proficiency tests must be "truly representative of case materials" (with respect to sample quality, accompanying description, etc.).)

(2) In light of the consensus on the need for blind proficiency testing, any method of error rate estimation cannot meet federal constitutional requirements unless it incorporated blind proficiency testing on samples simulating casework.

b. The laboratory that performed DNA testing in this case did not employ a generally accepted method to estimate error rate. At the time of petitioner's trial, Cellmark did not have any adequate external blind proficiency testing on realistic samples to provide a meaningful estimate of its error rate. Indeed, the true error rate of the laboratory is unknown and unknowable based on available data. Consequently, the value of the DNA evidence they offer is impossible to evaluate and therefore inadmissible.

31. Petitioner's constitutional rights were violated at trial by the inaccurate and false testimony concerning the DNA match. The way in which the prosecutor presented the statistical conclusion of the DNA evidence, through the direct examination of Ms. Weber, was flawed in ways that created misunderstanding, confusion, and false beliefs in the minds of the jurors.

a. "Even if the laboratory determination that defendant's DNA matches that found at a crime scene is accurate, the manner in which this finding is presented could be prejudicial. For example, the presentation of a very small 'probability of a random match' in the general population, even if validly computed, has been said to be misleading for a variety of reasons." D. Faigman, et. al., (Volume 3) MODERN SCIENTIFIC EVIDENCE, THE LAW AND SCIENCE OF EXPERT TESTIMONY, 219 (2002).

b. Ms. Weber testified that the "DNA banding pattern of Ernest Jones did match the bands in the sample from the vaginal swabs." (20 RT 3129.) By informing the jury that petitioner "matched" the samples taken from the victim, Ms. Weber and the prosecution misled the jury into thinking that a comparison between the crime scene DNA and Mr. Jones's DNA excluded all other donors. The jurors should have been told that a match means only that Mr. Jones cannot be excluded as the donor of the DNA, not that he is certainly the donor.

c. Ms. Weber testified that "the chance that a random individual might have the same DNA banding pattern as Ernest Jones is approximately 1 in 78 million." (*Id*. at 3130.) Ms. Weber's testimony improperly and falsely conveyed to the jury that there was a 1 in 78 million chance that petitioner did not commit the rape. *See, e.g.*, NRC II, *supra*, at 133 ("The 'prosecutor's fallacy' – also called the fallacy of the transposed conditional – is to confuse two conditional probabilities. Let P equal the probability of a match, given the evidence genotype. The fallacy is to say that P is also the probability that the DNA at the crime scene came from someone other than the defendant. . . . To obtain such a probability requires using Bayer's theorem and a prior

probability that is assumed or estimated on the basis of non-DNA evidence.").

d. The testimony falsely conveyed to the jury that the different banding patterns were "identical." (20 RT 3130.) Different banding patterns that are declared a match are not necessarily identical, but fall within a range that takes into account an acceptable rate of error in the procedure by which the DNA bands are transferred onto the autoradiograph. To imply that petitioner's and the evidence sample banding patterns are identical is to incorrectly dismiss the rate of error associated with the DNA analysis.

32. Petitioner was deprived of his Sixth Amendment rights by trial counsel's unreasonable and prejudicial failure to litigate the inadmissibility of the DNA evidence in a timely fashion and with sufficient support by expert testimony. Similarly, petitioner was deprived of his Sixth Amendment and Fourteenth Amendment rights by appellate counsel's unreasonable and prejudicial failure to litigate the inadmissibility of the DNA evidence in the direct appeal.

33. The admission of the DNA evidence was prejudicial. DNA evidence based on seemingly astronomical statistical probabilities, by its very nature, is particularly compelling to lay jurors.

N. CLAIM FOURTEEN: THE PROSECUTOR VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY COMMITTING EGREGIOUS ACTS OF MISCONDUCT DURING THE GUILT AND PENALTY PHASES.

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, a reliable and accurate guilt and penalty assessment based on accurate rather than false testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and to be free of the imposition of a cruel and unusual punishment were violated by the prosecutor's failure to disclose material exculpatory evidence. The prosecutor engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of unconstitutional

misconduct that involved deceptive or reprehensible methods and was designed to, and did in fact, prejudicially deprive petitioner of the foregoing constitutional rights.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Three, Four, Five, Nine, Ten, and Twelve through Sixteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The prosecution's presentation of false testimony and false inferences at trial concerning the injuries sustained by the victim irreparably skewed the jury's decision-making process.

a. The facts and allegations set forth in Claim One at paragraphs 1 and 12, *supra*, are incorporated by reference as if fully set forth herein.

b. The victim sustained a stab wound to her peritoneum that entered her uterus. (Ex. 177 at 3087.)

c. The prosecution falsely described this wound as a "vaginal wound." (17 RT 2804.)

d. Thereafter, the prosecution compounded the prejudicial effect by repeatedly, and falsely, describing and referring to the wound as a "vaginal wound" or a wound to the victim's vagina. (*Id*. at 2813; *see also* 26 RT 3892, 3936.)

e. This alleged "vaginal wound" had transmogrified into a "rape with the knives" by the prosecution's closing argument. (*E.g*., 26 RT 3892.)

f. The prosecution's false and inflammatory description of the victim's wounds was prejudicial. The jury's consideration and reliance on the prosecution's erroneous description of the stab wound as a "vaginal wound" was especially prejudicial because petitioner was charged with having raped the victim. The jury's consideration of this false and grossly prejudicial evidence resulted in

petitioner's convictions, a true special circumstance finding, and a sentence of death.

g. The prosecution falsely and prejudicially led the jury to believe that the physical evidence proved that petitioner raped the victim with a knife.

(1) The prosecution elicited testimony from the medical examiner that the stab wound to the pubic area "penetrated into the left side of the vulva." (17 RT 2797.) Despite this specific testimony, the prosecution from then on mischaracterized the doctor's testimony and referred to that wound as the "vaginal wound." (*Id*. at 2804; 26 RT 3936.)

(2) During closing arguments, the prosecutor elevated a stab wound that simply penetrated the vulva into a vaginal wound, and then made the impermissible and false assertion that the victim had been vaginally raped with a knife. (26 RT 3892.) To ensure a rape felony murder conviction and a true finding for the rape special circumstance, the prosecution argued to the jury that the victim's death was "a direct result of his rape with the knives." (*Id*.)

(3) This misleading, false, and highly inflammatory characterization of the knife wound prejudiced petitioner in that there was no actual evidence that petitioner specifically intended to rape the victim. By conjuring up the false image that petitioner raped the victim with a knife, however, the prosecutor capitalized on the jurors' fears and emotions, and blurred the crucial legal question of whether petitioner truly possessed the specific intent to commit rape. Absent this error, the jury would not have convicted petitioner and sentenced him to death.

3. The prosecution encouraged the medical examiner to give false testimony, and failed to correct this testimony, regarding injuries the victim sustained from the wrist bindings. (17 RT 2775-76.) The prosecution further falsely and prejudicially argued that the physical evidence proved that sexual activity occurred prior to the victim's death, when in fact the evidence suggested she was deceased. The facts and allegations set forth in Claim One at paragraphs 1 and 12, *infra*, and Claim Nine, *supra*, are incorporated by reference as if fully set forth herein.

a. During the autopsy, the medical examiner inspected the victim's wrists and ankles after the multiple layers of bindings had been removed. The medical examiner observed that "the wrist bindings leave crease marks but no other disturbance on the skin," and that there was "no disturbance on the skin in relation to the ankle bindings." (Ex. 171 at 3038.)

(1) At trial, the prosecution questioned the medical examiner about injuries to the binding sites. (17 RT 2775.) The medical examiner falsely testified that the "only area that I could attribute injury from bindings was the left wrist area in which there was *a bruising and abrasion which could have been caused from the bindings*." (*Id*. at 2775-76 (emphasis added).) The prosecution failed to correct the medical examiner's patently false testimony.

(2) By failing to correct the medical examiner's false testimony, the prosecution allowed the jury to make the erroneous inference that because the victim sustained a bruise as a result of her bindings, she was alive at the time her wrists were bound.

(3) The prosecution had no evidence to support his theory of the crime, that petitioner bound the victim, raped her, and murdered her. The physical evidence, including the victim's autopsy, strongly indicated the victim was first killed, her body sexually assaulted, and then her wrists and ankles bound. (*See* Ex. 177 at 3086.) The prejudicial effect of this false evidence is substantial. Allowing the jury to consider patently false evidence (the victim sustained a bruise to the wrist binding site), which in turn allowed the jury to make a wholly erroneous inference (the victim was alive at the time she was bound), resulted in the jury convicting petitioner and finding a special circumstance true, based on materially false evidence. Petitioner's unconstitutionally obtained convictions and death sentence must be reversed.

(4) To prevail on the theory of rape felony murder and to ensure a true finding as to the special circumstance of rape, the prosecution needed to prove that the victim was alive at the time the attempt to rape or the rape was initiated.

Accordingly, the prosecutor falsely and prejudicially propounded the theory that the physical evidence proved that the sexual intercourse occurred prior to Mrs. Miller's death despite overwhelming evidence to the contrary. (*See, e.g.*, 26 RT 3902 (rejecting post-mortem sexual contact theory); *id*. at 3896 (arguing victim must have been alive if bound).)

(5) Had it not been for the false and misleading testimony regarding the timing of events, the jury would have clearly understood that the victim had died prior to any attempted sexual contact. An afterthought, the bindings were the product of petitioner's severe mental illness. They were not used to subdue a live victim, but to mentally and emotionally subdue the victim's dead body.

b. The theory of first degree rape felony murder and the special circumstance of rape hinged on the prosecutor's ability to prove petitioner specifically intended to rape the victim. The prosecutor relied heavily on this false testimony as to the victim's injuries to portray petitioner's actions as deliberate and intentional in that they evidenced a calculated use of force. By presenting this false evidence, the prosecutor prejudicially denied petitioner the opportunity to refute the prosecutor's theory of the case, thereby rendering the trial fundamentally unfair and the guilt and sentencing determinations unreliable.

4. The prosecution falsely and prejudicially argued that petitioner's barricade prevented law enforcement from entering the apartment. The facts and allegations set forth in Claim Sixteen, *infra*, are incorporated by reference as if fully set forth herein.

a. Petitioner testified that he – paranoid and hearing voices telling him people were trying to kill him – placed various objects against or near the front and back doors of his apartment, but he did not barricade the doors. (23 RT 3505.) In fact, petitioner walked out the front door to get into the car. (*Id*. at 3508.)

b. Law enforcement officers testified to entering petitioner's apartment the day of his arrest without being hindered by a barricade. (17 RT 2729.)

The delay in entering the apartment stemmed not from efforts to storm a barricade, but from law enforcement agents' mistaken belief that the front door was locked. (15 RT 2477.)

c. The prosecutor repeatedly and erroneously portrayed petitioner's actions as a cold and calculating attempt to evade and endanger law enforcement, and further argued that because petitioner sought to elude law enforcement, he was inherently untrustworthy. (27 RT 3968.)

d. The evidence showed that petitioner's paranoia and auditory hallucinations caused him irrationally and ineffectually to place items near the doors. (23 RT 3505.) The evidence further showed that he abandoned this effort and instead attempted suicide. (22 RT 3345.) But for the prosecutor's materially false argument, petitioner effectively would have been able to develop a complete and accurate picture of his deteriorating mental state, and as a result, the jury would not have convicted or sentenced him to death.

5. During closing arguments, the prosecutor repeatedly and improperly argued that petitioner's failure to call an expert witness to verify or diagnose a mental disorder from which petitioner suffered and which affected his ability to form the requisite intent proved that petitioner did not suffer from a mental disorder. (26 RT 3905; 27 RT 3972.) These persistent remarks referred to facts not in evidence thereby undermining the presumption of innocence and prejudicially shifting the prosecution's burden. They were intended to and did prejudicially influence the jury rendering the trial fundamentally unfair.

6. During closing arguments, the prosecutor prejudicially and erroneously equated the intent element of the crime of rape with the intent element for the special circumstance of felony murder rape by arguing, "and in this case[,] that is to reject the voluntary intoxication and mental disorder, to accept that he formed the specific intent to rape the same way he did it with [a victim of a rape prior], and to come back with first degree murder." (27 RT 3991-92.) In grossly mischaracterizing an essential

element of the special circumstance, the prosecutor misstated the law. As a result, the jury was improperly and prejudicially influenced to convict, rendering the trial fundamentally unfair. The facts and allegations set forth in Claim Twelve, *supra*, are incorporated by reference as if fully set forth herein.

7. The prosecutor prejudicially engaged in improper and false victim impact arguments intended to inflame the jury's passions and prejudices and improperly influence the guilt deliberations. The magnitude of misconduct rendered the trial fundamentally unfair and undermined the reliability of the guilt determination. The facts and allegations set forth in Claim One and paragraph 12, *supra*, and Claim Twenty-one, *infra*, are incorporated by reference as if fully set forth herein.

a. The misconduct is demonstrated by, but not limited to, the following examples:

(1) During the rebuttal argument, the prosecutor stated, "I asked him pointed questions to try to get at the truth in this case. Do you think if Julia Miller were here she would have a few questions to Mr. Jones, a few pointed questions for Mr. Jones when he says she attacked him?" (27 RT 3975.)

(2) The prosecutor prejudicially concluded his rebuttal remarks by stating, "[h]e comes into this courtroom, two and a half years later and attempts to steal her dignity and her reputation, that she's the one that precipitated this – these heinous acts of violence. Don't let him get away with that last theft, ladies and gentlemen. It's a first degree murder and the special circumstances are true." (*Id*. at 3992.)

b. The prosecution's argument routinely strayed well beyond the bounds of vigorous argument into misconduct, thus prejudicially violating petitioner's federal constitutional rights.

8. During closing remarks, the prosecutor repeatedly and improperly referred to facts not in evidence to bolster his arguments. These speculations and assertions not subject to the adversary process, stated as fact, were instrumental to the

prosecutor's theory and undermined petitioner's defense and credibility. The facts and allegations set forth in Claim Five, *supra*, and Claim Sixteen, *infra*, are incorporated by reference as if fully set forth herein.

a. The misconduct is demonstrated by, but not limited to, the following examples:

(1) In disputing petitioner's allegations that the county jail adequately and professionally assessed petitioner's mental functioning and properly prescribed Haldol, the prosecutor prejudicially and improperly argued, "[t]hink about the county jail setting. We all know the county jail is overcrowded. . . . What is the first part of the County budget that gets cut? Mental Health. Mental Health for inmates. Where do you think that falls in county budget?" (27 RT 3970-71.)

(2) The prosecutor falsely implied that Shamaine Love and Pamela Miller did not wear watches which explained their inconsistent testimony as to the times surrounding the possession and sale of the victim's jewelry, when no such evidence was introduced. (*Id*. at 3973.)

(3) The prosecutor did not present evidence that RTD busses often ran late, but nevertheless argued, "Did RTD buses often run late? Oh, yeah, they sure do. Anyone who is taking them knows that. Could a bus have broken down that night? Yeah, it might have broken down. There wasn't one there." (*Id*. at 3978.)

b. Singly and cumulatively, these instances of prosecutorial misconduct rendered the trial fundamentally unfair and prejudiced petitioner.

9. The prosecutor repeatedly and erroneously misstated the law by arguing that if the jury were to convict petitioner of the lesser included offenses, it necessarily meant the jury believed petitioner and was endorsing his testimony by their verdict. (26 RT 3907.)

a. The facts and allegations set forth in Claim Twelve, *supra*, are incorporated by reference as if fully set forth herein.

b. The pervasive misconduct is demonstrated by, but not limited to,

the following examples:

(1) The prosecutor ended his opening remarks during closing arguments by stating, "[b]ecause if you accept any of those lessers, you have accepted [petitioner's] story." (*Id*.)

(2) In rebuttal, the prosecutor further stated, "[a]nd if you give him a lesser offense, you are saying [petitioner's testimony] is true." (27 RT 3987.)

c. The prosecutor's misconduct was prejudicial. The prosecution's misstatements of the law worked as intended, and greatly contributed to petitioner's conviction and true special circumstance finding.

10. The prosecutor introduced irrelevant, highly inflammatory victim impact evidence. Those facts set forth in Claims Fifteen and Twenty-one, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. The court erroneously admitted this egregious evidence and failed to properly instruct the jury as to the constitutionally permissible ways in which victim impact evidence could be considered. The court's inaction allowed the interjection of impermissible guilt and sentencing factors in petitioner's penalty phase trial. The prejudice to petitioner from this testimony only escalated as a result of the court's failure to limit the scope of this testimony and to provide necessary limiting instructions. As a result, petitioner's trial was fundamentally unfair and the sentence unreliable.

b. Trial counsel unreasonably failed to challenge the admission of this evidence and to object during its presentation. Trial counsel also unreasonably failed to request a constitutionally appropriate limiting instruction. Trial counsel thus prejudicially failed to protect petitioner's constitutional rights to a fair and reliable sentencing. His actions were neither strategic nor reasonable and fell well below the standards established for reasonably competent counsel.

11. Without a factual basis or evidentiary support, the prosecutor prejudicially and inaccurately characterized petitioner as a gang member and as such, predisposed to

commit violent acts. By doing so, the prosecutor interjected impermissible factors into the sentencing decision and prejudicially influenced the jury, rendering petitioner's trial fundamentally unfair. Those facts set forth in Claim Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

a. During the penalty phase the prosecutor engaged James Park in the following dialogue:

> Q: I think you said this was the incident in 1986 that he got into an actual physical fight, and I think you said he fought with a Crip gang member; is that correct?
>
> A: That was my recollection. I'm not sure whether that was the case. My recollection was that was mentioned.
>
> Q: Well, if I showed you the CDC, would it refresh your recollection maybe as to what happened in that incident?
>
> A: Yes, sir. There is the mention of the Crip there, yes.
>
> Q: Right. Now, actually what it says here is that Mr. Jones admits the charges and that he stated that he started the fight over Crip business. Isn't that what it says here?
>
> A: That was his statement, yes, sir.
>
> Q: Okay. So doesn't that – I mean you said he got in a fight with another gang member. Wouldn't that indicate that he actually was fighting over gang business that he was involved in?
>
> A: Not necessarily. Because Mr. Jones would have to guard his reputation. He could have been fighting with this alleged Crip for a lot of reasons and he is not going to say. Maybe the Crip was pressuring him. But even in – even in the court situation, in the prison court, you have to be a little careful what you say. You end up with more enemies than you can handle. So I don't know – without talking to Mr. Jones, I wouldn't know what all was behind

that incident.

(29 RT 4307-08.)

b. As demonstrated, the prosecutor prejudicially and falsely asserted that petitioner was involved in a gang simply because he had an altercation with a known gang member and that as a gang member, more likely to engage in violent behavior while incarcerated.

c. By this erroneous insinuation, the prosecutor prejudicially interjected inflammatory and impermissible sentencing factors into deliberations, which improperly influenced the jury and rendered the trial fundamentally unfair and the sentencing determination unreliable.

12. The prosecutor repeatedly and prejudicially characterized petitioner's perceived failure to take advantage of psychiatric treatment and systemic support as aggravating evidence, thereby interjecting improper sentencing factors into jury deliberations and rendering the sentencing phase fundamentally unfair and the sentencing determination unreliable. (31 RT 4640-41.) Those facts set forth in Claim One, *supra*, and Claim Sixteen, *infra*, are hereby incorporated by reference as if fully set forth herein.

13. The prosecutor continually and prejudicially engaged in improper victim impact arguments intended to inflame the jury's passions and prejudices and improperly influence the sentencing deliberations. The magnitude of misconduct, including the assertion of untested facts not in evidence, rendered the trial fundamentally unfair and undermined the reliability of the sentencing determination.

(1) The prosecutor's pattern and practice of said misconduct exacerbated the earlier spectator misconduct and was evidenced and illustrated by, including but not limited to, the following instances of impropriety:

(a) The prosecutor repeatedly, impermissibly, and prejudicially asked the jury to show petitioner the same sympathy he showed the victim if they were to consider sympathy at all. (*See, e.g., id*. at 4643, 4657, 4661.)

(b) In maligning what he characterized as a common defense argument that defendants incarcerated for life without the possibility of parole are deprived of many rights, the prosecutor prejudicially argued "think about the litany of things [the victim] will never do. That applies equally to her, and she did not do anything wrong." (*Id*. at 4654.)

(c) The prosecutor improperly and prejudicially speculated on what the victim and the defendant said, did, and or suffered during the commission of the crime. (*Id*. at 4661.)

(d) The prosecutor improperly and prejudicially suggested that the victim had not enjoyed the rights enjoyed by the defendant, in arguing, "[t]here were police officers out there who saved the defendant, and he came in here to stand trial. Who saved [the victim]?" (*Id.*) This comment was intended to and did undermine the defendant's right to due process, a fair trial and a reliable jury determination as to sentencing.

(2) This false and irrelevant victim impact evidence, individually, in combination, and when considered with the other serious violations of petitioner's fundamental constitutional trial rights, requires the reversal of his death sentence.

14. The individual and cumulative effect of the misconduct had a substantial and injurious influence or effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

15. To the extent trial counsel unreasonably failed to challenge the prosecutor's misconduct on any and all of the foregoing grounds, trial counsel was constitutionally and prejudicially ineffective.

O. CLAIM FIFTEEN: PETITIONER'S DEATH SENTENCE WAS UNCONSTITUTIONALLY BASED ON UNNOTICED, IRRELEVANT, AND HIGHLY PREJUDICIAL NON-STATUTORY AGGRAVATING EVIDENCE.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair, reliable, rational, and individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute; have the jury give full effect to all evidence in mitigation of penalty; the privilege against self-incrimination, confrontation and compulsory process; due process; a jury trial by a fair and impartial jury; conviction beyond a reasonable doubt; and the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the state failed to provide constitutionally required notice of factors to be used in aggravation, and the trial court permitted the prosecution to introduce highly prejudicial and irrelevant testimony of petitioner's sister regarding a statement petitioner allegedly made to her two and half years after the crime. These errors were compounded by trial counsel's unreasonable and prejudicial failures to investigate and rebut the potential aggravation and protect petitioner's rights to a reliable sentencing process.

In support of this claim, petitioner alleges the following facts, among others, to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One and Sixteen and the accompanying exhibits are hereby incorporated by reference as if fully set forth herein to avoid unnecessary duplication of facts.

2. The prosecution was constitutionally and statutorily required to provide notice to capitally charged individuals a reasonable amount of time before trial of the aggravating evidence it intends to introduce. (*See, e.g.*, Cal. Penal Code § 190.3.)

3. The prosecution prejudicially and impermissibly failed to provide notice to petitioner of the evidence it intended to introduce in aggravation during the sentencing portion of petitioner's trial, both with regard to a prior crime and a statement allegedly made by petitioner two and a half years after the crime.

a. On February 1, 1995, the day the jury reached a verdict in the guilt phase, the prosecutor provided petitioner and trial counsel their first notice of the aggravation he planned to present. The prosecution informed trial counsel that he had two witnesses that he planned to call, Pamela Miller and Kim Jackson. He was going to call Ms. Jackson, "a prior rape victim of the defendant," to "testify to the circumstances" involved in that incident. (27 RT 4064-65.) This notice of aggravation was given verbally.

b. The prosecution made no further oral or written proffer regarding Ms. Jackson's testimony. Furthermore, the record contains no evidence that the prosecution ever filed a written Notice of Aggravation regarding this incident.

c. Despite his late and insufficient notice, the prosecutor presented extensive permissible and impermissible aggravating evidence including the emotional and highly inflammatory testimony of the victims of petitioner's prior crimes. During Ms. Jackson's testimony, the prosecution elicited details of an incident in which petitioner allegedly raped her. Ms. Jackson testified that she and petitioner drove to her apartment after a barbeque at petitioner's sister's home. On the way home they stopped to buy marijuana. They smoked the marijuana at her apartment and talked. Ms. Jackson testified that when she went to her bedroom to get petitioner's coat, he followed her and raped her at knifepoint. (28 RT 4173-84.)

d. The prosecutor's failure to provide timely notice of the intention to introduce evidence of petitioner's prior conviction involving Ms. Jackson as aggravation and trial counsel's deficient performance resulted in false information being presented to, and mitigating aspects concerning the incident being withheld from, the jury.

4. Trial counsel's failure to investigate potential aggravation; failure to object to the prosecution's late and insufficient notice of this testimony; failure to request a more specific proffer of the intended aggravating evidence; and, failure to request a continuance to prepare for this newly announced aggravation was professionally unreasonable. Trial counsel had no strategic reason for failing to conduct such an investigation and make these objections and requests.

a. Reasonably competent counsel handling a capital case at the time of petitioner's trial knew that a thorough investigation of the prosecution's possible evidence in aggravation was essential to the development and presentation of a defense at penalty trial. Reasonably competent counsel also recognized that a thorough investigation of a defendant's background and family history, including the investigation of any prior crime, was essential to the adequate preparation of both the guilt and penalty phases. (*See, e.g.*, Ex. 183 at 3178; 3184-85.)

b. Prior to the start of petitioner's capital trial, trial counsel knew that Ms. Jackson was a long-term family friend; the facts surrounding the charges and the conviction stemming from the incident with Ms. Jackson; that petitioner apologized to Ms. Jackson in the immediate aftermath, and that he had likewise apologized to Mrs. Harris, right before requesting that Mrs. Harris kill him; and, that petitioner suffered from a major dissociative disorder, and that this encounter was one more of petitioner's dissociative episodes. (Ex. 154 at 2752; *see also* Ex. 150 at 2731.)

c. Prior to the penalty phase, trial counsel knew of the prior conviction stemming from the incident with Ms. Jackson, but unreasonably conducted virtually no investigation into the circumstances of this incident, other than to retrieve the court files related to the case and make a few unsuccessful attempts to contact Ms. Jackson. Indeed, the only person who even attempted to contact Ms. Jackson was investigator Daniel Bazan, whose role on the case was strictly confined to an investigation of guilt phase issues. (Ex. 19 at 204; Ex. 12 at 105.)

d. Given these facts, reasonably competent trial counsel would have

concluded that further investigation of this prior crime, including consultations with the defense's own mental health expert, was warranted. Trial counsel unreasonably failed to conduct such an investigation prior to trial or upon learning that the prosecution intended to introduce the evidence in the penalty phase. Moreover, trial counsel unreasonably failed to request additional time to perform these essential tasks.

e. Despite the availability of petitioner's family members and friends who had knowledge of the incident and petitioner's state of mind at the time of the incident, trial counsel failed to do more than superficially question them about the incident to develop relevant mitigating information.

f. Trial counsel unreasonably failed to locate or interview any further witnesses concerning this prior crime.

g. Ms. Jackson offered no testimony during the guilt phase, and it is reasonably probable that a timely, proper objection from trial counsel as to the timeliness and adequacy of the notice would have precluded her testimony in the penalty phase as well. Trial counsel further failed to demand a proffer of Ms. Jackson's testimony. A proffer would have supported his request for a continuance, which was necessary so that he could adequately prepare to challenge the newly surfaced facts in Ms. Jackson's account of events.

h. No more than five days, and only three business days, elapsed between the prosecution's notice of aggravation and Ms. Jackson's testimony. The prosecutor stated more than once on the record that trial counsel had no reason before that time to anticipate Ms. Jackson's testimony, despite trial counsel's knowledge of the prior conviction, as Ms. Jackson previously had adamantly refused to testify as a prosecution witness when initially asked to do so by the prosecution. (28 RT 4113-14, 4117-18.)

i. Despite this change of events, trial counsel failed to object that evidence regarding this incident was untimely under California Penal Code section 190.3 and, therefore, inadmissible at petitioner's penalty trial.

j. Regardless of the timeliness of the notice, trial counsel also failed to request that the prosecutor fulfill his duties under the notice statute to give a clear and accurate proffer of the testimony he expected to elicit from Ms. Jackson. As a result, trial counsel was ill equipped to prepare to cross-examine Ms. Jackson. Even if trial counsel failed to object because he possessed the case file and probation reports from this incident, and he believed he had sufficient notice as to all of those facts, his assumption that Ms. Jackson's testimony would be limited to the facts in the case file was professionally unreasonable and factually erroneous.

(1) For example, on direct examination, Ms. Jackson took pains to add additional, damaging facts to her new version of the events that evening. She testified that during the assault, petitioner, with a knife at her throat, told her "to shut up or he would kill me." (28 RT 4180.) She also testified that during intercourse, "all the time he was doing it, he kept saying 'I'm going to kill you,'" and that when he finished, she asked him if he was going to kill her. (*Id*. at 4181.)

(2) This version of events was not recorded in any documents regarding Ms. Jackson's case, and was inconsistent with her testimony during the preliminary hearing for petitioner's trial. (Ex. 102 at 2065-93.)

(3) Trial counsel attempted to cross-examine her about her inconsistent statements, but without adequate notice, trial counsel missed his opportunity to investigate Ms. Jackson's credibility, or argue that Ms. Jackson's new story was inadmissible because it was unreliable and unduly prejudicial.

k. Trial counsel unreasonably failed to present all of the mitigating evidence regarding this prior conviction of which he was actually aware to the jury. Ms. Jackson's cross-examination testimony spans eleven pages in the trial record, yet trial counsel never elicited certain basic, mitigating facts pertinent to petitioner's mental condition and state of mind at the time of this encounter. For example, the jury never heard that petitioner voluntarily turned himself into the police the morning after this incident. (Ex. 14 at 135.) This critical evidence of petitioner's state of mind,

including his sense of remorse, is all the more significant when placed against Ms. Jackson's testimony that petitioner tried to hide from what he had done, purportedly asking that Ms. Jackson not tell anyone what had happened. (28 RT 4183.) Trial counsel had no strategic reason for failing to present this readily available information.

l. Trial counsel unreasonably failed to conduct a minimally competent investigation into this prior conviction, including interviewing further lay witnesses and consulting with mental health experts. Petitioner incorporates by reference those facts in Claim One paragraph 9, *supra*, as if fully set forth herein. Had trial counsel conducted such an investigation, he would have been able to present a more complete and compelling description of the events that evening. Trial counsel had no strategic reason for failing to do so.

m. Trial counsel failed to provide any mental health experts with the additional facts that such an investigation would have revealed, in order to ensure a thorough evaluation of petitioner. Trial counsel, likewise, failed to have a mental health expert meaningfully discuss the circumstances of this incident during psychiatric or clinical interviews with petitioner. Had he done so, he would have been able to present to the jury, through the mental health experts, a more complete and compelling account of petitioner's state of mind during this encounter. Rather than present a mental health expert who could only guess at the sequence of events, as Dr. Thomas was forced to do during his cross-examination (30 RT 4520-21), trial counsel could have presented the jury with expert testimony to explain that all of these life circumstances of petitioner, including Ms. Jackson's derogatory comments to petitioner that evening about his dead brother Carl, combined to trigger petitioner's dissociative break and bring out the "entirely different person" that Ms. Jackson encountered. (28 RT 4194 ("It was like he took on a new person, like he was in a trance, and then afterwards, he seemed to snap back."); Ex. 178 at 3146.)

n. Had trial counsel adequately argued to exclude the testimony, or in the alternative, adequately developed and presented the substantial mitigating evidence

related to this prior conviction, there is a reasonable probability that the result of the proceeding would have been different.

5. The prosecutor's failure to provide timely notice of the intention to introduce evidence of petitioner's alleged statement to his sister Gloria Hanks as aggravation and trial counsel's deficient performance resulted in false information being presented to, and mitigating aspects concerning the incident being withheld from, the jury.

a. The trial court, over objection, admitted testimony of petitioner's sister regarding a highly prejudicial and irrelevant statement made by petitioner to his sister in a telephone call on New Year's Eve 1994. The trial court permitted the prosecution to introduce the testimony, which the jury then considered, in violation of California Penal Code section 190.3 and federal constitutional law.

b. On or about New Year's Eve of 1994, petitioner called his sister, Gloria Hanks.

(1) Petitioner called "about the holidays, to wish [her] a Happy New Years and stuff like that." (28 RT 4155-56.) Ms. Hanks had consumed a bottle and a half of champagne by the time she spoke to petitioner on the phone. (*Id*. at 4156.)

(2) Ms. Hanks changed the subject of conversation by informing petitioner that his lawyers had asked her about testifying on his behalf at the penalty phase of his trial. Ms. Hanks informed petitioner she did not want to get involved and she did not want to be a witness for "either side." (*Id*. at 4156-57.)

(3) Ms. Hanks said she could not testify "in good conscience." (*Id*. at 4151, 4157.)

(4) This decision not to testify was based on Ms. Hanks's uninformed understanding of "what [she] perceived [petitioner] had done." (*Id*. at 4151, 4157.)

c. Petitioner and his sister then discussed different subjects; however,

Ms. Hanks returned to the topic of not wanting to get involved in the penalty phase of petitioner's capital case. (*Id.* at 4157)

d. Ms. Hanks specifically asked petitioner if he was concerned about Pamela Miller's family. (*Id.*)

(1) Petitioner told Ms. Hanks "yeah he cared," but "what [did] that matter when his own family members [were] trying to turn against him." (*Id.*)

(2) When continually pressed by Ms. Hanks about what petitioner thought about Pam Miller and her family - after being told several times his sister would not testify for him - petitioner allegedly said "he didn't give a fuck about Pamela or her family." (28 RT 4154, 4159.)

e. At no time during their conversation did petitioner or Ms. Hanks mention the victim, Mrs. Miller, (*Id*. at 4164), or ask his sister to lie for him or do anything morally questionable (*Id*. at 4157).

f. At the time of this telephone call with Ms. Hanks, petitioner had been prescribed, and was supposed to be taking, the antipsychotic drug Haldol, as well as Sinequan (an antidepressant) and Cogentin (an anticholinergic). (Ex. 33 at 622, 647, 649, 651, 663, 669, 671, 674.) The antipsychotic drug Haldol had been mysteriously and abruptly discontinued in November 1994 and was not recontinued until the day petitioner's testimony in the guilt phase ended, January 24, 1995. (Ex. 33 at 663; Ex. 34 at 690, 693.) The anti-anxiety medication Atarax that petitioner had been taking from as early as June 8, 1993, was discontinued on December 27, 1994 (Ex. 33 at 648, 670; Ex. 34 at 678), and petitioner did not receive it, or any other anti-anxiety medication, after that date. (Ex. 34 at 678, 680, 682.)

g. On December 30, 1994, Kim Jackson contacted the prosecution. Ms. Jackson gave the prosecution information that petitioner's sister allegedly told Ms. Jackson about the telephone call; that petitioner had become angry when she told him that she refused to testify on his behalf; and that he made a disparaging comment about Pam Miller and her family. (28 RT 4083-84.)

h. On Friday, January 6, 1995, the prosecution interviewed Ms. Jackson regarding petitioner's conversation with his sister, and made a written report documenting that interview. The prosecution maintained that he turned over the report the following day or "very soon thereafter." (*Id*. at 4083.)

i. Trial on petitioner's guilt phase began on Tuesday, January 10, 1995, just two business days after the police interview of Ms. Jackson.

j. The prosecutor did not provide notice within a reasonable time prior to trial as required by California Penal Code section 190.3.

(1) First, around the first week of January, the prosecution orally informed defense counsel about the alleged telephone conversation between petitioner and Ms. Hanks. (*Id.*)

(2) Next, the prosecution gave the defense "written notice" that this was potential remorse rebuttal evidence. (*Id.* at 4084.)

k. The prosecutor changed his mind about calling Ms. Hanks as a rebuttal witness and decided instead to call Ms. Hanks in his case-in-chief. (*Id*. at 4074.)

(1) On February 1, 1995, the jury returned verdicts convicting petitioner on charges of rape and first degree murder, and found true the rape special circumstance. The jury acquitted petitioner of the charges of burglary and robbery. (2 CT 365-66, 368.)

(2) At the outset of the penalty phase, the prosecution again reaffirmed that Ms. Hanks might be called as a rebuttal witness to rebut any evidence of remorse. (27 RT 4064.)

(3) After barely obtaining a capital murder conviction, and not knowing "if Mr. Jones is going to get on the stand and express remorse" (28 RT 4112), the prosecutor announced his decision to call Ms. Hanks to testify in his case-in-chief on Friday, February 3, 1995, immediately before the start of the penalty phase on February 6, 1995.

l. The prosecution argued that Ms. Hanks's testimony was admissible on two imaginative but erroneous theories:

(1) The prosecution argued Ms. Hanks's testimony was proper rebuttal for the "*sense* of remorse that the defendant put on" in the guilt phase, even though he was unable to point to any specific expressions of remorse. (*Id*. at 4112 (emphasis added).)

(a) The prosecution shamelessly pointed to the limited mental state evidence allowed in the guilt phase as evidence of remorse: "He woke up next to the victim. He testified he was crying. All he wanted to do was kill himself, and I think he has wanted to have all his actions after this incident taken as remorse for the victim." (*Id.*)

(2) The prosecutor also argued that the alleged statement "increases the heinousness of the crime." (28 RT 4113.)

m. Trial counsel correctly argued admission of the alleged statement by petitioner would be prejudicial error on several grounds.

(1) The prosecution violated the notice requirements of California Penal Code section 190.3 by failing to provide sufficient notice of Ms. Hanks' testimony prior to trial. (*Id*. at 4078-79, 4109-10.)

(2) Evidence of lack of remorse is not a statutory aggravating factor and can only come in as rebuttal evidence. (*Id*. at 4110.)

(3) The introduction of this evidence would be unduly prejudicial, unreliable, confusing, and misleading. (*Id.* at 4079, 4110-11.)

(4) The prosecution twisted the alleged statement to mean something it did not, as the victim's name was never mentioned. (*Id*. at 4111.)

(5) Furthermore, the defense had not presented any evidence regarding petitioner's remorse; therefore, the prosecution was statutorily barred from presenting evidence of lack of remorse until such time as the defense offered such evidence in the penalty phase.

n. The trial court erroneously overruled trial counsel's objections and admitted the irrelevant and highly prejudicial evidence. (*Id*. at 4115-16.)

(1) The court, however, found sufficient notice, reasoning that the prosecution, by mentioning Ms. Hanks as a possible rebuttal witness, had provided sufficient notice of her testimony. (*Id*.)

(2) The trial court found the evidence was relevant pursuant to Penal Code section 190.3.

(a) Without explaining how a present act could affect the circumstances of a past crime, the trial court held the evidence relevant under California Penal Code section 190.3(a) – circumstances of the crime.

(b) Reaching even further, the trial court held the evidence was relevant to the circumstances of an entirely different crime, the incident involving Mrs. Harris, presented pursuant to California Evidence Code section 1101(b).

(c) The court reasoned "the representation that he was crying, didn't understand and tried to kill himself," rendered the evidence of the alleged telephone call admissible. (28 RT 4116.)

o. The prosecution called Ms. Hanks to testify, before petitioner's jury, about her alleged telephone conversation with petitioner, and the court allowed the prosecution to elicit the prejudicial and irrelevant nonstatutory aggravating evidence of the alleged statement made by petitioner. (*Id*. at 4150-60.)

p. Ms. Hanks's testimony should also have been excluded because it had no probative value, was taken out of context, was extremely prejudicial and unfairly painted petitioner as remorseless and uncaring about his victim. Without adequate and fair notice, petitioner was prevented from meaningfully challenging the prosecution's evidence against him.

q. The prejudicial admission of Ms. Hanks's irrelevant and inflammatory testimony and the prosecution's misconduct in failing to give petitioner adequate notice denied petitioner his constitutional rights as protected by the Sixth,

Eighth, and Fourteenth Amendment.

6. Trial counsel's unreasonable failure to object on other grounds to the introduction of the telephone call in aggravation, and trial counsel's failure to reasonably investigate the mitigating circumstances of petitioner's conversation with his sister was professionally unreasonable and deprived petitioner of his Sixth Amendment right to the effective assistance of counsel.

a. Trial counsel objected to the admission of this evidence on notice grounds. (28 RT 4078-79.) However, he failed to object on the additional grounds that petitioner's testimony was not evidence of remorse. Trial counsel also failed to request any continuance to prepare further arguments to preclude this testimony. Trial counsel had no strategic reason for failing to make these objections and requests.

b. Trial counsel failed to interview Ms. Hanks, who was party to the telephone call, or Ms. Jackson, who reported the telephone call to the prosecution.

(1) Upon learning of this telephone call, trial counsel made no effort to contact or interview Ms. Hanks about this incident prior to her testimony as a prosecution witness. The prosecutor later reported to the court that Ms. Hanks reported to him that she could not remember the incident because she drank excessively that night. (*Id*. at 4074.) Due to his failure to investigate, trial counsel had no information about the truth or accuracy of this statement, and offered no argument as to why the subject on which Ms. Hanks was to testify was clearly inadmissible. (*See id*. 4078-79.) As a result of these failures, Ms. Hanks testified on behalf of the prosecution, on Monday, February 6, 1995. (*Id*. at 4093-108.)

(2) At the time petitioner spoke to his sister on the telephone, she was severely intoxicated, having drunk a bottle and a half of champagne just that evening. Despite knowledge of this drinking, trial counsel failed to further investigate and present evidence of Ms. Hanks's longstanding drinking problems, and the legacy of substance abuse in petitioner's family, going back through multiple generations, that would have cast serious doubt upon the reliability and credibility of Ms. Hanks's

testimony pertaining to the telephone call. (Ex. 178 at 3103-08, 3142 (discussing legacy of family substance abuse); Ex. 124 at 2547-49; Ex. 2 at 16-17; Ex. 21 at 228; Ex. 16 at 164.)

(3) Trial counsel made no effort to interview Ms. Jackson after the New Year's Eve call and prior to her testimony as a prosecution witness, despite the fact that she was clearly still close with Ms. Hanks and that she had previously refused to testify in petitioner's trial. (28 RT 4113-14, 4118-19.) Trial counsel unreasonably failed to interview Ms. Jackson to obtain even more evidence with which to demonstrate that petitioner's severe mental illness caused him to react strongly to what he perceived as his sister's rejection of him. Such testimony from Ms. Jackson, to support the defense theory that petitioner's comments were not evidence of a lack of remorse, but in fact evidence of his worsening mental health for which he had never received adequate care, would have been compelling. (*See, e.g.*, Ex. 102 at 2034 (Jackson believed the incident was "a cry for help because he has a lot of family problems including the death of his brother" and her "only interest was that [petitioner] become involved in therapy in order to resolve his personal problems.").) Not only would her testimony acknowledging he needed psychiatric care further support the defense, but such supporting testimony coming from a prosecution witness would have gone far in deflating the prejudicial effect of petitioner's improperly admitted comment.

c. Trial counsel failed to investigate and present evidence of the inappropriate and dangerous medication regimen that directly affected petitioner's state of mind that evening.

d. Trial counsel's failure to conduct a minimally competent social history investigation prevented him from obtaining information to explain, and place in context, the telephone call.

(1) Many witnesses, including Ms. Hanks herself, were ready and willing to provide trial counsel with a wealth of information that could have placed

petitioner's remarks more fully in context. Trial counsel's failure to conduct an adequate social history investigation is summed up by Ms. Hanks's statement of her discussions with petitioner's defense team, "[w]e did not go into anything about [petitioner] or my family background too deeply." (Ex. 124 at 2546.) Had trial counsel conducted a minimally competent investigation into petitioner's family history and background, he would also have been able to present compelling evidence relevant to the exchange between sister and brother, including, but not limited to:

(a) The extreme difficulties petitioner had communicating with others and expressing his emotions, due to his lifetime of trauma (Ex. 178 at 3117, 3152-53; Ex. 151 at 2736; Ex. 16 at 149; Ex. 152 at 2741);

(b) The central communication style of the Jones family, which was verbal and physical confrontation, ready to challenge and to fight over anything, rather than healthy, affectionate, or calm conversation (Ex. 152 at 2741-42; Ex. 124 at 2502-03; Ex. 146 at 2714; Ex. 147 at 2719);

(c) An accurate picture of petitioner's poor intellectual and cognitive functioning, impaired impulse control, sub-par executive reasoning and planning skills, and his substantially impaired ability to understand, process, and react to information quickly and appropriately, all of which is the direct result of the profound damage to his frontal lobe (Ex. 175 at 3069; Ex. 154 at 2755-56; Ex. 178 at 3154-55);

(d) Gloria's role in petitioner's life as one of the few individuals who made a genuine, but ineffectual, effort to play a caretaker role, despite her youth (Ex. 124 at 2505; Ex. 16 at 170); and,

(e) Petitioner's unshakable ethic of loyalty to family and friends which he always maintained, and which he believed Gloria and his other siblings would accord him. (Ex. 151 at 2735-36; Ex. 149 at 2728; Ex. 148 at 2725; Ex. 178 at 3131, 3155.)

(2) Trial counsel unreasonably made no attempt to provide any

mental health expert with the above information in order for the expert to evaluate petitioner's mental state and the substance of petitioner's comments during the telephone call. As a result, no expert testified to petitioner's severe mental illness and worsening decompensation so that the jury could place the heated exchange between petitioner and his sister in its proper, mitigating context. (Ex. 154 at 2750-51.)

e. Trial counsel failed to explain the importance of mitigation to petitioner's family.

(1) At no time before or during petitioner's trial did trial counsel explain to Gloria Hanks the clear purpose of seeking mitigation testimony from family members. Had trial counsel conducted a reasonably competent penalty phase investigation, thoroughly interviewing petitioner's family members, and adequately explaining to them the process of a capital trial and the significance of mitigation testimony, there is a reasonable probability that the entire disastrous exchange between petitioner and his sister over the telephone would never have occurred. As Ms. Hanks notes about her misinformed reluctance to testify at that time:

> I wish someone had explained to me that testifying about all of my family's problems, and all of [petitioner's] strange behaviors, could have been useful at his trial. I had no idea. If I had known that, I could have provided all of this information [about the family] and helped my brother. But the whole reason I did not want to testify was because I did not think I could help.

(Ex. 124 at 2547.)

(2) If trial counsel had taken the time to convey these fundamental concepts to Ms. Hanks, she would have understood the role of mitigation, and there is a reasonable probability that the tragic fight during the telephone call, and petitioner's frustrated outburst, would never have occurred and that the result of petitioner's penalty phase, absent this damaging evidence, would have been different.

(3) Trial counsel failed to provide the jury with a more truthful

and drastically different picture of this conversation between the two siblings; had he done so, the jury would have discounted the prosecutor's contention that petitioner's comments displayed a "lack of remorse." Whether the telephone call was admitted or not, had trial counsel conducted a reasonably competent investigation and presentation of petitioner's family history and background as outlined above and in Claim 16, *supra*, through lay and expert witnesses, the jury would have had sufficient evidence with which to spare his life. (*See* Ex. 9 at 95; Ex. 138 at 2691; Ex. 133 at 2644-45.) Trial counsel's failure to do so was constitutionally deficient, and had a substantial and injurious influence and effect on the jury's penalty verdict. Relief is therefore warranted.

P. CLAIM SIXTEEN: PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN PREPARATION FOR AND DURING THE PENALTY PHASE BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, to confrontation and compulsory process, to the enforcement of mandatory state laws, to a trial free of materially false and misleading evidence, and to due process of law as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because petitioner's trial counsel rendered constitutionally deficient representation in the investigation, preparation and presentation of a penalty phase defense.

Trial counsel unreasonably failed to conduct a timely or adequate investigation of compelling penalty phase evidence and issues, did not develop or present a coherent penalty phase strategy, failed to make informed, considered, and rational decisions regarding potentially meritorious defenses and tactics, and failed to wholly or adequately investigate, test, and challenge the evidence in aggravation at penalty. Trial

counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion. Reasonably competent counsel handling a capital case at the time of petitioner's trial knew that a thorough investigation of a defendant's background and family history, including the defendant's medical, mental health, academic, and social history, was essential to the adequate preparation of the penalty phase. (*See, e.g.*, Ex. 182 at 3168-69; Ex. 183 at 3173-87.)

Counsel failed to conduct a reasonable mitigation investigation; follow up on investigative leads; present compelling mitigation obtained during the penalty phase investigation; prepare and present a comprehensive social history on petitioner's development, behavior and functioning; investigate, develop, and present compelling expert testimony in the penalty phase regarding petitioner's mental illnesses and myriad mental impairments; present readily available evidence regarding petitioner's drug and alcohol use and its effects on his behavior at the time of the crimes; challenge evidence of petitioner's prior crimes and aggravators; prepare witnesses to testify, or explain the objective and purpose of mitigation testimony; request, obtain, and admit into evidence documents containing compelling information about petitioner's and petitioner's family's medical, mental, educational, and other social history; or support those mitigation themes presented at trial with readily available evidence. Trial counsel has admitted to having no strategic reason for failing to present such compelling mitigating evidence to the jury. (Ex. 150 at 2733-34.) Had trial counsel presented such evidence to the jury, the jury would not have sentenced petitioner to death.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, funding, additional time, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts contained in the allegations set forth in Claims One, Four, Five, and Fifteen, *supra*, and the accompanying exhibits are hereby incorporated by

reference as if fully set forth herein.

2. Trial counsel's brief presentation of evidence during the penalty phase failed completely to convey the terror and trauma of petitioner's childhood and his lifelong development of his serious mental illness. Trial counsel's penalty phase investigation was deficient in several respects, including, but not limited to: (1) failure to locate interview and/or present compelling testimony from readily available family members of petitioner's immediate family; (2) failure to explain the purpose of mitigation testimony to critical family members; (3) failure to adequately interview and prepare the penalty phase witnesses who did testify, and as a result, failing to elicit from them readily available and persuasive mitigation testimony; (4) failure to request, obtain, and present documents containing compelling information about petitioner and his family's medical, military, educational. and other social history records providing further compelling mitigation; and failure to present to the jury substantial mitigating information in other documents he had obtained, including petitioner's school records; and (5) failure to adequately retain, consult, prepare, and present mental health experts who could have reviewed, evaluated, and explained how all this mitigation evidence contributed to petitioner's development, functioning, and mental illness, from birth through the time of the crime.

a. Trial counsel failed adequately to interview and prepare the penalty phase witnesses who testified; instead, the defense paralegal, who was primarily responsible for interviewing penalty phase witnesses, made the decisions as to what background information was important and what topics were to be covered when interviewing penalty phase witnesses. (Ex. 19 at 203, 204-05.) As a result, trial counsel prejudicially failed to develop and present readily available and persuasive mitigation testimony.

(1) Petitioner's father, Earnest Lee Jones, testified at the penalty phase that there were some family problems and fights when petitioner was growing up, and that he once caught his wife in bed with another man. Petitioner's father also

testified that he had a problem with alcohol during petitioner's childhood, but had become clean and sober when petitioner was in prison. (*See generally* 29 RT 4358-4385.) This testimony was only a fraction of the compelling mitigation he could have provided to the jury.

(a) Trial counsel elicited from petitioner's father that petitioner was an obedient and good child who never gave him any problems or showed him any disrespect. Petitioner's father also could have provided, and would have been willing to testify about, additional information regarding his son's character, emotional makeup, and impaired mental functioning, including, but not limited to:

(i) Petitioner was sensitive and quiet as a child. If something were going wrong, he was a sensitive boy and would pick up on it, but he was more likely to sit and watch than to try to get in the middle of what was happening. He blamed himself for things going wrong even when he was not to blame. (Ex. 8 at 84-85.)

(ii) Petitioner's problems were deeply-rooted. The pressure at home made him sad and confused, and he always seemed unhappy when he went off to school. He had trouble dealing with things like school. (*Id*. at 85.)

(iii) He was curious about how things worked, and took things apart, but could never put them back together. He went with his father to California Donuts to watch him bake some nights, and to learn how to do the baking. Even though baking was a simple process, petitioner could not learn the techniques. He still went, however, because he was eager to get out of the house at night. (*Id*.)

(iv) Petitioner was not like his other siblings, who were talkative and outspoken. He was well-behaved and did not talk back. (*Id*.)

(v) When petitioner broke his ankle in junior high school, and had to stay home from school, petitioner stayed with his father for a few months. At that time, Earnest Lee was separated from Joyce, and petitioner liked to follow his father around rather than stay with his mother. (*Id*. at 86.)

(b) Trial counsel presented little information from petitioner's father about his own parents or upbringing, other than that his own history of alcohol abuse began as a result of "family problems" and that petitioner's paternal grandfather had some mental problems. (29 RT 4361, 4387.) Petitioner's father also could have provided, and would have been willing to testify about, additional, specific information relating to his own parents and his own childhood, including, but not limited to:

(i) Petitioner's grandparents were African-American sharecroppers raised in poverty on cotton farms in Mississippi. Both had children from previous relationships when they married. The family moved from Mississippi to Arkansas when petitioner's father was a young boy, and eventually worked as sharecroppers on farmland owned by petitioner's maternal family, the Talleys. (Ex. 8 at 77.) The area, on the Missouri/Arkansas state line, was both poor and dangerous. Near the Jones and Talley houses was a local bar where fights, stabbings, and shootings took place almost weekly. (*Id*. at 87-88.)

(ii) Petitioner's paternal grandmother was physically strong and physically abusive; she hit the children hard when she punished them. Petitioner's paternal grandfather was feared and respected rather than loved. He expected to be obeyed and made petitioner's father work in the cotton fields growing up. (Id. at 78.)

(iii) Petitioner's paternal grandfather had a mental breakdown in the early 1960s. He attacked family members, tried to run over animals, sat in the dark talking to people no one else could see, and, on more than one occasion, ran into the street pointing his gun at people. He was institutionalized in Little Rock, Arkansas for several months, and it was petitioner's father who drew the task of driving to pick him up when he was finally discharged. (*Id*.)

(iv) Petitioner's father got into fights over petty issues as a teenager. (*Id*. at 78–79.)

(c) Trial counsel presented no information from petitioner's father, Earnest Lee Jones, about petitioner's maternal family, other than that both families wanted Joyce and Earnest Lee to marry when Joyce became pregnant for a second time as a teenager. (29 RT 4356-57.) Petitioner's father also could have provided, and would have been willing to testify about, additional, critical mitigation evidence regarding petitioner's maternal family history of mental illness, sexual abuse and sexually inappropriate behaviors, and the tension between the Jones and the Talley families, including, but not limited to:

(i) Petitioner's father met petitioner's mother because of the sharecropping arrangement, and knew several members of petitioner's maternal family. Petitioner's maternal family members were not close with one another, and petitioner's maternal grandmother, Vernice Talley, was not sociable with, and looked down upon, the sharecropping families on her land, including the Jones family. (Ex. 8 at 79.)

(ii) Petitioner's great-grandmother, Cora Talley, died in 1958 when petitioner's mother and father had their first child as teenagers. (*Id*.) Several of petitioner's grandmother's family members passed for white when they could. (*Id*. at 79-80.)

(iii) Like petitioner's mother Joyce, petitioner's maternal grandmother, Vernice Talley, exhibited signs of mental illness, fussing under her breath, and unable to sit still or be quiet unless everything inside her house was perfectly clean and orderly. (*Id*. at 79.) Also like petitioner's mother, Vernice Talley had been a young mother, and took on several boyfriends and dated frequently after motherhood. She preferred to spend time with men and have fun, rather than taking care of her children; she raised only one of her own children, her youngest daughter Angie, born in 1964. Prior to that, she expected her eldest daughter Joyce, petitioner's mother, to take care of the younger siblings while she went out on dates. (*Id*. at 80.)

(iv) Joyce was also mentally ill: "Her craziness was

in her head." (*Id*. at 83.) Joyce's brother, petitioner's maternal uncle, Carvis Baldwin, was equally disturbed in his mind from the time he was young, and his mental illness intensified as he got older. (*Id*. at 83-84.)

(v) Joyce was sexually molested when she was a girl, and became obsessed with being with a lot of men even after she was married and had children. (*Id*. at 82.) Vernice Talley outwardly disapproved of her daughter Joyce "courting," especially with a Jones boy, but Joyce was already sexually active. Earnest Lee was the boy closest at hand, and she snuck out without her mother's knowledge. When, at age fifteen, Joyce became pregnant by Earnest Lee, petitioner's maternal family, including Vernice Talley and her brother L.J., were furious about the pregnancy; Vernice Talley threatened to throw Joyce out of the house. They were not married after the birth of their first child, Gloria, and were still living in their respective parents' homes. (*Id*. at 80-81.)

(vi) Petitioner's mother was disinterested in motherhood. When Vernice Talley sent two of her children, Ronnie and Jackie, away to live with other families, Joyce rejected Earnest Lee's suggestion that they take in the children. (*Id*. at 83.)

(d) Trial counsel presented evidence through Earnest Lee that after Earnest Lee and Joyce were married in 1959, Earnest Lee moved to Memphis for work, and gained employment as a baker; that his young wife joined him a little later, and that his two young daughters joined them after that; that petitioner Ernest Dewayne Jones was born in Memphis; and that the family eventually moved to Los Angeles in 1964. (29 RT 4357-59.) Trial counsel failed to question Earnest Lee to elicit additional critical information he was willing and able to provide regarding Earnest Lee's and Joyce's history and relationships in Memphis, including, but not limited to:

(i) In Memphis, Earnest Lee met and befriended the Howell brothers. With all of his family problems, Earnest Lee often felt closer to the

Howell family than to his own family. They drank a lot together. Later, in Los Angeles, Earnest Lee found Bill Howell in bed with his wife at the Jones's apartment after a party at the house; he was angry with his wife, but he still remained friends with Bill Howell. (Ex. 8 at 81.)

(ii) In the 1980s, one of Earnest Lee's other sons, Alvin, went to live with Tony Howell because both Earnest Lee and his wife Joyce were severe alcoholics who could not take care of their own children. (*Id.* at 86.)

(e) Trial counsel presented evidence through Earnest Lee that his wife Joyce cheated on him during their marriage. (29 RT 4362–66) Trial counsel failed to question Earnest Lee to elicit additional critical information he was willing and able to provide regarding Joyce's promiscuity and affairs, including, but not limited to:

(i) Joyce's affairs, as did her drinking, dated back to at least as early as Memphis, and her pregnancy with petitioner. (Ex. 8 at 82.) Joyce was bold and careless with her affairs, and did all sorts of things in front of her children when they were young. (*Id*. at 84.)

(ii) Joyce had an affair with a man named Junior, whom Earnest Lee believes to be the biological father of petitioner. The subject of petitioner's paternity was an issue between Earnest Lee and Joyce when petitioner was about ten or eleven years old, and hearing his paternity discussed probably affected the way he saw his mother. (*Id*. at 82.)

(f) Trial counsel failed to question Earnest Lee to elicit the following additional mitigation information he was willing and able to provide about petitioner's family history and background, including, but not limited to:

(i) Several relatives moved to Los Angeles and lived in the Jones family apartment, including Joyce's mentally ill brother Carvis, her sister Ree, as well as petitioner's paternal uncles Robert, Richard, Sammie and Thomas Jones. (Ex. 8 at 83-84.) Petitioner's paternal uncle Richard has a severe drinking

problem and cannot obtain and keep any jobs as a result. (*Id*. at 84.)

(ii) Joyce began receiving County Welfare money in about 1970, but did not tell Earnest Lee about the money; he found out through another relative. (*Id*.)

(iii) Joyce was not interested in the children's education and laughed about their homework, never trying to help them with school. (*Id*. at 83.)

(iv) Earnest Lee began a three and a half year relationship with a new girlfriend, Bea, in approximately 1971, and the tension between his wife and his girlfriend resulted in his own increased drinking. (*Id*. at 85-86.)

(v) In the 1970s, petitioner's father was arrested several times for drunk driving, and, as a consequence, went to jail more than once. (*Id*. at 86.) During this time, Earnest Lee frequently fought with his wife and children. He also punished the children too hard when he lost his temper. (*Id*. at 86.)

(vi) When petitioner's father returned from Michigan at the time of Carl's death in 1983, he was still drinking. (*Id*. at 88.)

(vii) After petitioner had been dating Glynnis Harris and had a son together, they broke up. Petitioner had been living in the garage at the Harris's house but when he was put out of the garage he was homeless. He then lived at a shop where Earnest Lee and his brothers Thomas and Robert worked, until he was arrested for assaulting Mrs. Harris a short time later. (*Id*.)

(viii) When petitioner's case was pending in court for the attack on Mrs. Harris, Glynnis Harris, petitioner's ex-girlfriend and the daughter of the victim, sat in court with Earnest Lee rather than with her mother. (*Id*.)

(ix) When petitioner was released from prison in 1991, he seemed to have changed. He was more withdrawn, isolated, and introverted. (*Id*. at 89.)

(2) Petitioner's sister Tanya La Shone Jones testified that her parents fought and drank; that there was one incident when her mother stabbed her father; and that petitioner got upset when he found out that she and her younger brother were hungry and had nothing to eat. Petitioner's sister also testified that petitioner witnessed his brother Carl's body lying in the street for hours after he had been murdered; and that petitioner became even more withdrawn after this incident. (29 RT 4237-50.) This testimony was only a fraction of the compelling mitigation she could have provided to the jury.

(a) Trial counsel elicited from petitioner's sister that her mother had once been arrested for stabbing her father with a knife, and that her father had been taken away by ambulance following the attack. (29 RT 4238-39). Trial counsel failed to question Tanya to elicit additional critical information she was willing and able to provide regarding the intensity of the violence and fights between petitioner's parents, including, but not limited to:

(i) Another fight resulting in serious injury occurred between petitioner's parents in the late 1970s when petitioner's father came by drunk. He was angry that petitioner's mother was going out and they started fighting. The fighting intensified to the point where petitioner's father picked up a heavy marble ashtray, which he threw at petitioner's mother, hitting her in the head. The blow to her head knocked her down and blood gushed from a large gash in her head. Petitioner's mother was taken away in an ambulance. (Ex. 131 at 2607.)

(ii) When Tanya was in elementary school, petitioner's father tried to run their mother down with his car as she walked Tanya to school. As they crossed the street to the school, petitioner's father came out of nowhere, and drove towards them. He just missed hitting them. (*Id*. at 2606.)

(iii) Petitioner's father had a girlfriend named Bea. When Tanya was young, her mother became engaged in a screaming match with Bea at Bea's house. Petitioner's father was present at Bea's house and instructed Bea not to

open the door to petitioner's mother. As soon as Bea opened the door, the screaming match escalated into a physical altercation. During the fight, petitioner's mother bit off part of Bea's lip. (*Id*. at 2607.)

(b) Trial counsel, through Tanya, presented evidence that at the time of petitioner's brother's death, the family was scattered, and that petitioner's whole attitude changed after Carl's death in that he did not say much. (29 RT 4247.) Trial counsel failed to question Tanya to elicit additional critical information she was willing and able to provide regarding the death of petitioner's brother and the traumatic effect Carl's death had on petitioner, including but not limited to:

(i) At the time of Carl's death, the family was scattered because petitioner's mother had been evicted from her apartment. Tanya was living with her crack-addicted uncle, Sammie. (Ex. 131 at 2614.) Petitioner's mother and sisters were hysterical after the event, but petitioner was still and silent and had a faraway glazed-over look. He felt guilty and helpless over the death of his brother because he had not been able to prevent Carl's murder. (*Id*. at 2315.)

(ii) Petitioner's family did not have enough money to bury Carl, so petitioner set out to raise money for the funeral, but someone stole the money. Petitioner was lost and helpless when they discovered the money must have been stolen by someone who knew them and had access to the apartment.

(iii) The funeral was a debacle, and more chaos ensued when Carl's girlfriend screamed at petitioner for trying to help out with her baby. (*Id*. at 2615-17.) Petitioner's girlfriend tried to console petitioner and his family, but she could not get through to petitioner because he was numb. (*Id*. at 2616.)

(c) Trial counsel failed to question petitioner's sister to elicit the following additional mitigation information she was willing and able to provide about petitioner's family history and exposure to physical and psychological abuse, including, but not limited to:

(i) Petitioner's mother taunted his father by telling

petitioner's father that one or another of the children was not his. She often said this about petitioner. Another time, petitioner overheard a conversation with his father, and paternal uncles Thomas and Sammie; Thomas and Sammie were telling petitioner's father not to worry, because petitioner was the son of a man in Memphis. (Ex. 131 at 2604, 2618.)

(ii) Petitioner's paternal grandmother was a big and tall woman who was very strong. Once, when petitioner's paternal uncle Sammie was almost an adult, petitioner's grandmother hit him so hard that the force of the blow almost caused him to knock down one of the walls in the house. She told him that if he was a man, he could withstand her hitting him. (*Id*. at 2605.)

(d) Trial counsel failed to question petitioner's sister to elicit the following additional mitigation information she was willing and able to provide about petitioner's exposure to violence and crime in the neighborhood where he grew up, including, but not limited to:

(i) The Eighth Avenue neighborhood where petitioner grew up was rife with gangs and drugs. There was a crazy man living next door to the Jones's apartment. He was always running around naked with a gun in his hand. One day, he hit petitioner's sister Gloria in the head with a stick. Petitioner's brother Carl went over to his house in order to confront him about the attack on Gloria. Carl quickly left when he saw that the man had his gun. (Ex. 131 at 2606.)

(ii) Petitioner's brother Carl was often involved in fights in the street. He had a quick temper and would fight in a heartbeat. Carl also was a drug dealer and dealt PCP from the Jones's apartment. (*Id*. at 2608.) Carl was not only a drug dealer, but was known in the neighborhood as a thief too. He was a fast runner, so the police did not often catch him. However, on one occasion, he got caught breaking into a neighbor's apartment. As he was running away, the police shot him in the butt. He was arrested and after he was taken to the hospital he was taken to juvenile hall. The family never addressed Carl's criminal behavior. (*Id*. at 2609.)

(e) Trial counsel failed to question petitioner's sister to elicit the following additional mitigation information she was willing and able to provide about petitioner's character and mental functioning, including, but not limited to:

(i) Petitioner was quieter and more withdrawn than the rest of his siblings. Often, he just sat and watched rather than join in what others were doing. (Ex. 131 at 2609.) Petitioner spent much of his time tinkering with things around the house, constantly taking things apart to see how they worked. He took apart television sets and radios. Unfortunately, he was not good at putting things back together again and when he did manage to reassemble something, the item did not work properly after he was done. (*Id*.)

(ii) When petitioner was forced to defend himself in a fight, he turned into a completely different person, and did not look like himself. It appeared that he could not talk. He often did not revert to his usual persona until the next day. (*Id*. at 2609-10.)

(iii) Carl and his girlfriend, Nina, had a relationship similar to petitioner's mother and father. Carl beat up Nina regularly. Nina constantly had black eyes from the beatings Carl inflicted on her. Petitioner was not like his father or Carl in that respect; he did not beat on people, especially women. (*Id*. at 2608.)

(iv) The prior offenses involving Ms. Jackson and Mrs. Harris seemed completely uncharacteristic for petitioner. They bore out that petitioner was in need of some help, but the family just ignored it rather than dealing with petitioner's issues. (*Id*. at 2620.) When petitioner was released from prison, petitioner's father thought that the best way to handle any problem was to avoid making petitioner upset, rather than recognize petitioner's serious mental problems. (*Id*. at 2621.)

(v) Tanya had a difficult time being bused to a

predominantly white school, and started to miss the bus on purpose. Petitioner sat her down to talk to her about what was going on, because he was concerned about her missing school. (Ex. 131 at 2613.)

(vi) After his release, petitioner babysat his sister Tanya's newborn baby and was very patient with her. (*Id*. at 2621.)

(f) Trial counsel failed to question petitioner's sister to elicit additional mitigation information she was willing and able to provide about substance abuse in petitioner's immediate family, including that petitioner's sisters Gloria and Cassandra both have drinking problems. In addition, Cassandra gets violent when she is drunk. (*Id*.)

(3) Petitioner's paternal aunt by marriage, Geraldine White-Jones, testified that petitioner was raised by alcoholic parents in a violent household; that the children often did not have any food and were called names by their mother; that petitioner lived with her from time to time, but was always encouraged to return home; that petitioner's sister, Jean, had a serious drug problem, and at one time had attempted to kill herself; and that petitioner had overheard his mother arguing with his father, saying that his father was not his real father. Geraldine Jones also testified that petitioner lived with her from time to time, suffered from nightmares, and needed psychiatric help. (32 RT 4565-81.) Trial counsel unreasonably failed to elicit a wealth of compelling mitigation from her.

(a) Petitioner's aunt testified that petitioner's parents frequently fought, regardless of who was present. Geraldine testified about one particularly humiliating beating that occurred in 1968, after petitioner's father found his wife in bed with another man. (32 RT 4568, 4578.) Trial counsel failed to question Geraldine to elicit additional critical information she was willing and able to provide regarding this pivotal incident and other incidences of violence in the Jones household:

(i) When petitioner's father got home early that fateful morning to discover his wife in bed with another man, it was petitioner who let

him into the house. The other children knew better than to open the door. Petitioner's mother never forgave petitioner for opening the door that morning. (Ex. 123 at 2484-85.) Petitioner's mother continued to blame petitioner, rather than herself, for getting caught with Bill Howell. She treated petitioner worse than she treated her other children, and beat him more than the others. (*Id*. at 2495.)

(ii) Petitioner's father was himself having an affair at the time he caught his wife in bed with Bill Howell. Earnest Lee was embarrassed and angry because, after this incident, all his friends knew that his wife was cheating on him. (*Id*. at 2485.)

(iii) Petitioner's father beat his wife virtually every day they were together for the next several years after the incident, and subjected her to humiliating treatment. (*Id*.)

(iv) Petitioner's parents were both alcoholics who cheated on each other regularly, constantly argued and fought. Although Joyce was a small woman she fought her husband like she was a man. (*Id*. at 2482.)

(v) When petitioner's mother, Joyce, got out of control during fights, no one could intervene. Petitioner's uncle Sammie tried once, and Joyce sank her teeth into his rear end. (*Id*. at 2482-83.)

(vi) Petitioner's parents did not care what their children witnessed or heard them say during their fights, no matter how dirty, vulgar, or hurtful it was. (*Id*. at 2486.)

(vii) Violence was so commonplace in petitioner's home that the police were frequently called to the Jones residence to respond to complaints of domestic violence. After a while, the police stopped responding to the calls. (*Id*. at 2487.)

(viii) Joyce spoke frequently about the death of her son, Mario. Petitioner's father fought with his mother in the car one evening, when he leaned across the front seat to hit her, he hit the infant Mario instead. Within a day,

Mario was dead. (*Id*. at 2484.)

(b) Mrs. White-Jones testified that petitioner's parents drank a lot and that sometimes there was no food in the house. (32 RT 4567-68.) Trial counsel failed to question Mrs. White-Jones to elicit the following additional mitigating information she was willing and able to provide regarding the conditions of neglect and abuse in the Jones household and to which petitioner was exposed, including, but not limited to:

(i) Petitioner's father did nothing to take care of the children when their mother was not around. He could be found drunk in the house with no food while his children complained of going hungry. He even refused to give Geraldine money to buy food for his children. (Ex. 123 at 2485.) Earnest Lee's drinking was so bad that he could not hold a job. (*Id*. at 2487.)

(ii) When Earnest Lee left the home to live with his girlfriend, Bea, he stopped providing for his family entirely. (*Id*. at 2488.)

(iii) Petitioner's mother lived off welfare checks after Earnest Lee left, but she used the checks to purchase alcohol instead of buying food for the family. (Id.)

(iv) Petitioner missed a lot of school because he tried to make sure his younger sisters and brother had food. (*Id*. at 2486.)

(v) Petitioner's mother was often out of control with her alcoholism: Many times, she was so inebriated she urinated all over herself, and her children had to clean up after her. (*Id*. at 2488.)

(vi) Geraldine called the Welfare Department on several occasions because Joyce was passed out drunk and neglecting her children. However, by the time the welfare appointments came around, Joyce had cleaned up herself, her children, and their apartment so that the neglect went unreported. (*Id*. at 2487.)

(c) Mrs. White-Jones testified that petitioner lived with

her during the week from approximately 1981 to 1983. (32 RT 4579.) Geraldine also could have testified that petitioner's mother refused to permit petitioner to live permanently at Geraldine's house, and was in fact angry about the situation because she felt that Geraldine was trying to get her welfare payments reduced. (Ex. 123 at 2494.) Whenever petitioner stayed with Geraldine for more than a couple of days, Joyce made him feel guilty for deserting her and he would return home because he felt like he had to take care of her. Joyce's hold over petitioner seemed to stem from something terribly wrong and unhealthy in her relationship with him. (*Id*. at 2495.) Trial counsel failed to question Mrs. White-Jones to elicit the following additional mitigation information she was willing and able to provide about petitioner's family history, including, but not limited to:

(i) Petitioner's paternal grandparents, Doc and Virgie Lee Jones, were illiterate. (Ex. 123 at 2477.) Doc Jones raised the son of his youngest daughter, Alice. (*Id*.) Virgie Lee Jones was physically abusive; once, when she decided to beat one of her sons, she punched him so hard he flew through the room and dented one of the walls. (*Id*. at 2478.)

(ii) Petitioner's maternal grandmother, Vernice Talley Bladwin, as well as her ex-husband Chester Baldwin, who helped raise Joyce Jones, were crazy. (*Id*.) B*e*hind the back of the Jones family, Miss Vernice called the Jones family "a bunch of dirty niggers." (*Id*. at 2479.) Miss Vernice gave away two of her children, Jackie and Ronnie, when they were young. Joyce often talked about this when she was drunk and would get very upset. (*Id*. at 2480.) Miss Vernice's daughter, Ree, and her son, Carvis, were mentally ill. (*Id*. at 2479–80.)

(d) Trial counsel failed to question Mrs. White-Jones to elicit the following additional mitigation information she was willing and able to provide about petitioner's mother's mental functioning, including, but not limited to:

(i) Petitioner's mother was mentally ill. Petitioner's mother suffered from serious mood swings. It was impossible for the

Jones children to predict which side of their mother they would encounter at any given moment. They did not know if she would throw an ashtray or shoe at them or smile and keep on drinking. (*Id*. at 2483.)

(ii) Petitioner's mother, Joyce, acted as if she were fifteen years old. Her mind never matured and developed. (*Id*.) She treated her newborn babies like dolls. However, once they learned to crawl, she screamed, yelled, and beat them as she did with her older children. (*Id*.) When Joyce hit her children, she did not temper her blows, but hit them in the head as she would her six foot tall husband. (*Id*.)

(e) Trial counsel failed to question Mrs. White-Jones to elicit the following additional mitigation information she was willing and able to provide about petitioner's character, background and functioning, including, but not limited to:

(i) Despite his family environment, petitioner was a sweet and kind boy, willing to help out in any way he could. (*Id*. at 2495.) He was a quiet young man who preferred to keep to himself and did not have a lot of friends of his own. (*Id*. at 2496.)

(ii) The Eighth Avenue neighborhood where petitioner grew up was dirty, violent, and gang-ridden. One of the Eighth Avenue apartment buildings occupied by the Jones family was a "hellhole," where there were shootings in the middle of the day. (*Id*. at 2481.)

(4) Petitioner's friend, Wanda Barrow Keith, testified that she met petitioner when he gave her a ride home from the transmission shop where her car was being repaired. Petitioner and she dated from approximately October 1991 to December 1991. Petitioner was very kind, and showed concern for Ms. Keith's health. Although they stopped dating, they kept in contact by telephone, and at some point, petitioner told Ms. Keith that he had met someone with whom he was hopeful of having a long term relationship. (29 RT 4344-53.) Trial counsel failed to question

petitioner's friend Wanda Barrow Keith to elicit the following additional mitigation information she was willing and able to provide about petitioner's family history and background, including, but not limited to:

(a) When Ms. Keith met petitioner in October 1991, it seemed as if he were "new in the world." (Ex. 24 at 242.) She offered him spiritual guidance through Buddhist chanting, and he eagerly practiced with her. When his father discovered this, he insisted petitioner be sent to church instead. (*Id*.)

(b) Petitioner's relationship with his mother was painful for him. At times, he talked about her as though she belonged on a pedestal. But he also revealed the problems and difficult times, and said that his mother had left his father and all of the children to be with another man. That was very difficult for petitioner. (*Id*. at 243.)

(c) Ms. Keith's spiritual leader liked petitioner and was impressed that he enjoyed chanting, so she encouraged Ms. Keith to pursue a relationship with petitioner. Petitioner was interested in a romantic relationship, and they were intimate once. (*Id*.)

(d) They always liked each other, but Ms. Keith decided she was not interested in petitioner romantically. She told him that, and that he might be happier pursuing a romantic relationship with someone more his age. As with everything else in their relationship, he was fine with that, and did not give her a hard time about that decision. (*Id*. at 243-44.)

(e) When she heard petitioner had been arrested, she was shocked, because it seemed so out of character for him. (*Id*. at 244.)

b. Trial counsel failed prejudicially to explain the objective and purpose of mitigation testimony to critical family members, in order to allay any fears about the trial process, including their mistaken fears that testifying could only hurt, not assist petitioner.

(1) Trial counsel was ineffective for not questioning Gloria

Hanks about petitioner's background and mental impairments.

(a) Petitioner's eldest sister, Gloria Hanks, testified for the prosecution regarding a telephone call that she had with petitioner on New Year's Eve, in which he made a statement that was admitted as evidence of lack of remorse. (28 RT 4149-65.) Trial counsel's failure to elicit testimony regarding petitioner's family history and petitioner's mental illness and impairments from petitioner's eldest sister, Gloria, is inexcusable. Trial counsel had interviewed her and he was aware that she possessed a great deal of information about their parents, their chaotic and violent family life, and petitioner's mental deterioration.

(b) Trial counsel was aware of Gloria's role in the family and of her bond with petitioner. Trial counsel was aware that Gloria had seen petitioner dissociate "several times" before. (Ex. 144 at 2708.) Trial counsel was aware, or reasonably should have been aware, of the long and detailed history Gloria could have recounted of petitioner and his family, going back two and three generations. Trial counsel failed to present any of her mitigation testimony.

(c) Miss Hanks was not reluctant to help her brother; she was concerned that she had nothing to offer that would help him. She told petitioner that she could not testify on his behalf only because she did not understand what her testimony could do to help him, not because she refused him help. (Ex. 124 at 2545-46.) As Ms. Hanks notes about her misinformed reluctance to testify at that time, "I wish someone had explained to me that testifying about all of my family's problems, and all of Meso's strange behaviors, could have been useful at his trial. I had no idea. If I had known that, I could have provided all of this information [about the family] and helped my brother. But the whole reason I did not want to testify was because I did not think I could help." (Ex. 124 at 2547.)

(d) If trial counsel had conveyed these fundamental concepts to Ms. Hanks, she would have understood the role of mitigation, and would have been willing to testify on her little brother's behalf. Significantly, this simple

explanation would not only have given Gloria enough of an understanding to testify, it would have foreclosed any possibility that Gloria would ever have told petitioner otherwise. Had trial counsel conducted a reasonably competent penalty phase investigation, thoroughly interviewing petitioner's family members, and adequately explaining to them the process of a capital trial and the significance of mitigation testimony, there is a reasonable probability that the entire disastrous exchange between petitioner and his sister over the telephone would never have occurred, and petitioner's frustrated outburst, which became a centerpiece of the prosecution's case in aggravation, never would have happened at all. Instead, as Ms. Hanks stated of her discussions with petitioner's defense team, "[w]e did not go into anything about Meso or my family background too deeply." (Ex. 124 at 2546.) Trial counsel's failure to do so was constitutionally deficient, and had a substantial and injurious influence or effect on the penalty verdict. Relief is therefore warranted on this failure alone.

c. Trial counsel unreasonably and prejudicially failed to present to the jury the substantial mitigating information in the documents he obtained.

(1) Trial counsel had in his possession records from Kedren Community Mental Health Center, generated during petitioner's probation following the assault on Ms. Jackson. Trial counsel presented evidence through Dr. Thomas that petitioner "attended a number of sessions but terminated relatively early," and that the records indicated an inability on the part of petitioner to recognize that he was ill. (30 RT 4414-15.) Trial counsel was ineffective for failing to present evidence from the Kedren records as follows: Petitioner was seen at Kedren on three occasions. (Ex. 30 at 359.) Petitioner was seen for an initial assessment evaluation on January 9, 1985, when he was diagnosed with atypical anxiety, with a secondary diagnosis of compulsive traits. (*Id*. at 360.) At the time of the initial evaluation, petitioner was assessed to require only six visits, and was to have been discharged on February 17, 1985. (*Id*. at 375.) Petitioner was seen on January 21, 1985, and again on February 4, 1985, when he was described as somewhat anxious and depressed. (*Id*. at 378, 381.)

The records indicate that petitioner's case was closed on September 10, 1985, because petitioner had stopped going and the facility had been unable to contact him. (*Id*. at 361.) Trial counsel was ineffective for failing to use these records to point out that only two months had elapsed between petitioner's first treatment session and the offense involving Mrs. Harris. Thus, negating the prosecutor's characterization of petitioner's failure to take advantage of psychiatric treatment, that is, that petitioner had been put on "a psychological treatment program" which he had "refused to go along with." (31 RT 4640-41.) When in fact, petitioner was offered only six hours of counseling. (Ex. 30 at 375.)

(2) Trial counsel was ineffective for failing to present evidence of petitioner's longstanding compromised cognitive functioning and mental illness from a diagnostic study performed on petitioner in 1986 at Tehachapi prison in advance of sentencing on the incident involving Mrs. Harris. The records indicate that petitioner's IQ was rated 79 on a Shipley-Hartford test, which placed petitioner in the borderline range of functioning or 6.7 percentile of the population. (Ex. 86 at 1697.) Other documentation generated during this evaluation shows that petitioner exhibited signs and symptoms consistent with dissociation (e.g., I have had periods in which I carried on activities without knowing later what I had been doing; I have had blank spells in which my activities were interrupted and I did not know what was going on around me; I often feel as if things were not real) and psychosis (e.g., evil spirits possess me at times; much of the time my head seems to hurt all over; I have strange and peculiar thoughts). (Ex. 87 at 1699.)

(3) Trial counsel failed to present evidence from jail medical records admitted as Defendant's Exhibit V that medical personnel at the Los Angeles County Jail had prescribed antidepressant and antipsychotic medication because petitioner was depressed, paranoid, anxious, and hearing voices. (Ex. 33 at 593-677.)

(4) Trial counsel was ineffective for failing to obtain a complete copy of petitioner's jail medical records. Although petitioner's jail medical records

were admitted as an exhibit, those records were incomplete, and presented an inaccurate record to the jury of petitioner's treatment and medication regimen at the Los Angeles County Jail. Trial counsel had no strategic reason for failing to obtain these records. (Ex. 150 at 2733.) Had trial counsel obtained records for the period from September 1994 onwards, the records would have demonstrated that petitioner was not receiving his antipsychotic, anti-anxiety, or anticholinergic medication at the time he testified during the guilt phase; and, moreover, that he was not receiving these medications on New Year's Eve at the time of the phone call to his sister Gloria, which was admitted in aggravation as evidence of petitioner's lack of remorse. (Ex. 34 at 678-94.)

(5) Petitioner's school records were never made an exhibit in his trial or formally presented to the jury. Petitioner's education records provide evidence of petitioner's longstanding history of compromised cognitive functioning, poor academic performance, intelligence testing in the intellectual disability range of functioning, and petitioner's placement in Special Education and remedial classes throughout his time at school. (Ex. 50 at 1095-148; Ex. 51 at 1149-67.)

(6) In addition to information regarding petitioner's academic functioning, the records also demonstrate that petitioner did not have a consistent, predictable school pattern, attending two elementary, four junior high, and three high schools. (Ex. 50 at 1108, 1096, 1098.) Petitioner also missed a lot of school, for example, he was absent twenty-three days in fourth grade, and missed sixty days in the sixth grade. (*Id.* at 1108.) The records also contain information regarding petitioner's parents' neglect, failing to have petitioner's left eye exphoria treated (Ex. 51 at 1164; Ex. 50 at 1116); petitioner's signs of distress in tenth grade as evidenced by his self-inflicted injury after a bullet exploded in his hand when he took it out of the furnace (Ex. 50 at 1116); that petitioner liked school (Ex. 51 at 1150); and that petitioner loved sports, and was enrolled in varsity track, but his favorite sport was football (*Id.* at 1150).

d. Trial counsel unreasonably failed to investigate, develop, and present the testimony of education personnel who could review petitioner's school records and explain petitioner's academic failures and learning problems that were the direct product of his compromised mental functioning. Qualified and competent education personnel also could have testified about the connection between a student's academic achievement against the backdrop of a chaotic and unstable home environment.

(1) Despite the wealth of information contained in petitioner's school records, which trial counsel had in his possession, no education personnel testified at petitioner's trial. At trial, the jury was presented only with evidence that petitioner obtained his GED while in the Los Angeles Jail (29 RT 4265), and that, through the testimony of Dr. Thomas, according to the school records, petitioner performed below age expectation, and relayed the petitioner's own description of his problems at school as aggressive behavior with kids, a conduct disturbance and a disruption in the classroom. (30 RT 4449-50.)

(2) Trial counsel, therefore, left the jury with the misleading, incomplete, and inaccurate information that petitioner's problems in school were largely behavioral, rather than the result of his cognitive and other mental impairments.

(3) An accurate, complete and reliable portrait of petitioner's performance and struggles in school from education personnel would have included, at a minimum, the following facts:

(i) Petitioner was placed in an Educably Mentally Retarded ("EMR") program for three years commencing in the first grade, when he was six years old. Upon the referral of petitioner's first grade teacher, Ms. Bush, the school psychologist administered a Stanford-Binet intelligence test. Petitioner received a full-scale score of 68, placing him in the mentally retarded range of functioning. (Ex. 50 at 1103.) Dr. Sylvia Dean, Coordinator of Special Education Support Services for Los Angeles County Unified School District, Local District G, would have testified:

"A low score, on the Binet, such as [petitioner's] score of 68, probably would have been [interpreted] to mean that he did not have the skills or intellectual abilities to complete age and grade appropriate tasks." (Ex. 130 at 2599.)

(ii) From an early age, petitioner exhibited limited academic and social skills. "He did not recognize most letters and did not know most beginning consonant sounds. He reversed many numerals and letters in writing. He had poor listening skills and was slow in responding to directions. While he was able to work independently, he did not work well in group activities. He did not play and communicate with his peers." (Ex. 125 at 2552.) His impairments included a short attention span and poor listening skills. (*Id*. at 2553.)

(iii) At the time of his psychoeducational assessment in March 1971, petitioner was restless and impulsive, easily distracted and easily satisfied. He had limited language skills and some difficulty following directions. He showed weaknesses in vocabulary, description and comprehension, visual memory, perceptual discrimination, spatial relationships and psychomotor coordination. Reading was at a mid-kindergarten level (GE K6), spelling was at a beginning first grade level (GE 1.1) and arithmetic was at a beginning kindergarten level (GE K.2) on the Wide Range Achievement Test (WRAT). (Ex. 125 at 2552-53; Ex. 50 at 1103; Ex. 51 at 1158.)

(iv) Petitioner's poor scores on the Wide Range Achievement Test ("WRAT"), indicated difficulty writing the letters of the alphabet and recognizing very basic sight words, such as cat or dog. According to Dr. Dean, petitioner most likely did not have the skills to count past twenty-five, or to make blending sounds, such as "br," or "cr." Low ratings on the behavior scales further indicated problems with making appropriate decisions, caring for self, and responding age appropriately to social situations. (Ex. 130 at 2599.)

(v) Students who were in the EMR programs during the early 1970s were placed into those programs based on scores from IQ tests

administered by the school psychologist. Students whom teachers believed might benefit from the EMR program were referred to the school psychologist for evaluation. The School Psychologist was responsible for developing the case study. As part of the process, the psychologist gathered information relating to the student's health and attendance from the school nurse and the Pupil Service Attendance office, respectively. The psychologist often made home visits to obtain information on the student's family life. During this period, the regular education teachers provided work samples and sometimes completed forms relating to academics and behavior. The school psychologist reviewed all of the data, wrote a report and made recommendations for eligibility and placement. (Ex. 130 at 2598-99.)

(vi) Petitioner received Individualized Education Programs in at least the following school years, at three different schools: El Camino Real High School , September 1980 to June 1981; Crenshaw High School, September 1981 to June 1982; and, Workman High School September 1981 to June 1982. (Ex. 51 at 1153.) Each Special Education student has an Individualized Education Program (IEP). They are used exclusively for students who are in the process of being evaluated for, or who have been, diagnosed by a school district as having a disability. For each student, the IEP is reviewed and revised at least annually. As part of that annual process, the IEP will address goals for a student for the upcoming year; review the current IEP to determine whether a student met the goals set forth in it in the preceding year; and provide a determination for other services needed. (Ex. 130 at 2596.)

(vii) Placement in the EMR program enabled petitioner to attend school in a much smaller classroom, of typically 12 to 15 students. The students received a great deal of individualized attention, and had the opportunity to learn. Due to the smaller class size, the teachers were able to establish a rapport with the students not possible in the larger, mainstream classes. (Ex. 130 at 2599-600.) Typically, the EMR classes have no specific grade designations, and students of

various ages were taught together. Petitioner was in the EMR program at Hyde Park for three years, and retained for one year during that period of time. (Ex. 130 at 2600.)

(viii) Petitioner adjusted well to the small class size with individualized instruction and remained in the same EMR class with the same teacher for three years. He learned to read at a second grade level and completed all his work. (Ex. 125 at 2553.) Petitioner's special education teacher indicated on the annual review of his EMR placement in the second grade that with great motivation from his teacher, he could succeed at the second grade level. (Ex. 125 at 2553; Ex. 51 at 1167.)

(ix) Petitioner's school records also indicate that based solely upon the IQ test scores, petitioner was found ineligible to continue to receive Special Education services as of February 26, 1974. (Ex. 130 at 2600.)

(x) Results of the Wechsler Intelligence Scale for children (WISC) indicated low average general ability (FS IQ 87) with strength in logical thinking and weakness in mental alertness. (Ex. 125 at 2553.) Upon exiting the EMR program, petitioner returned to general education classes, and his subsequent school records reflect his inability to succeed in the larger general education class. (Ex. 130 at 2600.) At that time, there were no – or at most minimal – attempts to provide transitional services to these students or to track their success or failures either behaviorally, emotionally or academically. They were placed in classes and expected to survive with no structured or specifically identifiable supports or transition services or activities. (*Id*.)

(xi) Academic skills were two years below his fourth grade level as shown on the WRAT. Reading (GE 2.1) and spelling (GE 2.2) were at a low second grade level and arithmetic computation was at a high second grade level. His IQ scores on the WISC were in the low average range on both verbal (abstract) tests (VS IQ 87) and performance (concrete) tests (PS IQ 89). (Ex. 125 at 2553.)

(xii) Petitioner achieved virtually no academic

success in school once he was exited from the EMR program in 1974. (Ex. 130 at 2601.) Petitioner received remedial reading in the sixth grade at Hyde Park School, but he was markedly below average in all academic subjects, which caused him a great deal of frustration. (Ex. 125 at 2554.) He could not keep up with his peers without individualized instruction. By the end of elementary school, petitioner's signs of distress were apparent in his grades and his behavior. (*Id*. at 2557.)

(xiii) He was not re-referred for assessment until his sophomore year at El Camino High School; yet given his previous placement in Special Education, combined with his poor performance in subsequent elementary school years, he likely would have benefited from additional Special Education support had it been available to him. (Ex. 130 at 2601.)

(xiv) At El Camino, the Counseling and Psychological Services Pupil Referral form indicates that petitioner was sixteen years old, with an IQ of 84, which is in the low average range based on the Wechsler Adult Intelligence Scale (WAIS) test administered on April 20, 1981. (Ex. 51 at 1149.) His academic achievement was extremely poor, ranging from the second to the sixth grade level. (Ex. 130 at 2601-02.)

(xv) The school psychologist administered an IQ test to petitioner, and measured those results against his achievement to determine eligibility for placement into Special Education. In this particular instance, there was a sufficient discrepancy between petitioner's higher IQ test and his achievement test to consider placement into the Special Education program. (Ex. 130 at 2602.) In addition, at El Camino, the school nurse in tenth grade treated his left hand for multiple lacerations that petitioner received when a bullet exploded in his hand when he pulled it out of a furnace. There were pieces of shell imbedded in the lacerations. (Ex. 125 at 2555.)

(xvi) Achievement testing at that time showed weakness in all academic areas. Petitioner was functioning at a D and F grade level in

the classroom. Results of the Peabody Individual Achievement Test showed academic skills from the third to sixth grade level. General Information was below average (GE 6.3) and all other scores were markedly below average: Mathematics (reasoning) (GE 4.2); Reading Recognition (GE 4.1); Reading Comprehension (GE 4.4); Spelling (recognition) (GE 3.8). Results of the WRAT showed academic skills from the Second to Fifth grade level; Reading (sight words) (GE 5.2); Spelling (recall) (GE 3.3); Arithmetic (computation) (GE 2.3). (Ex. 125 at 2556.)

(xvii) Petitioner was sent to his school of residence (Crenshaw) for the eleventh grade. He had all his classes in the Educationally Handicapped Program. Instructional goals on his IEP for math were to master functions of addition, subtraction, multiplication, and division, for reading to read a paragraph silently and answer comprehensive questions, and for language arts to write sentences with correct structure, spelling, punctuation and grammar. (Ex. 125 at 2556-57.)

(xviii) In the second semester of eleventh grade, petitioner transferred to Workman High School in the Hacienda La Puente Unified School District (HLPUSD) when he lived with his Uncle Robert and Aunt Geraldine. (Ex. 52 at 1168.) He had four remedial classes and two non-academic classes. (Ex. 125 at 2557.)

(xix) Petitioner's inability to benefit from the special education programs or succeed in school may have been exacerbated by his frequently changing schools after elementary school; petitioner did not have a consistent, predictable school pattern. Petitioner attended two elementary schools, four junior high schools, and three high schools. Petitioner also suffered inconsistent school attendance. For example, in the sixth grade he was absent sixty days; he was absent twenty-three days in fourth grade. (Ex. 130 at 2602-03.)

(xx) From his first semester in seventh grade, petitioner's academic performance deteriorated. By the end of junior high school, his

signs of distress were apparent in his grades and his self-inflicted injury. From his first semester in tenth grade, petitioner's inability to keep up with the regular program was apparent. His success in the Special Education program was interrupted by transfers to another home and another school district. It is remarkable that he was continuously enrolled in school through twelfth grade and that he tried to return to an educational setting that met his needs. (Ex. 125 at 2557-58.)

e. Trial counsel unreasonably failed to investigate, develop, and present a minimally adequate social history investigation and present that history through lay witnesses and appropriate experts including a social historian. (*See, e.g.*, Ex. 182 at 3168-69; Ex. 183 at 3173-87.) Had trial counsel conducted a minimally competent social history investigation, he would have been able to present a compelling, unified mitigation case to the jury and to convey to the jurors numerous important mitigation themes related to petitioner's life and background, such as multi-generational family histories of sexual abuse, physical abuse, psychological battering, mental illness, poverty, lack of education, and chemical dependency; the dangers and violence of petitioner's immediate neighborhood in South Central Los Angeles, including the presence of gangs, drug trafficking and the constant competing firing of bullets and presence of police helicopters; petitioner's early and constant exposure to domestic violence, sexual violence, and confrontation; petitioner's constant dislocation and displacement due to family moves, evictions, or his parents' inability to care for their children; petitioner's educational and academic problems; petitioner's emotional and social isolation; petitioner's gentleness, kindness, loyalty to friends and family, and respect for women; the marked contrast between petitioner and his other siblings; the hunger, malnutrition and parental neglect of petitioner and his siblings; and the steady development and progressive worsening of petitioner's mental illnesses. Trial counsel prejudicially failed to locate, interview, and present this compelling testimony from witnesses already known to him, as well as from other numerous family relatives, neighbors, friends, acquaintances and education personnel whom trial counsel failed

even to identify. Had trial counsel conducted such an investigation, they would have discovered the following:

(1) On both the maternal and paternal sides of petitioner's family there is a history of mental illness.

(a) Petitioner's paternal grandfather, Ernest "Doc" Jones, suffered from mental dysfunctions that produced erratic, psychotic, violent, and dysfunctional behavior. Doc was controlling, domineering, and a bully. He expected his every whim to be indulged by his wife and daughters. (Ex. 17 at 179; Ex. 4 at 45; Ex. 18 at 186-87.) He put his children out to work in the blazing sun of the cotton fields while he sat watching on comfortably from a spot in the shade or from his truck. (Ex. 4 at 45; Ex. 21 at 218; Ex. 6 at 65-66.) When he thought that they did not work hard enough, he beat them. (Ex. 135 at 2655; Ex. 20 at 212; Ex. 6 at 65-66.)

(b) Doc's beatings of family members were unpredictable, vicious, and irrational. (Ex. 20 at 212; Ex. 4 at 45; Ex. 21 at 218; Ex. 18 at 187.) He beat his family with switches, belts, or extension cords, leaving bloody, painful welts on their bodies. (Ex. 4 at 45; Ex. 21 at 218; Ex. 128 at 2569-72; Ex. 1 at 3; Ex. 18 at 187.) Often, he would storm into the children's bedrooms in the middle of the night and begin whipping all the children lying in the bed until the children could determine which one of them was the target of his wrath. (Ex. 128 at 2569-70.) Only after the intended victim was discovered was it safe to move because the beating was always worse if they tried to escape it. (*Id*. at 257.)

(c) Doc's savage attacks and irrational behaviors intensified in the early 1960s when he hit his daughter Minnie Pearl on the back of her head, knocking her unconscious (Ex. 42 at 839), pulled guns on family members (Ex. 20 at 212), ran down the street naked, talked about things that did not make sense (Ex. 21 at 219), tried to run over animals in the street, and sat in the dark talking to people no one else but he could see (Ex. 8 at 78). He acted like a dog, and even slept out in the doghouse. (Ex. 191 at 3410.)

(d) Doc's behavior was so irrational that he was arrested, and his father filed a charge of insanity against him, resulting in Doc's institutionalization at Arkansas State Hospital in September 1963. (Ex. 108 at 2258; Ex. 42 at 832-40.) However, his irrational behaviors persisted after his release, and he once drove his youngest daughters Mary and Alice into the Mississippi River. (Ex. 1 at 7.)

(e) Petitioner's paternal grandmother, Virgie Lee Jones, had visual hallucinations. She saw headless, dead people out in the graveyard near the house where the family lived. (Ex. 20 at 213.) She was also physically abusive to her children, beating them with switches and attacking them with whatever came to hand, including knives. (Ex. 128 at 2569; Ex. 21 at 219.)

(f) Petitioner's paternal aunt, Bertha Mae, suffered a mental breakdown as a consequence of being repeatedly raped by her father as a child, marriage to an abusive husband, and the death of her grandfather. She suffered from chronic depression, was often suicidal and has been hospitalized as a result of her mental illness. (Ex. 4 at 54-55.) She also reported symptoms of disorientation and addiction, finding comfort communing in her dreams with dead relatives. (*Id*. at 55.)

(g) Petitioner's paternal uncle, Roosevelt "Richard" Jones, has never had his own house or apartment and has spent his entire adult life moving from place to place. (Ex. 128 at 2579.)

(h) Petitioner's paternal uncle, Sammie Jones, exhibits obsessive compulsive tendencies revolving around neatness and cleanliness, and worries if things were not kept in their proper place. (Ex. 128 at 2581.) Sammie is a "hardcore" gambler, regularly traveling to Las Vegas for the gambling. Once he has lost all his money, he starts drinking and stays drunk for several days at a time. (Ex. 21 at 223; Ex. 128 at 2581.) He also exhibits signs of impulsivity, taking off in his car and driving thousands of miles before letting people know his whereabouts. (Ex. 128 at 2580.)

(i) Petitioner's paternal aunt, Alice Jones-Banks, contemplated suicide during her teenage years as an alternative to living in her brutal home environment and to enduring her father's extreme cruelty. (Ex. 1 at 3.)

(j) Petitioner's maternal grandmother, Vernice Talley Baldwin, "Miss Vernice," exhibited signs of mental illness that manifested themselves in her obsessive, unpredictable, and physically and emotionally abusive behaviors. Miss Vernice was obsessive about order and neatness; she could not sit still unless everything was clean and in its proper place. (Ex. 3 at 23; Ex. 8 at 79.) She had delusional beliefs about consuming dust and insisted on rinsing items that came from the cupboard even though they had recently been washed. (Ex. 3 at 24.) Her behavior led her son-in-law, petitioner's father, to believe that she was "touched in the head." (Ex. 8 at 79.) She forbade her children from playing with other children she considered "dirty." (Ex. 3 at 24.) Miss Vernice's obsession with cleanliness often triggered acts of violence against petitioner's mother, Joyce Beatrice Jones, for her perceived failure to keep Miss Vernice's spotless house even cleaner. (Ex. 4 at 49.) Petitioner and his siblings were also on the receiving end of Miss Vernice's anger when they visited her back south: she got mad at them when they did not clean something the right way or do a certain thing at a certain time. (Ex. 2 at 9.)

(k) Miss Vernice believed that she was better than everyone else and considered herself above many of the African American families in the area because she was light-skinned. (Ex. 8 at 79-80; Ex.123 at 2478-79; Ex. 4 at 48.) Miss Vernice mistreated Joyce because she was the darkest skinned of her children; when Miss Vernice paid attention to Joyce, it was to scream and curse at her and tell her that she was worthless. (Ex. 4 at 49; Ex. 6 at 68.) She beat Joyce with fire wood, bottles, sticks and even a frying pan, rendering her unconscious. (Ex. 18 at 190-91). Miss Vernice's first husband, A.T. Hanks, Joyce's father, was also dark-skinned and was required to enter the house by the back door. (Ex. 18 at 189-90.) When Miss Vernice learned that he was cheating on her, she slashed his face, leaving him with a

scar from his ear to his mouth. (Ex. 135 at 2653.) Many people believed that Miss Vernice gave away two of her children because of their darker skin complexion, and had tried to give away a third child for the same reason. (Ex. 4 at 48; Ex. 6 at 68.)

(l) Miss Vernice was reclusive at times and did not leave her house, even for social occasions. (Ex. 6 at 66-67.) She had a long history of recurrent anxiety with a depressive spectrum for which she received anti-depressant and anti-anxiety medications, including Stelazine, which is also prescribed as an anti-psychotic. (Ex. 48 at 939, 989, 1019, 1024, 1028-29, 1032-33, 1043, 1045-46.) It did not take much to agitate her or trigger her anxiety; the very mention of the names of either of her ex-husbands was enough to make her angry. (Ex. 3 at 20.)

(m) Miss Vernice's sister, Beatrice, obsessed over the smallest of things and worried herself to the point where she made herself sick. (Ex. 22 at 233.)

(n) Petitioner's maternal uncle, Carvis Baldwin, exhibited signs of mental illness starting from a young age. Like his mother Miss Vernice, Carvis's mental deficiencies often manifested themselves in his obsessive, bizarre, erratic, and violent behaviors. As a young boy, Carvis appeared to be "disturbed in his mind." (Ex. 8 at 83.) He was variously described as "crazy" and "a nut and a half." (Ex. 13 at 112.) From as early as high school, he experienced delusional thinking, convincing himself that he was in a relationship with a girl he hardly knew and fighting over her with another boy. (*Id*. at 112.) Carvis cursed people out and started fights over the smallest of things or for no reason at all. (Ex. 13 at 112-13; Ex. 20 at 214.)

(o) Carvis was arrogant and believed he was a big shot. (Ex. 6 at 70) He was boastful and had a very high opinion of himself. He believed that people were jealous of him because he was so talented. (Ex. 13 at 113.) He even believed that he was well liked, when in fact people did not like him and told him as much. (Ex. 6 at 70.)

(p) Carvis was obsessed with appearance, order, and

neatness. (Ex. 13 at 113.) During high school, he planned on joining the Marines because their advertisements depicted them as being the toughest and the sharpest dressed. (*Id*.)

(q) Carvis's signs of mental illness increased as he got older. Although he had been moody when he was young, his mood swings intensified as an adult. (Ex. 13 at 117; Ex. 123 at 2480.) He was unable to sit still, went off on tangents during conversations or spoke gibberish. (Ex. 13 at 117.) His temper was worse and he reacted badly to ordinary situations. (Ex. 135 at 2657.) Alcohol exacerbated Carvis's moods: as soon as Carvis started drinking his "most violent, moody, aggressive personalit[y] took over." (Ex. 21 at 223.)

(r) As his temper got worse, Carvis became more abusive. He regularly beat his wife, Gloria, over insignificant things, such as, squeezing the toothpaste from the middle of the tube. (Ex. 13 at 125.) The final straw came for Gloria when Carvis threatened to kill her and pulled a gun on her. (*Id*. at 128.) Afraid for her life and the safety of her children, Gloria left Carvis. (*Id*. at 128-29.)

(s) After his wife left him, Carvis became more unstable, "he went totally nuts." (Ex. 189 at 3396.) He hated everything that reminded him of his ex-wife, and lashed out at other people. (*Id*.) He regularly cursed out his mother, calling her a "bitch" and a "whore," until she cried. (Ex. 129 at 2584; Ex. 3 at 30.) He flew into rages or talked utter nonsense, and did things for which there was no rational explanation. (Ex. 21 at 224.)

(t) Petitioner's maternal aunt, Vernice "Ree" Baldwin, like her mother, Miss Vernice, had obsessive tendencies and was irrationally concerned with dirt and germs. Ree was so preoccupied with dirt and germs that she did not permit her daughter to play with other children or touch the ground, to the point where her daughter became ill because she was non-resistant to germs. (Ex. 123 at 2479.)

(u) Ree became obsessed with religion and got involved with an extreme religious cult, undergoing a dramatic personality change in the

process. (Ex. 129 at 2589, 2593; Ex. 13 at 120; Ex. 123 at 2479.) She quoted the Bible in conversations and tried to convince others to join her church. (Ex. 13 at 120-21.) People tried to avoid her because of her religious fanaticism. (Ex. 123 at 2479; Ex. 132 at 2628.)

(v) Like her mother, Miss Vernice, and her brother Carvis, Ree had an inflated sense of importance, believing that she was better than everyone else. (Ex. 123 at 2479.) Ree, too, looked down on those who were darker-skinned than her and was verbally abusive to her husband on account of his darker complexion. (Ex. 129 at 2590.)

(w) Petitioner's maternal aunt, Jackie Baldwin, was seriously mentally ill. She suffered from depression, experienced hallucinations, and, after previous suicide attempts and drug addiction, shot herself. Jackie had serious emotional problems as a result of having been given up for adoption by her mother, Miss Vernice. (Ex. 147 at 2721.) She exhibited symptoms of anxiety like her mother, Miss Vernice, and like her Aunt Beatrice, worried excessively. (Ex. 22 at 237.) Jackie was reunited with her family in the late 1970s, and moved to Los Angeles to pursue her dream of becoming a famous singer. (Ex. 135 at 2662; Ex. 21 at 223; Ex. 124 at 2537-38 ; Ex. 3 at 35.) Jackie, however, could not sing. (Ex. 21 at 223; Ex. 3 at 35; Ex. 128 at 2568.)

(x) After a short time in Los Angeles, Jackie's personality began to change; she became depressed and withdrawn. (Ex. 147 at 2721.) Her behavior was unpredictable and she was quick to anger and became physically confrontational. (Ex. 129 at 2586.) She regularly saw a dark shadow of a man standing in the doorway. (Ex. 135 at 2663.) Jackie often expressed a desire to kill herself, and had cuts on her wrists from previous suicide attempts. (Ex. 3 at 36; Ex. 135 at 2663; Ex. 97 at 1948.) Ultimately, at the age of 21, Jackie succeeded in killing herself by shooting herself in the head in the bathroom of her brother Carvis's house. (Ex. 27 at 305; Ex 97 at 1944; Ex. 13 at 130; Ex. 135 at 2663.) After Jackie's death,

scraps of paper with delusional writings were found scattered throughout her apartment. (Ex. 129 at 2588.)

(2) Petitioner's immediate family all display symptoms of serious mental illness, including depression, mood disorders and the effects of severe traumatization.

(a) Petitioner's mother, Joyce Beatrice Jones, had multiple mental health impairments, including delusional thinking, auditory and visual hallucinations, and mood disorders, and exhibited violent, obsessive compulsive, and abusive behaviors. Joyce's violent, irrational tendencies stood out from an early age when she beat up other girls at school. These attacks were often unprovoked, vicious, and demonstrated that she was evidently quite disturbed. (Ex. 18 at 190; Ex. 21 at 220.) As an adult, she continued to earn her reputation as an unpredictable woman willing to fight anyone at a moment's notice. (Ex. 145 at 2710; Ex. 146 at 2713; Ex. 123 at 2482-23; Ex. 156 at 2777.) Those she came into contact with continued to believe that "she had a lot of mental problems." (Ex. 152 at 2740.)

(b) Joyce's mental impairments produced an obsession with cleanliness. Joyce frantically cleaned the Jones family apartments in Los Angeles, even when she was extraordinarily drunk. (Ex. 124 at 2506; Ex. 16 at 156.) She often terrorized her children with her cleaning mania, including getting them out of bed in the middle of the night to clean. (Ex. 155 at 2766; Ex. 18 at 197.) As soon as she claimed to find one item or piece of clothing out of place in a bedroom, she threw every item from the dressers and the closets into a heap in the living room, ordering the children to put everything back after school. Often, however, she could not bear to leave the mess and picked it up herself before the children returned from school. (Ex. 124 at 2506.) These rampages were not limited to the bedrooms, Joyce often repeated the same behaviors in the kitchen, taking all the dishes out of the cupboards and making the children rewash and replace each one. (*Id*.)

(c) Petitioner and his siblings were subjected to

humiliating treatment as a result of their mother's obsessive need for cleanliness. Petitioner's sister Jean Jones recalls that when she was young, her mother inspected the children before they were allowed out the door to go to school:

> We had to stand in line, and she would check our ears, and faces, and our underwear, to make sure everything was clean. She would take the girls in one room, and the boys in another, and make us pull down our pants or pull up our skirts to show our underwear.

(Ex. 16 at 156.)

(d) Joyce's cleaning mania often masked the terrible violence, abuse, and neglect suffered by the children in the Jones family home. More than once, her sister, friends, or neighbors called the child welfare agencies about the appalling state of the Jones household; but Joyce would frenetically clean and straighten before the welfare workers arrived, and the children would remain in the home. (*E.g.*, Ex. 88 at 1797, 1801; Ex. 123 at 2487.)

(e) Joyce also exhibited symptoms of dissociation, talking as though she were back in the past, and talking as if other people from the past were there, when they were not. (Ex. 3 at 26; Ex.18 at 200; Ex. 123 at 2483-84; Ex. 13 at 119.) This ability to disconnect from the present was one of the things that appeared to make her prone to violent and unpredictable behavior. One moment, things were fine; in the next moment, her mind had taken her back to a bad time in her life and overwhelmed any sense of self or self-control she had. (Ex. 124 at 2507.)

(f) Joyce experienced hallucinations. Once, she took off running, screaming that she saw blood and monkeys, forcing her children to chase after her and coax her back into the house. (Ex. 16 at 157.)

(g) Like her sister, Jackie, and her mother, Joyce suffered from both depression and anxiety. (Ex. 124 at 2504; Ex. 22 at 237-38; Ex. 123 at 2480.) Many people noticed that Joyce was depressed after the death of her 3 month old son, Mario, in 1965. (Ex. 27 at 301; Ex. 124 at 2504; Ex. 135 at 2658; Ex. 18 at

197; Ex. 123 at 2484.) Not long thereafter, Joyce completely gave up on the idea of motherhood and stopped caring much for her family. (Ex. 124 at 2504-05.)

(h) Joyce, like her brother Carvis, suffered from severe mood swings, she was quick to anger and could be seen crying one minute and cursing someone out in the next. (Ex. 123 at 2483; Ex. 3 at 26; Ex. 134 at 2647.) Joyce often thought people were talking badly about her when they were not. (Ex. 3 at 26-27.)

(i) Petitioner's father, Earnest Lee Jones, exhibited behaviors consistent with hypomania:

(i) He engaged in spending sprees, literally spending every dime he had to impress people and leaving himself penniless. (Ex. 25 at 249.) It was more important for Earnest Lee to impress people with nice clothes and a nice car than it was to feed his family. (Ex. 25 at 249; Ex. 18 at 194.) Earnest Lee gambled, drank, partied, and had numerous affairs throughout his marriage. (Ex. 18 at 195; Ex. 25 at 249; Ex. 124 at 2512.)

(ii) Earnest Lee is described by his siblings as a "high energy person" (Ex. 189 at 3394) who is "always on the go," and never sits still for very long (Ex. 15 at 139). He did not appear to need much sleep, often working one full shift before going on to his next job to complete another full shift. (Ex. 189 at 3394.) He frequently called family meetings in the middle of the night when he ranted and raved to petitioner and his siblings about what a bad person their mother was. (Ex. 124 at 2517.)

(iii) The very mention of Joyce's name often set off an explosive reaction, causing Earnest Lee to jump up, bang his hand on the furniture, and decry Joyce as an evil person. Once Earnest Lee's rage took hold, there was no way of stopping him, sometimes he stopped his tirade if everyone left the room. (Ex. 189 at 3397; Ex. 190 at 3403.)

(iv) Earnest Lee exhibited significant mood lability that made him very unpredictable. He could be irate, cursing and ranting all morning,

then as if "something in him snapped back into place," in the next moment, he was bright, cheery, hailing everyone with a smile on his face. (Ex. 190 at 3404-05.) Earnest Lee was irritable, argumentative and got angry with his family for no apparent reason. (Ex. 124 at 2518; Ex. 190 at 3403.) The only way to avoid upsetting him was to walk on eggshells around him. (Ex. 190 at 3403.) He held grudges and often brought up grievances that were months old. (*Id*.)

(v) When Earnest Lee proposed to his second wife after Joyce's death, he believed that God was directing him to marry her. (*Id*. at 3401-02.) After their marriage, however, his second wife, Teresa, had serious misgivings. Earnest Lee was very controlling, and wanted to control every aspect of his family's lives. (*Id*. at 3402.) When he became sober, he wanted to make up to his children for having been a bad father while they were growing up, but he did so by manipulating them – wielding power by giving or withholding money from them. (*Id*. at 3405.)

(vi) Earnest Lee displayed irrational thoughts and emotions. He became suspicious and jealous when he saw Teresa speaking to another man. Eventually, he became so irrational that he was jealous of her relationship with God and her Siamese cat. (*Id.* at 3403-04.) Ultimately, Earnest Lee's secretive and abusive behavior took its toll, and Teresa left him. Initially, after they separated, Earnest Lee found out where Teresa was living and stalked her. (*Id*. at 3407.)

(vii) Petitioner's siblings all exhibit signs of the long-term effects of massive and continuous trauma, as well as battling depression and other mental health problems. (Ex. 2 at 17; Ex. 124 at 2548-49; Ex. 131 at 2621; Ex. 143 at 2704; Ex. 145 at 2712; Ex. 146 at 2716; Ex. 16 at 162.)

(j) Petitioner's sister, Joyce Jean Jones, whom the family calls Jean, has battled depression for many years and attempted suicide when she was only a teenager. (Ex. 16 at 169, 171-72; Ex. 123 at 2490-91; Ex. 164 at 2980.) She continues to require psychiatric care. (Ex. 16 at 169.)

(k) Petitioner's oldest sister, Gloria Hanks, inherited her

mother's obsessive compulsive behaviors around neatness and cleaning. Gloria cleans compulsively, often in the middle of the night when everyone else is in bed. (Ex.143 at 2703; Ex. 2 at 17.) She also gets up in the middle of the night to cook, cooking by the light from leaving the refrigerator door open rather than turning on the kitchen light. (Ex. 2 at 17.)

(l) Petitioner's sister, Cassandra Samuel, like her mother, becomes irrational, unpredictable, belligerent, and violent when she is drunk. "Once she was angry, all bets were off as to what she might do," including threatening her ex husband at knifepoint. (Ex. 153 at 2745.) When she is sober, she exhibits symptoms of paranoia, believing that people are talking behind her back. Drinking heightens her paranoia, and she accuses people of saying things they never said. (Ex. 16 at 161-62.) Cassandra was diagnosed with major depression following an attempted suicide. (Ex. 39 at 801-06.)

(3) Petitioner's paternal and maternal families have a history of cognitive deficits, including intellectual deficits, difficulties with reading and writing, lack of education, and difficulties progressing in school.

(a) Petitioner's paternal grandfather, Doc, was illiterate his entire life and could barely sign his name. (Ex. 123 at 2477; Ex. 4 at 42.)

(b) Petitioner's paternal grandmother, Virgie Lee, wore her illiteracy as a badge of honor. (Ex. 123 at 2477.)

(c) Petitioner's paternal aunt and Doc and Virgie Lee's eldest daughter, Bertha Mae, rarely got to school because she had to work in the fields from sun up to sun down. (Ex. 18 at 187.) She had to repeat each grade several times over, and was made fun of by the students and teachers. At age fifteen, she was still in the fourth grade and dropped out of school. (Ex. 4 at 42-43.)

(d) Petitioner's uncle, Robert Jones, was promoted to the sixth grade because of his age, 14 years old. (Ex. 72 at 1503.) His IQ on the Otis Quick Scoring Mental Ability test was assessed at 66, within the range of an

intellectual disability. (Ex. 72 at 1504.) His probation officer in 1979 observed that he possessed below average intelligence. (Ex. 106 at 2231.)

(e) Petitioner's paternal uncle, Thomas Jones, had an IQ score of 85 on the Otis Quick Scoring Mental Ability test, placing him in the low average range or 16th percentile. (Ex. 77 at 1527.)

(f) Petitioner's paternal uncle, Sammie, also had an IQ in the low average range, scoring 81 on the Otis Quick Scoring test. (Ex. 74 at 1507.1.)

(g) Petitioner's maternal grandmother, Miss Vernice, was "dim-witted" and although her other siblings left the family farm to find work, Miss Vernice lacked the academic ability or skills to do so. (Ex. 6 at 65.) Miss Vernice did not care for school or wish to become a teacher like her two sisters. (Ex 22 at 233, 235.) Miss Vernice's mother continued to manage the farmland even though she was quite old because Miss Vernice was incapable of participating in much of anything, except looking pretty and attracting the attention of the men in the area. (Ex. 6 at 65.) Miss Vernice's brother, L.J., often drove down from Chicago to help out with renting the land. (Ex. 8 at 80.) Despite being a landowner, things were often financially difficult for Miss Vernice and she worked as a cleaning lady from time to time, the best job that she could get. (Ex. 22 at 235; Ex. 3 at 22; Ex. 124 at 2499; Ex. 13 at 113.)

(h) Miss Vernice's brother, Artis Talley, had a speech problem. He was difficult to understand because his words sounded jumbled. (Ex. 22 at 232.)

(i) Petitioner's maternal uncle, Carvis Baldwin, showed signs of impaired intellectual functioning. Carvis's IQ was scored at 82 on a California Test of Mental Maturity when he was 11 years and 1 month old. (Ex. 59 at 1430.) At the age of 12 years and 11 months he tested at the mental age of an 8 year old on an Otis Quick Scoring Mental Ability Test. (*Id*.) On achievement tests, he tested in the 5th and 10th percentile during his junior high school years. (*Id*.) Overall, he showed poor academic achievement in elementary and junior high school. (Ex. 59 at 1429; Ex.

60 at 1433-34.) Carvis's mother-in-law warned her daughter not to marry Carvis because of his immaturity. (Ex. 13 at 116.)

(j) Petitioner's maternal aunt, Ree, demonstrated low average functioning at school and had IQ scores ranging from 65 to 95. (Ex. 79 at 1676-77.)

(4) Petitioner's immediate family displayed evidence of impaired cognitive functioning, severe intellectual impairments, intellectual disability, and learning and speech disorders.

(a) Petitioner's mother, Joyce, had an intellectual disability (formerly referred to as mental retardation). Joyce's mother had a difficult time giving birth to Joyce. (Ex. 22 at 233-34.) Joyce scored in the intellectual disability range on mental ability tests. Twice she earned identical IQ scores of 61, which placed her squarely in the intellectual disability range of functioning. (Ex. 69 at 1498.)

(b) People believed that Joyce's mind never matured; she acted as if she had stopped maturing at fifteen years old, which was also around the time she first became a mother. (Ex. 123 at 2483-84; Ex. 25 at 249.) As a child, when she was able to get out of her mother's house, she was eager to please, especially with boys and men. (Ex. 6 at 68.) At the age of 15 years and 7 months, just after she had her first child Gloria, she had the mental age of a 9 and a half year old. (Ex. 69 at 1498.) Held back in the third grade, Joyce dropped out of school toward the end of junior high school, before completing the ninth grade. (Ex. 69 at 1497; Ex. 16 at 144.) Joyce was uneducated, and was not able to learn to read. (Ex. 142 at 2698; Ex.143 at 2701; Ex. 152 at 2740; Ex. 156 at 2777.)

(c) Joyce exhibited serious problems in adaptive functioning, as well. She could not tell time from a regular clock, and had to keep a digital clock on her mantel to know the time. (Ex. 147 at 2719.) She never held a steady job (Ex. 147 at 2719; Ex. 142 at 2698; Ex. 143 at 2701), and never learned to

drive with any skill (Ex. 124 at 2528-29.). Joyce had difficulty following rules or simple instructions. (Ex. 22 at 235.) She also got stuck on things and could not let things go. (Ex. 3 at 26.)

(d) Petitioner's father, Earnest Lee, stuttered up until adulthood. (Ex. 18 0 at 186.) At school, Earnest Lee was retained in the fourth grade and dropped out in the fifth grade aged 15 years old. (Ex. 64 at 1464.)

(e) Petitioner's siblings Gloria, Jean, Carl, and Alvin, along with petitioner, all attended Special Education classes at some point. (Ex. 16 at 144; Ex. 132 at 2642.)

(i) After being held back in the second grade, Gloria was evaluated and assessed as eligible for "special training." (Ex. 66 at 1476, 1479.) She was placed in the Educably Mentally Retarded (EMR) program during the third grade, and was later returned to regular classes even though she was considered to be borderline EMR; however, she was placed in a slow learner group. (*Id*.)

(ii) Jean was evaluated for mental retardation placement during second grade due to "academic retardation." (Ex. 119 at 2452.) Jean was unable to keep up with the class and was "so confused" that she appeared to lack interest. Petitioner's mother was contacted about Jean's performance and responded that she had the same problem with her older daughter. (Ex. 119 at 2453.) Jean was noted to have immature speech and recommended for speech classes. (Ex. 119 at 2454). At this time, Jean was assessed to have an IQ of 72 on the Stanford Binet, and, despite being aged 8 years and 9 months, tested at the age of 6 years and 6 months old. (Ex. 119 at 2452, 2455.) Jean's motor skills, abstract thinking, and practical knowledge appeared limited. (Ex. 118 at 2443.) She was placed in the EMR program. (Ex. 119 at 2459.) Jean was reassessed a couple of years later, at which time it was noted that "the mother has never accepted the child being in special classes." (Ex. 119 at 2461.) At this time, Jean's IQ was assessed at 93 and she was returned to regular classes into the fifth grade. (Ex. 119 at 2457; Ex. 118 at 2449.)

(iii) During kindergarten, Carl's teacher noted that he was immature and cried easily, he had a short attention span, and an inability to concentrate. (Ex. 56 at 1419.) Indeed, his elementary school record indicates that his academic performance was below average from kindergarten through sixth grade. (*Id*.) In the sixth grade, Carl was referred for evaluation of eligibility for the EMR program because of his markedly below average performance. (Ex. 57 at 1423-24, 1427.) Although a complete assessment was not performed because Carl was absent, he was evaluated to be a slow learner. (Ex. 57 at 1424.)

(iv) Petitioner's youngest brother, Alvin, was constantly getting into trouble as a young child. (Ex. 2 at 11.) From as early as kindergarten, he was getting picked on in school and got into fights regularly. (Ex. 2 at 11, 16.) He was unable to apply simple concepts, and as a young boy had trouble making his way to school on his own because he could not remember that when crossing the road the red light meant stop, and the green light meant go. (Ex. 124 at 2536.) He exhibited signs of hyperactivity and did not calm down until the sixth or seventh grade. (Ex. 16 at 158.) In addition to being in special education classes when he was young (Ex. 132 at 2642), Alvin also exhibits signs of poor adaptive functioning and an inability to be an independent adult. "[T]here is something strange about Alvin. It is difficult to describe, but he does not seem as grown up as he should be. Even though he is a grown man, Alvin has never been on his own." (Ex. 146 at 2716; *see also* Ex. 2 at 16.) Alvin was also unsuccessful in his attempts to gain a promotion from box person to cashier at the grocery store where he worked for many years. Despite taking the test several times, he was unable to pass it. (Ex. 132 at 2642.)

(5) Petitioner's maternal and paternal family history is replete with instances of sexual abuse and incest. Petitioner was exposed frequently and at a young age to sexual abuse and to the inappropriate and deviant sexual practices of his extended family.

(a) Both sexual abuse and incest were common in

petitioner's maternal family. (Ex. 129 at 2584.) Petitioner's maternal grandmother, Miss Vernice, was a victim of sexual abuse, and found it so commonplace that she once remarked to her son-in-law, it "happens to everyone." (Ex. 129 at 2592.)

(b) Joyce's sister, Ree, was molested by one of her uncles when she was a child. (Ex. 129 at 2584-85.) Ree's brother Carvis also had sex with Ree, telling her it was "normal" for them to sleep together. (*Id*. at 2584.) Carvis had an even closer, and more "special" relationship with his sister Delbra, whom he treated better than he treated other women. (Ex. 13 at 114.)

(c) Carvis's deviant sexuality was notorious. In addition to sleeping with his own sister, he hung women's dirty underwear up in his bedroom after he slept with them, hung nude photos of himself up in his house (including life-sized photos), asked to be called "Wild Man," and constantly talked about sex, and what he liked to do sexually. (Ex. 135 at 265; Ex. 3 at 30; Ex. 132 at 2626; Ex. 128 at 2582; Ex. 147 at 2723-24; Ex. 134 at 118, 121-22; Ex. 25 at 248; Ex. 155 at 2770.) He threw parties where he often slept with more than one woman at a time, lining them up on the couch before they went into the bedroom, and then often videotaping the interludes. (Ex. 21 at 225; Ex. 25 at 248; Ex. 16 at 174-75.) He also videotaped his and petitioner's Uncle Thomas's encounter with a prostitute at a family reunion, and included that segment as part of the family reunion video for others, including children, to view. (Ex. 132 at 2626.) Carvis shared a room with petitioner when he stayed with the Jones family in their cramped Eighth Avenue apartment before joining the military. He was cruel to petitioner and generally made the children feel creepy. (Ex. 155 at 2769; Ex. 124 at 2508.)

(d) Joyce's sister, Jackie, repeatedly orally copulated her nephew, Ree's son, Reggie, when he was about seven years old. (Ex. 129 at 2587; Ex. 135 at 2662.) Jackie also spent a good deal of time with petitioner; after being thrown out of Sherman and Ree's home for molesting Reggie, Jackie went to live with petitioner and his family. (Ex. 135 at 2663; Ex. 129 at 2587.) Reggie was traumatized

by the abuse and began to exhibit acting out behaviors; he received many years of counseling to help him deal with what had happened to him. (Ex. 135 at 2663, Ex. 129 at 2588-89, 2591.)

(e) In petitioner's paternal family sexual abuse also was common. Petitioner's paternal grandfather, Doc Jones, began sexually abusing his eldest daughter, Bertha Mae, from the time she was a very young girl. (Ex. 4 at 50.) Bertha Mae ran away to her Aunt Lela's several times, but her father would always go after her to get her back. (Ex. 4 at 54.) Doc repeatedly raped Bertha Mae at least two or three times a week, over a period of several years. He raped her at home, in the fields, or anywhere he could get her, covering her mouth with his hand so that no one would hear her screams of pain. (*Id*. at 51.) Doc raped his other daughters as well. (Ex. 4 at 52; Ex. 1 at 6-7; Ex. 6 at 66; Ex. 18 at 188; Ex. 25 at 247.) When his daughters were older, Doc tried to prevent them from leaving home by holding their babies hostage so they could not leave. (Ex. 4 at 52-53; Ex. 1 at 5; Ex. 20 at 212.) When Bertha Mae gave birth to her daughter, Patricia, it took her some time to finally get her baby out of the house and away from Doc. (Ex. 4 at 52-53; Ex. 128 at 2572.) Doc threatened to take Alice's life if she took her son "Fella," away from him. Alice believed that her father would kill her, so she left her son to be raised by Doc. (Ex. 1 at 5.) Doc's sexual domination was indiscriminate and well-known in the township, young girls who worked in the fields with him had to fend off his unwanted advances, and generally tried to avoid being near him. (Ex. 6 at 66.) However, this was not always possible since he often drove the young women that worked in the fields out to the fields in his truck. While he had these women captive in his truck, as he was driving, he would suddenly start sexually molesting them, grabbing them between their legs. The young women were helpless victims, and Doc only let go of their private parts when he decided to do so. Because of his mean temper and reputation for violence the women were too terrified to fight him off in case he beat them. (Ex. 191 at 3409-10.)

(f) Bertha Mae also was raped by her uncle beginning when she was about ten years old. Although Bertha Mae stabbed him with a fork it did not stop him from coming into her room and forcing himself on her on subsequent occasions. (Ex. 4 at 51.)

(g) Petitioner's paternal grandmother, Virgie Lee, also behaved in sexually inappropriate ways, propositioning other men in front of her husband, Doc. (Ex. 11 at 102-03.)

(h) Petitioner's paternal uncle, Thomas, followed his father's own abusive patterns and practices, sexually molesting, among others, children in the Jones household when he lived there. (Ex. 16 at 173; Ex. 123 at 2494.) Thomas grabbed children and pulled them onto his lap until he had an erection; he then held the child so that she would squirm in his lap trying to escape, in order to make his erection harder. (Ex. 124 at 2507.) If he could not corner and force a child onto his lap, he enticed them onto his lap with quarters. (Ex. 16 at 173.) He also openly masturbated in front of children. (Ex. 124 at 2516.) Even adults were nervous about being sexually molested by Thomas. Dawnette Wright, a close friend of Thomas's ex-wife Kim, lived with Thomas and Kim in the early 1970s, and reported that when Kim went back East for a month, she was too scared for her personal safety to be left alone with Thomas and the other "Jones men." She had good reason to be concerned - one night she woke up to find Thomas in her bed, uninvited and unannounced. (Ex. 156 at 2777.) Thomas did not just prey on the females in the family. When petitioner was very young, he recalls waking up and finding Thomas over his bed, touching him. As he often did when traumatic events happened, petitioner simply kept his eyes closed and acted like nothing was happening. (Ex. 178 at 3113-14.)

(6) In petitioner's immediate family there is a history of sexual abuse, exposure to sexually inappropriate behavior, and sexual promiscuity.

(a) Petitioner's mother, Joyce, was sexually molested when she was a girl. (Ex. 8 at 82.) Joyce's early exposure to inappropriate sexual

behavior also included, among other things, her mother's notorious promiscuity and sexual indiscretions. (Ex. 4 at 48.) Miss Vernice talked negatively about men, and forbade Joyce and her other daughters from courting and seeing men, yet at the same time she was overtly promiscuous herself at the expense of her children. (Ex. 3 at 22; Ex. 128 at 2568; Ex. 8 at 80.) Miss Vernice had men constantly coming to her home to have sex with her. (Ex. 6 at 67.) Her energies appeared geared towards sex and men, and not toward taking care of her children; her affairs were numerous and well-known in the small farming community where she lived. (Ex. 13 at 113; Ex. 6 at 67.) For example, it was well known in the community that she and Doc Jones were having an affair; in fact, it was rumored that Miss Vernice's daughter, Delbra, was Doc's daughter. (Ex. 6 at 67; Ex. 3 at 25.)

(b) Not surprisingly, Joyce quickly became sexually active as a young teenager, and was obsessed with attracting men at a very young age. (Ex. 8 at 82; Ex. 6 at 68.) Although Joyce was forbidden from going out with boys, she was able to sneak out with the boy next door, Earnest Lee Jones, and she did. (Ex. 128 at 2568.) It appears that she was about eleven or twelve years old when she first experienced consensual sexual intercourse. (Ex. 6 at 68; Ex. 20 at 215.) At age fifteen, Joyce gave birth to petitioner's oldest sister, Gloria, on March 21, 1958, in Caruthersville, Missouri. (Ex. 26 at 270.) Miss Vernice, although extremely disapproving of Joyce's relationship with Earnest Lee, eventually agreed to let Joyce keep the baby. (Ex. 4 at 50; Ex. 124 at 2499.) Gloria lived with her mother and grandmother while Earnest Lee continued to live with his family. (Ex. 8 at 81.) About the same time that Joyce was pregnant with Gloria, Miss Vernice was herself pregnant by a man named Toby Reynolds, who was known as Jack. Miss Vernice's daughter, Jackie, was born on November 30, 1958. (Ex. 26 at 272; Ex. 22 at 234.)

(c) Not long after Gloria was born, Joyce became pregnant again. Although they were both still teenagers and neither was ready to marry and take care of a family, Miss Vernice insisted that Joyce and Earnest Lee marry. (Ex. 8 at 81.)

Just prior to the birth of their second daughter, on March 19, 1959, Earnest Lee and Joyce, aged respectively seventeen and sixteen, were married with the consent of Doc and Miss Vernice. (Ex. 28 at 321.) Joyce Jean Jones was then born on May 18, 1959, in Steele, Missouri. (Ex. 26 at 275.) Following the birth of their second child, Earnest Lee, and then Joyce, moved to Memphis, leaving their two young girls to the care of their paternal grandparents. (Ex. 7 18 at 75; Ex. 21 at 220; Ex. 16 at 158; Ex. 124 at 2500.)

(d) Earnest Lee was exposed to Doc's sexual infidelities and abuse from an early age, and was traumatized by the violence and domestic instability that grew out of them. Doc had two children by different mothers before he even met and married Virgie Lee. (Ex. 7 at 72.) In fact, when he married Virgie Lee on September 21, 1940, in DeSoto County, Mississippi, he was still married to his first wife whom he did not divorce until June 15, 1973. (Ex. 28 at 332-33; Ex. 109 at 2259.) Doc did not try to hide his affairs and frequently stayed out all night, coming home still drunk the next morning. (Ex. 4 at 44-45.) Earnest Lee's parents constantly fought about Doc's affairs. (Ex. 18 at 188.) Doc encouraged his boys to be like him, drinking and chasing girls. (Ex. 6 at 69.) Like Joyce, Earnest Lee became sexually active from a very young age, (Ex. 6 at 215; Ex. 20 at 215); and as a teenager, he was known for having several girlfriends other than Joyce. (Ex. 4 at 56.)

(e) In the Jones household in Los Angeles, petitioner was witness to his parents' many sexual indiscretions. From the time he was a toddler, through adulthood, petitioner repeatedly saw his mother in bed with other men. (Ex. 124 at 2516; Ex. 8 at 84; Ex. 21 at 221.) His father also had many girlfriends; neither parent did much to hide their infidelities. (Ex. 21 at 221; Ex. 123 at 2481; Ex. 129 at 2586.) Growing up, when the family lived in a two-bedroom apartment on Eight Avenue, the younger children had to sleep in their parents' bedroom, while the older children shared the other bedroom. (Ex. 189 at 3395.) When the children were older, and petitioner was a teenager, they lived in another small apartment on Eighth Avenue

in South Central Los Angeles. The apartment was too small for everyone to have a bedroom, so his mother claimed the living room as her bedroom, unabashed to have sex there with her long-term boyfriend Horace Jenkins, or any other man she brought in from off the street. (Ex. 178 at 3128-29; Ex. 132 at 2636.)

(f) The children in the family were seriously affected by sexual abuse and inappropriate behavior. As a teenager, Cassandra had lots of boyfriends, and she earned a reputation for being sexually promiscuous by sneaking around to have sex with various boys. (Ex. 155 at 2774.) She was barely a teenager when she began having sex. (Ex. 16 at 161; Ex. 124 at 2530.) Although her mother used to threaten Gloria and Jean that she would knock their teeth out if they brought a boy home, when Cassandra was a teenager Joyce was often too drunk to notice what was going on around her. The most care anyone took about her behavior was when her older brother Carl beat up a local gang member, who was much older than Cassandra, for sleeping with her. (Ex. 124 at 2531.) When she got older, Cassandra was arrested on prostitution charges for soliciting a plainclothes police officer.

(g) Petitioner's sister, Jean, also turned to prostitution, at times, to support her drug habit. (Ex. 129 at 2593; Ex. 134 at 2648.)

(h) Petitioner's brother, Carl, was arrested for disorderly conduct for soliciting an undercover police officer to have sex with his girlfriend, Nina.

(i) Petitioner's youngest brother, Alvin, also displayed the effects of being constantly exposed to his parents' sexual exploits. He often tried to grab his sister on her private parts, even though she beat him when he did. (Ex. 134 at 2647.)

(j) For petitioner, this multi-generational pattern of violent, and inappropriate sexuality, culminated in his own sexual abuse at the hands of his mother, starting when he was a small child. (Ex. 128 at 2579, Ex. 178 at 3129.) When it was happening to him, he would do what he always did when so many other bad things happened: dissociate as a defense against the trauma. (Ex. 178 at 3129.) As

petitioner grew older, his mother continued to exert her "strange, strong" hold on him; when he went to live with his aunt by marriage, Geraldine, his mother acted as if Geraldine was taking one of her men away from her and made petitioner feel so guilty that he returned to her home. (Ex. 123 at 2495.)

(7) Both of petitioner's parents grew up in physically and psychologically violent households, and grew up having to fight merely to survive in their own physically and mentally abusive childhood homes.

(a) Petitioner's father, Earnest Lee Jones, was the eldest of thirteen children born to Doc and Virgie Lee. He was born in Hernando, Mississippi on November 27, 1941 (Ex. 26 at 267), in cotton farming territory, but the family moved to Dell, Arkansas, on the Missouri/Arkansas state line, when he was young. (Ex. 8 at 77.) Doc and Virgie Lee had 12 other children: Bertha Mae, born on April 4, 1943; Minnie Pearl, born on November 22, 1944; Robert, born on May 22, 1946; Roosevelt who the family calls Richard, born on January 20, 1948; Thomas, born on October 20, 1949; Sammie, born on December 16, 1951; Bobbie born on May 10, 1953; Henrietta, born on March 24, 1954; Juanita, born on November 16, 1955; Mary, born in June 1960; and Alice, born on September 7, 1961. (Ex. 26 at 259, 278, 282, 285, 287, 260, 276, 271.) A thirteenth child died at childbirth. (Ex. 4 at 41-42; Ex. 18 at 185.)

(b) With a family of twelve children and little money from sharecropping, the Jones family lived in dismal poverty. In the shacks they rented from the landowners, there was no running water or plumbing of any kind. (Ex. 18 at 184-85; Ex. 20 at 213.) The children slept either on the floor or piled three or four or five to a bed. (Ex. 21 at 217; Ex. 128 at 2568; Ex. 4 at 42.) Heat, when they had it, came from a wood-burning stove, which was also used for cooking. (Ex. 4 at 42; Ex. 21 at 217; Ex. 128 at 2568; Ex. 5 at 61; Ex. 18 at 186.) Winters were particularly harsh because they lacked adequate clothing and shoes, and also lacked food. (Ex. 25 at 247; Ex. 4 at 47; Ex. 21 at 218.) Often in the winter, the children stood outside in the snow

and bitter cold for hours waiting for public assistance food. (Ex. 4 at 47.) Sometimes they only ate beans, or buttermilk and cornbread. (Ex. 128 at 2568-69.)

(c) In the other seasons, the children worked in the cotton fields as soon as they were able, particularly Earnest Lee and the older children. They worked from sunup to sundown, often at their father's behest, who would oversee the work in the fields by sitting in his truck, and be coaxed into leaving his perch chiefly to beat one of the children if they did not pick their quota of cotton. (Ex. 18 at 187; Ex. 4 at 42, 45-46; Ex. 21 at 218; Ex. 6 at 65-66.) They were paid no money; their father kept it all. (Ex. 128 at 2567; Ex. 21 at 217; Ex. 15 at 141.) This regimen left little time for school, except on the rainy days when they could not pick cotton. Earnest Lee missed school more than he attended, and made it through only the fifth grade. (Ex. 64 at 1464; Ex. 4 at 42; Ex. 18 at 187.) One of Earnest Lee's sisters, Bertha Mae, persisted in trying to go to school, but was so behind her peers that at fifteen, she was still in the fourth grade. Teased and humiliated, she dropped out. (Ex. 4 at 42-43.)

(d) Petitioner's paternal grandparents, Doc and Virgie Lee, were not affectionate or gentle with one another or their children. They were both physically strong and ready to fight at a moment's notice. (Ex. 18 at 188; Ex. 17 at 179.) Doc and Virgie Lee's abusive behaviors continued through the time petitioner, as a young boy, traveled with his family to Arkansas on a number of occasions to visit Doc and Virgie Lee. (Ex. 7 at 76.) On one of these occasions, Virgie Lee decided to beat one of her sons, and she taunted him to stand his ground and take his beating like a man. When he did, she punched him so hard he flew through the room and dented one of the walls at the other end. (Ex. 123 at 2478; Ex. 131 at 2605.)

(e) Doc brooked no disagreement from any family member. In the evening after working in the fields, Doc expected that his every whim be indulged, and he never did any work at home. (Ex. 15 at 141-42; Ex. 17 at 179; Ex. 21 at 218.) His daughters even shaved him. (Ex. 18 at 187; Ex. 123 at 2478; Ex. 17 at 179.) From the moment he stepped in the door, his daughters and wife did everything

for him, from removing his shoes and socks to cooking and cleaning, as he demanded. (Ex 17 at 179; Ex. 18 at 186.) Unflinching obedience and respect was required from his sons as well. If he did not get what he wanted, his beatings were fierce, with switches, belts, or extension cords, leaving bloody welts on their bodies. (Ex. 128 at 2569-70; Ex. 21 at 218.) He hit his son Sammie in the back with a hoe, and then started to swing the blade at him. Sammie took off running, explaining, "I did not want to die that day." (Ex. 128 at 2571-72.) Another time, Doc fired his pistol at Sammie for talking back at him. Sammie was on a visit from Los Angeles. Sammie's daughter, Teresa, witnessed the shooting. She called both Sammie and Doc "Daddy" because Doc had helped raise her. She pleaded with Doc, "Daddy please don't shoot Daddy," as Doc took aim with his pistol and shot at Sammie. (Ex. 128 at 2573-74.)

(f) Petitioner's mother was raised in similarly impoverished and violent circumstances in the same cluster of hamlets on the Arkansas/Missouri state line. The Talley family owned land on the Missouri side of the line, and the Jones family was one of the families who rented land from the Talleys. Despite the Talley's comparative status as landowners, they were still extremely poor and isolated. (Ex. 135 at 2654.) Miss Vernice worked as a maid to try to earn money and often worked two jobs, but there was still never enough. (Ex. 22 at 235.) Their little white house had indoor plumbing and more than one room, but they were still poor, and often went without food. (Ex. 20 at 213; Ex. 135 at 2654.)

(g) Petitioner's maternal family was principally of mixed African American and Native American descent; Miss Vernice's maternal grandmother, Amanda Badgett, was a full-blooded Native American. Petitioner's grandmother's grandfather, John Talley, was white, and several of petitioner's great aunts and uncles were fair-skinned. (Ex. 22 at 229.) As more than one witness stated, petitioner's maternal family was "color struck," taking pride in the lighter-skinned members of the family, and their ability to pass for white, and taking pains to hide or humiliate the darker-skinned members of the family. (Ex. 132 at 2625-26; Ex. 6 at 68; Ex. 18 at

189-90.) Miss Vernice's family did not approve of her first husband, A.T. Hanks, because they believed he was from an uneducated family and he was darker-skinned. (Ex 22 at 233; Ex. 135 at 2655.)

(h) Petitioner's mother, Joyce, was the only child of Miss Vernice's marriage to A.T. Hanks. (Ex. 22 at 233-34.) Joyce was born on December 5, 1942, in Blytheville, Arkansas (Ex. 26 at 274), and shortly after her birth, Miss Vernice and A.T. Hanks separated (Ex. 22 at 234). Joyce herself was the darkest-skinned child in her family, and was not the recipient of her mother's affection, encouragement or pride. (Ex. 4 at 49; Ex. 18 at 190.)

(i) Miss Vernice's family looked down on petitioner's paternal family, the Jones family, in part as a result of skin color. (Ex. 7 at 75; Ex. 123 at 2479; Ex. 135 at 2655.) When Joyce became pregnant with Gloria, her mother was furious because Earnest Lee is dark-skinned. (Ex. 132 at 2625-26.) The families sat down and fought over what should be done. (Ex. 4 at 50.) Miss Vernice's brother L.J. did not approve of the relationship. (Ex. 135 at 2655; Ex. 7 at 75; Ex. 8 at 81.) Miss Vernice did not want Joyce to marry a Jones boy, and she did not want her to keep the baby. L.J. planned to send Gloria away when they saw that her skin was dark. Before this plan could succeed, L.J. died suddenly but a still-reluctant Miss Vernice refused to give the baby the Jones family name, and baby Gloria took the last name of Miss Vernice's then ex-husband Hanks. (Ex. 7 at 75; Ex. 124 at 2499.)

(j) When Joyce was about six years old, her mother married Chester Baldwin, under duress from her mother, because she was pregnant. (Ex. 22 at 234.) Chester Baldwin moved into the Talley's little white house with Miss Vernice, her mother, Cora, and Joyce. (Ex. 22 at 234.) Chester Baldwin proved himself to be a violently abusive, unfaithful spouse, and father figure. (Ex. 135 at 2653; Ex. 3 at 20-21.) During her marriage to Chester, Miss Vernice had four more children: Carvis, born on August 13, 1948; Vernice, born on September 13, 1949; Delbra born on July 21, 1953; and Ronnie on July 7, 1955. (Ex. 26 at 262, 294, 266,

and 284; Ex. 135 at 2653.)

(k) Miss Vernice gave up Delbra, Ronnie, and Jackie for adoption when they were young children. (Ex. 6 at 68; Ex. 135 at 2654-55.) There was little or no explanation or warning given to the children who were whisked away, or to the children who remained at home. (Ex. 5 at 62.) Many said it was because Miss Vernice did not want to be tied down with such young children, that she was recently divorced and too preoccupied with her social life, chasing men and partying to take care of the younger children. (Ex. 18 at 191.) Others speculated that it was because of the color of their skin. (Ex. 6 at 68.) Delbra was so unhappy in her new home that the family who adopted her returned her to Miss Vernice within the year. (Ex. 6 at 68.) Jackie and Ronnie were sent to live with different families, but both ended up in the St. Louis area. (Ex. 22 at 235-36; Ex. 89 at 1912.) All of the siblings were deeply scarred by their mother's abandonment of the two young children. What was most confusing to all the children, and what they could not reconcile, was why their mother dispatched Ronnie and Jackie so summarily, yet chose to keep her youngest daughter, Angie. (Ex. 13 at 114; Ex. 123 at 2480; Ex. 22 at 236; Ex. 21 at 219-20; Ex. 18 at 191; Ex. 3 at 34.) Angie's father, Otis Jones, was Miss Vernice's junior by sixteen and a half years. (Ex. 26 at 295; Ex. 27 at 310.) Angie was born on March 13, 1964, in Caruthersville, Missouri, just three months before the birth of petitioner. (Ex. 26 at 255.)

(8) Petitioner was exposed to physical and psychological violence from birth.

(a) Brought up to watch his father demand the complete obedience and subservience of the women around him, Earnest Lee began early to assert himself as eldest son, demanding that his sisters obey his orders when his father was not around, and stepping into his father's shoes in every way he could. (Ex. 18 at 186; Ex. 4 at 43.) Amongst the siblings there were also physical fights as they grew up, which continued into adulthood. Even when Earnest Lee and his family were

evicted from an apartment and they had to live with his younger brother Thomas, Earnest Lee continued to fight Thomas and boss him around, because he was the eldest and thought it was his right. (Ex. 124 at 2524.) Other times, Earnest Lee physically fought his adult brothers outside in the backyard, or in the street. Often the fighting got serious and they would hurt each other, as they had during childhood. (Ex. 2 at 15.)

(b) Miss Vernice treated her eldest daughter horrifically, cursing and terrorizing her at all hours. (Ex. 4 at 50; Ex. 18 at 190.) Joyce was treated more like a maid than a daughter, constantly cleaning, straightening, ironing, and doing other household chores while her mother was out. (Ex. 4 at 50.) Nothing was ever good enough, and nothing was ever done that did not need to be done again. (Ex. 4 at 50; Ex. 21 at 219.) When her mother was angry with Joyce, she beat her with whatever object came to hand. (Ex. 18 at 190.) One day, Earnest Lee's sister, Minnie Pearl, was visiting Joyce at home when she was pregnant. Miss Vernice was angry at Joyce about something, and hit Joyce in the head with an iron frying pan while Minnie Pearl stood watching, helpless. Joyce could not predict when her mother would be angry and violent, nor could she do anything to prevent the irrational outbursts and abuse. (Ex. 18 at 190-91.)

(c) Petitioner's parents replicated the dysfunctional and physically and psychologically brutal environments in which they had grown up, and intensified that cycle of violence against each other and against their own children. In petitioner's family, there was no safety for a small child, and no safe place for petitioner to learn, develop, or grow. His family was not affectionate or loving. (Ex. 124 at 2502.) His parents did not speak to each other in a regular voice, they yelled at each other. (Ex. 2 at 9-10.) Nor did his mother speak to her children in a normal voice; when she addressed them, she was angry and screaming. (Ex. 155 at 2771; Ex. 146 at 2714.) When petitioner was about five years old, he first saw other parents hug and kiss their children, and he wondered why he could not have that kind of love in his

own family. (Ex. 178 at 3111.) Instead, rampant and terrifying family violence, constant psychological, physical and sexual abuse, inappropriate and premature sexualization, and extreme alcoholism were the only family dynamics known to petitioner. Even before birth, petitioner was exposed to alcohol, nicotine, and physical assaults *in utero*. (Ex. 18 at 195-96; Ex. 124 at 2501; Ex. 4 at 55.)

(d) Physical and psychological brutality was a core dynamic to petitioner's parents' relationship. The domestic violence in the Jones household was frightening and uninhibited. Petitioner's parents engaged in brutal and long physical fights that terrorized the children and made them fear for their lives. "As much as the Jones children hated to see their parents fighting, they were more afraid of what would happen to them if they interfered. The Jones children were afraid of their parents and they believed – rightly so – that if they interfered they would be beaten to death." (Ex. 155 at 2768.) In the Jones household, the parents fought constantly, and violently. (Ex. 146 at 2713.) The family did not talk things over; if someone was upset, there was a fight. (Ex. 132 at 2629.) After the fight, no one talked about that either. Everyone acted as though nothing had happened. (Ex. 132 at 2631.)

(e) Joyce and Earnest Lee fought when they lived together in the beginning of their marriage; when they lived apart during times they were separated, they fought whenever they were in the same room together. (Ex. 152 at 2739; Ex. 146 at 2713; Ex. 143 at 2701.) Even when the family all sat down to the table for a meal together, Earnest Lee would kick at Joyce's legs throughout the meal and not allow her to move; at the end, her legs were bloody and she could barely stand. If she moved or cried out while he was kicking her, he would beat her. (Ex. 126 at 2559.)

(f) Earnest Lee was not deterred from beating his wife when she was pregnant, as petitioner's cousin described:

> When [Joyce] was visibly pregnant with [Cassandra], Joyce and Earnest Lee got into an all-out fight. . . . I was awakened around

> 2:00 a.m. by loud noises. . . . The people who lived in the other apartments were all outside watching the Jones's apartment. The front door of the Jones's apartment was open, and everyone could clearly see Earnest Lee beating Joyce in the head with a solid, wooden table leg. [Petitioner] and his older brother and sisters were in the apartment screaming and crying as they watch[ed] what was happening. Joyce was on the ground, her pregnant stomach sticking up, her head bloody, and her clothes nearly torn off of her body. Even in this condition, Joyce continued to fight Earnest Lee.

(Ex. 155 at 2767.)

(g) Much of the violence that engulfed petitioner as he struggled to develop a sense of self was related to sexuality. When he was young, the apartments the Jones family lived in were small, cramped and overcrowded, and everyone heard everything. One fight erupted in the parents' bedroom after sex, and culminated with his mother screaming her threat to petitioner's father that she was going to cut off his penis for cheating on her. (Ex. 16 at 154.) Joyce was ceaselessly angry about Earnest Lee's affairs, at the same time she was having her own. (Ex. 123 at 2482; Ex 124 at 2503, 2512.) She attacked him because of his affairs, both at home, and, after they separated, at his apartment. In the late 1960s, she waited at the Jones home while all the children watched television. When petitioner's father walked through the door, she sprang up and attempted to stab him. (Ex. 124 at 2512.) Later, in the mid-1970s when they were separated, she broke into his apartment, and patiently waited for him to come home. When he opened the front door, she jumped out at him and stabbed him with a large kitchen knife. Petitioner witnessed the stabbing. His mother went to jail and was released only when the older children persuaded their father to drop the charges. (Ex. 124 at 2527-28; Ex. 132 at 2630; Ex. 131 at 2608; Ex. 178 at 3136; Ex. 88 at 1795.) A short time after this incident, a referral was made to

the Department of Social Services because the parents were "always fighting." Petitioner left home and refused to return, telling a case worker that the conditions at home were not safe. (Ex. 88 at 1795.) However, the matter was resolved and no further action was taken when Joyce exerted her "strong hold" over him, and told the case worker that petitioner would be returning home soon. (Ex. 88 at 1796; Ex. 123 at 2495.)

(h) Still other times, petitioner's mother went after Earnest Lee's girlfriends directly, cursing and beating them, or smashing their cars or homes. (Ex. 132 at 2630; Ex. 16 at 155; Ex. 128 at 2577; Ex. 145 at 2711; Ex. 189 at 3397.) In a fight with one of petitioner's father's longstanding girlfriends, in the early 1970s, petitioner's mother fiercely bit off a chunk of the woman's lip after attacking her. (Ex. 135 at 2660-61; Ex. 132 at 2630; Ex. 131 at 2606-07; Ex. 16 at 155.)

(i) Petitioner's father's violence against his wife was likewise linked to his anger over her sexual transgressions. Petitioner's parents' affairs began before they were married (Ex. 4 at 56; Ex. 18 at 186; Ex. 189 at 3395), and simply became more frequent after their marriage (Ex. 135 at 2660-61; Ex. 21 at 220-221; Ex. 123 at 2481-82). It is almost universally agreed by all who know petitioner's parents that the defining moment in the Jones family occurred on that early morning in 1968, when Earnest Lee discovered his wife in bed with his best friend, William "Dubee" Howell. In the 1960s, Joyce dated Earnest Lee's good friend William E. Howell, for four or five years. On a regular basis, Dubee came to the Jones apartment when Earnest Lee left for his night shift at work, and Joyce had Dubee leave in the morning before Earnest Lee arrived home. (Ex. 145 at 2710.) However, following a late night birthday party at the Jones house, petitioner's father returned home early from his graveyard shift to find his wife in bed with Dubee. (*Id*.) Petitioner's sister Gloria tried to keep Earnest Lee out, but petitioner, then four or five years old, scrambled past his sister and unlocked all the locks for his father, not understanding what was going on. Earnest Lee beat Gloria with a belt as he came through the door;

he then proceeded to the bedroom where he beat Joyce so mercilessly, that the white bedspread was soaked with her blood. (Ex. 124 at 2514-15; Ex. 123 at 2484-85.) A neighbor who witnessed part of the fight was awakened by breaking glass and yelling. When he looked out of his window, he could see the broken window in the Jones apartment, and see Earnest Lee pressing Joyce against a dresser, blocking her escape route and hitting her in the face. Someone ran and pulled Earnest Lee off of Joyce, but he broke away and raced back to jump on her again. (Ex. 155 at 2768.) Before petitioner's mother was taken to the hospital by an ambulance, his father threw all of his wife's clothes out of the house, screaming she should never come back. Petitioner and his siblings watched as these horrendous acts of violence unfolded. (Ex. 124 at 2515; Ex. 16 at 152; Ex. 155 at 2768.) Petitioner's father then took petitioner aside and asked him what he had seen, feeding him birthday cake as the young child described sex acts for his father. It was one of the only times petitioner's father had singled him out for attention and treats. (Ex.124 at 2515-16.)

(j) Petitioner's mother left the hospital without a word to anyone, and did not come back for a while; when she did return, the cheating and the beatings resumed, but any semblance petitioner's parents had of a relationship disintegrated. (Ex. 124 at 2516.) This one event changed not only the marital landscape, but also the mother-son relationship, forever. Petitioner's mother blamed, and never forgave, petitioner for the transgression of unlocking the door that night for his father. (Ex. 123 at 2484-85.) As he grew up, his mother singled out petitioner for abuse and punishment. (Ex. 124 at 2513; Ex. 123 at 2495.)

(k) Petitioner's parents fought even more, and were no longer a constant couple. Joyce went on to have many other boyfriends. Earnest Lee was usually with his girlfriend Bea, and could be gone as long as six or seven months at a time before attempting to reconcile with Joyce. Once he returned to the family home, Earnest Lee and Joyce almost immediately began fighting, and the fighting intensified until Joyce kicked him out or he left voluntarily. (Ex. 145 at 2710-11.) The

apartment was too small for any children to escape the fighting while inside. (Ex. 135 at 2660.) When the fighting exploded, the younger children looked to the older children to protect them from harm's way. Usually this only meant huddling in a corner of the room where the fight was taking place, or being moved to another part of that room. (Ex. 128 at 2577; Ex. 178 at 3110.) Sometimes there was no time to escape to the relative safety of the corner, "as a little boy, [petitioner] did not know when he might become an intended or accidental casualty of his parents' unrelenting domestic warfare." (Ex. 178 at 3110.)

(l) "They were always angry at one another, and anything would spark a fight. Joyce often started the fights. For example, she would hit Earnest Lee in the head for no apparent reason. Once she did something like this, the fight was on." (Ex. 146 at 2713.) Often, she fought using any close at hand household object -- such as, knives, dishes, pots and pans, and heavy, deadly marble ashtrays -- as a weapon. (Ex. 18 at 194-95; Ex. 132 at 2629; Ex. 25 at 250; Ex. 16 at 155; Ex. 124 at 2502, 2512, 2521; Ex. 123 at 2483; Ex. 128 at 2578.) Even in the violent and frightening neighborhood where they lived, the battles between petitioner's father and mother stood out. (Ex. 132 at 2628; Ex. 131 at 2606; Ex. 178 at 3108-10.) They fought as if they were fighting to the death. (Ex. 124 at 2502.) Their fights were so loud people could sometimes hear the physical blows, not just the screaming. (Ex. 132 at 2629.) Many times, petitioner's siblings heard the fighting when they returned home from school. With nowhere else to go, they would stand outside the house and wait for the noise and chaos to subside, rather than going inside and risk getting hurt. (Ex. 16 at 170.) Police responded to domestic violence calls, but after a while, once they recognized the address, they often did not respond. When they did respond, the most they did was make Earnest Lee temporarily leave the apartment. (Ex. 124 at 2521; Ex. 132 at 2629; Ex. 147 at 2718.) The family lost more than one apartment because of their parents' violence. (Ex. 132 at 2628.) This deadly cycle of violence was exacerbated by their alcoholism, and they were almost always drunk. (Ex. 131 at

2604; Ex. 132 at 2629; Ex. 124 at 2502.)

(m) As a result of the crowded living conditions and the ferocity with which his parents fought, petitioner and his siblings were often inadvertently injured. During a fight, petitioner was knocked unconscious after his father pushed him into a glass table in an attempt to get at his mother. (Ex. 124 at 2512; Ex. 29 at 345.) Petitioner's younger brother was also hit in the head by a marble ashtray his mother had hurled at his father. (Ex. 2 at 10; Ex. 16 at 155; Ex. 132 at 2629; Ex. 35 at 697.) Another time, Earnest Lee tried to run petitioner's mother down with his car when she was walking petitioner's youngest sister to school. (Ex. 131 at 2606.) Petitioner's parents' violence may have also been lethal to one of their children. When petitioner was just over one year old, petitioner's father fought with his mother while they were driving in the family car, he leaned across the front seat to hit her. He missed and hit the infant baby Mario instead, along with petitioner's eldest sister Gloria who was in the front seat, holding the baby. The blow caused a bruise to form on Mario's forehead, but it was left unheeded and his parents went to sleep with baby Mario in the bed. By morning, Mario, the only other Jones child that petitioner's father is convinced was not his, was dead. It is unclear whether one of his drunken parents rolled over on him and suffocated him, or whether the punch inflicted the night before had been fatal. (Ex. 124 at 2504; Ex. 8 at 82; Ex. 16 at 175; Ex. 155 at 2767.) While physical fights in the car were common (*e.g.*, Ex. 2 at 10), this was the only one that resulted in a child's death.

(n) Petitioner's parents regularly took out their anger on their children and turned their attention to their children to punish them. (Ex. 123 at 2483.) Joyce's need to fight often lasted long past the time when the target of her initial anger had gone. Frequently after fights with Earnest Lee, she was so worked up that when he left, she redirected her anger at her children. (Ex. 143 at 2701; Ex. 145 at 2711.)

(o) Petitioner's mother in particular singled out petitioner

for her most constant physical assaults, which could come at any time, without warning. (Ex. 124 at 2513; Ex. 123 at 2495.) She beat the children with belts, shoe heels, mops and other household objects, and threw objects at the children when they were not within arm's reach. (Ex. 124 at 2513; Ex. 21 at 221; Ex. 123 at 2489; Ex. 128 at 2576; Ex. 155 at 2770-71.) Her mentally ill, irrational behavior, and her alcoholism made her a random, violent, and unpredictable assailant. Once, while walking to the Laundromat, she punched Cassandra in the eye with her fist because Cassandra had done something to upset her. (Ex. 132 at 2639.) Even when the children grew to be bigger than Joyce, they still knew better than to defend themselves against her attacks. (Ex. 155 at 2770-71.)

(p) Joyce rained down curses and screamed at her children from the moment they walked in the door until the moment they left the house (Ex. 16 at 157), and she also cursed at them in public places, such as, the grocery store. (Ex. 155 at 2771.) She called her children "bitches," "bastards," "whores," "motherf----ers," and other derogatory words. (Ex. 25 at 251; Ex.143 at 2702; Ex. 123 at 2486; Ex. 18 at 194.) As far as the neighbors could tell, she would interrupt her cursing and screaming so that she could yell at petitioner to get back into the apartment when he tried to escape. (Ex. 152 at 2741.) Even when petitioner temporarily escaped the apartment, his mother would send Carl out to find him and bring him back inside. (Ex. 143 at 2704.)

(q) When petitioner's younger brother Alvin could not always find his way to school, petitioner's mother made sure he got there by whipping him all the way to school with a belt. (Ex. 2 at 11.) Joyce's objective in sending the children to school was to ensure that she continued to receive her welfare check. (Ex. 16 at 156.) Joyce was often brutal with Jean, calling her a "black bitch," and other horrible names, and body-slamming her to the ground. (Ex. 123 at 2489.) Joyce also taunted, cursed, and beat up petitioner's sister, Cassandra, simply for being attractive and noticed by men, including the men Joyce took into the home for her own sexual

exploits. (Ex. 124 at 2530-31.)

(r) Joyce spent her days "drinking beer, smoking cigarettes, cleaning, and screaming at her children." (Ex.155 at 2766.) Joyce's alcoholism amplified her mental illness, and her abuse of her children when she was drunk, which was most of the time, "did not make sense." (Ex. 152 at 2740.) At any moment, petitioner's mother could begin a tirade. She angered easily over cleaning issues; if a child did not clean as well as she wanted that was all it took to trigger one of her vicious, obscenity-laden diatribes. (Ex. 143 at 2702.) In addition, if a child asked Joyce to repeat an instruction, that was enough to warrant a beating. Yet sometimes, even when her words might have made sense, it was impossible to understand her drunken, heavily slurred speech. "The children had to choose between guessing at her order and getting it wrong and getting a beating, or asking for her to repeat herself and getting a beating." (Ex. 155 at 2771.)

(s) Petitioner's father was equally uncompromising in his assaults. Petitioner's father, though not progressing past the fifth grade himself, often screamed at the children that they were dumb and stupid. (Ex. 16 at 144; Ex. 124 at 2503-04.) Petitioner was always mentally slow, and his father often ridiculed him for not being as smart as his younger sister, Cassandra; he had a hard time in school, and his father made it worse. (Ex. 132 at 2636-37.)

(t) Petitioner's father was brutal physically as well. He beat the children with belts, extension cords, and his fists. (Ex. 16 at 155; Ex. 124 at 2502.) Petitioner's father made petitioner strip naked before he beat him bloody with a belt. (Ex. 16 at 155.) Like his father before him, he beat his children whenever he wanted to, for any reason, and for no reason at all; he also went after them with knives. (Ex. 124 at 2518; Ex. 88 at 1795.) He continued to beat his children, after they had become adults, and even after he had undergone extensive treatment at a rehabilitation center for his alcoholism. (Ex. 2 at 16, 18; Ex. 20 at 216; Ex. 16 at 147.)

(u) Earnest Lee ranted that Joyce was a terrible mother, a

"bitch" and a "whore," from the time petitioner was a little boy. This criticism in particular escalated after Earnest Lee caught Joyce in bed with Bill Howell. To ensure that his hateful messages were not lost on the family, and in order to provide "leadership," petitioner's father would further persecute the children by convening "family meetings," often in the middle of the night, the agenda of which was exclusively their mother's bad character. (Ex. 124 at 2503; Ex. 8 at 87.) The meetings could last for hours, and if the children, who had been awakened for the impromptu meeting, again fell asleep, their father would wake them up again. Sometimes petitioner's mother and father started a fight, and the children sneaked back to bed. (Ex. 132 at 2629.) Whenever their father woke them in the middle of the night for one of his "family meetings," the children inevitably went to school the next day tired, and sleepy. If petitioner's father was displeased with them for falling asleep during the meeting, or for some other reason, he would send them to school without lunch money or a bus pass, and the children would return home from school even more tired and hungry. (Ex. 124 at 2517-18.)

(9) Petitioner was also subject to physical abuse at the hands of his siblings, other mentally ill relatives, and neighbors.

(a) For petitioner, the tentacles of violence reached far beyond his mother and father. The chaotic violence in the family spread in every direction: Parent on parent, parent on child, and sibling on sibling. One cousin reports of the Jones family, "[t]hey were more like warriors, all in one household together. They learned to survive and fought to survive by going to battle, often with each other." (Ex. 155 at 2765; *see also* Ex. 152 at 2741-42.) The constant violence resulted in a persistent state of agitation, anxiety, and emotional overload for petitioner.

(b) In this dysfunctional family system, sibling on sibling violence created additional danger for petitioner, who often fell prey to more physical violence from his own brother and sisters. In particular, petitioner's older brother Carl, who petitioner naively looked up to and followed around, often goaded petitioner until

petitioner had no other recourse than to attempt to defend himself. (Ex. 132 at 2635; Ex. 124 at 2532.) Carl was known in the neighborhood as being one of the toughest kids around; petitioner was shorter and weaker than Carl and not interested in fighting. Inevitably, petitioner emerged the loser when forced to defend himself against his brother. (Ex. 132 at 2635; Ex. 126 at 2561; Ex. 134 at 2650; Ex. 189 at 3399.) Amongst petitioner's siblings, fights broke out all the time. Two of the oldest children, Gloria and Carl, thought their sister Jean was too often a "tattletale," and beat her when she called or talked to a parent to report on the other children. (Ex. 124 at 2514.) Jean, Cassandra, and Carl were all like their mother in their fighting posture, and could "just as soon fight you as look at you." (Ex. 155 at 2772.) In particular, Carl and Cassandra were willing to fight anyone "in a second." (Ex. 143 at 2702), including their own siblings.

(c) Carl became another bully like their father Earnest Lee, and a fighter like both his mother and father. (Ex. 142 at 2699; Ex. 143 at 2702.) In the neighborhood, Carl earned a reputation for fighting in the streets, burglarizing neighbor's homes, and running from the police. (Ex. 126 at 2561; Ex. 142 at 2699.) Sometimes he outran the police, but several times he was caught and arrested. Once, the police shot him in the rear end to stop his sprinting escape. (Ex. 147 at 2720; Ex. 131 at 2609; Ex. 124 at 2529.) Carl was so out of control that he even burglarized his own relatives. (Ex. 156 at 2778-79; Ex. 155 at 2773.) He was a streetwise young man, and hung out with "wanna be" gang members. (Ex. 142 at 2699; Ex. 147 at 2720.)

(d) At home, Carl took over his father's role of ordering his family around, and expecting them to follow his rules. (Ex. 152 at 2741-42.) He acted just like Earnest Lee: he wanted everyone to take his orders, but did nothing fatherly or affectionate. (Ex. 152 ¶ 17 at 2742.) His siblings and his mother did not always take his orders, even though that meant a fight with Carl, who was the biggest and the tallest of all of the family. (Ex. 152 at 2742.) Carl argued and yelled at his mother Joyce, about her drinking, and about her boyfriend Horace Jenkins. Joyce

ended her fights with Carl often by throwing Carl out of the house, but before too long he would return and again start fighting with his mother and his siblings. (Ex. 143 at 2703-04; Ex. 142 at 2699.) He fought all of them. Carl beat up petitioner, who always lost those fights, and tried to avoid the fight until Carl forced him to defend himself. (Ex. 155 at 2771.) Typically, petitioner emerged from those fights with a bloody mouth or nose. (Ex. 2 at 13). Carl could be "very mean" to petitioner, yet petitioner revered his brother and did not treat Carl badly. (Ex. 156 at 2778.) Cassandra was forced to call the police and report that Carl beat her. (Ex. 132 at 2635.) When petitioner's father left California and his mother took up with Horace Jenkins, Carl repeatedly beat him as well. One time Carl beat Horace so badly that Horace appeared to be having seizures. On that night, petitioner was the one to call the ambulance, and made sure that Horace received medical attention. (Ex. 134 at 2650-51; Ex. 126 at 2560; Ex. 124 at 2537.)

(e) Petitioner also witnessed the violence his older brother Carl focused on his girlfriends, especially Carl's long-term girlfriend, Nina Black. (Ex. 131 at 2605, 2608-09.) Petitioner shared a room with Carl and Nina, so he could not avoid bearing witness to the regular and brutal beatings Carl gave Nina. (Ex. 124 at 2535.) Carl treated Nina the way his father had treated his mother, he beat her bloody. (Ex. 132 at 2636.)

(f) Petitioner also was subject to physical abuse at the hands of various angry or mentally ill relatives who served as purported caretakers when they lived with the Jones family, or babysat petitioner and his siblings. His mentally ill uncle Carvis, for example, lived with the Jones family before entering and after leaving the military. "Carvis was brutal to [] [petitioner]. He said he was disciplining [petitioner] and his brothers and sisters, but he would beat them with a belt for any little thing. It was a frequent sight to see Carvis angry about something and taking off his belt to hit one of the Jones children." (Ex. 155 at 2769-70.) During his stay, Carvis frequently lined the Jones children up in order to practice his Karate

moves; he punched, kicked, and hit the children in the head and body. The children were afraid to tell their parents about Carvis's abuse, because they knew their father could not beat Carvis in a fight. (Ex. 124 at 2509; Ex. 155 at 2770.) Carvis has a black belt in Karate. (Ex. 160 at 2786.)

(g) Petitioner's Uncle Thomas was an equally poor caretaker. Thomas frequently hurt petitioner and his brother Carl. He liked to put petitioner in a headlock, or grind his knuckles into petitioner's back until petitioner cried. (Ex. 155 at 2769.) Carl was left alone only after he grew big enough to fight back. (Ex. 146 at 2716-17.)

(h) Petitioner's aunt, Geraldine, with whom petitioner lived on more than one occasion and often for extended periods, gave the children whippings "at the drop of a hat." (Ex. 2 at 15.) She was very strict and was a big woman; when she was angry and came after the children, they were scared. (Ex. 124 at 2519.)

(i) Neighbors were unabashed about beating the Jones children as well. Keith Samuel remembers that his mother and petitioner's mother had no problem hitting each other's children for any infraction, and often did. (Ex. 153 at 2745.)

(j) Perhaps one of the only residences in which petitioner had any opportunity to feel safe was the home of the Washington family. Petitioner met Scott Washington when they attended Hughes Junior High School together. When petitioner attended high school in Woodland Hills, Mrs. Washington invited him to spend the week with the family so that he would not have to endure the long bus rides to and from school every day. Petitioner enjoyed his time with the Washingtons, but inevitably, his mother made him return home, to ensure that he was by her side and that she would keep receiving as much welfare money as she could. (Ex. 178 at 3131.)

(10) There is a multi-generational history of substance abuse and chemical dependency in both petitioner's maternal and paternal families.

(a) Several members of petitioner's extended family used alcohol or drugs to deal with the traumas inflicted upon them, and the often violent circumstances in which they were raised. Across petitioner's paternal and maternal families, the substance abuse was widespread and multi-generational.

(b) On his father's side, both his paternal grandparents, petitioner's father, and most of petitioner's paternal aunts and uncles fell prey to alcohol, drugs, or both, often as early as their pre-teenage years. (*E.g.*, Ex. 123 at 2492-94; Ex. 128 at 2574; Ex. 131 at 2614-15; Ex. 1 at 6; Ex. 2 at 14-15.)

(c) Petitioner's paternal grandfather, Doc, abused alcohol. (Ex. 43 at 845.) For a period of time, Doc and his friend got together on Saturdays and Sundays to drink all day. (Ex. 11 at 101.) On those days, Doc drank over five quarts of beer. (*Id*.) Other times, they would go through several bottles of home brewed liquor, which was as alcoholic as strong whiskey. (*Id*. at 102.) Doc would often return home in the morning from a night out with one of his girlfriends, still drunk from the night before. (Ex. 4 at 44.) Although Doc usually did not drink in front of his children, nonetheless, they could tell he was drunk because he stumbled and slurred his words. (Ex. 17 at 180.) By the 1970s, Doc was reckless about his drinking, drinking half pints of Old Granddad whiskey while driving his daughters back to Blytheville, Arkansas from Memphis. (Ex. 1 at 3-4.)

(d) Petitioner's paternal grandmother, Virgie Lee, also drank with her husband and his friend all day on the weekends. In fact, Virgie Lee drank as much, if not more, than her husband. (Ex. 11 at 101.) Doc and his friend Frank Edwards often started drinking at the liquor store, or in the truck on the way home, because they knew that Virgie Lee would drink everything she could get her hands on. (*Id*. at 101-02.) Virgie Lee was an ugly drunk; she got loud and, on a couple of occasions, propositioned Doc's friend right there in front of him. (*Id*. at 102-03.)

(e) Virgie Lee's younger sister, Katie, was an alcoholic who drank "whatever she could get her hands on." She and Doc argued and fought

with each other, and Katie continued to fight with Doc even when she was so drunk that she was getting badly beaten. (Ex. 17 at 179.)

(f) Petitioner's paternal uncles became serious drinkers. (Ex. 15 at 139.) Richard is an alcoholic, and cannot hold a job on account of his drinking. (Ex. 15 at 139; Ex. 8 at 84; Ex. 45 at 891-97.) When he returned from military service in 1970, he was using drugs and was constantly high. (Ex. 17 at 180; Ex. 128 at 2574.) He introduced his younger brother, Sammie, to hashish at this time. (Ex. 128 at 2574.) Richard moved onto using speed, PCP, and cocaine when he lived in Los Angeles. (Ex. 128 at 2579.)

(g) Petitioner's paternal uncle, Robert, spent most of his childhood under the influence of drugs. He sniffed gas from the tank of gas that was kept on the Jones property. He used to get so high that he would pass out and fall off the tank. (Ex. 18 at 187; Ex. 128 at 2573.) As an adult, he became a drug addict, using both marijuana and cocaine. (Ex. 123 at 2492-93.) Robert also abused alcohol and was involved in at least three alcohol related motor vehicle accidents. (Ex. 123 at 2492-93.)

(h) Petitioner's paternal uncle, Thomas, smoked marijuana, and may even have been selling it, as a teenager back in Arkansas. (Ex. 3 at 35.) After moving to Los Angeles, he started using heavier drugs, such as, speed, cocaine, and PCP. (Ex. 128 at 2579.) Thomas has been arrested for possession of narcotics, including Angel Dust (PCP) and Black Mollies (amphetamines). Thomas lost his house due to his drug habit. (Ex. 2 at 14-15.) In addition to his dependence on drugs, Thomas drank heavily. (Ex. 10 at 98; Ex. 124 at 2547.)

(i) Petitioner's paternal uncle, Sammie, also sniffed gas as a child from the gas tank on the Jones property. (Ex. 128 at 2573.) Richard had introduced Sammie to hashish, but Sammie discovered speed, cocaine, and PCP in Los Angeles. Once Sammie discovered crack cocaine, he became heavily addicted and lost both his family and his house due to his addiction. (Ex. 128 at 2579; Ex. 131 at 2614-

15.) Sammie also has a gambling addiction. When he loses his money gambling, he gets drunk and stays drunk for several days. (Ex. 21 at 223.)

(j) Petitioner's paternal aunts Bertha Mae and Bobbie have also battled alcohol addiction. (Ex. 1 at 6; Ex. 115 at 2365-76.) Bertha Mae was also addicted to tranquilizers. (Ex. 4 at 55.)

(k) On petitioner's maternal side of the family, his maternal grandmother was an alcohol abuser who kept jugs of homemade wine in her living room. (Ex. 11 at 103.) Alcohol related diseases were contributing conditions to the death of Miss Vernice's brothers, William and Charles. (Ex. 27 at 313; Ex. 157 at 2780.)

(l) Petitioner's maternal uncle, Carvis, is an alcoholic, whose alcoholism was not curtailed by the fact that he killed one of his girlfriends in a drunk driving accident in the late 1970s. (Ex. 3 at 33; Ex. 124 at 2547.) Carvis's drinking amplifies his mental illness: the more Carvis drinks, the meaner, more unpredictable, and more volatile he becomes. (Ex. 132 at 2627.) Although he is difficult when sober, he becomes impossible when drunk. (Ex. 21 at 224.)

(m) Petitioner's maternal aunt, Delbra Baldwin, the "most normal" sibling, was an alcoholic who was in and out of rehab. (Ex. 129 at 2593; Ex. 3 at 33; Ex. 168 at 3027.) She died of liver cancer at the age of forty-six. (Ex. 124 at 2547; Ex. 27 at 304; Ex. 3 at 33; Ex. 135 at 2653; Ex. 21 at 222)

(n) Petitioner's maternal uncle, Ronnie Baldwin, was an intravenous drug user, commencing in high school when he injected cocaine and shared needles. He also smoked marijuana. (Ex. 44 at 885.) Ronnie died at thirty-five of complications related to AIDS. (Ex. 27 at 311.1; Ex. 3 at 34.)

(o) Petitioner's maternal aunt, Jackie, quickly became addicted to drugs when she moved to Los Angeles. (Ex. 21 at 223; Ex. 129 at 2588.) Jackie was introduced to drugs when she started dating petitioner's Uncle Thomas, who also became her supplier. (Ex. 128 at 2568; Ex. 16 at 173.) Jackie freebased

cocaine and used PCP. (Ex. 3 at 35; Ex. 16 at 173.) During this time, her appearance altered, her hair started to fall out and she lost a lot of weight. (Ex. 135 at 2663; Ex. 21 at 224.) Not long after this, she killed herself with her Brother Carvis's gun, by shooting herself in the head. (Ex. 21 at 224.)

(11) Almost all of petitioner's immediate family members have or had problems with alcohol abuse and/or drug abuse.

(a) Petitioner's immediate family all exhibit signs of mental dysfunction, cognitive impairments, and the long-term effects of severe traumatization. Most of petitioner's family members have relied on self-medicating their symptoms through the use and abuse of alcohol or drugs. His parents were both severe alcoholics throughout his childhood and well into his adulthood. By the time petitioner was nine or ten years old, his parents were constantly drunk. (Ex. 21 at 221.)

(b) Petitioner's father was a severe alcoholic throughout petitioner's childhood. Petitioner and his siblings watched his father drink constantly. Earnest Lee was often violent when he was drunk; he began many battles with his wife, Joyce, after he was drunk. While Joyce loved beer, Earnest Lee drank hard liquor and "[i]t got to the point where he drank gin like it was water." (Ex. 146 at 2714-15.) He was arrested and jailed several times for drunk driving offenses, and often could not hold a job due to his alcoholism. (Ex. 8 at 87; Ex. 145 at 2710; Ex. 123 at 2487.) Of the jobs he did secure, he lost at least three of them due to his drinking; eventually, he could hold no job. (Ex. 145 at 2710.) Petitioner's sister, Gloria, notes that due to Earnest Lee's alcoholism, he often cannot remember events from his own children's upbringing. (Ex. 124 at 2501.)

(c) Petitioner's mother's alcoholism was chronic and extreme. As her former sister in-law observed, "Joyce went to bed with a long Coors beer, and woke up with a Coors." (Ex. 146 at 2714.) She drank at all hours, and throughout her pregnancies. (Ex. 18 at 195, 196; Ex. 155 at 2766-67; Ex. 124 at 2523.) When she drank, she became loud, vulgar, angry, violent, and frequently irrational.

(Ex. 152 at 2740; Ex. 21 at 221; Ex. 18 at 195-96; Ex. 145 at 2710; Ex. 143 at 2702.)

(d) As Earnest Lee came around to visit his family less often, Joyce drank more and more. Increasingly, her efforts and her money went almost exclusively to alcohol, to the detriment of her children. "She used food stamps to buy something small at a store so that she could use the change to buy beer." (Ex. 147 at 2719.) Eventually, she drank anything that contained alcohol, not just beer. (*Id*. at 2718.) The children began to find her passed out in the street. (Ex. 21 at 222.) Petitioner would try to get his mother to come home when he found her drunk out on the street. (Ex. 131 at 2612.) Often, she was so inebriated she urinated all over herself, leaving the children to clean up after her. (Ex. 123 at 2488; Ex. 126 at 2560.) Joyce drank until she died, and her face and body bore the consequences. Just before her death, she was thin and her skin was blotchy. (Ex. 145 at 2712.) Exceedingly ill and frail, and only four days before her death, she physically struggled in a car with her eldest daughter, Gloria, as Gloria tried to pry a beer out of her hands. (Ex. 124 at 2545.)

(e) Several of petitioner's siblings have recurrent and often severe problems with drug and alcohol abuse. (Ex. 131 at 2621; Ex. 21 at 228.) Petitioner's sister, Jean, started using drugs by the 1970s. Once, Carl tied Jean to an ironing board so that she could not go out and buy more drugs. Desperate to get drugs, Jean jumped out of the second story window, ironing board in tow. (Ex. 126 at 2561.) One of Jean's addictions was marijuana laced with PCP; she smoked even more PCP after Carl was murdered in the streets. (Ex. 152 at 2741.) Later, she could be found prostituting herself to support her drug habit. (Ex. 134 at 2648.) In addition to her drug addiction, Jean also has a history of chronic alcoholism. (Ex. 146 at 2716; Ex. 163 at 2961-65; Ex. 164 at 2980.)

(f) Both Cassandra and Gloria have severe problems with alcohol. Cassandra took after her mother and her father: she drinks excessively, and becomes violent and irrational when drunk. She is easily provoked to fight once she

has been drinking, and she has been unable to keep a job due to her alcohol use. (Ex.143 at 2703-04; Ex. 145 at 2712; Ex. 124 at 2549.) Cassandra drinks until she passes out and cannot always remember what she has said or done afterwards. (Ex. 2 at 16-17; Ex. 143 at 2704.) Gloria also drinks to excess, and has been arrested for Driving Under the Influence. (Ex. 2 at 17.)

(g) Carl not only abused drugs, but once his father left California, he also manufactured them in, and sold them from, his family's two bedroom apartment. He manufactured crack cocaine on the stove and stored PCP in the refrigerator. (Ex. 134 at 2650; Ex. 16 at 164; Ex. 131 at 2610; Ex. 132 at 2635.) People routinely hung out in his and petitioner's bedroom to use drugs; in fact, the Jones house was a "major hangout" for young people, because there were no rules and effectively, no adult oversight, despite Joyce's physical presence. (Ex. 16 at 164; Ex. 132 at 2638; Ex. 126 at 2561-62.)

(12) The neighborhood where petitioner grew up was blighted by poverty, violence, street crime, drugs, and gangs.

(a) The constant traumas petitioner experienced did not end at the Jones's family doorstep. Growing up, petitioner's neighborhood in and around the Eighth Avenue section of South Central Los Angeles, where his family most often resided, was also violent, gang-ridden, and drug-infested. (Ex. 25 at 251.) Shootings, stabbings, police helicopters, and police sirens were routinely seen and heard. (Ex. 151 at 2737; Ex. 134 at 2648; Ex. 124 at 2526.) One of the Eighth Avenue apartments occupied by the family was described as a "hellhole," where there were shootings in the middle of the day. (Ex. 123 at 2481.) Petitioner's immediate neighborhood was the territory of a gang called the "Rollin' 60s," a part of the Crips gang. The presence of the Rollin' 60s alone made the neighborhood dangerous (Ex. 142 at 2700), but the danger was in no way limited to gang activity.

(b) As a child, petitioner watched, stunned, as a neighbor shot her husband five times in the chest point blank with a .22 caliber pistol, threw the

pistol down on his bloody body, and shouted "die, Mother F--, die." (Ex. 124 at 2526.) Another boy petitioner knew, who was confined to a wheelchair as a result of paralysis sustained in an earlier shooting, was shot in the street as a revenge killing. (Ex. 134 at 2649-59; Ex. 153 at 2744; Ex. 126 at 2562.) In addition to his own parents' violent confrontations, petitioner witnessed at least a dozen incidents of shootings and stabbings in his neighborhood. (Ex. 178 at 3138-39.)

(c) In petitioner's neighborhood, streets frequently were roped off with police tape, and little children had to learn early on to duck when shots rang out. Police helicopters with their loud microphones and bright searchlights operated constantly, and often people could be seen hiding under cars or in backyards to avoid being detected by the police. Drugs were omnipresent. Many lots lay vacant in the neighborhood, often populated with little shacks people used as drug houses. (Ex. 151 at 2737.)

(d) One main "drag" in the neighborhood of South Central was Crenshaw Boulevard, between Vernon and Florence Streets, a few blocks east of petitioner's neighborhood. Drive-by shootings and other killings occurred more frequently there, because it was a spot where gang members congregated and confronted one another. (Ex. 152 at 2741.)

(13) Petitioner suffered from devastating neglect, abuse, and extreme poverty from the time he was an infant.

(a) Petitioner was born on June 26, 1964, in Memphis, Tennessee, the fourth child of Earnest Lee and Joyce Jones. (Ex. 26 at 268) As discussed above at paragraph 2.a.(8), *supra*, assaults on petitioner began while he was still *in utero*. From the start, Joyce's interest in motherhood was fleeting at best. As early as 1966, following the birth of her daughter, Casssandra, she showed little sign of any desire to parent. (Ex. 124 at 2504-05.) Others observed that Joyce was interested in the children as babies, treating them like little play dolls; when they were no longer infants, however, she lost all interest. (Ex. 123 at 2483; Ex. 129 at 2583.) Her

drinking only amplified the neglect, and had a terrible effect on her children. She could not mother them because she was drunk, often unable to perform simple tasks like getting them ready for school. (Ex. 132 at 2714.)

(b) Through the combined forces of oversight, abuse, alcoholism, neglect, and poverty, petitioner rarely experienced consistent mealtimes and adequate nutrition. By the late 1960s, petitioner's eldest sister Gloria, not petitioner's mother, was responsible for much of the cooking and the household chores. (Ex. 135 at 2659; Ex. 124 at 2505.) When petitioner's parents were too drunk to remember to buy groceries, Gloria sneaked into her father's room, where he lay asleep or passed out, and took money from his pants pockets so that she could buy food for the family. (Ex. 124 at 2512.)

(c) When he was not passed out, Earnest Lee was not much of a father to the children either; he basically ignored them or was not home at all. (Ex. 18 at 198; Ex. 135 at 2659; Ex. 21 at 221.) Any energy he did have was spent being angry at petitioner's mother. (Ex. 124 at 2520.) From approximately 1971, petitioner's father no longer permanently lived with the family. (Ex. 124 at 2521.) However, he came by to see them, and when he did, he usually caused trouble. (Ex. 155 at 2770; Ex. 128 at 2576; Ex. 88 at 1796; Ex. 132 at 2630.) From late 1979 through mid-1983, petitioner's father completely abandoned the family. He left the state without a word to his children. (Ex. 124 at 2534; Ex. 132 at 2631.) When he returned for his son Carl's funeral, it was the first time that anyone in the family had seen him for years. (Ex. 132 at 2633.) While he was gone the family's only income was from Joyce's welfare checks, which she spent on alcohol. (Ex. 123 at 2488; Ex. 131 at 2610.) Occasionally, he would send money to Cassandra, but not to anyone else, because she was his special daughter. (Ex. 124 at 2530; Ex. 131 at 2610.) If he called on the phone, it was to speak to Joyce or Carl, not petitioner. (Ex. 124 at 2534.)

(d) Petitioner and his siblings often were left to fend for their own food, particularly since their mother spent her welfare money on alcohol and

deliberately hid what little food she had from the children. As their aunt, Kim Jones, describes, "I can remember several times that [Joyce's] children were angry with her after they found some eggs, bread, or some other food she had tried to hide from them." (Ex. 147 at 2719.) The children were tortured through hunger: Uncle Thomas arrived at petitioner's home with a bag of fast food, and ate it all in front of the children, knowing they were starving. (Ex. 155 at 2769.) Sometimes, he left half a hamburger for the children to fight over. (*Id*.) Neighbors knew of their plight, and often let the Jones children eat a meal with them, even though they, too, were poor and did not have much food for their own families. (Ex. 126 at 2560.) When petitioner and Carl went over to their cousin's house, "they ate everything they could get their hands on." (Ex. 155 at 2770.) When petitioner's youngest brother, Alvin, was just a toddler, in the 1970s, the malnutrition was so severe that his limbs looked like "toothpicks." (Ex. 156 at 2778.)

(e) Due to her alcoholism, her lack of job skills, or both, Joyce could not hold a job, even though the family needed the money. (Ex. 145 at 2710; Ex. 143 at 2701; Ex. 146 at 2714.) Carl did not help pay for rent or for food (Ex. 142 at 2699.) In the 1970s, as Joyce's drinking continually increased, so did the neglect and desperate hunger of her children. Alcohol was her highest priority: Joyce "always made sure she had her beer. If it came down to a choice between feeding her children and buying alcohol, she bought alcohol." (Ex. 155 at 2770.)

(f) As a teenager, petitioner and his younger siblings often lacked electricity. (Ex. 135 at 2661.) When the electricity was turned off due to unpaid utility bills, they often ran extension cords from a neighbor's apartment in order to run appliances and have light. (Ex. 126 at 2560.)

(g) In the 1970s, petitioner missed a lot of school as he tried to find odd jobs here and there to help feed his younger siblings. (Ex. 123 at 2487.) Petitioner was unable to secure steady employment, but he did what he could to earn money, spending it on food or other necessities for his two youngest siblings,

Alvin and Tanya. (Ex. 16 at 163-64; Ex. 131 at 2610.) He was trying to make the football team and did not want to miss school so that he would be eligible to play; however, his loyalty and concern for his younger siblings impelled his absence. (Ex. 124 at 2538.) As his high school girlfriend recalls, "Ernest did a lot of things at home for his two youngest siblings, Alvin and Tanya. Many times, he was taken away from our telephone conversation to attend to them. His time was often taken up with taking care of them, rather than doing something for himself." (Ex. 141 at 2697.)

(14) Petitioner lacked a stable home environment.

(a) The emotional instability in the Jones household was mirrored by the physical instability of the family. Repeatedly, the Jones family was evicted from apartment buildings because of domestic violence, overcrowding, or because Earnest Lee could not refrain from getting into an argument with the landlord. (Ex. 132 at 2628; Ex. 124 at 2523-24.) The family moved constantly; sometimes petitioner's father lived with them, and sometimes he did not. (Ex. 124 at 2503; Ex. 178 at 3112.) At several points during petitioner's childhood, his family had no place to live. For example, in the early 1970s, the Jones family was evicted from an apartment for having too many people – two adults and seven children – in a two-bedroom apartment. (Ex. 147 at 2719.) If no one stepped in, the children – and the parents as well – went homeless.

(b) As a result, the children were often split up among various relatives and friends, for days, weeks, or months at a time. (Ex. 124 at 2523.) Earnest Lee's friend, Tony Howell, brother of William "Dubee" Howell, raised petitioner's younger brother Alvin for several years because both parents were so drunk they could not care for themselves, let alone a child. (Ex. 2 at 15-16; Ex. 8 at 86.) Petitioner sometimes stayed with his aunt, Geraldine, at least once for a number of months, but inevitably, his mother would make him return home. (Ex. 123 at 2495-96.)

(c) After their mother was evicted from her apartment for

failing to pay rent, the family was once again dispersed. Initially, the younger children, Tanya and Alvin, lived with Joyce and her boyfriend, Horace, at his home. (Ex. 135 at 2661.) Eventually, Horace lost his place too and Joyce and Horace were homeless, sleeping on the streets. (Ex. 124 at 2539.) Petitioner moved from place to place, and often had to find his own place to live. (Ex. 135 at 2661; Ex. 14 at 134.) At one time or another everyone in the Jones family lived with petitioner's pedophilic uncle, Thomas. Prior to the death of his brother Carl, petitioner went to live with his Uncle Thomas and his wife, Kim Jones, for several months. (Ex. 124 at 2539.) Petitioner, his father, and sister even slept on the floor of Thomas's auto shop prior to petitioner's arrest for assaulting his girlfriend's mother. (Ex. 16 at 167.)

(15) Petitioner suffers from impaired cognitive functioning, organic brain damage, and compromised adaptive functioning.

(a) Petitioner's own development, personality, mental health history, and character, also form part of the backdrop of mitigation evidence trial counsel should have, but did not, present during the penalty phase. Just as trial counsel overlooked several witnesses who could recount petitioner's family and social history, there were numerous witnesses and documents to elucidate petitioner's own personal struggle, at home, at school, with friends, and with his own increasing mental illness. Trial counsel was deficient for failing to present, or fully present, this personal history through lay witnesses and experts, including a social historian, that was known, or reasonably should have been known, to him.

(b) Unfortunately, petitioner's problems reached even beyond his dysfunctional family dynamics, and his violent and dangerous community environment, into the physiology and biochemistry of his own brain. Even before birth, petitioner was an at-risk child, with an increased likelihood of organic brain damage and other problems as a result of his mother's drinking and smoking while pregnant with him. (Ex. 124 at 2501; Ex. 4 at 55; Ex. 18 at 195.) After birth, petitioner's risks of organic brain damage further increased when he suffered numerous

head injuries, many before he was even of school age. In addition to those head injuries petitioner received as a casualty of his parents fights (Ex. 124 at 2512; Ex. 29 at 345), and the physical abuse suffered at the hands of family members (Ex. 155 at 2769; Ex. 21 at 221; Ex. 1 at 2), petitioner was teased and beaten up as a small child in the neighborhood. Frequently he stood passively, suffering violent blows to the head. (Ex. 16 at 147-48; Ex. 124 at 2511-12.)

(c) Petitioner exhibited other classic signs of organic impairment early in his life. He was a clumsy little boy, always running or bumping into things. (Ex. 16 at 146.) Growing up, some of his friends noticed he had a strange way of speaking. "His language was not smooth, and there was something different, and definitely noticeable, in his speech pattern. He phrased things oddly enough that his manner of speaking stuck in my mind." (Ex. 148 at 2727; *see also* Ex. 149 at 2728.)

(d) Petitioner had difficulties with auditory processing. He did not always appear to understand what was being said to him, the words did not seem to sink in, or it took him time to process what was being said. (Ex. 124 at 2518.) He could not always follow basic instructions, or forgot what he had been told. When this happened, his father got extremely angry and would beat petitioner. (Ex. 16 at 146; Ex. 178 at 3132.)

(e) As a boy, petitioner was curious about how things worked, and took things apart, but was unable to reassemble them. (Ex. 124 at ¶ 2513; Ex. 155 at 2775; Ex. 8 at 85; Ex. 132 at 2637; Ex. 131 at 2609.) Petitioner's mother's response to these failures was to beat him. (Ex. 124 at 2513.) This curiosity persisted into adulthood, but petitioner never mastered the skills necessary to put things back together. When he lived with his sister Gloria, he took apart the television set to see how it worked. It never worked again. (Ex. 124 at 2539.)

(f) Petitioner had several learning problems, especially in simple math, and as a consequence, had trouble making change, so he could not be sent

to the store alone. (Ex. 16 at 145.) As a young boy, petitioner was not able to learn from his past behaviors. He ate hot sauce, drank whiskey and tried chewing tobacco to get money from his Uncle Thomas, even though all these things were likely to, and sometimes did, make him sick. (Ex. 124 at 2508, 2510; Ex. 2 at 15.) Petitioner was not able to learn the simple process of baking, despite paying close attention to the steps involved. Petitioner's father brought him to California Donuts some nights to learn how to do the baking. Although petitioner never got the hang of it, he still went because he was eager to get out of the house at night (Ex. 8 at 85.) Some of petitioner's difficulties in learning arose from problems with attention. (Ex. 189 at 3399.) Later on, petitioner wanted to learn how to become a mechanic, but he could not work on cars because he was unable to learn simple, let alone complex, car mechanics. (Ex. 21 at 226; Ex. 10 at 97.) In fact, petitioner never learned how to take care of himself; he could not cook, much less hold down a steady job. (Ex. 16 at 167.)

(g) As a result of petitioner's impairments, school became one more obstacle for him. From the start, he was behind his peers in academic performance and ability, and never caught up. (Ex. 16 at 144-45.) He had trouble sequencing, performing simple tasks, and was already behind his peers in knowing the alphabet and counting. He did not recognize most letters and did not know most beginning consonant sounds. He reversed many numerals and letters in writing. He had poor listening skills and was slow in responding to directions. While he was able to work independently, he did not work well in group activities. He did not play and communicate with his peers. (Ex. 125 at 2552; Ex. 51 at 1159.) His impairments included a short attention span and poor listening skills. (Ex. 125 at 2553.) He also showed weaknesses in vocabulary, description and comprehension, visual memory, perceptual discrimination, spatial relationships and psychomotor coordination. (Ex. 51 at 1158.)

(h) Towards the end of the first grade school year, his teacher referred petitioner to the school psychologist for a determination of whether he

should be placed in Special Education classes. The school psychologist administered the Stanford-Binet intelligence test, and he scored a full scale IQ score of 68, placing him in the intellectual disabled range of cognitive functioning. He was appropriately placed in Educably Mentally Retarded (EMR) classes, where he could receive individualized instruction and attention. (Ex. 125 at 2552-53; Ex. 50 at 1104.)

(i) Petitioner did not learn how to write his own name until the third grade. (Ex. 16 at 145.)

(j) After three years in the EMR program, petitioner was returned to regular classes and held back in the fourth grade. (Ex. 125 at 2553-54.) Petitioner was found ineligible for Special Education classes based solely upon IQ test scores. (Ex. 130 at 2600.) Returning to the fourth grade into the larger, mainstream classes, he faltered again, and achieved no real success in school after that. (Ex. 130 at 2600.)

(k) By the fifth grade, he was still having trouble reading whole sentences while his sister Cassandra, his junior by two years, was reading books. (Ex. 132 at 2636-37.) He received remedial reading in both the fifth and sixth grades. (Ex. 125 at 2554.) He was absent for sixty days in the sixth grade when his ankle was fractured. (Ex. 50 at 1108, 1115.) He was markedly below average in all academic subjects, which caused him a great deal of frustration. (Ex. 125 at 2554.) By the end of elementary school, petitioner's signs of distress were apparent in his grades and his behavior. (Ex. 125 at 2557.)

(l) While his other siblings found different ways to stay out of the house and away from their parents, petitioner continued to go home, despite the danger there. Unable to perform in school, he did not join some of his siblings at the library after school, and he did not easily make other friends. (Ex. 16 at 146, 175; Ex. 131 at 2609.) Others noticed that petitioner was not as mature or as smart as his siblings (Ex. 143 at 2703), and was, generally, mentally slower than children his age (Ex. 16 at 147.) He played with his much younger cousin as if he was his peer. (Ex.

123 at 2491-92.) Children in the neighborhood took advantage of his gullibility and used him as a foil to their schemes. (Ex. 16 at 148-49.)

(m) He skipped from school to school as his family moved around or farmed him out to other people, and he continued to miss school in junior high school due to the worsening family environment and the need to work to take care of other siblings. (Ex. 14 at 134 Ex. 123 at 2486; 131 at 2610.) At Horace Mann Junior High School, where he attended the seventh and part of eighth grade, it was even more difficult to get by; the school was one of the most violent in South Central Los Angeles, with in-school gangs, drive-by shootings at the school, students beating up teachers, and constant physical fights. (Ex. 124 at 2525-26; Ex. 134 at 2649; Ex. 155 at 2772, 2774.)

(n) From his first semester in seventh grade, petitioner's academic performance deteriorated. By the end of junior high school, his signs of distress were apparent in his grades and his self-inflicted injury. From his first semester in tenth grade, petitioner's inability to keep up with the regular program was apparent. His success in the Special Education program was interrupted by transfers to another home and another school district. (Ex. 125 at 2557-58.)

(o) When petitioner was bussed to the predominantly white El Camino High School in Woodland Hills, he was once more referred for assessment for Special Education because of learning problems. (Ex. 130 at 2601; Ex. 51 at 1151). The School Psychologist administered an IQ test to petitioner, and measured those results against his achievement to determine eligibility for placement into Special Education. In this particular instance, there was a sufficient discrepancy between petitioner's higher IQ test and his achievement test to consider placement into the Special Education program. (Ex. 130 at 2602.) Achievement testing at that time showed weakness in all academic areas. Petitioner was functioning at a D and F grade level in the classroom. Results of the Peabody Individual Achievement Test showed academic skills from the third to sixth grade level. (Ex. 125 at 2556; Ex. 51 at 1154.)

(p) Petitioner was then sent to his school of residence (Crenshaw) for the eleventh grade. He had all his classes in the Educationally Handicapped Program. Instructional goals on his Individualized Education Program (IEP) for math were to master functions of addition, subtraction, multiplication and division, for reading to read a paragraph silently and answer comprehensive questions, and for language arts to write sentences with correct structure, spelling, punctuation and grammar. (Ex. 125 at 2556-57; Ex. 14 at 133-34.)

(q) Petitioner's problems with reading and writing followed him into adulthood when he was unable to fill out job applications because he could not read or spell very well. (Ex. 14 at 134, 136.) Thus, petitioner was unable to find and hold down jobs, other than the most unskilled, menial and undemanding temporary ones. (Ex. 16 at 163-64.)

(r) Petitioner's sister sent petitioner items he needed when he was in prison. Petitioner indicated which items he needed by sending cuttings from the catalogs. He might write a few words and sign his name but the words were often misspelled, including his own name. (Ex. 16 at 145.)

(s) Petitioner also had difficulties reading social cues. When he was a young pre-schooler, although he already was watchful and observant, he was not always capable of interpreting the events and social cues around him, failing to understand danger and take evasive action to protect himself. (Ex. 16 at 147-48; Ex. 124 at 2511.) As he got into his teens and as an adult, he often misinterpreted behavior and interactions with women. (Ex. 132 at 2637-38.) For example, when he lived at his Uncle Thomas's, he thought that his Aunt Kim was romantically interested in him because she was kind to him. (Ex. 147 at 2723.)

(t) None of these signs and symptoms of organic impairment was presented to the jury. In fact, reliable and thorough neuropsychological testing shows that as a result of these multiple insults to the brain, petitioner suffers severe organic brain damage, to the frontal and parietal lobes, and

also to the corpus callosum. This organic damage severely affects numerous aspects of petitioner's mental functioning, including memory, concentration, attention, perception of spatial relationships, and overall academic aptitude. As indicated by his extremely poor performance during neuropsychological testing, "Mr. Jones suffers from such severe brain damage that he is unable to function at the same level as 99 percent of those in his age category." (Ex. 175 at 3072.)

(16) Petitioner suffers from a severe and debilitating mental illness, and exhibits symptoms consistent with exposure to chronic trauma.

(a) Petitioner stood out in his family. He was a well-behaved child, and while his siblings were loud and assertive and talkative, petitioner was withdrawn, quiet and gentle. Petitioner's nickname, "Meso," was one of the first, among many, things petitioner was teased about as a child, because his face had red bumps that resembled measles. (Ex. 155 at 2765.) Practically from birth, petitioner often seemed to be "not there," with no one paying much attention to him at all. His paternal aunt by marriage, Gloria Jones, described his demeanor: "[Petitioner] was a very quiet and withdrawn child. Growing up, he was so inside himself that even when he was present, it was as if he was not there. I often thought of him as an invisible child. He was the child that was not there." (Ex. 146 at 2715.)

(b) Petitioner was unlike his other siblings. He "was the only one who did not participate in trying to rule the roost." (Ex. 152 at 2742.) He did not talk back to people and, he was not "mouthy" like the rest of the Jones siblings. (Ex. 143 at 2702; Ex. 142 at 2699; Ex. 8 at 84-85.) Petitioner was not interested in being in a gang. No gang would have wanted him anyway, because he did not like to fight, and was not streetwise. (Ex. 142 at 2699; Ex. 143 at 2702-03; Ex. 16 at 151.)

(c) As a young boy and as a young man, numerous witnesses describe petitioner as quiet, sweet, kind, polite, respectful and shy. (Ex. 142 at 2699; Ex. 14 at 132; Ex. 126 at 2563; Ex. 132 at 2635; Ex. 16 at 147; Ex. 149 at 2728.) Unlike any of his siblings, he was a "homebody" who kept to himself. One of

Joyce's friends remembers seeing petitioner outside only when he went back and forth from school, or to the corner store for his mother. He stayed close to wherever he was living at that moment, watching television or helping out in the house. (Ex. 142 at 2699.) People found it "strange" and "odd" that he did not seem to have much social interaction because he was such a good boy. (Ex. 147 at 2723.) Petitioner's oldest sister, Gloria, who helped take care of him, saw that, "[f]rom the beginning, my little brother Meso was different. He was always a weird kid, and acted strangely." (Ex. 124 at 2508.)

(d) Petitioner began exhibiting signs of mental impairment when he was barely a toddler. Petitioner experienced auditory and visual hallucinations from an early age. His family heard him carry on conversations with people he saw and heard in his closet, whom others could neither see nor hear. (Ex. 124 at 2508; Ex. 16 at 146.) When he was young and slept in his parents' bedroom, he often saw a colorless man wearing a hat against the wall. Petitioner exhibited early signs of paranoid tendencies, expressing irrational fears, sleep disturbances, and heightened anxiety. (Ex. 178 at 3115-16.) From very early childhood, as soon as he started sleeping in his parents' bed, petitioner was terrified of the dark. (Ex. 16 at 147.) He refused, even in the face of abuse by his mentally ill uncle Carvis who shared the bedroom, to turn the light off to go to sleep. Just before throwing petitioner into the closet and locking the door, Carvis told petitioner that the people he saw and spoke to in the closet were monsters. These experiences terrified petitioner and served to only intensify his fear of the dark and the closet. After these episodes, petitioner often could not calm down for hours. (Ex. 124 at 2508-09; Ex. 16 at 147.) Adding to his terror, petitioner's mother told him that he was born with a veil, therefore, he was supposed to see spirits. (Ex. 178 at 3115.)

(e) When he was alone in the house, petitioner was compelled to turn on all the lights and open all the windows. He believed that by doing this, someone could watch over and protect him, and it made him feel safer. (Ex.

178 at 3116.) Even as an adult, when the electricity in the house had been turned off because no bills were paid, petitioner could only sleep if he lit several candles or forced himself to go to sleep while it was still light out. (Ex. 16 at 147.) Petitioner also experienced constant and terrifying nightmares all throughout his childhood, including one dream where he was being chased by a dark presence. (Ex. 178 at 3116.) Petitioner woke up screaming and yelling from these nightmares; they became so frequent that his parents ignored his screams. (Ex. 16 at 146; Ex. 178 at 3115-16; Ex. 123 at 2496.)

(f) From an early age, petitioner began to experience dissociative episodes. Dissociation appears to have been his only means of coping with his horrifying childhood. Throughout his childhood, the multiple sexual, physical and psychological traumas he experienced impeded his ability to develop a coherent self, or find any external place of safety. Petitioner's response to the overwhelming and constant fear was one of mentally shutting down, psychological numbing, and repression. (Ex. 178 at 3118.) Neighbors could see petitioner's struggle, and his dissociation. "[Petitioner] was not involved in arguments and fighting. He clearly could not deal with the violence and madness that went on in that home. Whenever fights broke out, it was like some part of Meso just shut down and he had to escape, instead of fight, so that he could survive." (Ex. 152 at 2742.) Even when engaged in some other activity, petitioner could not stop the dissociative process: "It was not unusual to see Meso staring off into space, lost in his own thoughts, even when he was sitting in front of the television." (Ex.142 at 2700.) One of his aunts by marriage, the wife of his Uncle Thomas, described it thus: "Meso usually looks like he is lost in thought, a thousand miles away. . . . He sometimes had such a glazed expression on his face, however, that he looked like he was on drugs. Other people could have thought that he was on drugs even when he was not." (Ex. 147 at 2722.) Petitioner's only defense mechanism that allowed him to survive the repeated assaults from his parents, his siblings, and others was to involuntarily become "frozen," "like a statue," and

unresponsive. Too overwhelmed to express what was bothering him, he withdrew more and more, sitting and saying nothing for hours. He did not know how to tell others what was wrong. (Ex. 152 at 2741.) When the devastating violence in the family was raging, petitioner stared vacantly, standing away from everything and everyone, psychologically numbing himself to the pain that was too overwhelming for a small child to bear. (Ex. 16 at 148; Ex. 1 ¶ 9 at 2.) He wore a "faraway" or "glazed" expression during these times when he was upset. (Ex. 16 at 146, 149.)

(g) Petitioner was not able to listen and process information adequately. He was watchful and observant, trying unsuccessfully to interpret the experiences and social cues around him. If someone spoke to him, he did not always appear to understand what he or she was saying. He was often slow to respond, and slow to enter a conversation and interact with others. When someone asked him a question, often the words did not sink in, or it took him a great deal of time to process what they were saying. (Ex. 124 at 2518; Ex. 16 at 146.) Unable to recognize and respond appropriately or quickly to danger, petitioner was in the line of fire even more than his other siblings. If one of his older siblings were not there to take him away from the danger, often he would end up hurt. (Ex. 16 at 147-48.) It seemed like he enjoyed laughing, but he never let out a laugh easily, and never seemed happy enough to give anything but a little laugh. (Ex. 151 at 2737.)

(h) Petitioner was "extremely quiet and emotionally reserved, and he comes across as being shy and withdrawn. . . . If someone speaks to him he will speak, but unless someone else starts a conversation with him, he is silent." (Ex. 147 at 2722.) As one friend noted, "[h]is demeanor stood out. He was a very quiet boy, and somewhat of a loner. . . . Ernest appeared different from other kids as well because he was a very serious little boy. He always seemed to be apart from others, thinking rather than taking much interest in having fun like other little children." (Ex. 151 at 2735.)

(i) Petitioner had no specific caretaker, even as a small

child. When petitioner was small, he was fed and clothed by whoever was around that morning, or that day. (Ex. 124 at 2511.) His mother frequently was unable to help petitioner get ready for school; sometimes she was too drunk to help him. (Ex. 132 at 2628.) The neglect became evident: petitioner's childhood records tell the story with evidence of sores, untreated and infected insect bites, lacerations, and a nail that was stuck in his foot for four days before anyone sought treatment. (Ex. 29 at 336-58.) Despite petitioner's school sending home notice regarding his left eye exophoria, no action was ever taken by his parents to have this eye condition treated. (Ex. 51 at 1164; Ex. 50 at 1116.)

(j) Petitioner exhibited obsessive behaviors like several of his siblings and extended family. When he was a toddler, he had to eat each item of food off his plate separately. (Ex. 124 at 2510.) As he got older, he was very clean and had to keep things in his room organized in a certain way, and spent a lot of time making sure that they were organized exactly the way he wanted. (Ex. 124 at 2527.)

(k) Petitioner was uncomfortable in groups, or around strangers, unsure of how to behave. (Ex. 123 at 2497.) He spent most of his time alone, and did not have a lot of friends, but treasured those he had. (Ex. 149 at 2728; Ex. 151 at 2735-36.) Having learned as a young child to hide his emotions and not trouble others with his feelings, petitioner was emotionally isolated even from his friends. (Ex. 142 at 2699; Ex. 145 at 2712.) Although it was clear to outside observers – even those who did not know his family – that his home situation was deplorable, petitioner was unable to make sense of the world around him and was unable to talk about, let alone seek assistance, for his pain. (Ex. 151 at 2736.) Even when his own brother Carl beat him up, petitioner acted like nothing bad had happened. (Ex. 143 at 2704.) At most, he "acted like he had a lot on his mind." (Ex. 151 at 2736.)

(l) Petitioner's sense of self, and self-identity, was further challenged by the uncertainty of who his real father was. When he was a teenager, he overheard his parents fighting about whether Earnest Lee was really his father. (Ex.

124 at 2527.) He also heard one conversation where his uncles told his father not to worry, because petitioner was not his son. (Ex. 131 at 2618.) Overhearing conversations and his parent's fights was the only way the issue was ever raised to him. (Ex. 123 at 2496-97; Ex. 128 at 2579; Ex. 146 at 2715.) Petitioner had no help from anyone else in dealing with this sudden and traumatizing revelation. As with everything else that overwhelmed and plagued him, it remained inside him, unresolved. Earnest Lee's response was to never speak to petitioner about it. (Ex. 8 at 82.) His father's silence has only served to further traumatize petitioner, because for Earnest Lee, blood relationships and marriage are "what is important for Earnest Lee in treating people like family." (Ex. 146 at 2717.) Earnest Lee did not want to accept that petitioner was not his son (Ex. 135 at 2658), and the prospect upset him enough that he avoided the topic with petitioner, although raising it several times with his sister-in-law, and confidante, Kim Jones. (Ex. 147 at 2719.)

(m) As he had done as a young child, petitioner continued to experience dissociative episodes in his teenage years. His expression became fixed and glazed and he would lose contact with the present. Without notice, he could change into a completely different person. This sudden dissociation occurred often in moments of stress, when his siblings were fighting, or someone was trying to fight him. (Ex. 124 at 2529-30, 2539; Ex. 131 at 2615.) Drugs or alcohol did not induce these altered states of consciousness. (Ex. 124 at 2530; Ex. 147 at 2722.)

(n) Petitioner was exposed to drugs and alcohol at an early age. He first tried marijuana when he was in the third grade when he found his older paternal cousin, Alvin Wright's, marijuana which he kept in a shoebox. (Ex. 178 at 3142.) However, petitioner did not tolerate drugs well, and he worried about using drugs. With cocaine in particular, he felt disoriented and out of touch with reality, and lost his sense of control. Marijuana and alcohol exacerbated petitioner's mental problems. Because marijuana heightened his paranoia, he did not like to smoke it around people he did not know. When he was under the influence of drugs or alcohol,

he lost control of himself and acted without thinking, later unable to recall what had occurred. Several times when Ernest used alcohol he experienced blackouts. (Ex. 178 at 3143.)

(o) The death of petitioner's older brother, Carl, was another blow to petitioner's already fragile mental condition. (Ex. 132 at 2638.) Petitioner was distraught at the death of his brother Carl in July 1983. He had been around the corner from where the murder occurred, and blamed himself for not being there to help his brother as he bled to death in the street. (Ex. 124 at 2526, 2540; Ex. 131 at 2615; Ex. 27 at 300.) Carl's body lay in the street for a few of hours waiting for the coroner's office to retrieve it. During this time, a number of onlookers, including petitioner, gathered in the street, staring at Carl's lifeless body. (Ex. 123 at 2491; Ex. 131 at 2615.) Although petitioner's mother and sisters were hysterical after the murder, petitioner was still and silent and had that "faraway glazed-over look" that he had worn as a child when he was distressed. (Ex. 131 at 2615.) Although this tragedy affected everyone in the family, petitioner seemed to suffer the most. (Ex. 3 at 28.) For a long time afterwards, he was agitated, trying to figure out who had done this. (Ex. 135 at 2665; Ex. 16 at 167.) He also threw his best efforts into raising money for his brother's funeral, because the family had no money to bury the body. (Ex. 131 at 2615.)

(p) After Carl's death, petitioner began to have flashbacks of the body, lying in the pool of blood on the street, as well as visual hallucinations of his brother. (Ex. 178 at 3144.) His behavior also became increasingly bizarre. A neighbor recalls often seeing petitioner "yelling crazy things to people in the neighborhood, just like a street person. He talked trash to people for no reason, even to gang members who could have easily killed him. It made no sense. Fortunately, people realized that Meso was off of his rocker, so they left him alone. Still, it was like he had a death wish. Everyone knew that Meso had lost it." (Ex. 134 at 2652.) He began to dress differently, his eyes were blank, and friends could barely recognize him.

It was as if a dark cloud had fallen over him. (*Id*.)

(q) Petitioner continued to experience dissociative trance-like states where he was unresponsive to external stimuli. Shortly after Carl's death, one evening at his sister's house, he suddenly dissociated while they were arguing. She called out his nickname several times, but he could not hear her. She left the room until his trance was over. (Ex. 124 at 2539-40.) Petitioner dissociated one evening in front of a family friend, Kim Jackson. At the time, Ernest was engaged to Glynnis Harris, and Glynnis was pregnant with his son. (Ex. 14 at 135.) After a barbecue, Ernest and Kim Jackson went back to her apartment and smoked marijuana and talked about Carl. (Ex. 102 at 2009-11, 2032, 2065, 2080; Ex. 178 at 3146.) The topic was too difficult for him, and Ernest became more agitated, but he could not do anything about it. That moment of great vulnerability and stress touched off for Ernest an extreme dissociative reaction. Ms. Jackson could see this change immediately. His entire face and demeanor changed, and he forced her to have intercourse. (28 RT 4194.) Immediately after he came out of the trance, he saw her crying and slowly began to understand that something bad had happened, and apologized to her profusely. (Ex. 102 at 2033, 2068-69.) He drove to Centinela Hospital and called his girlfriend to meet him there; he wanted to be admitted for treatment. They talked for a while, and petitioner turned himself into the police instead. (Ex. 14 at 135.) Immediately following his arrest, petitioner was taken to Beverly Hills Medical Center by LAPD officers, complaining of transient memory loss. (Ex. 180 at 3159.) Ms. Jackson initially accused petitioner of rape, but later agreed to have Ernest plead to a lesser charge, recognizing that he needed psychological treatment. (Ex. 102 at 2034.) Petitioner was sentenced to 104 days jail time and ordered to cooperate with the probation department for mental health treatment. (Ex. 102 at 1990.) Petitioner was released from jail in October 1984, and reported to his probation officer every month subsequently, except for the month of March. (Ex. 102 at 2045.) Petitioner was referred to Kedren Community Health Center by his probation officer, and attended an

assessment evaluation there on January 9, 1985. He had two subsequent one hour individual sessions on January 21, 1985, and February 4, 1985, just prior to becoming homeless. (Ex. 30 at 359-61, 375, 378-81.) Petitioner's family was in denial about his problems, and was too caught up in their own problems to help him, if they even cared. (Ex. 21 at 226; Ex. 124 at 2542-43.) Petitioner did not receive the medical treatment he needed for his severe mental disorders. (Ex. 178 at 3146.)

(r) Shortly after his son Tristan was born on October 22, 1984, petitioner suffered many setbacks, and his depression and suicidal tendencies, along with his other mental illnesses, worsened. Petitioner's girlfriend, Glynnis, had noticed petitioner's sudden mood changes a couple of years into their relationship. In particular, petitioner became agitated when another man looked at Glynnis, convinced that this other man was going to take her away from him. (Ex. 14 at 134-35; Ex. 104 at 2183.) After he was released from jail petitioner had no place to live, his sister, Gloria, refused to have him stay with her, and he ended up living in the garage behind Glynnis's mother house. (Ex. 14 at 136.) Petitioner had dissociative episodes and heard voices telling him to do things when no one else was in the room. (Ex. 14 at 137.) He could not find a job and as his relationship faltered, his paranoia deepened as well, and he believed that Glynnis and her mother were plotting against him. (Ex. 178 at 3145.) Petitioner attempted to minimize the intensifying symptoms of depression and paranoia by self-medicating; accordingly, he began using increasing amounts of marijuana and alcohol. (Ex. 14 at 136-37.) When Glynnis finally severed ties with him, and her mother told him he could no longer stay in the garage, his anxiety and depression increased further. (Ex. 14 at 137; Ex. 30 at 378, 381.) Completely homeless, in approximately February 1985, he went to live at his uncle's auto shop, sleeping on the floor. (Ex. 8 at 88.) Petitioner's father, his sister Jean, and petitioner were all living in Thomas's transmission shop at this time. Jean and her father would wake up at night to see petitioner staring blankly, silent, for hours. (Ex. 16 at 167-68.)

(s) In March 1985, Petitioner walked up to the home of

his ex-girlfriend Glynnis Harris's mother, Doretha Harris. His heightened paranoia made him think that Glynnis and her mother were out to get him. He stood outside the house, and another trance-like interlude began to crystallize. Petitioner felt like he was watching a movie. Voices told him to go forward, and he felt an overwhelming force driving him to go inside the house. After entering the house, and upon being confronted by Mrs. Harris who was holding a large knife, petitioner dissociated and assaulted her. Once he realized what he had done, he retrieved the knife she had originally confronted him with and, holding the knife to his stomach, begged Mrs. Harris to kill him. (Ex. 178 at 3147.)

(t) Following his conviction for the assault on Mrs. Harris, and prior to his sentencing in that case, petitioner was referred to the California Department of Corrections (CDC) for an evaluation under California Penal Code section 1203.03. Clinical staff at the California Institute for Men recommended that he be committed to the CDC because of his underlying mental and emotional problems, evident from the nature of the offenses. (Ex. 83 at 1691; Ex. 84 at 1694-95.) During his evaluation, petitioner was noted to have experienced symptoms consistent with delusional thoughts and dissociation. (Ex. 87 at 1699.) Later, when he talked about his incarceration, he said that prison was a scary place: He got a glassy, faraway look in his eyes as he recounted to one witness that he had seen things that no man should ever have happen to him. (Ex. 10 at 97.) Petitioner was not placed in a mental health treatment program nor did he receive mental health treatment during his incarceration.

(u) Upon his release from prison in 1991, petitioner's mental condition had deteriorated, and he often behaved even more bizarrely. He clearly needed mental health treatment, but he did not have the skills to cope with his problems on his own, and his family preferred to simply try to avoid upsetting him. (Ex. 135 at 2666; Ex. 131 at 2621.) Sometimes, he seemed the same as he had always been; polite, sweet, gentle, not bitter about prison, and eager to start out again and make his life better. (Ex. 149 at 2728.) Other times, he was depressed, constantly

worried about what people thought of him, and convinced that people were out to get him. He reacted irrationally to everyday situations. (*Id*.) His voice was flat, and his eyes had a glazed, faraway look. (*Id*.) Petitioner was unable to hold down a steady job, and he had trouble interacting with people. Even though he was unable to learn the basics required of a car mechanic, his uncle Thomas gave him work at his transmission shop. (*Id*.) Because petitioner lacked the mental capacity to repair cars, he was given janitorial jobs, asked to run simple errands, and also given the task of driving home those customers whose cars were left at the shop. (Ex. 21 at 226-27.) He was not given enough work to be around the shop full-time because too many of the shop employees thought he was too strange. (Ex. 10 at 98.)

(v) Petitioner clearly needed support and guidance, but his uncles who worked at the shop, as well as other employees, tried to avoid him by giving him a few dollars to make him go away. (*Id*.) During the Los Angeles riots, in the summer of 1992, his uncle asked him to help watch over the shop and gave him a gun. (Ex. 21 at 227; Ex. 10 at 99.) Petitioner dressed up in military attire and marched around the store like a soldier. He could not sit still, and when he let other employees in, he opened the gate just a crack, peering around suspiciously to make sure they had not been followed. He saluted as they entered, thinking he was at war. The employees in the shop mocked him, but petitioner did not grasp their teasing, and continued to behave as if he were on a military mission. (Ex. 10 at 99.) Each night of the riots, petitioner sat in the shop all night to make sure that the place was not looted or burned down. Petitioner sat in the dark, for four to five hours at a time, staring out the window. (Ex. 21 at 227.)

(w) Petitioner's self-medication with alcohol increased significantly during this period. At one point during the riots, petitioner drank an entire fifth of whiskey, which seemed to have no effect on him, except that he appeared more withdrawn. (Ex. 21 at 227.)

(x) Up to the day before his arrest, petitioner's debilitating

depression worsened, and he was noticeably suicidal. He told one acquaintance that he had no reason to live, did not care if he lived or died, and that his uncles did not care about him. (Ex. 10 at 99.) His paranoia increased, and he began taping telephone conversations. His sister Gloria recalls that he played the tape for her. When the tape finished, he instructed her that she was not to talk about him on the telephone, and then he sat mutely on her couch "staring right through [her] with blank scary eyes." (Ex. 124 at 2544.) Petitioner's dissociative trances also plagued him. Two days before he was arrested, he acted bizarrely, again with his sister Gloria, coming to her door and asking for her car keys with no conversation or explanation. He had a glazed expression and his voice was low, deep, and strange. (Ex. 124 at 2544.) The day before he was arrested, his conversations were nonsensical. When asked if he was okay, Ernest:

> [S]tarted talking about trees. He was mumbling to himself about how people were out to get him and that he did not want to go on. He did not care if he lived or died. From the look in his eyes and his babbling speech, it seemed like he was talking to someone other than me, but I was the only one there. I was afraid that he was going to kill himself.

(Ex. 10 at 99-100.)

(y) On the day of the offense, petitioner drank two forty-ounce beers and whisky, smoked marijuana, as well as crack cocaine. (22 RT 3299-301, 3318; 24 RT 3594-96.) The events that transpired that evening were the direct result of petitioner's chronic mental impairments. Petitioner's psychosis and dissociative disorder overwhelmed his rational functioning and prevented him from modulating his behavior. His reactions to the events around him were the product of his distorted and impaired world-view and delusional thinking. (Ex. 178 at 3156-57; Ex. 154 at 2754-55.)

(z) It was not difficult for those who knew petitioner and

his family to see the connection between his mother's treatment of him and his dissociative encounters with Mrs. Harris and Mrs. Miller. Even lay witnesses who knew petitioner's mother understood the tremendous and damaging effect she had on him. As a neighbor explained who remembered petitioner as a "quiet, gentle child," he "was not too surprised when I found out the victim was his girlfriend's mother. [Petitioner] was constantly exposed to the Mr. Hyde side of his mother – the drinking, cussing and fighting. He did not know how to talk about the way he felt when his mother was acting up, and he kept it all inside. Although he tried to physically escape from these situations . . . his feelings never had a chance to escape." (Ex. 152 at 2742-43.)

(aa) On the night of the murder, during the car chase that ensued, petitioner heard multiple voices telling him to kill himself. (Ex. 178 at 3150.) Overcome with guilt and shame, petitioner shot himself in the chest. (Ex. 154 at 2752; Ex. 178 at 3156.)

(bb) Petitioner's multiple mental impairments were evidenced by the Los Angeles County Jail medical staff who prescribed anti-depressant, anti-anxiety, and anti-psychotic medications. Petitioner received Cogentin and Haldol for hearing voices. (Ex. 33 at 647.) Petitioner received the Haldol and Cogentin for sixteen months, but immediately prior to trial these medications were abruptly discontinued. (Ex. 33 at 596-620; Ex. 34 at 685.) On the final day of petitioner's testimony during the guilt phase, jail officials re-prescribed those two medications, and petitioner was under the influence of these drugs throughout the remainder of the proceedings. (Ex. 34 at 690, 678-85.)

(17) Petitioner was polite, protective and loyal to his family and friends.

(a) Petitioner grew up in a violent environment with fighting all around him but he was not a fighter. (Ex. 16 at 147.) During his parents fights, he tried to protect his younger siblings by putting a blanket over them for

protection. (Ex. 3 at 27.) He was the protective older brother, and the peacemaker in the family. He tried to prevent fights and get his siblings to settle their disputes without resorting to violence. (Ex. 2 at 13.) Even though he was no match in physical strength for his older brother, Carl, he tried to save his younger sister, Cassandra, from Carl's abuse when Carl started fighting with her. (Ex. 132 at 2635.)

(b) Petitioner also tried hard to be obedient, and respectful; of all of his siblings, he was least likely to make trouble. He was the only one of his siblings who did not steal items from the corner store. Even though his siblings teased him, he refused to participate, no matter what they said. (Ex. 16 at 147.) Petitioner blamed himself for things going wrong even when he was not to blame. (Ex. 8 at 84–85.) He was always respectful to his parents even when they were drinking and acting in ways that did not demand respect. (Ex. 21 at 228; Ex. 142 at 2699.) When he found his mother drunk in the street, he tried to coax her back inside, and never spoke badly to her or treated her poorly. (Ex. 14 at 132.)

(c) Petitioner participated in athletics and football at school, even though he was not a natural athlete. (Ex. 124 at 2532; Ex. 155 at 2774; Ex. 21 at 226; Ex. 16 at 150; Ex. 134 at 2651.) Petitioner loved to play football, and football was what he wanted to do most, but sometimes his grades were not good enough. (Ex. 16 at 150; Ex. 124 at 2538.). Then, he suffered an injury and could no longer play. (Ex. 21 at 226; Ex. 8 at 86.) Being unable to play football was devastating to petitioner because he was not good at many things: what he perceived as his "only chance to succeed at something [] vanished." (Ex. 16 at 150-51.)

(d) Petitioner tried hard in school because he wanted to do something with his life, but given his home environment, the neighborhood he grew up in, and his learning problems it was very difficult for him to succeed. (Ex. 126 at 2563, Ex. 14 at 133-34.) Although no one cared whether he went to school, he wanted to go. (Ex. 134 at 2651.) Moreover, petitioner persevered, attending two elementary schools, four junior high schools, and three high schools, which in turn entailed,

bussing, transfers to different school districts, and living at different residences. (Ex. 125 at 2557-58.) Petitioner also suffered inconsistent school attendance. For example, in the sixth grade he was absent sixty days; he was absent twenty-three days in fourth grade. (Ex. 130 at 2602-03.) As one educational personnel admitted: "It is remarkable that he was continuously enrolled in school through twelfth grade and that he tried to return to an educational setting that met his needs." (Ex. 125 at 2557-58.) It was his determination to learn that got him passed onto the next grade when he was in school, not his ability to do the work, but, ultimately, he fell so far behind that the pressure was too great and he dropped out of school. (Ex. 16 at 145; Ex. 14 at 133-34; Ex. 124 at 2538.)

(e) By the time that petitioner would have graduated, his father had left and his mother had fallen apart. He was often absent from school taking care of his younger siblings because their mother had disappeared for days at a time, or trying to earn pocket money to help clothe and feed them. (Ex. 14 at 133; Ex. 131 at 2610; Ex. 2 at 14; Ex. 178 at 3133-34.)

(f) Petitioner was never in a gang; he was never interested in joining any gang, and the gang members never showed any interest in him. While older boys in the violent neighborhood often beat up younger boys just because they could, petitioner never engaged in this violence, and was described instead as polite, sweet, respectful, jumping to help anyone in need. (Ex. 132 at 2638; Ex. 16 at 151; Ex. 142 at 2700; Ex. 134 at 2651.) He helped people without needing to be asked. He helped his Aunt Geraldine landscape her yard, and later to pack up her belongings when she moved to Georgia. (Ex. 123 at 2495-96.) He helped his neighbor with her groceries, painted her apartment for her, and helped coach her son in football. (Ex. 126 at 2563; Ex. 102 at 2026.) Petitioner's niece was born shortly after his release from prison. Petitioner babysat his niece on a regular basis. He was patient and kind with the baby, when she was fussing and crying, he remained patient and would calm her by walking her, feeding her and playing with her. (Ex. 131 at 2621.)

(g) Petitioner was a loyal and devoted friend to the few friends he had. (Ex. 149 at 2728.) One of his elementary school friends remembered how petitioner had waited after school every day to walk her home because she had been threatened by other students and was afraid to walk home alone. (Ex. 151 at 2735-36.) Although she was new to the school, petitioner made her feel safe there. (Ex. 151 at 2736.)

(h) Petitioner was a calm person, and he was particularly respectful toward women. He was known for not treating people, and women in particular, badly or speaking poorly of others. (Ex. 146 at 2717; Ex. 147 at 2723; Ex. 148 at 2725; Ex. 149 at 2728; Ex. 24 at 242.) He tried hard to please others; he preferred to try and make his few friends laugh rather than talk about anything negative. (Ex. 148 at 2725.) Another friend in a family of all girls remembers that her mother was "very strict" about who could visit at the house; however, she thought highly of petitioner and allowed him to come to the house to visit her daughters. (Ex. 148 at 2726; Ex. 149 at 2728.) His female friends felt protected and taken care of when they were with him. (Ex. 149 at 2728.) Petitioner was the first boyfriend of Maria Bethune, a girl he met at the beginning of high school. Ms. Bethune remembers petitioner fondly, and describes him as respectful, kind, enjoyable to talk to and to be around, and always "a good and supportive boyfriend." (Ex. 141 at 2696.)

(i) Many witnesses noted that the incidents involving Ms. Jackson and Mrs. Harris were uncharacteristic for petitioner, and were shocked by his arrest. (Ex. 135 at 2665; Ex. 146 at 2717.) When petitioner faced a prison sentence after being convicted for assaulting Mrs. Harris, he stated that he preferred to serve time in prison so that he could learn about himself and further his education than to get probation. (Ex. 84 at 1695.) Even after serving time in prison, petitioner was not bitter and was hopeful about making his life better on his release. (Ex. 149 at 2728.) However, without support petitioner simply lacked the skills and ability to seek out resources himself, and his family were unwilling or incapable of assisting him in

getting appropriate treatment for his multiple mental impairments. (Ex. 135 at 2666; Ex. 10 at 98.)

f. Trial counsel unreasonably failed to locate, request, obtain and admit into evidence readily available documents and records, containing information about petitioner's and his family's medical, military, educational, and social history, thereby providing compelling mitigation evidence. Trial counsel failed also to supervise the collection of such records, leaving the task to the defense paralegal to determine which documents to obtain. (Ex. 19 at 203.) The following documents were readily available and could have provided evidence as follows:

(j) Petitioner's siblings' school records, demonstrate low intellectual functioning of several of petitioner's siblings, including referral to special education classes; petitioner's mother's refusal to accept the children's placement in special education; difficulty functioning and progressing in school; behavioral problems indicative of the chaotic environment in the home; dispersion of the Jones children to relatives and others *in loco parentis*; and vision problems. (Ex. 53 at 1171–73; Ex. 54 at 1174-1395; Ex. 56 at 1401-22; Ex. 57 at 1423-27; Ex. 61 at 1435-54; Ex.66 at 1467-86; Ex. 76 at 1509-20; Ex. 118 at 2436-51; Ex. 119 at 2452- 66.)

(k) School records of members of petitioner's maternal family, evidence the mental retardation of petitioner's mother, containing two IQ scores of 61 during the late 1950s, when she began to have children (Ex. 69 at 1497-500); and the low average intellectual functioning and poor academic achievement of petitioner's maternal aunts and uncle (Ex. 55 at 1397; Ex. 59 at 1429-32; Ex. 79 at 1676-79).

(l) School records of petitioner's father and his siblings attest to low average intellectual functioning on the paternal side of the family, as well as lack of education and difficulty progressing in school. (Ex. 63 at 1463; Ex. 64 at 1464-65; Ex. 71 at 1502; Ex. 72 at 1503-05; Ex. 74 at 1507; Ex. 75 at 1508; Ex. 73 at 1506; Ex. 77 at 1527.)

(m) Medical, court and Coroner's records detail the signs and symptoms and existence of the mental illnesses of petitioner's paternal grandfather, petitioner's maternal grandmother, and petitioner's maternal aunt who committed suicide. (Ex. 48 at 938-1056; Ex. 42 at 832-40; Ex. 108 at 2258; Ex. 97 at 1944-51.)

(n) Social services records for petitioner's mother indicate that petitioner's parents had separated as early as 1965, and that from at least as early as 1967, petitioner's father was not supporting the family. (Ex. 88 at 1781-85.) The records also detail that shortly after the family first moved to Los Angeles, Earnest Lee applied for aid for himself and his family because he was unable to work at his job as a baker because Carl had contracted bacillary dysentery – a communicable disease. (Ex. 88 at 1785.)

(o) Social service records for petitioner's mother document his mother's arrest for fighting in 1976; petitioner's father's attack on Carl with a knife; and petitioner's fear for his own safety at age twelve, and his attempts to escape the domestic terror in his family because "conditions in the home are not safe." (Ex. 88 at 1795.)

(p) Court records for Horace Jenkins, petitioner's mother's boyfriend during the early 1980s and until her death, document his propensity for violence and domestic abuse. (Ex. 114 at 2355.)

(q) Police records bear out petitioner's Uncle Carvis's aggressive and assaultive behaviors. (Ex. 160 2784-89.)

(r) Medical records for petitioner document abuse and neglect of petitioner as a young child in the late 1960s and early 1970s, including a number of visits for infected insect bites, and a head injury incurred "running into the corner of a coffee table. (Ex. 29 at 336-58.)

(s) Coroner's records indicate neglect of petitioner's younger brother Mario on the day of his death. (Ex. 100 at 1971.)

(t) Medical records of petitioner's siblings describe petitioner's mother suffering from dizziness and headaches during pregnancy, and document neglect and abuse, of the Jones children. (Ex. 37 at 707-15; Ex. 40 at 815-18; Ex. 35 at 695-99.) For example, medical records of petitioner's youngest brother, Alvin, detail being struck on the head by a "flying glass plate" and, at age four, being treated for lethargy and "alcohol fragrant" following being pushed under a car. (Ex. 35 at 697, 699.)

(u) Social service records for petitioner's mother detail abuse and neglect of the Jones children in the early 1980s. (Ex. 88 at 1793.)

(v) Medical records and court records chronicle alcoholism, substance abuse and drunk driving with respect to various family and extended family members. (Ex. 106 at 2234; Ex. 43 at 845; Ex. 45 at 891-97; Ex. 46 at 898; Ex. 44 at 885-90; Ex. 36 at 700-05; Ex. 163 at 2961-70.)

(w) Court records of petitioner's paternal grandfather, Ernest "Doc" Jones, show that he had been polygamously married to petitioner's paternal grandmother. (Ex. 109 at 2259-69.)

(x) Medical records of petitioner's maternal uncle, Carvis Baldwin, indicate his dysfunctional sexualization. (Ex. 38 at 725-800.)

(y) Military records of petitioner's paternal uncle, Thomas Jones, contain evidence of poverty of the petitioner's family and his extended family. (Ex. 90 at 1923-32.)

g. Trial counsel's failure to present this mitigation evidence was prejudicial.

(1) Reasonably competent counsel would have investigated, developed and presented the foregoing compelling mitigation evidence. Many witnesses were ready and willing to provide trial counsel with this wealth of information that would have placed petitioner's conduct more fully in context, and given the jury a full, accurate picture of who he was. Numerous lay witnesses,

substantial documentation, and mental health experts would have more completely attested to petitioner's longstanding mental disorders and impairments. Had trial counsel presented to the jury this comprehensive picture of petitioner's serious mental illness and lifelong mental impairments, the jury would have had the tools to understand the connection between petitioner's mental health history, and in particular his dissociative defense mechanism – which takes over when he is under what he perceives to be a high degree of stress – and his actions on the night of the crime. The presentation of the multiple risk factors across petitioner's lifetime, and a comprehensive presentation of petitioner's mental health history, would have demonstrated to the jury the true hardships and tragedies of petitioner's life, with a reasonable probability that the result of the proceedings would have been different.

3. Trial counsel failed to adequately retain, consult, and prepare mental health experts who could have reviewed, evaluated and explained how the mitigation evidence contributed to petitioner's development, functioning, and mental illness from birth through the time of the crime.

a. Trial counsel knew that such expert testimony was the "cornerstone of the penalty phase defense." (Ex. 12 at 110.) Trial counsel prejudicially failed adequately to prepare, develop and present compelling expert testimony at the penalty phase. Trial counsel unreasonably and prejudicially failed to provide his experts with materials and information relevant to their assessments, including basic social history documents and interviews critical to the evaluation of petitioner's mental state at the time of the crime. Trial counsel also prejudicially failed to provide his experts with adequate time to conduct their evaluations, requesting their appointments only at the eleventh hour, and receiving the results of their evaluations immediately before, or in some instances after, petitioner's trial had begun. Even with respect to the limited mitigation evidence presented, trial counsel unreasonably and prejudicially failed to have any experts explain how the events and circumstances described affected petitioner, in order to provide the jury with ample evidence with which to return a

verdict of life imprisonment.

(1) Had trial counsel, instead, conducted a professionally competent penalty phase investigation, a qualified expert moreover could have testified to the significant effects that petitioner's life experience and upbringing had on petitioner's functioning, personality development, and mental illness. Such testimony would have provided the jury with a more complete framework in which to evaluate the mitigation evidence presented. Instead, the jury was left with virtually no guidance as to the implications, effects or impacts petitioner's various personal and family experiences had on him, and instead, they voted for a death sentence. By this failure, trial counsel violated petitioner's rights to the effective assistance of counsel.

(a) Trial counsel hired Dr. Claudewell Thomas in August 1994 to evaluate petitioner with respect to his mental state at the time of the crime. Dr. Thomas was hired only a few months before the trial began. By letter, trial counsel asked him whether he believed "that [Mr. Jones] was legally insane at the time of the offense. If you do not believe he was legally insane or even if you do, whether he is suffering from some mental condition or defect which he could not control and which might help explain his behavior." (Ex. 154 at 274.) Dr. Thomas interviewed petitioner in September 1994, and recommended that trial counsel retain another expert to conduct a complete battery of neuropsychological tests. Dr. Thomas presented his findings to trial counsel in December 1994, after petitioner's trial had begun, and after the neuropsychological testing was completed. Those findings included Dr. Thomas's opinion that petitioner's competence to stand trial was an issue (*id*.), and that petitioner suffered from schizoaffective schizophrenia, with a depressive cast, and also suffered from a major dissociative disorder (*id*. at 2750). These conditions had been progressively worsening over time, and while in custody at the Los Angeles County jail, petitioner required prescriptions of powerful antipsychotic medications. Petitioner's mental disorder waxed and waned: At any given moment he might look alert and oriented, but petitioner's mental state could deteriorate rapidly. (*Id*. at 2750-

51.)

(b) Trial counsel did not meet with Dr. Thomas until December 20, 1994, at which time Dr. Thomas explained the rarity and severity of petitioner's mental disorders in more detail. (*Id*. at 2752; Ex. 150 at 2731.) As a result of this and other consultations, Dr. Thomas opined to trial counsel that petitioner was in any event not competent to testify in his own behalf; that the nature of petitioner's disorder resulted in petitioner's own great shame and remorse; that petitioner had great difficulty recalling events as they occurred, often trying to fill in the memory gaps with inaccurate, but genuinely held, delusional beliefs; and that petitioner could not control or predict when his dissociative episodes might be triggered. (Ex. 154 at 2752.) Dr. Thomas presented these findings to the jury only at the penalty phase of the trial, not at the guilt phase. (30 RT 4408-554.)

(c) Over the course of the Fall of 1994 – and at least through the end of December 1994, after Dr. Thomas presented his initial findings to trial counsel orally and in writing – trial counsel provided various materials to Dr. Thomas for his review in connection with his psychiatric evaluation of petitioner, including police and probation reports, previous mental health evaluations, and a limited number of witness interview summaries. (Ex. 154 at 2749-50.) Dr. Thomas was dissatisfied with the limited nature of the materials and his contact with trial counsel, but he did not receive any additional materials despite his requests. Dr. Thomas observed:

> Mr. Manaster had very little time to prepare a mental state defense and thus did not have much time to direct or assist in my evaluation of Mr. Jones. I wanted to work on the case as best I could, but my limited contact with Mr. Manaster was very dissatisfying. The case apparently had caused Mr. Manaster a great deal of distress, which adversely affected his decision-making . . . Upon reviewing the materials provided by Mr.

> Manaster, I noted several areas in which information about Mr. Jones's social history and functioning were lacking. I conveyed to Mr. Manaster the need to obtain this information, but at no time was this information provided to me.

(Ex. 154 at 2749.)

(2) Trial counsel further unreasonably failed to keep Dr. Thomas apprised of petitioner's relevant mental condition and failed adequately to consult with Dr. Thomas regarding petitioner's testimony. Prior to petitioner's guilt phase testimony, trial counsel discussed with petitioner his flashback to seeing his mother in bed, as part of the preparation for petitioner's testimony. Trial counsel neither informed Dr. Thomas of this critical revelation nor consulted with him about it in any way prior to petitioner's testimony. When petitioner later discussed this flashback with Dr. Thomas on February 1, 1995, Dr. Thomas was unaware that petitioner had discussed it with counsel, and that he had testified about it to the jury. In fact, Dr. Thomas was unaware that petitioner had even testified until the prosecutor informed him of this fact during his cross-examination. (Ex. 154 at 2752-53.)

(a) Dr. Thomas, therefore, could not evaluate or corroborate his own preliminary findings with the type of basic social history data mental health professionals typically relied upon in developing and presenting their medical opinions. Trial counsel had no strategic reason for this failure: He failed both to provide the expert with materials already available to him, and he failed to investigate, develop and convey to the expert the results of a minimally competent investigation into petitioner's history and background. (Ex. 150 at 2733-34; Ex.154 at 2750.)

(3) Trial counsel failed to inform Dr. Thomas as to the fundamental procedures of a capital trial, and the role of mitigation in the penalty phase of a capital trial.

(a) Trial counsel further failed to inform Dr. Thomas about

the unique procedures of a capital trial to ensure that Dr. Thomas understood his role in petitioner's penalty trial and the unique role of mitigation in a capital penalty trial. Dr. Thomas believed he was retained to opine on petitioner's mental state at the time of the crime, and was never informed there was any other role he could play as a testifying expert at the penalty phase. Trial counsel did not explain to the experts their roles in the case or guide their assessment in light of the California death penalty statute and counsel's own trial strategy.

> At no time prior to my testifying did Mr. Manaster explain my role in the capital sentencing context. He did not explain the scope of potential mitigation in a capital trial or the importance that such information may have on a jury's decision. Thus, I did not testify about substantial mitigating factors in Mr. Jones's case.
>
> I wish I had better understood the role of mitigation in a capital case. I would have wanted an opportunity to testify about even the limited information I did have of the dysfunctional family life Mr. Jones had, and the impact it had on his growth and functioning. I received a limited amount of information from Mr. Manaster, and did not know whether that information was presented to the jury through other witnesses. I mentioned the information briefly a few times during my testimony, but the majority of Mr. Manaster's questions focused specifically on Mr. Jones's mental state at the time of the crime.

(Ex. 154 at 2755.)

(b) Trial counsel's failure had a substantial, prejudicial impact on petitioner's penalty verdict, because Dr. Thomas testified about virtually none of the mitigation evidence available or reasonably available to trial counsel had he conducted a minimally competent social history investigation.

(4) Trial counsel prejudicially failed to present to the jury many

of Dr. Thomas's relevant psychiatric findings.

(a) At the penalty phase, Dr. Thomas's testimony focused on petitioner's mental state at the time of the crime. As a result, Dr. Thomas never testified about a number of his other, relevant findings of which trial counsel was actually, or reasonably should have been aware, including: that petitioner's competence to stand trial was at issue; petitioner's delusional thought disorder and memory impairments, particularly related to dissociative episodes, rendered him an unreliable witness on his own behalf and should not have testified; petitioner's medications included Theodrine, which has been known to cause psychosis; and, petitioner's mental disorder was not one that can be detected from observation alone, but was severe and longstanding nonetheless. A reasonably competent and adequately prepared mental health expert further could have testified that petitioner had been prescribed antipsychotic medication by jail medical staff, and that there was a substantial doubt as to whether petitioner was competent to stand trial, particularly where that medical regimen had been interrupted without clinical basis for the change. (*Id*. at 2751-54.)

(5) Trial counsel prejudicially failed to present to the jury expert testimony to explain the other mitigation put on by the defense, or to explain petitioner's two prior convictions in the context of his mental illness.

(a) Trial counsel failed to have Dr. Thomas discuss and give effect to what little mitigation evidence had been offered through lay witnesses at the penalty phase. At a minimum, Dr. Thomas could have reviewed all of the evidence presented in the penalty phase and explained to the jury some of the effects petitioner's parents' alcoholism, fighting and domestic disturbances had on a young child, as well as the effect of his father's departure, his brother's violent death, and his family's poverty. Dr. Thomas could have also explained the nexus between the incident in which Earnest Lee found his wife in bed with Bill Howell, and the effect that must have had on petitioner, a pre-schooler at the time. (*Id*. at 2758.) Critically, trial counsel failed to elicit from Dr. Thomas much information concerning petitioner's two

prior convictions, and why they, too, were the product of a mentally ill, depressed and suicidal individual, and not a man with any desire or intent to hurt women. (Ex. 178 at 3155-56.)

(b) The jury similarly never heard about other mitigation evidence Dr. Thomas had reviewed through documentation. For example, Dr. Thomas reviewed petitioner's school records from the Los Angeles Unified School District, but was asked to discuss very little information in them; and no other penalty phase witness filled that obvious gap. Dr. Thomas's testimony as to petitioner's school performance consisted entirely of three pages of testimony in which Dr. Thomas stated that the records indicated a grade level performance below the age expectation of petitioner. And, that in Dr. Thomas's interview with petitioner, petitioner had indicated that he had what amounted to a conduct disturbance in terms of aggressive behavior in relation to other children and disruption of the classroom. Dr. Thomas opined that petitioner suffered from a constellation of symptoms, including impulsivity and inattention that amounted to Attention Deficit Disorder. (30 RT 4448-50.)

(c) The jury, therefore, heard only that petitioner, at some point in time, was performing below the level expected of him, and had some behavior problems. Trial counsel failed to present through Dr. Thomas the remaining wealth of information in petitioner's school records, including, but not limited to: that he was shuttled and bussed to numerous schools as a child; that he was never able to perform at his grade level, and often was multiple grades below his peers; that he was placed in Special Education classes at more than one school, at one time for receiving an IQ score in the intellectual disability range of functioning; that he tried hard and did better when he received individualized instruction in elementary Special Education classes, but he was removed from those classes; and, that his "conduct disturbance" arose only when he was returned to mainstream classes where he floundered. (*See generally*, Ex. Ex. 50 at 1095-1148; Ex. 51 at 1149-67; Ex. 52 at 1168-70.)

(d) Another example of a missed opportunity was trial

counsel's failure to enlist Dr. Thomas's expertise to explain the circumstances and the family dynamic at work during the critical telephone call between petitioner and his oldest sister Gloria on New Year's Eve, 1994. Had trial counsel conducted a minimally competent investigation into petitioner's family history and background, he would also have been able to present, through a mental health expert, compelling evidence relevant to the exchange between sister and brother, including, but not limited to: the extreme difficulties petitioner had communicating with others and expressing his emotions, due to his lifetime of trauma (Ex. 178 at 3117, 3152-53; Ex. 151 at 2736; Ex. 16 at 149; Ex. 152 at 2741); the central communication style of the rest of the Jones family, which was verbal and physical confrontation, ready to challenge and to fight over anything, rather than healthy, affectionate or calm conversation (Ex. 152 at 2741-42; Ex. 124 at 2502-03; Ex. 146 at 2714; Ex. 147 at 2719); an accurate picture of petitioner's poor intellectual and cognitive functioning, poor impulse control, and poor executive reasoning and planning skills due to, among other factors, damage to his frontal lobes, which substantially impaired his ability to understand and process information and react to new information quickly and appropriately (Ex. 175 at 3069; Ex. 154 at 2751, 2755-56; 2761; Ex. 178 at 3154-55); Gloria's role in petitioner's life as one of the few individuals who made a more genuine effort to play a caretaker role, despite her youth (Ex. 146 at 2714; Ex. 124 at 2505; Ex. 16 at 170); and, petitioner's unshakeable ethic of loyalty to family and friends which he always maintained, and which he believed Gloria and his other siblings would accord him (Ex. 151 at 2735-36; Ex. 149 at 2728; Ex. 24 at 245; Ex. 154 at 2750, 2759; Ex. 178 at 3131, 3155).

(e) Trial counsel made no attempt to provide any mental health expert with the above information in order for the expert to evaluate petitioner's mental state and the substance of petitioner's comments during the telephone call. Consequently, no expert testified about this telephone call during the penalty phase to place this heated exchange in context, against the backdrop of petitioner's severe psychosis and worsening decompensation. (Ex. 154 at 2750-51.) Moreover, trial

counsel was ineffective for not obtaining a complete copy of petitioner's jail medical records. Had trial counsel obtained a complete copy of petitioner's jail medical records, at a minimum, he would have been able to show that petitioner was not in fact receiving his anti-anxiety or anti-psychotic medication at the time he placed the phone call to Gloria. Had trial counsel furnished his expert with a copy of the records, a mental health expert could have explained that petitioner's agitation and inability to modulate his thoughts and reactions to his sister's perceived abandonment of him were the effect of untreated mental illness and delusional thought processes, and his behavior was not that of a rational, competent individual.

(f) In sum, had Dr. Thomas been provided with the numerous lay witness accounts, pertinent documentation, and ample time to interview and evaluate petitioner, he could have synthesized all of the information that was, or reasonably should have been presented at the penalty phase (*see, supra*, paragraph 2.), to render "a more complete diagnosis and assessment of Mr. Jones's mental condition, and given a more persuasive account of his development and background leading up to the night of the incident." (Ex. 154 at 2756-57.) The evidence would have provided the jury with a far more accurate and comprehensive picture of the origin and etiology of petitioner's mental health, and a fuller context in which to place petitioner's account of the incident with Mrs. Miller.

(g) Absent trial counsel's deficient performance, the jury would have learned that petitioner's mental impairments, which are of long-standing etiology and predated the crime, thwarted petitioner's ability to comprehend events, plan responses, and control his behavior, particularly during stressful situations, with the reasonable likelihood that the result of the proceedings would have been different.

(6) Trial counsel failed to consult with, retain and provide materials to Dr. William Spindell or obtain the services of another neuropsychologist.

(a) Trial counsel unreasonably failed to consult with, retain, and provide materials to a competent neuropsychologist. After Dr. Thomas

recommended that neuropsychological testing be conducted, trial counsel requested and had appointed Dr. William Spindell, immediately before the trial began. With almost no time and incomplete materials, Dr. Spindell completed a partial battery of tests on petitioner and provided a report to trial counsel on November 11, 1994, just nineteen days before trial began. Trial counsel was not satisfied with some of the work, including multiple factual errors Dr. Spindell wrote in his final report to trial counsel. Trial counsel had wanted two mental health experts to testify at petitioner's trial, and he had no strategic reason for failing to do so; by the time he determined that the work of one of the experts was not satisfactory, petitioner's trial was beginning and he had no time left to hire anyone else. (Ex. 150 at 2732-33.)

(b) Reasonably competent counsel would have employed a neuropsychologist and provided the expert with sufficient time and information upon which to complete a full evaluation of petitioner's cognitive functioning, and provided the expert with a complete social and medical history relevant to this testing. Had trial counsel done so, the jury would have heard compelling testimony that petitioner suffers from severe brain damage, with profound impairments particularly to his frontal and parietal lobes, as well as the corpus callosum. This organic damage severely affects numerous aspects of petitioner's mental functioning, including memory, concentration, attention, perception of spatial relationships, and overall academic aptitude. Damage to the frontal lobes alone can impair judgment, insight, control, the ability to plan and organize, and overall self-regulation. (Ex. 175 at 3065-66.)

(c) As indicated by his extremely poor performance during neuropsychological testing, "Mr. Jones suffers from such severe brain damage that he is unable to function at the same level as 99 percent of those in his age category." (*Id.* at 3072.)

(d) The jury would have further heard that the insults to petitioner's brain resulting in this damage began even before he was born, when his mother smoked and drank alcohol during her pregnancy with him (Ex. 18 at 195-96;

Ex. 124 at 2501; Ex. 4 at 55), and continued after birth, through numerous head injuries petitioner received as a very young child, and, through childhood malnutrition and neglect (Ex. 175 at 3073-75).

(e) The jury also would have heard that on the standard Wechsler Adult Intelligence Scale–III test, petitioner earned a full-scale IQ of no higher than 77, which placed him only a few points above the intellectual disability range. (*Id*. at 3063.) Other intelligence instruments, however, place his score squarely within the mental retardation range. (Ex. 51 at 1161) Reasonably competent counsel would have also presented this expert witness testimony, and trial counsel had no informed strategic reason not to retain and present this evidence during the penalty phase. (Ex. 150 at 2732.)

(f) Absent trial counsel's deficient performance, the jury would have learned that petitioner's mental impairments, which are of long-standing etiology and predated the crime, thwarted petitioner's ability to comprehend events, plan responses, and control his behavior, particularly during stressful situations, and that these impairments, among others, in fact prevented him from planning, controlling, or altering his actions during his highly emotional and stressful encounter with Mrs. Miller. Had the jury been presented with all of this information, there is a reasonable likelihood that they would have voted for a sentence less than death.

4. Trial counsel unreasonably and prejudicially failed to investigate and challenge the prosecution's improper victim impact evidence.

a. Trial counsel failed to object to, or otherwise challenge, the irrelevant and false victim impact evidence offered by the prosecution. The prosecution presented misleading victim impact evidence that the victim's daughter began using drugs as a result of her mother's death, irrelevant testimony regarding the father's alleged anger with the witness, and testimony regarding the witness's father's death. Trial counsel was aware of the scope of this evidence before the penalty phase testimony began, yet failed to request that the testimony be limited to only relevant and

legally admissible victim impact evidence. (28 RT 4121.)

b. The victim's daughter and petitioner's former girlfriend, Ms. Miller, testified that after her mother's death her sister began to use drugs and alcohol so extensively that her five children were taken away from her. (28 RT 4140-41.) Ms. Miller further testified that her sister's substance abuse worsened after their father's death. Trial counsel failed to object and request that the jury disregard this irrelevant testimony because it was misleading. Ms. Miller's sister abused drugs prior to her mother's death. (28 RT 4143-44.) Had trial counsel conducted a reasonable investigation, or at a minimum requested a limiting instruction, he would have been able to exclude or counter this prejudicial and misleading evidence.

c. Ms. Miller also testified that her father blamed her for the victim's death, and that this put a strain on their relationship. This testimony was misleading as well as irrelevant. Ms. Miller testified that her father blamed her and her sister for their mother's death. Despite his alleged anger with her, Ms. Miller's father wanted her around him constantly and also bought her things, including a new car. (28 RT 4138.) Ms. Miller testified that once her drug-addicted sister returned to Fresno and he was alone in his house again, she and her father resumed their former relationship. (28 RT 4138.) It is unclear why this testimony was presented, let alone presented to the jury unchallenged. It had no relevance to any issue in the penalty phase, other than to garner sympathy for Ms. Miller. It was clearly unreasonable for trial counsel to fail to challenge the admissibility of this testimony.

d. Ms. Miller also testified that within eight months of the crime, her father "grieved himself to death." (28 RT 4138.) Although regrettable, the death of Ms. Miller's father had no bearing on how the victim's death affected her family. Months after his wife's death, during this process of "griev[ing] himself to death," Mr. Miller remarried. (Ex. 28 at 315.) In light of his intervening marriage, testimony that her father "grieved himself to death," is more prejudicial than probative, and should have been excluded, on those grounds. Furthermore, trial counsel knew that Mr. Miller

had a long history of hypertension, was a heavy drinker, and died, not from a broken heart, but from arteriosclerotic cardiovascular disease. 'Trial counsel had no legitimate reason for failing to challenge the admissibility of this prejudicial and misleading evidence prior to Ms. Miller's testimony because he was aware of her father's marriage and the true cause of his death prior to the start of trial.

5. Individually and cumulatively, the foregoing errors by counsel were objectively unreasonable under prevailing professional norms at the time of petitioner's capital trial, and rendered trial counsel's performance constitutionally deficient at the penalty phase of petitioner's trial. But for trial counsel's unprofessional errors, considered individually and cumulatively, petitioner would not have been sentenced to death.

Q. CLAIM SEVENTEEN: THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS WHEN IT PERMITTED THE PROSECUTION TO ELICIT IRRELEVANT, MISLEADING, AND HIGHLY PREJUDICIAL INFORMATION DURING THE PENALTY PHASE OF PETITONER'S TRIAL AND WHEN IT PRECLUDED PETITIONER FROM PRESENTING EVIDENCE THAT WOULD MITIGATE THIS INFORMATION.

Petitioner's death sentence was imposed in violation of petitioner's rights to a fair, reliable determination of penalty based on the jury's consideration of accurate, non-prejudicial, and relevant evidence as guaranteed by the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, because the trial court permitted the prosecution to elicit irrelevant facts concerning petitioner's minor, non-violent jail infractions and present them in a highly prejudicial manner during the penalty phase of his trial. The trial court further violated petitioner's rights to a fair determination of penalty when it precluded petitioner from presenting evidence that would mitigate this information.

In support of this claim petitioner offers the following facts, among others, to be presented after full discovery, investigation, adequate funding, access to this Court's

subpoena power, and after an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Fourteen, Sixteen, Twenty-three, and the accompanying exhibits are incorporated by reference as if fully set forth herein.

2. Petitioner sought to introduce the testimony of prison expert James Park, a former associate prison warden and prison consultant to the California State Legislature, to establish that petitioner would likely lead a productive, non-violent life if he were sentenced to life without the possibility of parole. (29 RT 4212.)

3. The prosecution informed the Court that he intended to cross-examine Mr. Park about petitioner's three minor, non-violent "115" disciplinary actions in prison. (*Id*. at 4214.) The prosecutor further informed the Court that he also intended to question Mr. Park about petitioner's ten even more minor "128" disciplinary infractions, described by Mr. Park as incidents that involved petitioner's mere "skirting" of prison rules. (*Id*. at 4306, 4313.)

4. Petitioner objected to the introduction of all the non-violent disciplinary infractions arguing that they were irrelevant to the jury's determination of petitioner's future dangerousness because of their non-violent nature and that they were also highly prejudicial. (*Id*. at 4216-17.) The Court overruled the objections and allowed the prosecutor to cross-examine Mr. Park about these minor, non-violent infractions. (*Id*. at 4219.)

5. During the course of cross-examination, the prosecution unfairly and prejudicially injected misleading information into the sentencing phase of petitioner's trial. By questioning Mr. Park on three minor, non-violent "115" disciplinary write-ups petitioner received in prison, the prosecution introduced information that was completely irrelevant to the jury's determination as to whether petitioner should live or die.

a. The prosecutor implied that petitioner was a sophisticated criminal because he knew how to make jailhouse wine, which he asserted, with no factual basis,

was a complex process.[14] (*Id*. at 4314-15.) The prosecutor's insinuations that petitioner was a high-level, clever criminal were harmful because they were not only factually inaccurate, but the exact opposite was true – petitioner suffered from significantly impaired intellectual functioning. (*See supra* Claim Sixteen and *infra* Claim Twenty-three.) The prosecution's remarks and questions were also particularly prejudicial because they implied that petitioner could pose a future danger in prison.

b. The prosecutor further prejudiced petitioner when he suggested to the jury that petitioner made wine on a regular basis and that after drinking the wine petitioner would become belligerent. (*Id*. at 4316-17.) The prosecutor asserted that petitioner had impulse control problems which were exacerbated by alcohol. (*Id*. at 4319.) The prosecutor's assertions constitute a baseless manipulation of petitioner's minor infractions, stretched in an attempt to make them resemble the circumstances surrounding the crime. The prosecution's masterful manipulation was an attempt to lead the jury to conclude that petitioner would kill someone in prison if given anything other than a death sentence.

c. The prosecutor further rendered petitioner's sentencing proceedings constitutionally unreliable when he asserted that petitioner's shouting at another inmate over an incident involving crackers constituted a violent act. (*Id*. at 4312-13.) In fact, petitioner's behavior was not violent nor did it lead to any violence. The prosecutor's mischaracterization of this incident impermissibly and unconstitutionally prejudiced petitioner's sentencing phase proceedings.

6. The trial court further erred by permitting the prosecution to cross-examine Mr. Park about an incident where the jail guards used mace to subdue another inmate and in the process, accidentally sprayed petitioner who was standing in close proximity.

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[14] Mr. Park did testify that making "pruno" was "probably general knowledge" to those incarcerated "unless they just arrived." (29 RT 4314-15.)

a. The prosecutor insinuated that petitioner was sprayed with mace because he was the individual causing the problem, despite the fact that there was no factual basis for this contention. (*Id*. at 4340-41.)

b. Indeed, the factual information available to the prosecutor was that it was a different inmate who was causing the problem that required such a drastic security action. (*Id*. at 4211-12.)

c. Permitting the prosecution to cross-examine Mr. Park about this incident unfairly led the jury to believe that petitioner was so violent that he had to be subdued with mace. This belief directly and unfairly prejudiced the jury in their sentencing phase deliberations.

7. The trial court erred further still by permitting the prosecution to cross-examine Mr. Park about petitioner's ten very minor "128" infractions.

a. These incidents consisted of petitioner failing to follow the instructions of guards over minor matters; going to see the dentist instead of doing his work; being in another "man's face"; and, being in a part of the jail where he was not permitted. (*Id*. at 4306, 4313.)

b. These infractions were non-violent and were considered only a "minor skirting" of prison rules that did not require a formal write-up. (*Id*. at 4306.) Allowing these incidents to go to the jury unfairly and unconstitutionally painted petitioner as a person who would not cooperate with the guards and who could not be controlled.

8. The trial judge compounded the prejudicial effect of allowing the jury to hear and consider the irrelevant and non-violent infractions when it prevented defense counsel from attempting to ameliorate the prejudice wrought by the prosecution's irrelevant and baseless insinuations.

a. Trial counsel argued that if the prosecutor were permitted to introduce evidence of petitioner's non-violent, minor disciplinary infractions, he should be permitted to introduce the fact that if sentenced to life without the possibility

of parole, petitioner would be housed at the highest level of security and that petitioner would be less likely to engage in the objectionable behavior that led to the 115 and 128 disciplinary actions. (*Id*. at 4212-16, 4330-31.)

b. The trial court ruled against defense counsel and consequently prevented petitioner from presenting evidence that would have substantially mitigated his past jail infractions and his potential to be a future danger in prison. By doing so, the trial judge deprived petitioner of his right to due process and to a fair trial.

9. Allowing the jury to hear about petitioner's irrelevant, non-violent, disciplinary infractions was especially prejudicially because the prosecution used them in a specious attempt to contradict the defense evidence that petitioner would adjust well in prison, if sentenced to life without the possibility of parole. The prosecution's use of petitioner's non-violent, irrelevant - yet highly prejudicial - minor prison infractions, therefore, had a substantial and injurious effect or influence on the jury's penalty phase verdict.

10. Trial counsel's unreasonable and prejudicial failure to fully challenge all of the bases for the introduction of petitioner's non-violent, minor disciplinary infractions, including its prejudicial effect on a fair and reliable sentencing determination, and his failure to object to the prosecutor's arguments in favor of the jury considering and weighing this evidence as a factor in aggravation constituted ineffective assistance of counsel.

11. To the extent that additional support for this claim should have been raised on direct appeal, petitioner's appellate counsel rendered prejudicially ineffective assistance in violation of petitioner's Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection in failing to do so.

R. CLAIM EIGHTEEN: SEVERAL INSTANCES OF UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL.

Petitioner's conviction, death sentence, and confinement were unlawfully

obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate, and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice, by several instances of juror misconduct in the course of his trial.

Due to the presence of two high profile cases and an unusual media circus atmosphere in the Los Angeles County courthouse, petitioner's trial took place in an environment that created an unacceptable risk that impermissible factors affected the jury's deliberative process. Given the unusual circumstances, both of petitioner's presiding judges repeatedly and extensively instructed the jurors about their duties and obligations. Despite these repeated instructions and admonitions, jurors committed numerous instances of misconduct during the guilt and penalty phases of petitioner's trial. Members of the jury failed to fulfill their obligation (1) to render their verdict following consideration of only the evidence presented in the case; (2) to avoid discussing petitioner's case with anyone other than fellow deliberating jurors; (3) to avoid premature discussions with other jurors; (4) to avoid prejudging the case before the presentation of all evidence; (5) to avoid expressing an emphatic opinion at the beginning of deliberations, but rather to approach their task as impartial jurors with an open mind throughout the deliberation process; (6) to include only sitting, and not alternate, jurors in the deliberations; (7) to avoid inserting their own untested knowledge of expert matters into the deliberation process; (8) to pay close attention to all of the evidence presented at trial; and, (9) to follow the law as laid out in the instructions.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Nine, Twelve,

Thirteen, Twenty-one, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Petitioner's trial occurred at the same time and in the same courthouse as two distinct high-profile and controversial cases involving defendants O.J. Simpson and Heidi Fleiss. By all accounts, the atmosphere in the courthouse resembled a circus, with television crews and spectators crowding the hallways and courtrooms and the heightened security making the daily experience of entering the courthouse a taxing one. This courthouse environment, together with the fact that petitioner's jury was not restricted from watching the news, created an unacceptable risk that impermissible factors affected the jury's deliberative process.

a. Through their media exposure, the jurors improperly considered evidence extraneous to petitioner's case. Due to the increased security and bomb threats, the jurors were adversely affected by the courthouse environment, violating petitioner's fundamental right to a fair trial by an impartial jury. Jurors recalled the hectic atmosphere several years after the trial.

(1) Juror Omar Muhammad:

> Mr. Jones's trial occurred at the same time as the O.J. Simpson trial. In fact, the Simpson trial was just a courtroom away from us. The media attention that the Simpson trial received completely overshadowed the Jones trial. The difference between the two trials was quite amazing. I could not get over how many people gathered at the courthouse to see the Simpson trial, it was a circus. Along with all the increased media attention, the Simpson trial also increased the security in the building. It was a long process just to get passed the security checkpoints and into the courthouse everyday.

b. (Ex. 138 at 2689.)

(2) Juror Richard Freed:

> O.J. Simpson's trial was going on at the same time, just down the hall from us. The courthouse was busy with reporters and people milling around. I enjoyed sitting in the cafeteria before court started and watching people. I saw many of the main players in O.J.'s case, either in the hallway, the cafeteria, or on the elevator. The jurors on Mr. Jones's case were not restricted from watching television news, so we were aware of what was happening in O.J.'s trial.

c. (Ex. 127 at 2564.)

(3) Juror Emil Ruotolo:

> There was quite a bit going on around that time. In fact, O.J. Simpson's trial was just two courtrooms away from us, and there was another high profile case going on across the hall. The courthouse was full of reporters and people milling around. . . . Our judge made a big deal about how his courtroom would be nothing like O.J.'s; he seemed bothered by all the attention the Simpson case was receiving. . . . During the trial, there were a couple of bomb scares. Due to one of the scares, we were not allowed to leave until late at night. We were never told if the bombs were real or not.

d. (Ex. 9 at 92.)

(4) Juror Robert Reagan gave an interview after the trial focusing on the fact that petitioner's trial took place at the same time as that of O.J. Simpson:

> After the trial was over I received a phone call at work from Paul Feldman, a reporter with the Los Angeles Times. . . . He interviewed me and an article was later published with quotes of mine. The article focused mainly on the disparities and similarities between the trials of Mr. Jones and O.J. Simpson, which was

> taking place down the hall. The disparities were shocking and disturbing. Mr. Jones's jurors were allowed to watch television and were therefore aware of what was going on in Judge Ito's courtroom.

e. (Ex. 133 at 2645.)

(5) Alternate juror Virginia Surprenant: "The courthouse was extremely crowded. O.J. Simpson and Heidi Fleiss were also being tried around the same time in the same courthouse. Even though Mr. Jones's trial was not as high profile as these other cases, there were spectators there everyday." (Ex. 23 at 239.)

f. Petitioner's jurors were not restricted from watching the television news and were exposed to extensive extra-record information relating to DNA evidence from the O.J. Simpson trial. The jurors committed prejudicial misconduct by considering this extraneous evidence during petitioner's trial.

(1) Juror Emil Ruotolo admitted "[t]he woman who testified about the DNA evidence was really impressive. We talked about how she went to the same school as the DNA expert in the Simpson trial so we know she had to be good. After listening to her, I became a firm believer in DNA testing." (Ex. 9 at 93.) Juror Richard Freed similarly agreed that "[t]he person who testified about the DNA evidence was really impressive." (Ex. 127 at 2564.)

(2) The prejudice to petitioner is clear. DNA evidence played a crucial role in petitioner's case. The prosecution's DNA expert's testimony was unfairly and improperly bolstered by extraneous evidence connecting her to the O.J. Simpson trial. Furthermore, the deficiencies in the DNA evidence presented at petitioner's trial were obscured by the overwhelming extra-record information about DNA received by the jury through the media coverage of the Simpson trial. (*See supra* Claim One at paragraph 5 and Claim Thirteen.)

3. Throughout the trial, the court repeatedly instructed the jury on their obligations and duties. The jurors were instructed (1) not to discuss the case with

anyone other than other jurors during deliberations; (2) to base their decisions only upon the evidence presented in the case; and, (3) not to prejudge the case or determine the penalty before hearing all of the evidence to be presented. The trial court explained to the jurors in explicit terms that this type of behavior constitutes misconduct and jurors were to report other jurors that committed misconduct during the trial.

a. Upon swearing in the jurors at the outset of the trial, Judge Trammell took the unusual step of explaining the nature of juror misconduct to the jury and strongly admonishing them to avoid it:

> I am going to do something I have never done before but I feel compelled in light of what happened next door in the Heidi Fleiss case; that is, I am ordering each and every one of you not to discuss this case with anyone until the case is actually submitted to the jury. . . . In the guilt phase you are not to discuss or consider the issue of penalty or punishment. . . . Lastly, you are not to visit any of the scenes during the course of the trial and you are not to talk to anyone about the case or the subject matter of penalty or punishment. That order is being made under penalty of contempt of court if any of you violates that order. . . . One of the questions we asked all of you in the questionnaire and to which some of you objected to and that was we said, if you observe anything going on with the other jurors that you feel is wrong, would you report it to the court? It's imperative that that be done because if we catch juror misconduct where we can substitute – if, in fact, there is misconduct, and we can remove the juror who's involved in the misconduct and substitute in one of the alternates, it saves the possibility of a new trial having to be granted or some additional repercussions along the way.

b. (13 RT 2331-2333.)

c. Prior to their guilt phase deliberations, Judge Ferns read the jury CALJIC 1.00, which instructed that they must base their verdict "on the facts and the law. . . . [Y]ou must determine the facts from the evidence received in the trial and not from any other source. . . . You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (26 RT 3816, 3818; 2 CT 254.)

(1) The second instruction read by the court, CALJIC 1.03, reinforced the idea in CALJIC 1.00 to base their decision on the evidence presented at trial and further instructed the jurors they were not to visit the crime scene or consult non-jurors or reference works for additional information. (26 RT 3819-3820; 2 CT 258.)

(2) Judge Ferns then emphasized this point by stating:

> And I usually don't highlight an instruction, but I had two instances last year, both homicide cases where one juror went and got a 1972 penal code to look up something, and that juror didn't remain. Another case, some jurors brought a newspaper article in and used that in their deliberations. Nobody told me about it until after the fact. So everything that you – and the only source of information on this information is what you got in here and the instructions that I'm giving to you that you'll take into the jury room.

d. (26 RT 3820.)

e. The court clearly instructed the jury not to consider petitioner's penalty while deliberating on the guilt verdict or the findings as to the special circumstances: "In your deliberations, the subject of penalty or punishment is not to be discussed or considered by you. This is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case."

(26 RT 3861-62; 2 CT 310 (CALJIC 8.83.2).) The court repeated this instruction shortly thereafter. (26 RT 3875.)

f. Prior to the penalty phase deliberations, the court once again instructed the jury with CALJIC No. 1.03. (2 CT 258; 31 RT 4611-12.) At this point, the jury had been admonished no less than four times about their obligation to avoid discussing the case with anyone other than deliberating jurors and to avoid considering evidence and information extraneous to the trial. In addition, two separate presiding judges felt it necessary to reinforce and emphasize this instruction to the jury.

g. The court also gave the jurors CALJIC 17.40, which instructed them to form their own opinion, but only after hearing all of the evidence and discussing it with fellow deliberating jurors. (2 CT 331; 31 RT 4693.)

h. The jury received CALJIC 17.41, which instructed on the proper attitude and conduct expected of jurors, including maintaining an open mind throughout the deliberation process. (2 CT 332; 31 RT 4694.)

i. In addition to the instructions noted above, the trial court also clearly admonished the alternate jurors not to discuss the case with other jurors or form an opinion prematurely. (31 RT 4697; 2 CT 338 (CALJIC 17.53).)

j. Before each and every recess, the jurors were again instructed not to discuss the case with anyone and not to deliberate further upon the case until all deliberating jurors were reassembled in the jury room. (*See, e.g.*, 2 CT 337 (CALJIC 17.52).)

4. Despite these clear and emphatic admonitions repeated throughout the trial, several jurors committed clear and highly prejudicial misconduct by discussing the case with third parties, considering evidence extraneous to that presented at trial, discussing the case prematurely among themselves, and determining and considering petitioner's penalty before or during the guilt phase of the trial.

a. Juror Youssif Botros, an Egyptian Coptic Christian, admitted to the other jurors during penalty deliberations that he had consulted with his priest about

petitioner's case:

> Another juror was a Coptic Christian from Egypt. He was having a difficult time sentencing someone to death so he asked his priest for help. His priest told him to read the Bible for guidance. He told us that he read the section of the Bible that spoke about 'an eye for an eye' and was therefore able to vote for death.

(Ex. 127 at 2565.)

b. In recounting to the rest of the jury his conversation with his priest and the particular section of the Bible that enabled him to reach a verdict of death, juror Botros necessarily involved, and thereby tainted, the entire jury with his misconduct. His introduction of a passage from the Bible ("an eye for an eye") into the deliberation process constituted the introduction of a particularly prejudicial type of extraneous evidence -- the Bible.

c. The remaining jurors also failed to follow the trial court's explicit instructions by not immediately reporting juror Botros's misconduct and the injection of Biblical tenets into petitioner's penalty deliberations, thereby committing further misconduct. (*See*, *e.g.*, Ex. 122 at 2475; Ex. 127 at 2565.)

d. Several other jurors directly violated the trial court's admonition to avoid premature discussion with fellow jurors and prejudgment of the case and penalty.

(1) Alternate juror Virginia Surprenant:

> Occasionally I went out to lunch with a couple of other jurors. We got to know each other pretty well. There was one juror in particular, an African American woman, who we were worried about. She never shared her feelings, so we feared that she was planning to vote for the other side. But when they started deliberating she was the first to speak her mind and she was very vocal that the jury had no choice but to sentence him to death.

(Ex. 23 at 240.)

5. Petitioner's jurors were discussing the case prematurely (and with someone who was not one of the twelve jurors) and, more egregiously, deciding petitioner's penalty well in advance of the close of evidence. Alternate juror Virginia Surprenant decided petitioner's penalty during the guilt phase: "As soon as I saw the photographs of Mrs. Miller it was set in my mind that he deserved the death penalty." (*Id*. at 239.)

(1) Most, if not all, of the jurors were considering and deciding petitioner's penalty of death during the guilt phase deliberations, in clear violation of the court's specific instructions to the contrary:

> Two men were extremely vocal about voting for the death penalty from the moment we stepped into the Jury Room for the guilt deliberations. One man was short, stocky, and appeared to be working-class. The other was a tall, older man. They said that Mr. Jones was guilty of these crimes and therefore he should get the death penalty. We talked about how the case was all about the guilt phase because once we decided that we knew we had to vote for death. . . . By the time the penalty phase came it was too late, our minds were already made up. We needed something to work with in the guilt phase, but there was nothing.

(Ex. 138 at 2690-91.)

(2) The prejudice to petitioner is clear. The jurors disregarded their instructions and misapplied the law in the respective phases of petitioner's trial, erroneously and prejudicially assuming that a guilty verdict immediately presupposed a sentence of death.

a. Several jurors took rigid and immovable positions at the outset of deliberations, contrary to the court's instructions. Aside from violating the court's specific instructions, their actions indicated that they had already made up their minds well in advance of the deliberations process.

(1) Juror Martha Williams, the sole African-American woman on petitioner's sitting jury, was "the first to speak her mind and she was very vocal that the jury had no choice but to sentence him to death." (Ex. 23 at 240.) By stating her opinion in such a way at the outset of penalty deliberations, juror Williams left no room for movement or thoughtful discussion.

(2) Juror Williams was not alone in taking a rigid stance early in the deliberations process: "Two men were extremely vocal about voting for the death penalty from the moment we stepped into the Jury Room for the guilt deliberations." (Ex. 138 at 2690.)

(3) Aside from the impropriety of deciding the penalty in the guilt phase, this approach and attitude toward the penalty determination was in direct contravention to the clear instruction of the court, and constituted misconduct, which therefore raises a presumption of prejudice to petitioner.

b. Ms. Surprenant's detailed and contemporaneous knowledge of what occurred during guilt and penalty deliberations demonstrates that the alternate jurors were present during those deliberations, another violation of the court's specific instructions. Ms. Suprenant admitted that:

> As an alternate juror, I watched the entire trial and sat in on the jury's deliberations for both the guilt and penalty phases. The other alternate juror and I had to sit on a couch in the Jury Room while the jury sat around a table deliberating. The alternates had to leave the room when the jurors voted on their guilt and penalty verdicts.

(Ex. 23 at 239.)

c. Another juror committed prejudicial misconduct by deciding petitioner's penalty during the guilt phase and allowing his decision to be influenced by sentiment, passion and prejudice.

(1) At the time of trial, the juror's wife and two daughters were

of similar ages to the victim and her two daughters. He was the only sitting juror with a wife and two daughters so close in age to the victim and her daughters:

> During guilt deliberations, one of the other jurors told us that he had a wife and two daughters about the same age as the victim and her daughters. He said he could understand how upset the daughter was and said that if his two daughters found his wife like that, that would be it, he would get the death penalty. He said right then and there, after hearing the daughter, he knew he had to vote for death. We all listened and felt for him, it must have been hard to hear that stuff with a wife and two kids so close in age to the victims.

(Ex. 9 at 93.)

(1) This is corroborated by juror Richard Freed: "During penalty deliberations, each of the jurors took turns speaking our mind. One of the jurors spoke passionately about his own family: he had a wife and daughters and was clearly very upset by the crimes." (Ex. 127 at 2565.)

(2) This juror committed prejudicial misconduct by deciding petitioner's penalty of death during the presentation of guilt phase evidence, in direct contravention of the trial court's clear instructions. He committed further prejudicial misconduct by basing his decision upon the sentiment and passion he felt due to the fact that his wife and daughters were of similar age to the victim and her two daughters, rather than upon the existence and weight of mitigating and aggravating factors as he was instructed to do by the trial court.

6. Two jurors committed prejudicial misconduct by injecting their own untested specialized knowledge into the deliberation process. By doing so, these jurors violated petitioner's Sixth, Eighth, and Fourteenth Amendment rights to confront and cross-examine witnesses, and essentially became unsworn witnesses at petitioner's trial; the prejudice is manifest because their comments were not substantially the same

as any evidence admitted in court.

a. Juror Richard Freed recalled the defense "argued that Mr. Jones was too drunk to have understood what he was doing. During guilt deliberations, I brought up the fact that Mr. Jones could not have been that drunk, as there was semen found in his victim; he was still able to become sexually aroused and to ejaculate." (Ex. 127 at 2564.)

(1) Juror Freed's assertions regarding human physiology while intoxicated, besides being of questionable scientific validity, constituted extrajudicial information considered by the jury during deliberations. Juror Freed, in effect, became an unsworn witness at petitioner's trial, violating petitioner's fundamental Sixth Amendment right to cross-examine and confront witnesses against him.

(2) Juror Freed, and by association the rest of the jurors, committed prejudicial misconduct by considering extraneous, unreliable evidence in determining petitioner's guilt. The prejudice to petitioner from juror Freed's misconduct is extreme. Petitioner's intoxication and resultant mental state were central and heavily contested issues in petitioner's trial.

b. Juror Omar Muhammad, a physician's assistant working at the Metropolitan Federal Prison in Los Angeles, committed similar misconduct by taking it upon himself to educate the rest of the jurors about petitioner's medications:

> During trial, Mr. Jones had a faraway look in his eyes. He looked the same throughout the entire trial. I know from my experience with psychiatric medications that Mr. Jones looked like someone who was medicated with anti-depressants. I recognized the names of the anti-depressants that Mr. Jones was taking and told the other jurors what I knew about the medications.

(Ex. 138 at 2689.)

(1) As with juror Freed above, juror Muhammad's injection of his own specialized, yet untested and potentially inaccurate, knowledge about

petitioner's medications rendered him an unsworn witness at petitioner's trial, violating petitioner's fundamental Sixth Amendment right to cross-examine and confront witnesses against him.

(2) Such knowledge did not fall within the acceptable category of juror experience brought into deliberations. Rather, juror Muhammad's knowledge of anti-depressant medications was the product of his specialized occupation and had no place in the deliberation process.

(3) As with juror Freed's misconduct, juror Muhammad's injection of his specialized knowledge of petitioner's medication went to the key issue of petitioner's mental state, heightening the prejudice to petitioner.

7. Juror inattention or absence during the presentation of evidence is misconduct. One of petitioner's jurors committed serious misconduct by failing to pay attention to the evidence presented by the defense in the penalty phase of petitioner's trial.

a. Juror Emil Ruotolo admits that he fell asleep during the defense expert's testimony at the penalty phase:

> The penalty phase was brief. The doctor who testified for the defense was difficult to understand. . . . He talked about some mental problem that Mr. Jones had, but he never said what that mental problem was. He also said something about how Mr. Jones's son could have the same mental problem. His testimony was impossible to pay attention to, and I kept falling asleep.

(Ex. 9 at 95.)

b. Juror Ruotolo's sleeping during the defense expert's testimony at the penalty phase was serious misconduct, raising a presumption of prejudice to petitioner. A sleeping juror is an absent juror. His inattention suggests that he, along with the other jurors, had prejudged the outcome of the case and closed his mind to further consideration of evidence. In an admittedly brief penalty phase, juror

Ruotolo's failure to pay close attention to the scant defense testimony places into question the reliability of petitioner's penalty determination.

8. In their determination of petitioner's penalty, petitioner's jurors committed serious and prejudicial misconduct by failing to follow the court's instruction relating to the meaning of a sentence of death versus that of life without parole. Instead, the jurors based their decision upon the unfounded assumption that a sentence of death would not be carried out.

a. Juror Emil Ruotolo admitted:

> It was not difficult for us to vote for the death penalty, because regardless of our verdict, we knew that Ernest would end up getting life. We talked about how his drug use would save him from ever being executed. I just knew, as I still know, that there is no way they would actually execute him.

(*Id*. at 96.)

b. This statement demonstrates the jurors' patent disregard for the law and consideration of evidence extraneous to that presented at trial, constituting serious misconduct and bringing into question the reliability of petitioner's penalty determination. It further evidences discussion among the jurors about their lack of belief that petitioner would be executed, constituting misconduct of a magnitude higher than that of a single juror's misapprehensions about the meaning of the relative sentences. The entire jury was tainted by this blatant disregard for the court's instructions and misapplication of the law.

9. Petitioner's jurors committed further misconduct by misapplying the law relating to the intent required in their finding for rape felony murder and the rape special circumstance.

a. Petitioner hereby incorporates by reference those facts contained in the allegations set forth in Claim Twelve, *supra*, as if fully set forth herein.

b. The confusing nature of the intent requirement for the crime of rape

versus rape as the underlying felony for felony murder or as a special circumstance was the subject of numerous discussions among the trial court and counsel. (*E.g.*, 25 RT 3719-21, 3777-79.)

(1) Defense counsel unsuccessfully requested special instructions relating to the charged rape special circumstance in an attempt to clarify the confusing intent requirement for the jury. (*See* 25 RT 3770-72.) His special instruction read as follows: "A special circumstance of rape-murder is not satisfied if the accused's primary criminal goal is to kill rather than to force the decedent to have sexual intercourse against her will and without her consent." (2 CT 354.)

(2) During closing arguments, the prosecutor prejudicially and erroneously equated the intent element of the crime of rape with the intent element of the special circumstance of rape by arguing, "And in this case, that is to reject the voluntary intoxication and mental disorder, to accept that he formed the specific intent to rape the same way he did it with [a victim of a rape prior], and to come back with the first degree murder." (27 RT 3991-92).

c. Juror Omar Muhammad recalled the jury's guilt deliberations:

> Deliberations during guilt phase were difficult and confusing. The instructions were worded in such a way that made them hard for us to understand. We talked about how the instructions did not make sense and we had to ask the judge several questions to try and clarify what we were supposed to do. . . . We talked about how the case was all about the guilt phase because once we decided that we knew we had to vote for death.

(Ex. 138 at 2690.)

d. Juror Muhammad also stated, "The defense did not put on any evidence that Mr. Jones may not have raped the victim. In fact, we heard nothing about the rape charge except that he did it." (*Id*.)

e. Juror Emil Ruotolo also found the jury instructions in the guilt

phase confusing: "The guilt deliberation was a difficult process because the instructions were very confusing. We all had our differing interpretations of them. I never really understood them, despite several jurors trying to explain what they meant. Other jurors expressed similar problems understanding the instructions." (Ex. 9 at 94.) Juror Ruotolo then states, "We all talked about how we already decided that he was guilty, and we did not understand how to view the evidence in light of our guilt verdicts." (*Id.* at 95.)

f. The jury did not understand the difference between the general intent requirement for the crime of rape versus the specific intent requirement for the underlying felony of rape for felony murder or the rape special circumstance. (*See, e.g.*, 1 CT 249 (juror note asking for the definition of felony-murder).) Instead, the jury simply assumed the truth of the special circumstance allegation based on their guilty verdict on the rape charge. The jurors committed prejudicial misconduct by failing to follow the law regarding the requirement of specific intent for the rape felony-murder special circumstance.

g. The court's failure to clearly instruct the jury, trial counsel's failure to request clear, adequate, and complete instructions for the intent requirements for felony murder and special circumstance, as well as the prosecutor's misconduct in equating the intent requirements during his closing argument, further confused and misled the jury. As discussed further in Claim One at paragraphs 11 and 12, *supra*, trial counsel rendered ineffective assistance for unreasonably failing to request all necessary guilt and penalty phase jury instructions and for failing to object to the prosecution's misstatement of the governing law; and, the prosecution committed prejudicial misconduct for misstating the governing law in closing arguments, as discussed in Claim Fourteen, *supra*.

10. Each of these instances of juror misconduct alone would create a presumption of prejudice that the state would be hard-pressed to rebut. Together, the multiple instances of juror misconduct had a substantial and injurious effect or

influence on the jury's penalty phase verdict by completely eviscerating petitioner's fundamental right to a fair trial. This plethora of juror misconduct raises an unrebuttable presumption of prejudice, requiring a grant of relief.

S. CLAIM NINETEEN: PETITIONER WAS DEPRIVED OF HIS RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS BECAUSE THE JURY WAS INFLUENCED BY IMPERMISSIBLE FACTORS INCLUDING REPEATED OUTBURSTS BY THE VICTIM'S DAUGHTERS.

The convictions and sentence of death were rendered in violation of petitioner's rights to due process and to a fair trial by an impartial jury as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the jury was exposed to impermissible factors including repeated outbursts by the victim's daughters throughout the guilt and penalty phases of trial and, in particular, comments and narration throughout the testimony of Woodrow Brooks, one of petitioner's critical witnesses in the guilt phase.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts and allegations set forth in Claims One and Eighteen, and the accompanying exhibits, are hereby incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Throughout petitioner's trial, the victim's daughters, Pamela Miller and Deborah Harris, were vocally hostile towards petitioner. In the presence of the jury, Ms. Miller and Ms. Harris called petitioner names and launched serious, prejudicial, and unfounded allegations at him.

3. Ms. Harris's comments and editorializing during the testimony of one of petitioner's critical witnesses, Woodrow Brooks, further prejudiced the jury, depriving petitioner of the right to a fair trial.

a. Ms. Harris sat in the front row of the courtroom within a few feet of

petitioner, and where she could clearly be seen and heard by the jury. (Ex. 9 at 93; Ex. 23 at 239.)

b. During Mr. Brooks's testimony, Ms. Harris repeatedly nodded and shook her head, gestured, made comments, and loudly "editorialized" about Mr. Brooks's testimony. (22 RT 3271.) Her conduct was so disruptive that the judge called a sidebar and told counsel that he intended to remove Ms. Harris from the courtroom. The prosecution warned the judge that he might "get a reaction" from Ms. Harris and, consequently, the judge took a recess in order to ask Ms. Harris to leave the courtroom outside of the presence of the jury. (*Id.*)

c. When Ms. Harris asked the judge why she was being asked to leave, the judge responded, "because you keep gesturing with your head, shaking your head, nodding up and down and shaking your head back and forth and making comments." (*Id*. at 3273.) Ms. Harris's conduct was so extreme that even after she assured the judge she would stop gesturing and commenting, he still refused to allow her to remain in the courtroom. (*Id*.)

d. The judge not only prohibited Ms. Harris from sitting in the courtroom for the witness immediately after Mr. Brooks, he further prohibited her from sitting in the courtroom for petitioner's testimony. The Judge's *sua sponte* decision to prevent the victim's daughter from hearing petitioner's testimony for fear that her commentary and outbursts would further improperly prejudice the jury sheds light on the outrageousness of her conduct. (*Id*. at 3287.)

e. Although the court removed Ms. Harris after her behavior during Mr. Brook's testimony, her removal did not ameliorate her past conduct and the prejudice that petitioner had suffered.

4. The victim's daughter's hostility was observed and considered by the jurors in petitioner's case.

a. An alternate juror vividly recalled that "the victim's daughters carried on constantly, screaming and yelling at Mr. Jones." (Ex. 23 at 239.) The juror

further noted that the daughters' behavior culminated in "a lot of drama inside our courtroom." (*Id*.)

b. The jury was also exposed to Ms. Miller's prejudicial rants and outbursts, including when she "called Mr. Jones names and screamed out that [petitioner] had also caused the death of her father who died of a heart attack a few months after her mother was killed." (*Id*.) Many years after the trial, Ms. Miller remained memorable to jurors as "extremely vocal throughout her testimony and the entire trial." (*Id*.)

c. The courtroom conduct of Ms. Harris and Ms. Miller exposed the jury to unsworn, irrelevant, and highly prejudicial victim impact evidence in the guilt phase of petitioner's trial.

d. The content of Mrs. Miller's daughter's prejudicial outbursts were unfairly and unconstitutionally made part of the jury's guilt phase deliberations. (*Id*.)

5. The effect of the victim's daughters' outbursts on the jury was prejudicial.

a. Ms. Miller's accusation that petitioner was responsible for not only their mother's death but also for the death of their father was tremendously prejudicial to petitioner. According to these accusations, petitioner was not just responsible for the death of Mrs. Miller; he was responsible for murdering both Mrs. and Mr. Miller.

b. Ms. Harris's "editorializing" comments that the testimony of Woodrow Brooks – one of petitioner's few, yet critical witnesses – was inaccurate, further prejudiced petitioner, depriving him of his right to an unbiased jury.

c. Equally harmful were the name-calling, personal attacks, and the hatred that the victim's daughters displayed toward petitioner. This behavior was especially prejudicial because of the sisters' status as the aggrieved daughters of the person whom petitioner was charged with killing.

6. Through their conduct, Ms. Miller and Ms. Harris indicated that only a death verdict would be acceptable and their message was not wasted on the jury. As one juror observed, "[d]uring the guilt deliberations, one of the jurors told us … he

could understand how upset the daughter was... He said right then and there, after hearing the daughter, he knew he had to vote for death." (*Id*.)

7. The victim's daughters' courtroom conduct and outward display of hatred for petitioner influenced the jurors at both the guilt and sentencing phases of petitioner's trial, thus depriving him of an impartial jury and of a fair and reliable guilt and penalty determination.

8. Despite the prosecutor's prior awareness of the prejudicially disruptive courtroom conduct by the victim's daughters, the prosecutor failed to take pre-emptive measures to safeguard petitioner's right to a fair trial. Instead, he allowed Ms. Harris to sit in the front row of the courtroom, in full view and hearing of the jury. (22 RT 3271.)

9. Petitioner was deprived of his Sixth Amendment right to effective assistance of counsel because trial counsel unreasonably and prejudicially failed to protect the integrity of the trial process, including requesting judicial intervention at the onset of the prejudicial behavior and moving for a mistrial as the misconduct escalated.

10. To the extent that appellate counsel failed to raise or present with sufficient constitutional support on appeal any of the grounds in this claim, appellate counsel's failures constitute unconstitutionally deficient representation that prejudiced petitioner. Absent the unreasonable deficient performance, it is reasonably probable that the result would have been more favorable to petitioner.

11. The individual and cumulative effect of the victim's daughters' rants and outbursts prejudiced petitioner and had a substantial and injurious influence or effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

T. CLAIM TWENTY: PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF IRRELEVANT AND INFLAMMATORY PHOTOGRAPHS.

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a reliable, fair, non-arbitrary, and non-capricious determination of guilt, to be free of cruel and unusual punishment and to the effective assistance of counsel because of the introduction of irrelevant and highly inflammatory photographs of the victim.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Twelve, and Fourteen, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The prosecution introduced numerous enlarged photographs of the crime scene and the victim. The most disturbing, prejudicial, and irrelevant photographs showed the victim lying on the ground with knives protruding from both sides of her neck. (*See, e.g.*, III Supp. 1 CT 3, 5 (People's Exhibits 5A, 5C: photographs of victim with knives protruding from her neck); *id*. at 8, 10 (People's Exhibits 5F, 5H: photographs of victim's body).)

3. The prejudicial photographs shed no light on any factual issues relevant to the disputed issue of intent. The photographs were also cumulative; they added nothing to the prosecution's case regarding the victim's cause of death that had not been testified to by Dr. Scholtz (*see* 17 RT 2774 *et seq*.) or the manner in which the victim was found testified to by Detective Rosemary Sanchez (*see id*. at 2682 *et seq*.), and Coroner's investigator Dan Anderson (18 RT 2837 *et seq*.). Moreover, the prosecution possessed photographs of the crime scene that did not include the victim's

body. (*See, e.g.*, III Supp. 1 CT 25-28, 46, 48 (People's Exhibits 10A-D, 18A, 18C).)

4. Petitioner was denied his right to a fair trial because the improperly admitted photograph misled and distracted the jury from carefully analyzing the relevant evidence. Rather than form their decision based on a dispassionate review of the evidence, the jurors were induced to make a decision on a purely emotional basis. For juror Emil Ruotolo, "[t]he crime scene photos were absolutely horrifying. . . . [One photograph displayed] a close-up of the victim with knives sticking out of her neck; it was absolutely awful. The picture was directly in my line of vision and many times I had to close my eyes to escape it." (Ex. 9 at 94.) Juror Ruotolo also confirms that during deliberations the jurors "talked about how horrible the pictures were." (*Id.*; *see also* Ex. 138 at 2690.)

5. Social science research shows that not only are jurors profoundly biased against defendants by the introduction of graphic photographs, but that they also are unaware of their bias. Kevin S. Douglas, David R. Lyon, & James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM BEHAVIOR 485 (1997). In a mock trial, researchers found that jurors exposed to autopsy photographs were almost twice as likely to find the accused guilty than those who had not seen the photographs. (*See id.* at 492.) "[A]lthough graphic photographs clearly influenced the verdict, participants felt that they should not and did not, and also considered their levels of impartiality to be moderately high." (*Id.*) The researchers went on: "This finding is particularly troublesome because if jurors cannot even recognize the extent to which such evidence affects them it will be impossible for them to reduce or control the impact of the evidence when instructed to do so by a judge." *(Id.* at 499.) In conclusion, the study advised considerable care by courts in weighing probative value against the prejudicial impact of graphic evidence. *(Id.* at 500.)

6. The effect of the graphic "horrifying" crime scene photos on petitioner's jury was tremendous. Even though the "crime scene photos were awful" the jury could

not escape the photographs in the courtroom because "[t]he pictures were kept up on a bulletin board next to us. We talked about how horrifying those pictures were." (Ex. 138 at 2690.) For juror Freed, the victim "sounded like a nice woman" and hearing her voice on a recording "was powerful" for him. (Ex. 127 at 2564-65.) This strong identification with the victim could only have made "the photographs of her" even more "disturbing." (*Id*.) *See generally* Douglas, Lyon & Ogloff, *supra*. An alternate juror was straightforward with her confession; "[a]s soon as I saw the photographs of Mrs. Miller it was set in my mind that he deserved death." (Ex. 23 at 239.)

7. The photographs admitted during petitioner's trial were neither relevant to the crime charged nor an aid in proving an element of that crime. The admission of the graphic and gruesome photographs rendered petitioner's trial fundamentally unfair, and had they been excluded, it is reasonably probable that the jury would have reached a different result.

8. Admission of inflammatory and irrelevant photographs of the victim, individually and cumulatively, had a substantial and injurious influence or effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

9. To the extent trial counsel and/or appellate counsel failed to challenge the admission of these irrelevant and prejudicial photographs, trial counsel and/or appellate counsel were constitutionally and prejudicially ineffective.

U. CLAIM TWENTY-ONE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BECAUSE THE JURY RECEIVED INADEQUATE AND INSUFFICIENT PENALTY PHASE INSTRUCTIONS THAT PERMITTED THE PROSECUTION TO FALSELY AND PREJUDICIALLY ARGUE THAT MITIGATING EVIDENCE WAS AGGRAVATING.

Petitioner's death sentence and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, a reliable, fair, non-arbitrary, and non-capricious determination of guilt, to

be free of cruel and unusual punishment, and to the effective assistance of counsel because confusing and incomplete penalty phase instructions prevented the jury from properly deciding petitioner's sentence.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims Twelve, Fourteen, and Twenty-two, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Petitioner's jury was instructed with CALJIC 8.85 "Penalty Trial – Factors for Consideration." (2 CT 411-12.) Using this standard instruction was insufficient; and, these insufficiencies were highlighted by the prosecution's blatantly improper closing argument. As a result of the trial court's failure to give all necessary instructions, petitioner's jury rendered its penalty verdict based on improper and insufficient instructional guidance.

3. As a result of the prosecution's continuous misstatement of the law (*see supra* Claim Fourteen), the jury was misinformed that (1) mitigation had to be related to the crime; (2) petitioner's alleged failure to take advantage of mental health resources was an aggravating factor; and, (3) petitioner's mental impairments were aggravating factors.

4. In light of the prosecution's egregious misstatements of the law, the trial court had an obligation to ensure that petitioner's jury had a clear understanding of the actual law that governed its penalty phase deliberation. The duty of the trial court to correct the prosecution's misstatements of law was heightened because they came only after the trial court had read the penalty phase instructions to the jury; therefore, without further clarification, the jury began deliberating immediately after the prosecution's prejudicial misstatements of the applicable law. (31 RT 4608-32 (trial court reads penalty phase instructions); *id*. at 4634 (prosecution begins his closing

statement).)

5. CALJIC 8.85 failed to fully and clearly inform the jury what constituted mitigating evidence. (2 CT 411-12.)

a. The prosecutor disingenuously argued, "[o]n the other hand, a mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (31 RT 4635.) By failing to likewise inform the jury that a mitigating circumstance is also "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death" (2 CT 411), the prosecution impermissibly informed the jury the instructions allowed it to consider petitioner's evidence mitigating only if it was linked to the crime.

b. The prosecution continued impermissibly, and repeatedly, to define only that evidence that related to the crime, as mitigating evidence:

(1) With respect to sympathy, the prosecutor stated, "I would suggest to you that you show the same sympathy to the defendant that he showed to Mrs. Miller if you are going to think about sympathy in this case." (31 RT 4643.)

(2) In discussing petitioner's mental health evidence, the prosecutor stated, "[i]f you accept that he has a mental problem, even if you accept that based upon the doctor's testimony, I asked the doctor does [sic] schizophrenic schizoaffective patients have a greater likelihood of committing violent acts than a normal person? And he says no." (*Id*. at 4648.)

(3) The prosecutor continued, "if you accept that he is telling you the truth, that he truly has the schizophrenic schizoaffective psychosis that led to this delusional state that led to the killing, does that mitigate? Does that mitigate the enormity of the crime?" (31 RT 4653.)

c. The trial court prejudicially failed to cure the prosecutor's misleading characterizations, or otherwise ensure that the jury consider as mitigation

evidence that was not related to the crime. (31 RT 4698 (court instructs on definition of mitigation); 2 CT 405-06 (CALJIC 8.88)[15].)

d. The jury therefore was encouraged to consider and weigh only that evidence directly related to petitioner's conduct in and around the time of the crime as mitigating evidence.

e. The failure to properly instruct, as to the scope of mitigating evidence, prevented the jury from understanding their duty and rendering a jury determination based on its consideration of all relevant evidence, thereby denying petitioner the right to a fair and reliable jury determination.

6. The trial court failed to prohibit the consideration of mitigating factors as aggravating.

a. The prosecutor argued, and the instructions permitted the jury to consider, petitioner's age at the time of the crime and the perceived failure to avail himself of available psychological assistance as aggravation.

b. The prosecutor explicitly stated, "It's the People's position that age, in fact, is a factor in aggravation." (31 RT 4640.)

(1) The prosecutor immediately followed with repeated references to petitioner's perceived failure to take advantage of supposed available treatment, including but not limited to:

(a) "If he truly had these mental problems, and Kim Jackson was willing to back off and say, yes, go get some help, and he was put on probation with a psychological treatment program [sic.]." (*Id*.)

(b) "Now either, he refused to go along with the treatment, they couldn't treat him. He didn't really have a problem, and that this was something that he went along with in order to get a reduced sentence of a battery. And I want you

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[15] As with other penalty phase instructions, the first page of CALJIC 8.88 is printed on a form with a guilt phase CALJIC title, in this case, CALJIC 9.42. The actual CALJIC number is typed immediately above the instruction.

to think about that, and his lack of participation in the program." (*Id*. at 4640-41.)

(c) With reference to petitioner's failure to follow up on his father's suggestions to get involved with the church, the prosecutor argued "[a]nother opportunity that he could have used to get himself together that he did not." (*Id*. at 4641.)

(d) "Is that Mrs. Miller's fault somehow or society's fault somehow [that] the defendant didn't take advantage of these opportunities?" (*Id*. at 4642.)

(e) In concluding his remarks on this subject, the prosecutor stated, "[petitioner] is 27 or 28 and had two clear wake up calls that he ignored, and went on to commit his enormous crime. A factor in aggravation." (*Id*.)

(2) As a result of the prosecution's request that the jury consider these factors as aggravating, the court had a duty to correct these misstatements and clarify the governing law, but failed to do so.

(3) The court failed to designate the factors set forth in CALJIC No. 8.85, subparagraphs (d), (h), and (i) as mitigating only, thereby permitting the jury to consider petitioner's age at the time of the crime and perceived failure to take advantage of assistance as aggravating factors. (2 CT 411-12.)

(4) The failure to label the factors as aggravating or mitigating, and to designate the factors set forth in CALJIC 8.85, subsections (d), (h), and (i) as mitigating only resulted in an impermissible lack of guidance to the jury, which was not cured by the instructions as a whole. (*Id*.)

(5) The court's failure rendered the instructions unconstitutionally vague by failing to inform the jurors of what they must find; it did not adequately channel and limit the sentencer's discretion to impose death and left the appellate reviewer to speculate on the jury's use and interpretation of the factors as aggravating or mitigating.

c. The prosecutor impermissibly and unconstitutionally argued, and

the instructions permitted the jury to consider, petitioner's mental impairments as a factor in aggravation.

(1) The prosecutor stated, "I submit to you, ladies and gentlemen, that there is no way of predicting what this man is going to do in custody later, especially if you accept the psychotic killer that the doctor has put forth. And that in itself might be an aggravating factor if you so decide as far as putting him to death, that being what his mental state is and the dangerousness that exists in this man." (31 RT 4644.)

(a) The prosecutor failed to delineate between the limited factors to be considered in aggravation, as opposed to those factors to be considered as mitigating only.

(b) The trial court failed to cure the prosecutor's misconduct, by not designating the factors set forth in former CALJIC 8.85, subparagraphs (d) and (h) as mitigating only. (2 CT 411-12.)

(2) Mental illness, impairment, or deficiency cannot be used against the individual suffering from it. It renders a criminal defendant less, not more morally reprehensible. It is constitutionally impermissible to attach an aggravating label to traits, such as mental infirmity, that must militate in favor of a lesser penalty.

(3) The court did not explain this constitutional imperative to the jurors – that the extreme mental or emotional disturbance and impaired capacity as the result of mental illness could be mitigating factors only – and they were, therefore, more likely to use petitioner's illness to aggravate the crime and impose death.

(4) The court did not explain to the jurors that the absence of evidence on these factors did not transmute them into aggravating factors or factors that they could use against petitioner. The wording of the instruction ("whether or not") allowed the jurors to determine that this factor was aggravating if the circumstance described in these subsections was "not" present. (*Id*.)

(5) The court did not define aggravation or mitigation for the

jury and therefore the jury had no basis for understanding that these factors were mitigating only.

(6) Throughout the trial, evidence was produced that petitioner was mentally ill, mentally disturbed, and emotionally disturbed, suffering from multiple major mental illnesses.

(7) The failure to label the factors as aggravating or mitigating and to designate the factors set forth in CALJIC 8.85, subsections (d) and (h) as mitigating only resulted in an impermissible lack of guidance to the jury, which was not cured by the instructions as a whole. (*Id*.)

(8) The instructions left the jury free to consider and use petitioner's mental and emotional illness and disturbances as an aggravating factor, rendering the resulting death sentence cruel and unusual and arbitrary, inasmuch as this status cannot be used to enhance punishment.

7. To the extent that this Court concludes that trial counsel and/or appellate counsel failed to object to these instructions or properly proffer correct instructions, petitioner has been prejudicially deprived of effective assistance of counsel.

8. Singly and cumulatively, these erroneous, incomplete and confusing jury instructions - reinforced by the prosecution's legally erroneous arguments - prohibited the jury from understanding their duty, appreciating the charge as a whole, and considering the full breadth of constitutionally permissible evidence, thereby rendering petitioner's sentencing determination fundamentally unfair, unreliable, arbitrary and capricious.

V. CLAIM TWENTY-TWO: PETITIONER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT DEPRIVED PETITIONER OF HIS RIGHT TO A JURY DETERMINATION OF FACTS NECESSARY TO SENTENCE HIM TO DEATH.

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment

rights to trial by jury, due process, be free of arbitrary and capricious sentencing, effective assistance of counsel, an individualized sentencing proceeding, be free of cruel and unusual punishment, equal protection of the laws, the presumption of innocence, and a fair and impartial jury because petitioner's jurors were not instructed that they must unanimously agree on the circumstances in aggravation that supported their verdict, and that the beyond a reasonable doubt burden of proof applies to determining which factors are aggravating; whether the factors in aggravation outweigh the mitigating factors; and, whether or not death is the appropriate penalty.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts and allegations contained in each of the Claims in this Petition are hereby incorporated by reference as if fully set forth herein.

2. California's standard penalty phase instructions, as delivered in this case, did not provide the jury with an adequate framework for resolving the capital sentencing decision. The trial court failed to instruct the jury on the core adjudicative principles necessary to channel the jury's discretion, to ensure that the sentencing process is neutral and principled, and to guard against arbitrariness, bias, and caprice.

3. In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances," Cal. Penal Code § 190.3, and that aggravation is so substantial compared to mitigation that a verdict of death is appropriate. The jury was so instructed in this case. (2 CT 406 (CALJIC 8.88); 31 RT 4699 (instructing the jury that "[t]o return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death, instead of life without parole.").)

4. The trial court failed to instruct the jury on the proper burden of proof for each of their tasks. Petitioner's jury was not instructed that, before it could impose a

sentence of death, it must, beyond a reasonable doubt:

a. unanimously find the existence of each aggravating factor (2 CT 409 (CALJIC 8.87 specifically instructs "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider" it as an aggravating));

b. find the aggravating factors outweigh the mitigating factors (*id*. at 406 (CALJIC 8.88 merely requires aggravating factor to be "so substantial" in relation to the mitigating factors)); and,

c. find that death is the appropriate punishment (*id*. (CALJIC 8.88 requires no finding that death is the appropriate punishment)).

5. Petitioner's death sentence violates the federal constitution because the instructions given to his jury failed to assign to the prosecutor the burden of proving the following beyond a reasonable doubt: that death was the appropriate sentence, that the aggravating factors exist, and that the aggravating factors outweigh the mitigating factors. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002) (for capital defendants, any fact that exposes them to greater punishment must be found by a jury beyond a reasonable doubt); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 242-43 (1999).

a. Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first-degree murder and a true special circumstance finding. Although a finding of a special circumstance, in addition to a conviction of first-degree murder, carries a maximum sentence of death, Cal. Penal Code § 190.2, neither a judge nor a jury may impose such a sentence based solely on the guilt phase findings.

(1) A special circumstance finding "authorizes a maximum penalty of death only in a formal sense." *Ring*, 536 U.S. at 586, (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J. dissenting)).

(2) In order to impose the increased punishment of death, the

jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors. Cal. Penal Code § 190.3.

(3) These two additional factual findings are absolutely required in order to impose an increased punishment and it is this fact-finding that triggers *Apprendi*: these findings are "essential to the imposition of the level of punishment that the defendant receives" – they increase the punishment beyond "that authorized by the jury's guilty verdict." *Ring*, 536 U.S. at 610-11 (Scalia, J. concurring).

b. During the penalty phase of petitioner's trial, a wealth of new evidence and testimony was introduced, necessitating additional fact-finding by the jury. The jury's fact-finding duty included consideration of new evidence and testimony, including a prior crime (28 RT 4175-98) and statements made by petitioner that demonstrated his alleged lack of remorse for the crime (*id*. at 4150-65). Only after making these factual determinations, finding the existence of at least one aggravating factor, finding that the aggravating factors outweighed the mitigating factors, and finding that the aggravating factors were so substantial that death was the appropriate punishment, was the jury permitted to impose a sentence of death.

c. The trial court's failure to require a unanimous finding beyond a reasonable doubt as to the existence of any and all aggravating factors renders petitioner's death sentence constitutionally infirm, thus mandating a reversal and the imposition of a life sentence.

d. This error is compounded by the fact that the jury was never clearly, correctly, and unambiguously instructed on the prosecutor's burden of proof or given an adequate definition of "beyond a reasonable doubt."

e. Further, the jury was not given complete, correct and clear instructions necessary to find the existence of each criminal act petitioner was alleged to have committed.

6. Petitioner's death sentence must be vacated and a life sentence imposed

because the trial court failed to require that the finding regarding the weighing of aggravating circumstances against mitigating circumstances be proved beyond a reasonable doubt. Read together, *Jones*, *Apprendi*, and *Ring* render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." *Apprendi*, 530 U.S. at 494 n.19.

a. In California, the decision to impose a death sentence requires a "factual assessment" that the aggravating circumstances exist and outweigh the mitigating circumstances. Unless the State prevails on both factual assessments, the defendant is ineligible for a death sentence. *See* Cal. Penal Code § 190.3 (the jury "shall impose" a sentence of confinement in state prison for a term of life without possibility of parole if mitigating circumstances outweigh aggravating circumstances).

b. Accordingly, whether the weighing assessment is labeled an enhancement, eligibility determination, or balancing test, *Ring*, *Apprendi*, and *In re Winship*, 397 U.S. 358 (1970), require that this most critical "factual assessment" be made beyond a reasonable doubt.

7. The trial court's failure to require a finding beyond a reasonable doubt that death is the appropriate sentence renders petitioner's sentence constitutionally void. The death sentence must be vacated and a life sentence imposed.

8. Petitioner's sentence must be reversed because the trial court failed to require a unanimous jury finding as to sentencing issues. The Constitution requires jury unanimity before a particular circumstance can be considered in aggravation at a capital trial.

a. The jurors were not instructed that their findings as to any of the aggravating circumstances were required to be unanimous.

(1) The court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone unanimously agree that any particular combination of aggravating factors warrants a sentence of death.

(2) As a result, the jurors in this case were not required to

deliberate at all on critical factual issues. The failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious, and unreviewable manner and tipped the sentencing process in favor of execution in violation of petitioner's right to a fair trial, a reliable and fair jury determination of penalty, and due process.

b. A unanimity requirement is an integral element of the reasonable doubt standard that *Apprendi* and *Ring* hold is applicable to penalty phase findings essential to imposition of a death sentence. Justice Scalia recognized as much in his concurring opinion in *Ring*, where, in criticizing *Furman*'s requirement that the states adopt aggravating factors, he identified what that requirement entailed:

> Better for the court to have invented an evidentiary requirement [the finding of specific aggravating factors] that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

c. *Ring*, 536 U.S. at 610 (Scalia, J. concurring).

d. The failure to require unanimous – or even majority – agreement regarding aggravating circumstances undermines the reasonable doubt standard by vitiating the deliberative function of the jury, which guards against unreliable factual determinations.

e. The failure to require that the jury unanimously, or even by a majority, find the aggravating factors true also stands in stark contrast to rules applicable in California to non-capital cases. California law requires a unanimous finding in all other contexts in which a jury is entrusted to determine a defendant's alleged criminal activity, including criminal conduct alleged to establish noncapital sentencing enhancements. Adoption of precisely the opposite approach in capital cases flies in the face of the United States Supreme Court's mandate that procedural protections afforded capital defendants must be more rigorous than those provided non-capital defendants, and in petitioner's case, singles him out for less procedural

protection than other individuals not charged with a capital offense.

f. Given the constitutionally significant purpose served by jury deliberation on factual issues, the enhanced need for reliability in capital sentencing and the weight given aggravating factors by a jury, a procedure that allows individual jurors to impose death on the basis of factual findings that they have neither debated, deliberated upon or even discussed is unreliable and, therefore, constitutionally impermissible.

9. Allocation of the burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. The California Evidence Code requires that the trial court instruct the jury on standards to evaluate the evidence. Evidence Code section 500 provides that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Nothing in California's death penalty law exempts it from this generally applicable provision of the Evidence Code, and therefore it applies to the penalty phase and imposes upon the prosecution a burden of proof for aggravating circumstances. California Evidence Code section 502 requires that trial courts have a sua sponte duty to instruct on the applicable burden of proof and standard of proof. *See also Walton v. Arizona*, 497 U.S. 639 (1990) ("it is essential that the jurors be properly instructed regarding all facets of the sentencing process"). Here, the violation of the Evidence Code resulted in a miscarriage of justice and deprived petitioner of an important state created liberty interest, in violation of the Due Process Clause of the Fourteenth Amendment, and denied him equal treatment in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

10. The failure to provide a standard of proof is particularly detrimental when the existence of mitigating circumstances is disputed, as in this case. Since the only standard that the jury was exposed to in the case was the "beyond a reasonable doubt"

standard, there is a substantial likelihood that the jurors applied that standard in deciding whether or not a mitigating circumstance was established. As a result, there is at least a reasonable likelihood that the jury applied the challenged instructions in a way that prevented it from considering and giving effect to constitutionally relevant mitigating evidence, in violation of the Eighth and Fourteenth Amendments.

11. The penalty phase correlate of the guilt phase presumption of innocence is a presumption of life. The jury should have been, but was not, instructed that a presumption of life applied at the penalty phase of petitioner's case.

12. The failure to impose a reasonable doubt standard and require unanimity as to penalty phase determinations is structural error that is not subject to harmless error analysis.

a. *Ring* now requires that *Apprendi* be applied to the California death penalty sentencing scheme to preclude standardless individual juror determinations of aggravating factors and death verdicts. In this case, the trial court's instructions did not require that the jurors unanimously find all the alleged aggravating circumstances only upon proof beyond a reasonable doubt. The jurors were not instructed that the weighing process – the most critical inquiry and the one that actually authorized the jury to return a verdict of death – must be proved to their satisfaction beyond a reasonable doubt. (*See* 2 CT 406 (8.88).)

b. Like other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error infects the very structure in which capital sentencing proceeds and can never be harmless.

c. The failure to properly instruct on unanimity and the burden of proof is a structural error "without which [the penalty trial] cannot not serve its function." *Sullivan v. Louisiana,* 508 U.S. 275 (1993). It is, therefore, reversible per se.

13. California's statutory scheme further violates federal constitutional

requirements because it fails to afford capital defendants basic protections against a freakishly arbitrary and capricious sentence of death. The statute fails to grant the reviewing court the constitutional tools necessary to fully protect a capitally sentenced defendant against such cruel and usual punishment. The failure to require a jury to provide written findings and the reviewing court to engage in inter-case proportionality review renders the California death penalty scheme unconstitutional.

a. California Penal Code section 190.3 does not require a jury to provide written findings of the aggravating factors upon which it relied for selection of a death sentence.

(1) Articulated reasons to support a sentence are essential to implement and secure a capital defendant's right to meaningful review.

(2) In a non-capital case, the sentencing court is required to articulate reasons for its sentencing choice.

b. By failing to designate the sentencing factors as either mitigating or aggravating, the statute invites arbitrary and capricious sentencing decisions.

c. The statute does not require proportionality review, a necessary safeguard against the infliction of wanton and freakish punishment, especially in light of the failure of either the special circumstances set forth in California Penal Code section 190.2 or the sentencing factors set forth in section 190.3 to meaningfully distinguish between those who deserve death and those whose lives should be spared.

(1) Petitioner was a young man whose serious mental illness resulted in him committing a crime of which he was totally unaware at the time of its commission.

(2) Petitioner's dissociative state rendered him wholly incapable of forming the necessary intent to commit any of the crimes with which he was convicted, including felony murder rape.

(3) In the absence of inter-case proportionality review which would result in the sentence being overturned, petitioner's death sentence is truly

capricious, freakish, and arbitrary.

14. Notwithstanding petitioner's right to be resentenced based on the trial court's failure to require that the aggravating factors be found unanimously and by a beyond a reasonable doubt standard of proof, as well as requiring the same standard of proof for determinations that aggravating factors outweigh mitigating factors and that death is the appropriate sentence, if this Court vacates any of the counts or the special circumstance, the writ should be granted for a new sentencing hearing.

a. Petitioner's penalty phase jury was instructed in accordance with California Penal Code section 190.3 that it "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (31 RT 4627; 2 CT 405 (CALJIC 8.88).)

b. A reduction or reversal of any of the charges would clearly fall within the rubric of factors permissibly considered by petitioner's jury in setting the penalty of death in this case.

c. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding, by the Eighth Amendment, petitioner must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death.

d. If this Court vacates any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily no longer valid, and there no longer remains a finding by the jury that the aggravating factors "so substantially" outweigh the mitigating evidence. (2 CT 406.) This Court, therefore, cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "the facts reflected in the jury verdict alone." *See Ring*, 536 U.S. at 586 (citing *Apprendi*, 530 U.S. at 483).

e. Accordingly, because jury findings regarding the facts supporting

an increased sentence are constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made if any count or special circumstance is reversed or reduced.

15. To the extent that this Court concludes that trial counsel requested and/or failed to object to the confusing instructions or request proper clarifying instructions, such inaction constitutes deficient and prejudicial representation.

16. Petitioner was deprived of his Sixth and Fourteenth Amendment rights by appellate counsel's unreasonable and prejudicial failure to identify, research, and present these issues to this Court in the direct appeal.

17. These errors had a substantial and injurious effect or influence on the jury's determination of the verdicts at both the guilt and penalty phase.

W. CLAIM TWENTY-THREE: PETITIONER'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT BECAUSE OF HIS MENTAL RETARDATION AND MENTAL IMPAIRMENTS.

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of his Eighth and Fourteenth Amendment rights to be free of cruel and unusual punishment because his combined mental impairments make him ineligible for a death sentence. Pursuant to the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), petitioner may not be executed because petitioner's low and lifelong level of functioning falls squarely within the range of mental retardation. Regardless of petitioner's intellectual disability, *Atkins* still bars his execution, as the holding applies with equal force to persons who are volitionally incapacitated, and periodically unable to control their conduct due to mental illness, particularly in times of great stress or extreme emotional states. Finally, absent the *Atkins* decision, the federal Constitution prohibits petitioner's execution. Petitioner's severe and multiple mental illnesses substantially diminish his moral culpability as to the offenses for which he was convicted and sentenced to death, and render any death judgment grossly and unlawfully disproportionate to his personal

responsibility for the harm resulting from the offense.

In *Atkins v. Virginia*, the United States Supreme Court declared that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibited the execution of individuals with mental retardation. (*Id.*) The decision in *Atkins* relied upon three related rationales: The empirically established consensus against executing the mentally retarded; the Court's independent determination that retaining the death penalty for the mentally retarded would not further any interest in retribution or deterrence; and the fact that the nature of the impairment of mental retardation leads to an unacceptable "risk of wrongful executions." *Id.* at 315-21. The Court further noted that individuals with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand the reactions of others." *Id.* at 318. Petitioner is plagued with all of these deficits in functioning, has severely limited adaptive functioning, and, from early childhood, tested in the mentally retarded range of functioning.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts set forth in Claim Sixteen, and the accompanying exhibits are hereby incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

(a) Petitioner suffers from an intellectual disability.[16] In *Atkins*, the Supreme Court noted the definition of mental retardation provided by the

[16] Recognizing the stigma attached to being labeled as "mentally retarded," the American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) set aside that label, replacing it with the term "intellectual disability." INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) at 3.

American Association on Mental Retardation (hereinafter "AAMR") in MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) (hereinafter "Mental Retardation I"). *Id.* at 2245, n.3; 2250. As provided therein,

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Mental Retardation I at 1.

a. Five days before the Supreme Court issued its decision in *Atkins*, the AAMR released the tenth edition of its publication and revised its definition of mental retardation as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORT (hereinafter "Mental Retardation II") (10th ed. 2002) at 1.)

b. On September 18, 2009, the American Association on Intellectual and Developmental Disabilities (hereinafter "AAID") released the eleventh edition of its publication, revising the term "mental retardation" and replacing it instead with the term "intellectual disability." The definition of intellectual disability is as follows: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) at 3.)

c. The American Psychiatric Association utilizes a definition that is "similar" to the AAMR's 1992 definition, *Atkins*, 536 U.S. at 309, n.3, and defines mental retardation as:

(a) [S]ignificantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

(b) (DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) (hereinafter "DSM-IV-TR") at 41.)

d. The Court in *Atkins* left it to the states to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317. In response to *Atkins*, the California Legislature enacted California Penal Code Section 1376(a), which provides that the term mentally retarded means "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

e. Petitioner meets all of the definitions of mental retardation or intellectual disability within the meaning of *Atkins*.

(1) From the beginning of elementary school, petitioner's intellectual deficits were apparent and well-documented.

(a) Toward the end of first grade, when petitioner was five years old, he was tested and found to have a full scale IQ score of 68, squarely in the mentally retarded range of functioning. (Ex. 50 at 1103.) Later IQ scores obtained while petitioner was in elementary school and high school were also low, and when adjusted to account for the Flynn effect,[17] place petitioner in the borderline mentally

[17] The Flynn effect is the theory that IQ scores increase over time. In the United

retarded range of functioning.[18] (Ex. 51 at 1149, 1151, 1154.)

(b) Despite a number of years in special education classes at multiple schools, no actual improvement in petitioner's academic, intellectual, and adaptive functioning was observed or documented. Outside of the special education environment, petitioner's academic failures were even more noticeable; after being removed from the Educably Mentally Retarded ("EMR") program into the fourth grade, he was unable to achieve success in school. (Ex. 130 at 2601; Ex. 125 at 2557-58; Ex. 50 at 1105, 1108-09.)

(2) Numerous lay witnesses and childhood friends observed petitioner's impairments from an early age.

(a) Friends noticed problems in petitioner's speech pattern (Ex. 148 at 2727; Ex. 149 at 2728), his poor communication skills, and his genuine difficulty in initiating conversation or expressing abstract emotional concepts (Ex. 16 at 149; Ex. 132 at 2636; Ex. 143 at 2703; Ex. 147 at 2722; Ex. 151 at 2736; Ex. 152 at 2741); his inability to learn from the experience of mistakes (Ex. 124 at 2508; Ex 2 at 15); and his incapacity to understand the reactions of others or protect himself from threats (Ex. 132 at 2637-38; Ex. 19 at 207; Ex. 178 at 3116-17; Ex. 16 at 147-48).

(3) Petitioner's adaptive functioning throughout his childhood and adulthood remained severely impaired.

(a) Numerous witnesses describe petitioner's immaturity

States, this increase is approximately 0.3 points per year, or 3 IQ points every 10 years. *See generally*, James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, PSYCHOLOGICAL BULLETIN 95, 29-51 (1984); James R. Flynn, *Massive IQ gains in 14 Nations: What IQ Tests Really Measure*, PSYCHOLOGICAL BULLETIN 101: 171-191 (1987); Flynn, J. R.. *IQ Gains Over Time*, in ENCYCLOPEDIA OF HUMAN INTELLIGENCE at 617-623 (R. J. Sternberg ed. New York MacMillan 1994); Flynn, J. R. *Searching for Justice: The Discovery of IQ Gains Over Time*, AMERICAN PSYCHOLOGIST, 54, 5-20 (1999).

[18] Recent testing confirms earlier test scores. (Ex. 175 at 3063 [petitioner's IQ 77.])

at various stages of his development. (*E.g.*, Ex. 123 at 2491-92; Ex. 143 at 2703; Ex. 124 at 2541.)

(b) Petitioner was unable to complete simple errands. Once, when his father gave him money to give to his mother, petitioner forgot why he had the money and spent it. On returning home, his father asked about the money, and petitioner had to admit that he had forgotten that the money was for his mother. (Ex. 178 at 3132.) Since he had problems with simple math and counting, he could not count money and make change. When he went to the store, someone had to go with him to make sure he received the correct change. (Ex. 16 at 145.) Even petitioner's mother recognized his limitations; she depended on petitioner's brother to purchase items at the corner store instead of sending petitioner. (Ex. 155 at 2766.)

(c) As he grew older, petitioner displayed no ability to live independently. (Ex. 16 at 166; Ex. 189 at 3400.) Long after his other siblings had fled his mother's house, petitioner remained, unable to fend for himself. Numerous witnesses noted that petitioner spent a lot of time inside his homes, rather than venturing out into the world. This was true at his mother's house, and even when he lived with other relatives. (Ex. 147 at 2723; Ex. 16 at 150, 174-75; Ex. 142 at 2698-99.)

(d) The only known time he lived alone was for a brief period when he lived in the garage behind Mrs. Harris's home until he was made to leave there. Shortly thereafter, he was arrested for sexually assaulting Mrs. Harris.

(4) Petitioner had no stable employment history, and most of the time held no job at all.

(a) Petitioner could perform very simple, unskilled tasks, but was unable to develop any special skills, and was never entrusted with more complicated tasks. (Ex. 10 at 97; Ex. 21 at 226.)

(b) Petitioner's inability to obtain even non-skilled employment was a constant issue between him and his girlfriend, Glynnis Harris; she

reports that she had to help him fill out one or more job applications, because he could not do so by himself. (Ex. 14 at 136.)

(c) Petitioner liked to take mechanical items apart; but he never could put them back together. When he lived with his sister Gloria as a young adult, he took her television apart and it never worked again. (Ex. 124 at 2539.)

(5) Various mental health professionals also document petitioner's impairments through testing and evaluation.

(a) Petitioner has basic problems understanding and processing information, and fundamental problems with judgment and impulse control. (Ex. 178 at 3154-57.)

(b) Some of petitioner's more marked deficits include problems with memory, attention, and concentration. Petitioner also exhibits deficits in judgment, self-awareness, misperception of social expectations, problem-solving abilities, planning, organizing and sequencing. (Ex. 175 at 3064-66.)

(c) Petitioner exhibits little ability to engage in abstract thinking. (Ex. 175 at 3065-66; Ex. 154 at 2761; Ex. 178 at 3155.)

(6) Deeply concerned over how others perceive him (Ex. 154 at 2751), petitioner engages in behaviors, typically referred to as "masking" behaviors, designed to hide his shortcomings.

(a) He is eager to please, reluctant to disagree with others, and prefers to be the listener, rather than the talker. (Ex. 141 at 2697; Ex. 147 at 2722; Ex. 16 at 148-49; Ex. 152 at 2742.)

(b) He consistently avoids challenging environments, such as large groups of people, interactions with strangers, as well as the intimidating environment of school. (Ex. 148 at 2726; Ex. 151 at 2735; Ex. 132 at 2638; Ex. 134 at 2651; Ex. 123 at 2497; Ex. 14 at 134.)

(7) Petitioner's limited functioning is not an isolated case within his family.

(a) Almost all of his siblings attended special education classes. (Ex. 16 at 144; Ex. 132 at 2642; Ex. 54; Ex. 57; Ex. 66; Ex. 119.) They too exhibited problems in adaptive behavior, including an inability to live independently, find and hold a job, or keep an apartment on their own without assistance from a parent or friend. (Ex. 124 at 2548; Ex. 8 at 90; Ex. 146 at 2716.)

(b) Petitioner's mother was intellectually disabled as well; twice she received full scale IQ scores of 61 during high school. (Ex. 69 at 1498.) Petitioner's mother also suffered severe limitations in her adaptive functioning: Joyce could not tell time on an analog clock (Ex. 147 at 2719), and was illiterate (Ex. 142 at 2698; Ex. 143 at 2701.) Like petitioner, Joyce never held a job for any length of time, and most of the time she did not work at all. (Ex. 142 at 2698; Ex.143 at 2701; Ex. 123 at 2488; Ex. 16 at 157.) She was unable to learn how to drive, and was constantly involved in car accidents when she did try to drive. Because she could not understand and apply the tasks required to drive a car safely, her passengers were usually terrified while the car was in motion. (Ex. 124 at 2528-29.)

f. Given petitioner's impaired intellectual ability, as evidenced by his low IQ scores and severely restricted adaptive functioning, both of which manifested before age 18, the Eighth Amendment prohibits his execution. *Atkins v. Virginia*, 536 U.S. 304.

2. Petitioner is ineligible for the death penalty because he is mentally ill and suffers from organic brain damage.

a. Aside from petitioner's intellectual disability, the reasoning and logic of *Atkins* applies to petitioner, whose mental impairments render him volitionally incapacitated. When the Supreme Court concluded that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty, its rationale for doing so compels the conclusion that the volitionally incapacitated are likewise ineligible. The Court noted the obvious cognitive limitations of the retarded, but also stressed their "diminished capacit[y] . . . to control

impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," characterizations that have even greater applicability to those who because of mental illness or brain damage are completely unable to conform their conduct to the requirements of the law. *Id*. at 318.

b. At the time of the crime, petitioner suffered from a myriad of mental impairments, the most debilitating of which were psychotic disorders, including schizophrenia and schizoaffective disorder. Prior to the crime, petitioner also exhibited lifelong symptoms of delusional thought patterns, affective disorders, sleep disorders, and the sequelae of severe trauma typically found in those suffering from post-traumatic stress disorder. (*See* Claim Sixteen, paragraph 2.)

(1) The unrebutted testimony at trial was that, because of these mental impairments, petitioner did not have "the ability to control the normal functioning self." (30 RT 4435; *see also* 4465; 4466-67.) Indeed, as a result of his mental illness, petitioner was incapable of controlling his behavior, forming intent to commit the crimes, or otherwise modulate his behavior to conform to the law.

(2) Each of the psychiatrists who conducted a thorough evaluation of petitioner – whether those evaluations occurred near the time of the crime or more recently – agree that petitioner was not in control of his actions or behavior at the time of the crime. (Ex. 154 at 2754-55; Ex. 178 at 3155-57.)

c. The Court in *Atkins* also noted the particular danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes," which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. 536 U.S. 321.

(1) Petitioner faced this risk as a result of his mental illness since one of his central defense mechanisms to trauma is his dissociation; often he appears to others with a flat affect, a lack of expression or emotion, or "frozen," as if he is unaware or uninterested in the world around him. (Ex. 1 at 2; Ex. 10 at 97; Ex. 131 at 2615; Ex. 16 at 146; Ex. 124 at 2530; Ex. 147 at 2722.)

(2) Moreover, he experienced such dissociation during his trial. (Ex. 144 at 2707.) This demeanor may easily be mistaken for a lack of remorse, and is the type of mistaken and prejudicial impression of the jury *Atkins* is designed to prevent. Petitioner's jury noticed his demeanor, noting that he had a faraway look in his eyes, and that his expression was the same throughout the trial. (Ex. 138 at 2689.)

d. In addition to severe mental illness, petitioner suffers from severe brain dysfunctions suggestive of significant damage to petitioner's frontal and parietal lobes and corpus callosum. (Ex. 175 at 3075-76.) As indicated by his extremely poor performance during neuropsychological testing, "Mr. Jones suffers from such severe brain damage that he is unable to function at the same level as 99 percent of those in his age category." (Ex. 175 at 3072.)

e. This type of brain damage, coupled with petitioner's severe mental illness, and drug and alcohol intake on the day of the crime, meant that petitioner was incapable of controlling his behavior, forming the specific intent to commit the crimes, or otherwise modulating his behavior to conform to the law.

(1) Frontal lobe damage has produced cognitive rigidity, distorted perception, and an inability to inhibit unwanted responses. In addition, damage to the frontal and temporal lobes, and resulting deficits in memory and attention, make it difficult for petitioner to respond flexibly to new situations, particularly when he is under the influence of drugs or alcohol. (Ex. 175 at 3076.)

(2) Demyelination in petitioner's corpus callosum means that the coordination of communication between different parts of petitioner's brain is deficient, and exacerbates his other deficits. (*Id.*)

(3) Petitioner's organic brain impairment is longstanding and developed early in life.

(a) Petitioner's mother drank excessively and smoked while pregnant with him. (Ex. 124 at 2501; Ex. 4 at 55; Ex. 18 at 195.) After birth, petitioner suffered numerous head injuries as a result of physical abuse and accidents,

many before he was even of school age. (Ex. 124 at 2512; Ex. 29 at 345; Ex. 16 at 147-48; Ex. 124 at 2511, 2512.)

(b) Petitioner also experienced extended periods of malnutrition and neglect. Petitioner often went without food due to his parents' alcoholism, when they either forgot to buy food or spent all their money on alcohol. (Ex. 124 at 2505, 2512; Ex. 123 at 2488; Ex. 131 at 2610; Ex. 147 at 2719; Ex. 155 at 2769; Ex. 126 at 2560; Ex. 156 at 2778.) Similarly, petitioner's mother and father were uninterested in their children, rarely if ever giving them attention, unless it was to punish them. (Ex. 124 at 2504-05; Ex. 123 at 2483; Ex. 129 at 2583; Ex. 146 at 2714; Ex. 18 at 198; Ex. 135 at 2659; Ex. 21 at 221.)

(c) The severe and lasting effects of alcohol on an in utero developing brain, and early childhood exposure to cigarette smoke, as well as childhood malnutrition and repeated childhood head injuries, are well documented. (Ex. 175 at 3075.)

(d) As a child, petitioner exhibited classic signs of organic brain impairment. He was a clumsy little boy, always running or bumping into things, had speech problems, limited language skills, and problems with auditory processing, and was often unable to understand what was being said to him or to follow instructions. (Ex. 16 at 146; Ex. 148 at 2727; *see also* Ex. 149 at 2728; Ex. 125 at 2552-53; Ex. 50 at 1103; Ex. 51 at 1158; Ex. 124 at 2518; Ex. 178 at 3132.)

(4) Petitioner's organic brain damage was evident at the time of trial.

(a) Although petitioner was not given a complete neuropsychological assessment at the time of trial, there was evidence of the cognitive rigidity, deficits in abstract reasoning, and perseveration revealed by recent neuropsychological testing.

(i) Petitioner was administered a personality test, the Minnesota Multiphasic Personality Inventory, after the incident involving Mrs.

Harris. The psychologist who administered the test noted that petitioner was a very concrete individual, had great difficulty with abstract ideas, and functioned best under structured conditions. (30 RT 4419.)

(ii) Dr. Thomas, who examined petitioner at the time of trial, similarly observed symptoms of organic brain impairment: Petitioner exhibited memory impairments, concrete thinking, and an inability to shift topics. (Ex. 154 at 2761.)

(5) Petitioner's organic brain damage and resulting impairment directly affected his behavior, functioning, and personality for most of his life and the behavior for which he was convicted. (Ex. 175 at 3076.)

f. Lacking in any premeditation or deliberation during his encounter with Mrs. Miller, and unable to control or understand his own behavior during his psychotic, dissociative breaks from reality, petitioner's mental illness, and brain damage, each standing alone or coupled together, whether or not classified as "mentally retarded," classify him as ineligible for execution.

3. Petitioner's death sentence violates the Eighth Amendment in light of his mental impairments.

a. Apart from the Court's decision and reasoning in *Atkins*, petitioner's mental impairments equally prevent the State from carrying out his death sentence because his moral culpability for the crimes is thereby substantially diminished, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crimes. A sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 173 (1972) (joint opinion of Stewart, Powell and Stevens, JJ.).

b. Here again, because during the time of the crime, petitioner was neither able to control his conduct, nor intended the crimes for which he was convicted and sentenced to death (*see* Ex. 154 at 2754-55; Ex. 178 at 3155-57), and was unable to plan, organize, initiate, regulate, or monitor his behavior (Ex. 175 at 3065-66, 3069),

petitioner's execution is barred by the Eighth Amendment's requirement of proportionality.

X. CLAIM TWENTY-FOUR: THE CALIFORNIA DEATH PENALTY STATUTE UNCONSTITUTIONALLY FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY.

Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and were obtained in violation of his right to be free of the infliction of cruel and unusual punishment; due process; counsel and the effective assistance thereof; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and international law as set forth in treaties, customary law, human rights law, and under the doctrine of *jus cogens*, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty; fails to justify the imposition of a more severe sentence on defendants like petitioner compared to others found guilty of murder; permits the imposition of a freakish, wanton, arbitrary, and capricious judgment of death; and, allows the arbitrary selection of defendants such as petitioner for prosecution without consistent guidelines to ensure reliability.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Petitioner was arrested in 1992 and tried in 1995 on one count of murder and on three special circumstances including rape, robbery, and burglary.

2. To be legal and constitutional, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty.

3. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of genuinely narrowing the class of murderers to those most deserving of death on Penal Code section 190.2, the

"special circumstances" section of the statute.

4. California's death-eligibility or special circumstances statute was not designed to perform the constitutionally required narrowing, and both the Legislature and the California Supreme Court's interpretations of the statute have actually expanded the statute's reach.

5. The number and scope of the special circumstances, i.e., the factors that permit a death-eligibility finding under California's death penalty statute, have steadily increased since 1977. (Ex. 187 at 3329-51.)

6. In 1977, the California Legislature enacted a new death penalty law. Under that law one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death eligible. 1977 Cal. Stat. 1255-66. Under the 1977 statute, death eligibility was to be the exception rather than the rule.

7. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." Petitioner was tried and convicted under this 1978 death penalty law. The objective of the Briggs Initiative's drafters was to make the law as broad and inclusive as possible. (Ex. 185 at 3314-15.) The statute was intended to apply to all homicides committed while the defendant was ''engaged in, or was an accomplice in, the commission of, the attempted commission of, or the immediate flight after, committing or attempting to commit serious felonies, as well as all willful and intentional homicides," including all first degree murders then defined by California Penal Code section 189. (*Id*.)

8. The Briggs Initiative sought to achieve this result first, by expanding the scope of California Penal Code section 190.2 to more than double the number of special circumstances compared to the prior law, and second, by substantially broadening the definitions of the prior law's special circumstances, most significantly by eliminating the across-the-board homicide mens rea requirement of the 1977 law. (Ex. 187 at 3333.)

9. Under the Briggs Initiative, the majority of the special circumstances in

section 190.2 have no homicide mens rea requirement for the actual killer.

10. When the crime for which petitioner was charged was committed, California Penal Code section 190.2 contained twenty-six different crimes punishable by death.[19]

11. The death-eligible class created by the California death penalty scheme is too broad to comply with constitutional requirements set forth in *Furman v. Georgia*, 408 U.S. 238 (1972), as a result of the broad legislative definition of first degree murder, the number of special circumstances, and judicial rulings on both the scope of first degree murder and the special circumstances.

12. First degree murder in California is defined by Penal Code section 189. At the time of petitioner's trial and conviction, that section created three categories of first degree murders: (1) murders committed by listed means, (2) killings committed during the perpetration of listed felonies, and (3) willful murders committed with premeditation and deliberation.

13. Penal Code section 190.2 contained twenty-six special circumstances, or twenty-six different crimes punishable by death. The extraordinary breadth of the special circumstance categories is attributable not only to the number of special circumstances, but also by the breadth of the lying-in-wait and the felony-murder special circumstances. Cal. Penal Code §§ 190.2(a)(15) & (a)(17); *People v. Morales*, 48 Cal. 3d 527, 557, 575 (1989) (Mosk, J. concurring and dissenting) (expansive interpretation of lying-in wait-special circumstances).

14. Empirical evidence shows that the overwhelming majority of murders in California could be charged as capital murders and in virtually all of them, at least one special circumstance could be proved. As a result, the California death penalty statute fails to genuinely narrow the class of death-eligible murderers in violation of the

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[19] A twenty-seventh special circumstance—the "heinous, atrocious, or cruel" special circumstance, Penal Code section 190.2(a)(14)—had been invalidated previously by this court but remains in section 190.2 (Ex. 186 at 3320 n.3.)

Eighth and Fourteenth Amendments, and there was, and is, no meaningful basis upon which to distinguish the cases in which the death penalty is imposed from those in which it was not at the time of petitioner's case and presently.

15. A study of the 27,928 convictions in California for first degree murder, second degree murder, or voluntary manslaughter with an offense date between January 1, 1978, and June 30, 2002 ("Baldus Study") shows that the special circumstances enumerated in Penal Code section 190.2 fail to perform the narrowing function required by the Eighth and Fourteenth Amendments. (Ex. 184 at 3223-24.)

a. Among persons convicted of first degree murder between January 1992, and June 2002, 95 percent would have been eligible for the death penalty based on the facts of the offense under California law in place as of 2008.[20] (*Id*. at 3201-02 (Table 1, Part I).) Among the same class of persons, 91 percent would have been eligible for the death penalty under California law in place during the *Carlos* Window. (*Id*. (Table 1, Part II)).)

b. When the 95 percent death-eligibility rate under 2008 law is compared with the 100 percent of first degree murders that were death eligible under pre-*Furman* Georgia law, the resulting 5 percent narrowing rate illustrates that California law fails to limit death eligibility as required by *Furman* and its progeny. (Ex. 184 at 3203-04 (Table 2, Part II).) Similarly, the 91 percent death-eligibility rate

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[20] For purposes of the Baldus Study, death eligibility was determined according to the law in place as of January 1, 2008 and during the so-called *Carlos* Window. (*Id*. at 3193 n.4, 3199, 3203.) The *Carlos* Window refers to the time period governed by the California Supreme Court's decision in *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), which held that the robbery felony murder special circumstance (Penal Code section 190.2(a)(17)(i)) required proof that the defendant had the intent to kill or to aid in a killing. In *People v. Anderson*, 43 Cal. 3d 1104 (1987), the Court overturned *Carlos*, holding that intent to kill is not a requirement to find a felony murder special circumstance for a person who is the actual killer. *Carlos* applies to murders committed between December 2, 1983, and October 13, 1987, the dates of the *Carlos* and *Anderson* opinions. The offense for which petitioner was charged did not occur during the *Carlos* window.

under *Carlos* Window law represents only a 9 percent narrowing rate compared to pre-*Furman* law. (*Id*. (Table 2, Part I).)

c. Among persons convicted of first degree murder, second degree murder, and voluntary manslaughter between January 1978 and June 2002, 59 percent would have been eligible for the death penalty based on the facts of the offense under California law in place as of 2008. (Ex. 184 at 3201-02 (Table 1, Part I).) Among the same class of persons, 55 percent would have been eligible for the death penalty under California law, during the *Carlos* window period.

d. A comparison of this 59 percent death-eligibility rate under 2008 law with the rate under pre-*Furman* Georgia law provides a narrowing rate of 35 percent. (*Id*. at 3203-04 (Table 2, Part II)).) A comparison of the 55 percent death-eligibility rate during the *Carlos* Window period with the rate under pre-*Furman* Georgia law provides a narrowing rate of 40 percent. (*Id*. (Table 2 Part I).)

e. The Baldus Study establishes that California's death sentencing rate, or the rate at which persons who were factually eligible for the death penalty actually received a death sentence, is 4.4 percent. (Ex. 184 at 3217, 3218, 3222.) For those convicted of first-degree murder and whose crimes were factually eligible for a death sentence, the death-sentencing rate is 8.7 percent. (*Id*. at 3220.)

16. A survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappealed murder conviction cases filed during the same period in three counties, Alameda, Kern, and San Francisco, ("Statewide Study") similarly demonstrates that Penal Code section 190.2 fails to perform the constitutionally required narrowing function. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U. L. REV. 1283, 1327-35 (1997).

17. The results of the Statewide Study show only 9.6 percent of convicted first degree murderers were being sentenced to death, giving California a death sentence rate of 11.4 percent; this is a conservative estimate. (Ex. 186 at 3322-23.)

18. A second survey of murder conviction cases in Alameda County ("Alameda County Study") involved 803 murders (including all the death penalty cases) committed between November 8, 1978 (the effective date of the 1978 Death Penalty Law) and November 7, 2001. Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719 (2007).

19. The results of the Alameda County Study revealed a death sentence rate for convicted first degree murderers who were eligible for the death penalty of 12.6 percent. This higher rate is likely attributable to Alameda County's status as a "high death" county and, as above, it likely overstates the actual death sentence rate. (Ex. 186 at 3324.)

20. By using the same calculation methods as were used in the Statewide Study, the death sentence rate in 1992—the year petitioner was charged—was 11 percent. (*Id*. at 3322.)

21. The studies conducted by Professors Baldus and Shatz independently corroborate each other's results. When Professor Shatz excludes juveniles from both of his studies and, using 2008 California law, 91.5 percent of the cases in the Statewide Study and 91.4 percent of the case in the Alameda Study were death-eligible. The nearly identical rates using differing sources of information – appellate decisions in the Statewide Study and court files in the Alameda Study – confirm the accuracy of Professors Baldus's and Shatz's conclusions with respect to the determination of death-eligibility rates in the *Carlos* Window and under 2008 law. Moreover, when the juvenile cases are excluded, Professor Shatz's findings are almost identical to those of Professor Baldus, who found a death-eligibility rate of 91 percent and 95 percent for first-degree murder convictions under *Carlos* Window and 2008 law, respectively.

22. The death sentence rates calculated by the Baldus Study, the Statewide Study, and the Alameda County Study are significantly below the assumed percentage of death judgments at the time of *Furman* (15-20 percent), a percentage implicitly

found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment.

23. The California death penalty scheme does not afford any additional protections by statute or decisional law—including, but not limited to, requirements of unanimity, proof beyond a reasonable doubt, proportionality review, or written findings—that serve to narrow the class of death-eligible murderers or meaningfully distinguish the cases in which the death penalty is imposed from those in which it is not. Nothing in California's death penalty scheme that might otherwise save the infirm eligibility mechanism does so.

24. California's death penalty scheme is broader than that of any other state by several different measures. First, the rate of death eligibility among California homicides is the highest among death penalty jurisdictions. (Ex. 184 at 3210-15.) Second, California's death-eligibility rate is so much higher than any other death penalty jurisdictions that it can be described as a statistical outlier. (*Id*.; Ex. 188 at 3371-73.) Third, California's narrowing rate, or the rate at which California's death penalty statute narrows death-eligibility from pre-*Furman* Georgia law to 2008 California law, is lower than similar rates for other states. (Ex. 184 at 3209.)

25. The present death penalty law in California is truly a "wanton and freakish" system that randomly chooses a few victims for the ultimate sanction from among the thousands of murderers in California.

26. Individual prosecutors in California are afforded completely unguided discretion to determine whether to charge special circumstances and seek death, thereby creating a substantial risk of county-by-county arbitrariness.

27. Because petitioner was prosecuted under this overly inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue setting it aside.

28. Trial counsel's failure to move to strike the special circumstances allegations on any and all of the foregoing grounds was constitutionally unreasonable

and prejudicial to petitioner. Trial counsel did not have any legitimate strategic reason for failing to raise the above challenges to the prosecution of petitioner for capital murder.

Y. CLAIM TWENTY-FIVE: PETITIONER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS SELECTED AND IMPOSED IN A DISCRIMINATORY, ARBITRARY, AND CAPRICIOUS FASHION AND WAS BASED ON IMPERMISSIBLE RACE AND GENDER CONSIDERATIONS.

Petitioner's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution because the prosecution used race, gender, and other unconstitutional considerations in its charging decision to seek the death penalty. Petitioner's federal constitutional rights to a fair trial, to be free of arbitrary and capricious sentencing, to an individualized sentencing proceeding, to be free of cruel and unusual punishment, and to equal protection of the laws were violated.

The equal protection guarantee of the federal Constitution prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis. This principle has greater importance when the possible sentence is death. The Supreme Court consistently has recognized that the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination. Accordingly, the Constitution demands a high degree of rationality in imposing the death penalty. A capital sentencing system that permits race, gender, or other impermissible criteria to influence charging decisions or one that permits arbitrary and capricious charging decisions violates the Constitution.

Similarly, the Constitution is violated when the death sentencing scheme results in arbitrary and capricious charging and sentencing patterns. A death sentence is unconstitutionally imposed when the circumstances under which it has been imposed

create an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim or mistake.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claim Twenty-four, and the accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Petitioner is an indigent African-American male. His capital prosecution was the result of invidious discrimination based on his race, ethnic background, and gender.

3. Under California law, the Los Angeles County District Attorney is responsible for identifying the murder cases in Los Angeles County in which the state will seek the death penalty.

4. During the period 1977-1995, the Los Angeles County District Attorney's Office used race as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. The Los Angeles County District Attorney's Office sought the death penalty in this case against petitioner who is African-American, while not seeking the death penalty in other cases with similar or more egregious facts than petitioner's case where the defendant was white. *See* Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999,* 46 SANTA CLARA L. REV. 1, 25 (2005). Petitioner's race was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek the death penalty against him.

b. The ultimate decision-maker in the Los Angeles County District Attorney's Office was white, as were many, if not all, of the intermediate decision-makers in petitioner's case.

c. In addition to racial discrimination in petitioner's case, there is a pattern of racial discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995.

d. This pattern of racial discrimination in the charging decisions of the Los Angeles District Attorney's Office is consistent with empirical studies indicating the widespread presence of racial bias in charging decisions generally. Such studies show that the death penalty is imposed and executed upon African-Americans with a frequency that is disproportionate to their representation among the number of persons arrested for, charged with, or convicted of death-eligible crimes. *See, e.g.*, Glenn L. Pierce & Michael L. Radelet, *supra*, at 1; "*Developments in the Law, Race and Criminal Process*," 101 HARV. L. REV. 1472, 1525-26 (1988).

5. During the period 1977-1995, the Los Angeles County District Attorney's Office used gender as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. Petitioner's gender was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek the death penalty against him.

b. The ultimate decision-maker in the Los Angeles County District Attorney's Office was male as were many, if not all, of the intermediate decision-makers in petitioner's case.

c. In addition to gender discrimination in petitioner's case, there is a pattern of gender discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995.

d. This pattern of gender discrimination in the charging decisions of the Los Angeles District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible gender bias in charging decisions generally.

e. The death sentence is imposed and executed upon men with a

frequency that is disproportionate to their representation among the general population, the number of persons arrested for, charged with or convicted of death eligible crimes.

6. During the period 1977-1995, the Los Angeles County District Attorney's Office used economic status as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. Petitioner's economic status was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek the death penalty against him.

b. In addition to economic discrimination in petitioner's case, there is a pattern of economic discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995.

c. This pattern of economic discrimination in the charging decisions of the Los Angeles District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible economic status bias in charging decisions generally. In petitioner's case, the Los Angeles County District Attorney's utilization of petitioner's indigence as a factor in charging decisions constitutes prosecutorial misconduct and violated petitioner's fundamental due process rights. Los Angeles County is not alone in the prejudice against young indigent minority men, as California's death row is overwhelmingly comprised of young indigent men.

d. Statistically, the death penalty in the State of California as a whole is disproportionally applied to impoverished defendants who are represented by counsel appointed at public expense. The death sentence is imposed and executed upon poor people with a frequency that is disproportionate to their representation among the general population, the number of persons arrested for, charged with or convicted of death eligible crimes. The application of the death penalty against individuals based on their poverty level is simply another unjustifiable standard and

arbitrary classification that is prohibited by the United States. A prosecutor's utilization of the poverty level of an individual as a factor in deciding whether to charge capitally is also prosecutorial misconduct.

7. During the period from 1977-1995, the Los Angeles County District Attorney's Office applied no consistent permissible criteria in its charging decisions with respect to those cases in which it sought a penalty of death, including the decision to charge petitioner.

a. During this period, the Los Angeles County District Attorney's Office used impermissible criteria, namely race and gender of the defendant, in its charging decisions regarding the cases in which it would seek a penalty of death.

b. In petitioner's case, the Los Angeles County District Attorney's Office decided to seek the death penalty. This charging decision was made on the basis of impermissible factors -- race and gender -- and was not based upon any constitutionally permissible factors that were consistently applied across all death penalty-eligible murder cases.

c. The Los Angeles County District Attorney's Office sought the death penalty in this case against petitioner, while not seeking the death penalty in other cases with similar or more egregious facts than those presented by petitioner's case.

d. The pattern of the charging decisions for death-eligible homicides indicates that the Los Angeles County District Attorney's Office has no consistent, constitutionally permissible criteria, on which to base its death penalty decisions.

8. The application of race, gender, and economic status as criteria for imposing the death penalty against petitioner was constitutionally impermissible. Similarly, arbitrary and capricious charging decisions violate the Constitution. Accordingly, petitioner's sentence of death must be set aside.

9. Trial counsel was ineffective in failing to present appropriate challenges to the charging decision. Petitioner's trial counsel failed to raise available challenges to the constitutionality of the charging decision in this case. Counsel failed to raise a

challenge to the California statutory scheme in general and failed to raise the issue that capital charging decisions and sentences in California, and in Los Angeles County in particular, are disproportionately determined by the race and gender of the victim, the race and gender of the accused, and the class of the accused. Trial counsel's unreasonable and prejudicial failure to raise such challenges deprived petitioner of his Sixth Amendment rights. A reasonably competent attorney during the time of petitioner's trial would have raised such a challenge.

10. The violations of petitioner's guaranteed constitutional rights in this regard were per se prejudicial and relief is warranted without any showing that the error was harmless. In any event, this violation of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the penalty judgment fundamentally unfair, and resulted in a miscarriage of law.

Z. CLAIM TWENTY-SIX: PETITIONER'S DEATH SENTENCE IS UNLAWFUL BECAUSE CUSTOMARY INTERNATIONAL LAW BINDING ON THE UNITED STATES BARS IMPOSITION OF THE DEATH PENALTY ON MENTALLY DISORDERED INDIVIDUALS.

Customary international law and *jus cogens* prohibit the imposition of the death penalty on mentally disordered individuals. Such international law is part of United States federal law and is, thus, the supreme law of the land under Article VI, section 2 of the Constitution of the United States. Because petitioner is mentally disordered, his execution would violate international customary law and the obligations of the United States under that law.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts and allegations contained in each Claim in this Petition are hereby incorporated by reference as if fully set forth herein.

2. According to the Supreme Court, "International law is part of our law, and

must be ascertained and administered by the court of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); *id.* at § 702 cmt. c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts.").

3. Customary international law has been a part of federal law since our country was established. When Chief Justice Jay explained, "the United States by taking a place among the nations of the earth [became] amenable to the laws of nations," he was speaking of customary international law, not merely the treaties the United States would one day make. *Chishom v. Georgia*, 2 U.S. 419, 474 (1793); *see Ware v. Hylton*, 3 U.S. 199, 281 (1793) ("When the United States declared their independence, they were bound to receive the law of nations."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980) ("upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law."). Even the obligations to obey future treaties stemmed from the customary international law principle of *pacta sunt survaneda* ("promises are to be kept").

4. International human rights law has now become an established, essential and universally accepted part of the international community. Louis Henkin, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1 (Louis Henkin ed. 1981). Individuals, including United States citizens, possess remediable rights based on international law. *See, e.g.*, *Filartiga*, 630 F.3d at 877; *see also Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (discussing foreign and international law prohibiting the execution of juvenile offenders); *Lawrence v. Texas*,

539 U.S. 558, 573 (2003) (citing decisions of the European Court of Human Rights in analysis of Due Process Clause requirements as indicative of relevant "values we share with a wider civilization"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (Court expressly considers the opinion of the "world community" in concluding that the execution of mentally retarded offenders violates the Eighth Amendment); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540-41 (N.D. Cal. 1987); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

5. Under the Supremacy Clause, customary law trumps state law. *See Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920). The states, under the Articles of Confederation, had applied international law as common law, but with the signing of the United States Constitution, "the law of nations became preeminently a federal concern." *Filartaga*, 630 F.2d at 877-78. "[I]t is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution." Louis Henkin, et al., INTERNATIONAL LAW, CASES AND MATERIALS 164 (3d ed. 1993); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (finding international law to be federal law).

6. There is no "precise formula" or fixed length of time for determining how widespread a practice must exist before a court can find that an international norm has ripened into customary international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (1989). However, courts have found that conventions with as few as ninety-five members could be conclusive evidence of a customary international law. *See Filartaga*, 630 F.2d at 882.

7. Customary international law is the "customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. at 700. Before it is customary international law, an international norm must (1) be adhered to in practice by most countries and, (2) those countries must follow the norm because they feel obligated to do so by a sense of

legal duty or "*opinio juris*." *See, e.g.*, Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1273 (1991); *see also* Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right*, 11 HARV. BLACKLETTER L.J. 37, 39-43 (1994).

8. The prohibition on imposing the death penalty on the mentally disordered meets both prongs of this test, and qualifies as an international norm or legally binding international law. Nations throughout the word have adopted the norm that the execution of mentally disordered individuals is morally intolerable. At least 133 countries presently prohibit the execution of the mentally disordered. Amnesty International, FACTS AND FIGURES ON THE DEATH PENALTY (2007).

9. This norm has been unanimously attested to by the bodies and agencies of the United Nations competent to make such determinations. In 1984, the United Nations Economic and Social Council (ECOSOC) adopted standards relating to the death penalty which state, *inter alia*, "nor shall the death sentence be carried out on pregnant women, or on new mothers, *or on persons who have become insane*." U.N. Econ.& Soc. Council [ECOSCO], *Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50 U.N. DocE/1984/84 (May 15, 1984) (emphasis added). Those safeguards were endorsed by the United Nations General Assembly that same year. *See* G.A. Res. 39/118 ¶¶ 2, 5 U.N. Doc. A/39/51 (December 14, 1984). In 1989, the ECOSOC expanded these standards and recommended the following, "Member States take steps to implement the safeguards . . . where applicable by: eliminating the death penalty for persons suffering from mental retardation or *extremely limited mental competence, whether at the state of sentence or execution*." U.N. Economic and Social Council , *Implementation of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 1(d), ECOSOC Res. 1989/64, U.N. Doc. E/1989/91 (May 24, 1989) (emphasis added).

10. Various international bodies around the world have endorsed this norm

through resolutions and protocols. In 1982, the Council of Europe adopted Protocol Six to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, providing for the total abolition of the death penalty in peacetime. The Protocol has been ratified by forty-six countries. Amnesty International, *Death Penalty: Ratification of International Treaties*. The Russian Federation has signed, but not ratified, the treaty. *Id.*

11. The Council of Europe is comprised of forty-seven countries from the European continent. The United States is one of eight countries currently enjoying observer status on the council. On June 25, 2001, the Parliamentary Assembly of the Council of Europe adopted a resolution condemning the execution of mentally disordered persons, "[The Council] is particularly disturbed about executions carried out in Observer states which have committed themselves to respect human rights. The Assembly condemns the execution of juvenile offenders, *of offenders suffering from mental illness or retardation*, and the lack of a mandatory appeal system for death penalty cases." Eur. Consult. Ass., *Abolition of the Death Penalty in Council of Europe States,* Resolution 1253 (2001), available at, http://assembly.coe.int/Documents/AdoptedText/TA01/ERES1253.htm (last visited March 8, 2010) (emphasis added).

12. In February 2002, the Council of Europe adopted Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, abolishing the death penalty. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances ETS No. 187 (2002), available at http://conventions.coe.int/Treaty/EN/Treaties/HTML/187.htm (last visited March 8, 2010). Forty-two countries have ratified and three others have signed the protocol. Amnesty International, supra.

13. At its twentieth regular session in 1990, the General Assembly of

American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty which provides for the total abolition of the death penalty during peacetime. OAS, Treaty Series, No. 73. To date, eleven countries are parties to the Protocol. Amnesty International, *supra.*

14. The United Nations Commission on Human Rights has officially held that the continued use of the death penalty against mentally disordered individuals in the United States is a violation of international law. From 1999 until it was replaced by the Human Rights Council in 2006, the United Nations Commission on Human Rights specifically urged "all States that still maintain the death penalty . . . not to impose the death penalty on a person suffering from any forms of mental disorder or to execute any such person." *See* U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 61st Sess., Res. 2005/59, U.N. Doc. E/CN.4/ 2005/59 (2005); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 60th Sess., Res. 2004/67, U.N. Doc. E/CN.4/RES 2004/67 (2004); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 59th Sess., Res. 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 58th Sess., Res. 2002/104, U.N. Doc. E/CN.4/2002/77 (2002); *The Question of the Death Penalty*, 57th Sess., Res. 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 56th Sess., Res. 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 55th Sess., Res. 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999).

15. Beginning in 2007 the United Nations General Assembly called for a moratorium on the execution of all persons because of its concerns about their consistency with international law. *See Moratorium on the Use of the Death Penalty*, G.A. Assembly, 62d Sess., Res. 62/149, U.N. Doc. A/RES/62/149 (2007).

16. The United Nations Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions has repeatedly found the United States to be in contravention of accepted international standards relating to the execution of the mentally ill. In

December of 1996, the Special Rapporteur issued a reported stating that the Rapporteur intervenes when capital punishment is imposed upon the "mentally retarded or insane." United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, ¶ 9(a), U.N. Doc. E/CN.4/1997/60 (Dec. 24, 1996). In the addendum to the report, which addressed the actions of particular countries, the Rapporteur specifically found that the United States does not conform to guarantees and safeguards contained in international instruments prohibiting the execution of the mentally retarded and the mentally ill. E/CN.4/1997/60/Add.1 (Dec. 24, 1996). In his 1998 report specifically addressing the use of the death penalty in the United States, the Special Rapporteur expressed a concern "about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards." United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur: Addendum: Mission to the United States*, ¶ 36, U.N. Doc. E/CN.4/1998/68/Add.3 (Jan. 22, 1998). In 2000, the Special Rapporteur urged governments that still execute persons "to take immediate steps to bring their domestic legislation into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons." United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, ¶ 97, U.N. Doc. E/CN.4/2000/3 (Jan. 25, 2000).

17. The international law norm prohibiting the execution of mentally disordered individuals has become so widespread as to be peremptory, a *jus cogens* norm which is non-derogable.

18. Article Fifty-three of the Vienna Convention defines *jus cogens*: as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. *See* Vienna Convention, *supra*, 1155 U.N.T.S. 331.

19. As demonstrated by treaties, official pronouncements, and practices

described *supra*, the prohibition of the execution of the mentally disordered has become as widespread and clear as the prohibition of slavery, torture, or genocide. Contrary to the policy and practice of the United States, the world consensus is absolute: the execution of mentally disordered persons is a violation of binding international law. Petitioner's death sentence therefore violates binding customary international law and *jus cogens* and is unlawful.

20. Virtually every major mental health association in the United States has published a policy statement advocating either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. The organizations that take positions against the execution of mentally ill offenders include, but are not limited to, the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the National Mental Health Association.

21. Petitioner's diagnosed and documented mental disorders place him under the protection of international law. (*See* Claims Four, Five, Sixteen and Twenty-three *supra*; *see also* Ex. 154 at 2750 (finding petitioner suffers from schizoaffective disorder); *id*. at 2761 ("Mr. Jones's multiple mental impairments affected his judgment and his actions throughout his life, and had particularly insidious effects on his behavior and thought process the evening of the incident."); Ex. 175 at 3075-76 (petitioner's severe brain damage "has likely been pervasive and diminished his ability to function in everyday life"); Ex. 178 at 3157 (the "tragic combination" of petitioner's traumatic experiences, neglect, isolation, genetic predisposition to develop a major mental illness, numerous head injuries and substance abuse impaired petitioner's functioning throughout his life).)

22. The Supreme Court's prohibition against the execution of mentally retarded individuals should apply equally to petitioner, who suffers from debilitating mental illness and was as a result unable to conform his conduct to the requirements of the law. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *City of Cleburne v. Cleburne*

Living Center, 473 U.S. 432 (1985) ("all persons similarly situated should be treated alike"); (*supra* Claims Sixteen and Twenty-three.). Petitioner's moral culpability was substantially diminished by the severity of his mental illness, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell and Stevens, JJ) (a sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment).

23. Petitioner's convictions and death sentence also are unlawful because the conduct of criminal proceedings and the imposition of the death penalty in a racially discriminatory manner violate provisions of international treaties binding upon the United States. (*See supra* Claims Fourteen, Nineteen, Twenty-two, and Twenty-five.)

24. State and federal procedural laws, rules or practices may not be applied to deprive petitioner of his international rights.

AA. CLAIM TWENTY-SEVEN: THE EXTRAORDINARILY LENGHTY DELAY IN EXECUTION OF SENTENCE IN MR. JONES'S CASE, COUPLED WITH THE GRAVE UNCERTAINTY OF NOT KNOWING WHETHER HIS EXECUTION WILL EVER BE CARRIED OUT, RENDERS HIS DEATH SENTENCE UNCONSTITUTIONAL.

Mr. Jones has spent nineteen years awaiting review of his conviction and sentence of death because California's death penalty system is dysfunctional. Moreover, because California's review process fails to correct constitutional errors in capital cases, Mr. Jones likely will spend several more years litigating his convictions and sentences. At the end of this lengthy process, Mr. Jones likely will be granted a new trial, just as the federal courts have done in the majority of California capital habeas corpus proceedings. Even should the state prevail in these proceedings, the state's inability to create a lawful execution procedure renders it gravely uncertain when or whether Mr. Jones's execution will ever be conducted. California's appellate and post-conviction processes thus has failed to provide Mr. Jones with a full, fair, and timely review of his conviction, and sentence, his confinement is rendered

unnecessarily lengthy, tortuous, and inhumane, and his execution is unconstitutional. Mr. Jones's sentence of death and continued confinement are unlawful and violate his rights to due process; equal protection; meaningful appellate review; and freedom from the infliction of torture and cruel and unusual punishment, ex post facto punishment, and double jeopardy as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law as set forth in treaties, customary law, international human rights law, including but not limited to the European Convention on Human Rights and international decisional law, and under the doctrine of jus cogens.

In support of this claim, Mr. Jones alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The protracted period between the imposition of Mr. Jones's judgment of death and the filing of this Amended Petition has negated the purposes of the death penalty deemed constitutionally acceptable. Mr. Jones was arrested and charged with capital murder in August 1992 when he was twenty-eight years old. 1 CT 87-89; Ex. 26 at 268. He was formally sentenced to death on April 9, 1995, at age thirty. 2 CT 504; Ex. 26 at 268. He will be fifty years old on June 27, 2014. Ex. 26 at 268. To date, Mr. Jones has been on Death Row continuously under a sentence of death at San Quentin State Prison for nineteen years.

2. The length of time between the imposition of sentence and the final review of the legality of his convictions and death sentence is attributable to no fault of Mr. Jones. The delay is a direct consequence of inadequacies in California's death penalty system and the state's inability to implement capital punishment in a manner that does not violate the Constitution. "The elapsed time between judgment and execution in California exceeds that of every other death penalty state" (California Commission on the Fair Administration of Justice, Report and Recommendation on the Administration of the Death Penalty in California at 114 (Gerald Uelmen ed., 2008)

(Commission Report) (available at http://www.ccfaj.org/documents/CCFAJ FinalReport.pdf)), averaging over two decades for the handful of executions that have occurred in California (Commission Report at 116).

a. Mr. Jones was, and at all times has been, indigent and therefore forced to rely on the courts for the appointment of counsel in state and federal proceedings.

b. The California Supreme Court has had great difficulty recruiting experienced counsel to represent death-sentenced prisoners in automatic appeals because of the unique combination of skills necessary for such representation. Appeal from a judgment of death is automatic, mandatory, and cannot be waived by individuals sentenced to death. The obligation to undergo this process stems, in part, from the state's interest in insuring reliability in legal proceedings that result in a sentence of death. Moreover, counsel in a capital appeal have a duty to raise all meritorious issues, and the California Supreme Court has a duty to examine the complete record to determine whether the trial that resulted in a death sentence was fair. The delayed appeal process was typically lengthy in Mr. Jones's case. More than four years passed before the California Supreme Court appointed counsel to represent Mr. Jones in his automatic appeal on April 13, 1999. Mr. Jones's automatic appeal was not fully briefed until February 26, 2002. On March 17, 2003, the California Supreme Court affirmed Mr. Jones's conviction (*People v. Jones*, 29 Cal. 4th 1229, 64 P.3d 762 (2003)), and the judgment became final on October 21, 2003 (*Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286 (2003)), over eight years after he was sentenced.

c. The California Supreme Court further delayed timely review of Mr. Jones's judgment during the state post-conviction proceedings. As a result of a lack of funding and other state created disincentives, recruitment of experienced counsel to represent death-sentenced prisoners has been virtually impossible. Commission Report at 133-36. At the time that Mr. Jones was appointed habeas corpus counsel in

2000, there were approximately 215 inmates on California's death row without habeas corpus counsel. Habeas Corpus Resource Center, Annual Report 1999-2000, at 6. Currently, there are 353 men and women under sentence of death in California without habeas corpus counsel.

d. Over five years after Mr. Jones was sentenced to death, on October 20, 2000, the California Supreme Court appointed the Habeas Corpus Resource Center to represent him in state habeas corpus proceedings. Mr. Jones filed his state petition on October 21, 2002,[21] containing detailed allegations of the constitutional claims asserted and supplied numerous supporting records and declarations.

e. The size of the court's caseload, and limitations on judicial resources, resulted in the passage of another six-and-a-half years before the court denied Mr. Jones's state habeas petition on March 11, 2009, without conducting a hearing or resolving factual disputes.

f. As with the automatic appeal process, California's state habeas process is in place to protect California's interest in safeguarding the rights of its citizens by ensuring compliance with the Constitution and the correctness of procedures resulting in sentences of death, as set forth in California Government Code section 68662. *In re Morgan*, 50 Cal. 4th 932, 941 n.7, 237 P.3d 993 (2010). The delay, therefore, is essential to California's vindication of its own interests and was not a stratagem on the part of Mr. Jones to postpone execution of his sentence.

3. As a consequence of California's inadequate review process, federal

[21] At the time of filing the state petition, the California Supreme Court's policies provided that Mr. Jones's petition would be considered timely if it was filed two years from the date of appointment of counsel. The California Supreme Court has since determined that the minimum amount of time required to investigate and present legally sufficient challenges to a petitioner's conviction, sentence and confinement is three years. Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3 Timeliness Standard 1-1.1 (as amended Nov. 30, 2005) (available at http://www.courts.ca.gov/documents/ PoliciesMar2012.pdf).

litigation of Mr. Jones's challenges to his convictions and death sentence will be protracted and likely result in the granting of habeas corpus relief.

a. The California Supreme Court has granted some form of relief in capital habeas corpus proceedings only eighteen times since 1978. The Court summarily denies the overwhelming majority of capital habeas corpus petitions without any explication of its reasoning after reviewing only the petition and, usually, the requested informal briefing. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 741 (2007); see also Commission Report at 134. Indeed, the Supreme Court historically has issued orders to show cause in fewer than eight percent of habeas corpus proceedings, and held evidentiary hearings in less than five percent of the cases. Commission Report at 134; *see also* Judge Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. at 741.

b. Mr. Jones timely filed a Petition for Writ of Habeas Corpus by a Prisoner in State Custody (28 U.S.C. § 2254) (Petition) on March 10, 2010, in this Court. ECF No. 26. Respondent filed an Answer to Petition for Writ of Habeas Corpus (Answer) on April 6, 2010, in which he generally denied each and every allegation raised by Mr. Jones. Answer at 22, 23, 25, 26, 28, 29, 31, 33, 35, 37, 38, 41, 42, 45, 47, 48, 50, 51, 53, 54, 56, 58, 60, 61, 63, 65, 67, 69, 71, & 72, ECF No. 28..

c. On February 17, 2011, Mr. Jones filed a Motion for Evidentiary Hearing. ECF No. 59. On April 4, 2011, the United States Supreme Court issued its opinion in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), holding that the bar to federal habeas corpus relief set forth in 28 U.S.C. section 2254(d)(1) must be evaluated solely by reference to "the record that was before the state court that adjudicated the claim on the merits." *Id*. at 1398. In response to the opinion, this Court vacated the remaining briefing schedule for Mr. Jones's Motion for Evidentiary Hearing and ordered the parties to brief Mr. Jones's entitlement to an evidentiary hearing in light of *Pinholster*, which they completed. *See* ECF Nos. 62, 68, 71, & 74. In an order denying Mr. Jones's Motion for an Evidentiary Hearing

without prejudice, this Court ordered the parties to conduct merits briefing to "set forth how each claim satisfies section 2254(d)(1) and/or section 2254(d)(2) on the basis of the record that was before the state court that adjudicated the claim on the merits." ECF No. 75. That briefing was completed on January 27, 2014. *See* ECF Nos. 84, 91, & 100.

d. Litigation in this Court and the appellate courts likely will be protracted, further delaying the ultimate resolution of whether his judgment is constitutionally infirm. Moreover, much of the delay in federal court proceedings is "attributable to the absence of a published opinion and/or evidentiary hearing in the state courts." Commission Report at 123.

e. In stark contrast to the Supreme Court's rates of affirmance and denial in death penalty cases, federal courts have granted relief in federal habeas corpus proceedings arising from California death judgments in more than a majority of the cases reviewed. As reported by the Commission on the Fair Administration of Justice in 2008, "federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments" and "[r]elief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%." Commission Report at 115. Between the 2008 publication of the Commission's report and an article on California's death penalty system authored by Judge Alarcon and Paula M. Mitchell in 2011, "federal habeas corpus relief has been granted in five additional cases, and denied in four additional cases, all of which are final judgments, making the rate at which relief has been granted 68.25%." Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Debacle*, 44 Loy. L.A. L. Rev. S41, S55 n.26 (2011).

4. The death penalty as currently implemented in California has functionally deprived Mr. Jones of his due process right of access to the courts. *See e.g., Jones v. State*, 740 So. 2d 520 (Fla. 1999) (holding twelve year delay in holding competency

hearing while defendant on death row violated due process). In that case, the Florida Supreme Court likened the egregious delay to hold a competency hearing to the delays in death penalty appeals criticized as excessive by Justice Breyer in *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998).

5. Prolonged confinement under sentence of death is physically and psychologically torturous in violation of the Eighth Amendment to the Constitution of the United States.

a. At San Quentin, Mr. Jones has been housed with several hundred other condemned inmates in East Block. East Block is "a looming warehouse-like structure constructed in 1930," and is described as being the length of two football fields, forty yards wide, and six stories high. "It is like a giant empty warehouse into which a smaller five-story concrete structure has been concentrically placed." The five stories, or tiers, have two sides. Each side of these five tiers contains approximately 54 cells, making approximately 250 cells per side, and 500 cells in the block. "Each cell is fully encased by concrete, with a grated metal door that adjoins the narrow walkway running the length of the tier." Armed officers patrol narrow gun rails built into the outer wall. There are two such gun rails that run the circumference of the four interior walls. Guards look into the cells across the space separating the gun rails from the tiers. *Lancaster v. Tilton*, No. C 79-01630 WHA, 2008 WL 449844 at *5 (N.D. Cal. Feb. 15, 2008). Mr. Jones lives in a windowless, six by eight foot cell with three concrete walls and bars on the cell front, fitted with metal grating. *See Toussaint v. McCarthy*, 597 F. Supp. 1388, 1394-95 (N.D. Cal. 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986).

b. During Mr. Jones's confinement on Death Row, living conditions there have been found so substandard, unhealthy, and inhumane, and the medical and mental health care determined to be so deficient and below minimally acceptable constitutional standards - both on the Row and in other relevant areas of San Quentin - that lawsuits and the long-term intervention and oversight of the courts have been

required. *See, e.g., Plata v. Brown,* Case No. C-01-1351 TEH (N.D. Cal.) (finding prison medical care, including that on Death Row, to be deficient); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (concerning deficiencies in prison mental health care); *Thompson v. Enomoto,* 815 F.2d 1323 (9th Cir. 1987) (alleging conditions and treatment on Death Row violate Eighth and Fourteenth Amendments); *Toussaint*, 597 F. Supp. 1388 (describing conditions in East Block); *Lancaster*, 2008 WL 449844 (continuation of Thompson litigation).

c. Since Mr. Jones's confinement at San Quentin in 1995, twelve men have been executed (one in Missouri), thirteen have committed suicide, and sixty have died of natural causes or other means. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution in California.

6. California does not currently have a method of execution that comports with state and federal law.

a. California Penal Code Section 3604(a) provides that "[t]he punishment of death shall be inflicted by the administration of a lethal gas or by an 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."

b. California's use of lethal gas executions has been found to violate the Eighth Amendment. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994) (finding that California's method of execution by lethal gas was cruel and unusual under the Eighth Amendment, due to the pain inflicted and the evidence of the rejection of the method by society), *vacated on other grounds*, *Fierro v. Terhune*, 147 F.3d 1158 (1998) (holding that current plaintiffs lacked standing). In addition, the California Department of Corrections and Rehabilitation (CDCR) has not issued lawful regulations to conduct such executions.

c. Because of litigation challenging California's lethal injection

protocol, there have been no executions since January 2006. In December 2006, the United States District Court for the Northern District of California declared the manner in which the CDCR implemented its lethal injection protocol violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Morales v. Tilton* 465 F. Supp. 2d 972 (N.D. Cal. 2006).

d. In May 2007, the CDCR revised its lethal injection protocol. The CDCR, however, failed to follow the appropriate regulatory process, and the Marin County Superior Court enjoined the CDCR from executing condemned inmates by lethal injection until the necessary regulations were enacted in compliance with the California Administrative Procedures Act (APA). The CDCR appealed and, in 2008, the California Court of Appeal affirmed the trial court's decision. *Morales v. California Dept. of Corrections & Rehabilitation*, 168 Cal. App. 4th 729, 85 Cal. Rptr. 3d 724 (2008).

In response, the CDCR began to promulgate new regulations in May 2009, the validity of which were once again challenged in state court. In May 2013, the California Court of Appeal held that the revised protocol was invalid for failure to comply with the provisions of the APA, and permanently enjoined the execution of any inmate by lethal injection unless and until new regulations governing lethal injection are promulgated. *Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059, 1064, 157 Cal. Rptr. 3d 409, 413 (2013)

e. At this time, California does not have a lethal injection protocol in place. *Morales v. Cate*, 5-6-CV-219-RS-HRL, 2012 WL 5878383 (N.D. Cal. Nov. 21, 2012). Moreover, California will not have a valid lethal injection protocol for the foreseeable future because the state must first comply with the APA requirements for publishing the regulations and responding to comments and because any such regulations likely will be subjected to protracted litigation in state and federal court.

7. A death sentence, such as Mr. Jones's, that does not serve legitimate and substantial penological goals, and that cannot be accomplished by alternative sentence

violates the Eighth Amendment. The legitimate penological goals of a death sentence are deterrence and retribution. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Gregg v. Georgia*, 429 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). *But see Furman v. Georgia*, 408 U.S. 238, 343, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Marshall, J., concurring) ("Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government . . . Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.") (citations omitted). A punishment is deemed excessive and unconstitutional if it serves no penological purpose more effectively than would a less severe punishment. *See, e.g., Furman*, 408 U.S. at 280 (Brennan, J., concurring), 312-13 (White, J., concurring); *Ceja v. Stewart*, 134 F.3d 1368, 1373-78 (9th Cir. 1998).

8. Execution of Mr. Jones following lengthy and torturous incarceration constitutes cruel and unusual punishment both because of the physical and psychological suffering inflicted on Mr. Jones, and because of the failure of such an extraordinary sentence to serve any legitimate state interest. *See, e.g., Thompson v. McNeil*, 129 S. Ct. 1299, 129 S. Ct. 1299 (2009) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 1047, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution). Delay in the execution of death judgments "frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment." *Gomez v. Fierro*, 519 U.S. 918, 117 S. Ct. 285, 136 L. Ed. 2d 204 (1996) (Stevens, J., dissenting).

9. Carrying out Mr. Jones's sentence after this extraordinary delay violates

the Eighth Amendment:

a. To confine an individual, such as Mr. Jones, on death row for a protracted period of time constitutes cruel and unusual punishment. *See e.g., Knight v. Florida*, 528 U.S. at 990; *Lackey v. Texas*, 514 U.S. at 1047. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890); *see also Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S. Ct. 457, 94 L. Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon").

b. Execution following lengthy and torturous incarcerations constitutes cruel and unusual punishment because the State's ability to exact retribution and deter other serious offenses by actually carrying out such a sentence is drastically diminished. *See, e.g.*, *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998).

(1) To survive Eighth Amendment scrutiny, a death sentence must serve legitimate and substantial penological goals. 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 discernible 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*, 408 U.S. at 312; *see also Gregg v. Georgia*, 428 U.S. at 183 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

(2) In order to satisfy the Eighth Amendment, "the imposition of the death penalty must serve some legitimate penological end that could not be otherwise accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' then it is unnecessarily excessive within the meaning of

the Punishments Clause." *Ceja v. Stewart*, 134 F.3d at 1373 (quoting *Furman*, 408 U.S. at 280 (1972) (Brennan, J., concurring)).

c. Mr. Jones has had the uncertainty of awaiting execution of his sentence for nineteen years. The acceptable state interest in retribution is and has been satisfied by the psychological and physical harshness and severity of that sentence. In Medley, the period of uncertainty in question was just four weeks. 134 U.S. at 172. "That description should apply with even greater force" here in Mr. Jones's case where the delay has lasted nineteen years and will likely be several more years. *Lackey*, 514 U.S. at 1045-47 (Stevens, J., dissenting from denial of certiorari).

d. The state's interest also has been satisfied by the additional deterrent effect of many years in prison and a continued life of incarceration. The additional deterrent effect of an actual execution in this case is minimal at best.

10. The application of the Eighth Amendment in this context must be interpreted in light of evolving public opinion. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (footnote omitted). Moreover, "the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" Gregg, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 378, 30 S. Ct. 544, 54 L. Ed 793 (1910)). Since 1995, the year Mr. Jones was sentenced to death, forty-one countries have abolished the death penalty for all crimes, *see* Amnesty International (available at http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes). Since Mr. Jones's arrival on Death Row, six states have abolished capital punishment - New York and New Jersey in 2007; New Mexico in 2009; Illinois in 2011; Connecticut in 2012; and Maryland in 2013. *See* Death Penalty Information Center (available at http://www.deathpenaltyinfo.org/ states-and-without-death-penalty). A closely divided electorate very nearly abolished capital punishment in California in the general

election of 2012. Society is clearly maturing and evolving away from imposition of the death penalty. As consensus grows, the more obvious it becomes that execution of an inmate following a long and torturous incarceration under sentence of death violates the standards of decency that give the Eighth Amendment its meaning.

11. Mr. Jones's prolonged confinement under sentence of death violates international human rights law.

a. The European Court of Human Rights has held that protracted postconviction, pre-execution confinement is a human rights violation of sufficient magnitude to prohibit the United Kingdom from sending an accused to face such a fate. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989) (six to eight year delay before execution in Virginia prohibited United Kingdom from extraditing potential capital defendant to that state).

b. The Canadian Supreme Court cited such delays as a relevant consideration in deciding that extradition of a murder suspect to the United States without first obtaining assurances that the death penalty would not be imposed violated principles of fundamental justice. *United States v. Burns*, 1 S.C.R. 283, 353 (2001).

c. Courts in other countries, even those assuming the lawfulness of a death sentence, have held that "lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel." *Knight v. Florida*, 120 S. Ct. at 462 (Breyer, J., dissenting from denial of certiorari). A delay of fourteen years (less than the amount of time Mr. Jones has been condemned) is deemed "shocking," and delays of more than five years are described as "inhuman or degrading punishment." *Id*. at 463 (internal citations omitted).

12. Moreover, the state has no legitimate penological interest (deterrent or retributive) in executing Mr. Jones and his execution would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur because of the unique facts of his case. The facts and exhibits set forth in claims 1, 2, 3, 4, 19, 25, and 28 concerning petitioner's mental state at the time of the crime

and serious questions about his role in the crime, his character and background, and his neurocognitive and mental vulnerabilities are incorporated by this reference.

13. The cruelty that has attended the delay to date of the execution of Mr. Jones's death sentence renders that sentence excessive under currently prevailing and evolving standards of decency under the state and federal constitutions, as well as international law. Accordingly, Mr. Jones's death sentence is unconstitutional.

BB. CLAIM TWENTY-EIGHT: PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

Petitioner's conviction, sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner was denied his right to due process, equal protection, the right to counsel and the effective assistance thereof, full and fair appellate proceedings, and a reliable determination of his guilt, death eligibility, and punishment due to appellate counsel's representation, which prejudicially fell below minimally acceptable standards of competence by counsel acting as a zealous advocate in a capital case.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing.

1. The California Supreme Court appointed appellate counsel to represent petitioner in his automatic appeal on April 13, 1999. The court certified the record on April 28, 2000. Thereafter, appellate counsel requested and received seven extensions of time. Appellate counsel filed petitioner's direct appeal brief on June 19, 2001, and the reply brief on February 26, 2002.

2. Omissions by appellate counsel, such as the failure to present all available facts in support of legal claims, the failure to advance legal claims that could have been raised on appeal because they fully appear on the certified record, or the failure to advance every available legal basis for a litigated claim were not the product of a

reasonable – or any – tactical decision. The following are meritorious issues for which appellate counsel had no strategic reason for failing to include in petitioner's direct appeal:

a. Petitioner's federal constitutional rights to a fair and reliable guilt and sentencing determination were violated by the trial court's erroneous ruling allowing the jury to draw impermissible inferences from highly inflammatory propensity evidence during the guilt phase. (*See supra* Claim Ten.)

b. The trial court unreasonably and prejudicially failed to protect petitioner's federal constitutional rights by allowing the prosecution to engage in numerous instances of deceptive and reprehensible prosecutorial misconduct in the guilt and penalty phases. (*See supra* Claim Fourteen.)

c. The trial court violated petitioner's federal constitutional rights when it abdicated its responsibility to ensure an effective inquiry into prospective juror biases. (*See supra* Claims Seven and Eight.)

d. Petitioner was deprived of his federal constitutional rights because the jury was given incomplete and confusing jury instructions and verdict forms in the guilt and penalty phases of petitioner's trial. (*See supra* Claims Twelve and Twenty-one.)

e. The erroneous admission of improper, prejudicial, and false victim impact evidence violated petitioner's state and federal constitutional rights. (*See supra* Claim Fourteen.)

f. The prosecution violated petitioner's federal constitutional rights by failing to disclose material exculpatory evidence. (*See supra* Claim Three.)

g. The prosecution knowingly presented false evidence in violation of petitioner's federal constitutional rights. (*See supra* Claim Fourteen.)

h. No evidence supports petitioner's convictions and true special circumstance finding in violation of the federal constitution. (*See supra* Claims One and Nine.)

i. Petitioner's federal constitutional rights were violated when the prosecution failed to give trial counsel adequate notice of aggravation evidence pursuant to California Penal Code section 190.3. (*See supra* Claim Fifteen.)

j. The trial court failed to protect petitioner's federal constitutional rights by admitting evidence of petitioner's minor, non-violent, prior prison infractions, and not permitting petitioner to mitigate the court's error by permitting evidence of the conditions of confinement for prisoners sentenced to life without the possibility of parole. (*See supra* Claim Seventeen.)

k. Petitioner's federal constitutional rights were violated by the admission of numerous inflammatory and irrelevant photographs and also by trial counsel's failure to object to their introduction. (*See supra* Claim Twenty.)

l. The failure of California's death penalty statute to narrow the class of death eligible offenders violated petitioner's federal constitutional rights. (*See supra* Claim Twenty-four.)

m. As a result of petitioner's profound mental illness and severe cognitive defects, petitioner's death sentence violates the tenets of international law. (*See supra* Claim Twenty-six.)

n. Petitioner's federal constitutional rights were violated because the direct appeal of his capital conviction and death sentence were based on an incomplete and inaccurate appellate record. (*See infra* Claim Twenty-nine.)

3. Appellate counsel's unreasonable failure to develop and present these claims on appeal was prejudicial. Had the claims been presented, they would have required reversal of the judgment.

CC. CLAIM TWENTY-NINE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BY THE SUPERIOR COURT'S FAILURE TO CREATE AND PRESERVE AN ADEQUATE AND RELIABLE RECORD OF THE PROCEEDINGS THAT RESULTED IN HIS CONVICTIONS AND DEATH SENTENCE.

The convictions and sentence of death were rendered in violation of petitioner's

right to due process, equal protection, a reliable death sentence, reliable and meaningful appellate review, and his right to effective assistance of counsel on appeal as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. These violations occurred because the trial court refused to comply with constitutional and statutory requirements that all significant proceedings be conducted on the record and that the record compiled on appeal be complete.

In support of this claim, petitioner alleges the following facts, among others, to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The United States Constitution requires the creation of a record in death penalty cases that accurately and comprehensively reports and reflects the substance of all proceedings conducted in the case. In direct contravention of petitioner's right to an accurate and reliable record, the Superior Court failed to maintain and provide to the California Supreme Court, and petitioner, an accurate record of the proceedings.

2. On or about March 23, 2000, the Los Angeles County Superior Court certified the record on appeal in *People v. Ernest Jones*, Los Angeles Superior Court No. BA 063825.

3. The certified record is incomplete in numerous respects. The Clerk's Transcript on appeal does not include the following documents currently in the Los Angeles Superior Court Clerk's file in this case:

a. Information, filed December 24, 1992

b. Minute Order, dated December 24, 1992

c. Court Order for Housing, filed September 3, 1993

d. Court Order regarding legal visitation of defendant, filed October 20, 1993

e. Court Order, filed November 30, 1993

f. Court Order, filed November 30, 1993

g. Court Order, filed December 23, 1993

h. Copy of the Opinion of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals,* not file stamped

i. Copy of the Opinion of the Sixth Circuit Court of Appeals in *United States v. Bond,* filed May 19, 1994

j. Reporter's Transcript of proceedings on April 5, 1994, in *People v. Jamal Fountain,* Contra Costa County Superior Court No.910267-4, filed May 24, 1994, regarding deoxyribonucleic acid (DNA) testing procedures used by Cellmark Laboratories

k. Reporter's Transcript of proceedings on April 8, 1994, in *People v. Jamal Fountain*, filed May 24, 1994, regarding DNA testing procedures used by Cellmark Laboratories

l. Confidential Court Order, filed August 25, 1994

m. Service of Subpoena Duces Tecum and Supporting Affidavit, dated September 27, 1994

n. Notice of Motion for Pretrial Discovery, prepared by Fred Manaster, undated and without a file stamp, regarding discovery of DNA materials

o. Points and Authorities in Support of Scientific Evidence (Kelly-Frye), prepared by Lisa Kahn, Deputy District Attorney, undated and not file stamped

p. Motion to Quash Subpoena Duces Tecum, prepared by counsel for Pacific Bell, not file stamped

q. Amendment to Information, filed January 9, 1995

r. Court Order regarding legal visitation of defendant, filed January 12, 1995

s. Minute Order, dated June 5, 1995

t. Minute Order, dated June 13, 1995

u. Minute Order, dated July 18, 1995

v. Minute Order, dated August 17, 1995, admitting exhibits into evidence

w. Minute Order, dated August 22, 1995, amending the April 7, 1995 imposition of sentence

x. Minute Order, dated August 29, 1995

4. The Clerk's Transcript on appeal also is missing documents filed with, and reporter's transcripts from, proceedings in the Los Angeles County Municipal Court. The documents missing from the certified record on appeal include:

a. Reporter's Transcripts of proceedings conducted on September 1, 1992 (arraignment)

b. Reporter's Transcripts of proceedings conducted on September 4, 1992 (arraignment and plea)

c. Reporter's Transcripts of proceedings conducted on September 8, 1992 (arraignment)

d. Reporter's Transcripts of proceedings conducted on September 21, 1992 (preliminary hearing)

e. Reporter's Transcripts of proceedings conducted on October 21, 1992 (preliminary hearing)

f. Reporter's Transcripts of proceedings conducted on November 6, 1992 (preliminary hearing)

g. Order Directing Defendant to Supply Plaintiff with Blood and Saliva Samples, signed November 6, 1992

h. Reporter's Transcripts of proceedings conducted on December 2, 1992 (preliminary hearing)

i. Reporter's Transcripts of proceedings conducted on December 2, 1992 (defendant's motion for appointment of new counsel)

5. In addition, the Los Angeles County Superior Court Clerk's Office apparently misfiled documents from petitioner's capital prosecution into the clerk's files for petitioner's prior prosecutions. Thus, numerous documents were omitted from the record on appeal. These documents include the following:

a. Affidavit of Custodian of Records at Martin Luther King Hospital, dated September 14, 1994

b. Subpoena Duces Tecum and Application for Subpoena Duces Tecum by Jeffrey Ramseyer, District Attorney, addressed to the Custodian of Records at Martin Luther King Hospital for Medical Records of Ernest Dewayne Jones, dated July 19, 1994

c. Medical Records of Ernest Dewayne Jones from Martin Luther King Hospital for treatment on August 14 and 15, 1992

d. Affidavit of Custodian of Records at the Department of the Coroner, dated August 23, 1994

e. Autopsy Report No. 92-07798, Julia Miller, dated October 20, 1922

f. Medical Report Forensic Science Center No. 92-07798, Julia Miller, dated August 27, 1992

g. Report of Toxicological Analysis, dated September 9, 1992

h. Department of the Coroner Case Report of M. Shepherd, dated August 25, 1992

i. Department of the Coroner Investigator's Report, dated August 25, 1992

j. Autopsy Check Sheet, dated August 27, 1992, and Coroner's Diagrams

k. Sexual Assault Evidence Data Sheet, dated August 25 to August 27, 1992

l. GSR Data Sheet, dated August 27, 1992

m. Forensic Laboratory Analysis Report, dated June 15, 1993

n. Personal Effects Inventory, dated August 25, 1992

o. Declaration Pursuant to Section 27491.3 of Government Code, dated September 2, 1992

p. Case Reported/Original Jurisdictional Determination Record

q. Order for Release

6. In addition, the documents listed in the preceding paragraphs represent only a portion of the documents missing from the record of the trial proceedings. Petitioner has been irreparably injured by the failure of the Superior Court for the County of Los Angeles to ensure the integrity of the record of the trial proceedings. As a result of the Superior Court's failure to create and maintain an accurate record, numerous documents in the Clerk's File have been lost. Current habeas counsel for petitioner has sought to locate and obtain copies of all materials filed in the Superior Court, but has been informed that the complete Clerk's Files in this matter cannot be located.

a. Subsequent to the appointment by the California Supreme Court of the Habeas Corpus Resource Center (HCRC) as habeas counsel for petitioner, HCRC personnel traveled to the Los Angeles County Superior Court to inspect the Clerk's File. That review revealed the existence of numerous documents omitted from the Clerk's Transcript. Counsel for the HCRC requested that the Clerk's Office provide copies of the missing materials.

b. HCRC personnel inspected the file at the Los Angeles Criminal Courts Building. The Clerk's Office was able to locate only one box of case records. After reviewing the computer tracking system, the Clerk's Office personnel informed petitioner's counsel the file had been sent to Department 69, on September 16, 1999. There was no record of it having been returned to the Criminal Courts Building.

c. HCRC personnel also made inquiries regarding the files at the Civil County Courthouse where Department 69 is located. The clerk at the Civil Courthouse again checked the computer, which showed that the last activity for the file was in February 7, 2000, when it was sent to M3DP for inventory. Counsel for petitioner requested that the clerk contact the courtroom clerk for Department 69 who confirmed that the file was not in chambers.

d. Subsequent to traveling to Los Angeles, HCRC personnel again

made several attempts to locate the missing court files. HCRC personnel made follow-up telephone calls to various superior court personnel, including the former death penalty coordinator. At HCRC's request, the death penalty clerk at the Criminal Courts Building conducted a further search, but was still unable to find the missing files. The clerk had located two boxes, one of which was completely empty and marked on the outside "People v. Jones, Box 1 of 2."

e. Although petitioner's counsel has made numerous attempts to locate the missing files, the complete record cannot be found.

7. Petitioner was deprived of his constitutional right to effective assistance of appellate counsel by their failure to ensure that a complete and accurate record on appeal was provided to the California Supreme Court.

a. On April 13, 1999, the California Supreme Court appointed Harry Mitchell Caldwell as lead counsel and Jan J. Nolan as associate counsel to represent Mr. Jones on his automatic appeal.

b. On or about September 20, 1999, appellate counsel filed a Request to Correct the Record, Augment the Record, Examine Sealed Transcripts and Settle the Record on Appeal, which did not request inclusion of any of the material noted above in the record on appeal.

c. Habeas counsel informed appointed appellate counsel of the deficiencies in the record on appeal.

(1) On March 16, 2001, the HCRC informed appellate counsel that the record on appeal was incomplete and that the Superior Court's Clerk's File contained numerous items that should be included.

(2) On March 19, 2001, after receiving from the Los Angeles County Superior Court a portion of the materials missing from the Clerk's Transcript, the HCRC sent copies of those materials to appellate counsel.

(3) On April 5, 2001, the HCRC sent to appellate counsel additional materials that the HCRC had received from the Los Angeles County

Superior Court. The HCRC further informed appellate counsel that additional materials were not provided, including the contents of a legal-sized folder entitled "Trial Folder #1," which was not available for review, and material reviewed and requested but not copied and sent. Further, the HCRC also informed appellate counsel that court personnel informed us that they could not locate the complete capital case file.

(4) On May 14, 2001, the HCRC again informed appellate counsel that the record on appeal was incomplete and that the Los Angeles County Superior Court had not been able to locate the missing files.

d. Despite being aware of the missing documents, appellate counsel unreasonably failed to locate and include any of the missing material in the record on appeal. Appellate counsel's failure was prejudicial to petitioner's right for full and fair review of his statutory and constitutional issues on appeal.

8. In addition to documents clearly missing from the court files, extra-record evidence indicates the existence of unreported court proceedings related to repeated, audible outbursts from the members of the victim's family in the courtroom.

a. Sworn juror declarations attest to the continued onslaught of outbursts and comments. One juror observed that the conduct of the victim's family members provided, "a lot of drama inside our courtroom." (Ex. 23 at 239.) She noted that, "The victim's daughters carried on constantly, screaming and yelling at Mr. Jones. They were clearly distraught and unable to control themselves." (*Id*.)

b. Another juror similarly observed that the daughter who testified (Pamela Miller) "was extremely vocal throughout her testimony and the entire trial. She and her sister yelled out in court many times. She called Mr. Jones names and screamed out that he had also caused the death of her father . . ." (Ex. 9 at 93.)

c. The judge observed this behavior from the bench, and at one point commented on the physical "editorializing" through shakes and nods of the head, that was taking place in the audience. (22 RT 3271.) However, the trial court failed to

order the removal of disruptive audience members until long after the ongoing and highly prejudicial conduct was observed by the members of the jury, and did not ensure that the verbal outbursts were properly preserved on the record and reported by the court reporter.

9. As a result of the failures to ensure an accurate and complete record of the trial proceedings, petitioner has been deprived of his constitutional right to due process, equal protection, reliable guilt and penalty determinations, and meaningful appellate review. The unreasonable failure of the court and counsel to provide petitioner with a reasonably complete and accurate appellate record is prejudicial per se. Further, the failures have had a prejudicial impact on both appellate and habeas counsel's ability to raise and litigate potentially meritorious claims on appeal and habeas.

DD. CLAIM THIRTY: THIS COURT IS CONSTITUTIONALLY COMPELLED TO ASSESS CUMULATIVELY WHETHER ERROR OCCURRED AND FURTHER WHETHER THE ERRORS WERE PREJUDICIAL.

Petitioner's conviction, sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights in light of the multiple constitutional errors committed by the prosecutor, petitioner's counsel and the trial court and which together rendered petitioner's trial fundamentally unfair and rendered the resulting verdicts and judgment unreliable.

The facts and allegations contained in each Claim in this Petition are hereby incorporated by reference as if fully set forth herein. Petitioner expressly requests that the Court examine the errors set forth above cumulatively and cumulatively assess their prejudicial effect on petitioner's right to a reliable review and evaluation of the harm caused to him thereby.

Multiple deficiencies merit a collective or cumulative assessment of prejudice; errors that do not require a judgment to be set aside, when viewed alone, may require

relief in the aggregate. *See Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992). This is particularly true because a fragmented prejudice assessment is antithetical to capital jurisprudence.

At each stage of petitioner's capital trial, from his arrest to his sentencing, petitioner was denied adequate protection from the numerous constitutional violations attributable to the action and inaction of his counsel, the prosecutor, the judge, and the jurors who convicted petitioner and voted that he be sentenced to death. Considered cumulatively, these failures rendered petitioner's entire trial defective and fundamentally unfair. The accumulation of errors in petitioner's trial had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

V. PRAYER FOR RELIEF

WHEREFORE, petitioner, Ernest Dewayne Jones, respectfully requests that the Court:

1. Take judicial notice of and consider in conjunction with this Petition the certified state record, all records, documents, and pleadings filed in the California Supreme Court in petitioner's automatic appeal, *People v. Jones*, California Supreme Court No. S046117, and of all documents, exhibits, motions, and other documents filed in *In re Ernest Dewayne Jones on Habeas Corpus*, California Supreme Court No. S110791 and *In re Jones on Habeas Corpus*, California Supreme Court No. S159235;

2. Require respondent to lodge with the court the entire state record specified by Local Rule 83-17.7 within the time frame specified therein;

3. Order respondent to file an Answer, responding to each allegation contained in the Petition, and show cause why the requested relief should not be granted;

4. Order the Los Angeles County District Attorney's Office to disclose all files pertaining to petitioner's case and grant petitioner leave to conduct additional

discovery, including the right to take depositions, request admissions, propound interrogatories, and the means to preserve the testimony of witnesses;

5. Grant petitioner sufficient funds to secure investigative and expert assistance as necessary to prove the facts alleged in this Petition;

6. Grant petitioner authority to obtain subpoenas for witnesses and documents from third parties that are not otherwise obtainable;

7. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;

8. Permit petitioner a reasonable opportunity to supplement this Petition to include claims that become known as a result of discovery and further investigation and as a result of obtaining information previously unavailable to him;

9. After full individual and cumulative consideration of the constitutional violations raised in this petition and a cumulative assessment of their prejudicial effect on the jury's determinations, vacate the judgment of conviction and sentence of death imposed on petitioner in Los Angeles County Superior Court Number BA063285;

10. Grant such further relief as the Court may deem appropriate in the interests of justice.

Dated: April 28, 2010

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER
Michael Laurence
Cliona Plunkett

By: /s/ Michael Laurence
Michael Laurence
Attorney for Petitioner Ernest Dewayne Jones

VI. VERIFICATION

I, Michael Laurence, declare as follows:

1. I am an attorney licensed to practice law in the State of California and admitted to practice in the United States District Court for the Central District of California. I am employed as the Executive Director of the Habeas Corpus Resource Center (HCRC), which has been appointed by this Court to represent Ernest Dewayne Jones in these proceedings.

2. I am making this verification on behalf of Mr. Jones because he is incarcerated in Marin County at the San Quentin State Prison in San Quentin, California, a county different from the location of the HCRC, and because many of the factual matters presented in this petition are more within my knowledge than his.

3. I am authorized by Mr. Jones to represent him in this action and 18 U.S.C. § 2242 authorizes this verification.

4. I have supervised the preparation of this amended petition and declare that its contents are true.

Executed under penalty of perjury under the laws of the United States of America on this 28th day of April 2014 in San Francisco, California.

/s/ Michael Laurence
Michael Laurence