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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE MOTION FOR AN EVIDENTIARY HEARING Hearing Date To Be Determined

TO: KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND HERBERT S. TETEF, DEPUTY ATTORNEY GENERAL:

PLEASE TAKE NOTICE that at a date and time to be set by the Court, petitioner Ernest Dewayne Jones, by and through counsel the Habeas Corpus Resource Center, will move this Court for an order granting petitioner an evidentiary hearing on Claims One, Three, Four, Five, Fifteen, Sixteen, Eighteen, Twenty-Three, and Twenty-Four in the Petition for Writ of Habeas Corpus.

Mr. Jones brings this motion pursuant to the United States Constitution, and all other applicable statutes, case law and local rules. This motion is based on the attached statement of facts and memorandum of points and authorities, concurrently filed exhibits, and the record before this Court.

Dated: February 17, 2011

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: /s/ Michael Laurence
MICHAEL LAURENCE
Attorneys for Petitioner
Ernest Dewayne Jones

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INTRODUCTION

Petitioner requests that this Court grant his motion for an evidentiary hearing to fully develop the facts presented in support of his federal habeas claims of ineffective assistance of counsel, suppression of evidence, competency to stand trial, involuntary medication, juror misconduct, and ineligibility for the death penalty. Petitioner is entitled to an evidentiary hearing because he was not afforded the opportunity to develop or prove these claims in state court. Despite submitting substantial documentary evidence in support of these claims, requesting discovery and a hearing, the California Supreme Court denied the state habeas corpus petitions without any factual development, findings, or legal conclusions.

Respondent failed to answer petitioner's allegations in any meaningful way, thereby creating factual disputes between the parties. With regard to petitioner's factual allegations in each of his thirty claims in the Petition for Writ of Habeas Corpus by a Prisoner in State Custody (28 U.S.C. § 2254) ("Petition"), Doc. 26, filed Mar. 10, 2010, respondent repeats the generic phrase "As to the factual allegations made in support of Claim [ ], Respondent denies or lacks sufficient knowledge to admit or deny, every allegation; alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas relief." (Answer to Petition for Writ of Habeas Corpus ("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), Doc. 28, filed Apr. 6, 2010.)

Petitioner was charged with first degree murder, with special circumstances of burglary, rape and robbery, and those felonies as separate counts. The state also charged petitioner with the use a deadly weapon and with serving a prior prison term. If granted a hearing, petitioner is prepared to present evidence that his first-degree murder conviction and sentence of death were obtained in violation of his constitutional rights.

Petitioner will present evidence that his actions on the night of Mrs. Julia Miller's murder were the product of a serious mental illness, which was central to his defense at trial. Trial counsel, Fred Manaster, retained a mental health expert to opine on petitioner's sanity at the time of the offense, but presented no mental state evidence during the guilt phase. Evidence of petitioner's mental illness came solely from petitioner himself, although he was likely incompetent to stand trial at the time. (Notice of Lodging ("NOL") C2 Ex. 154 at 2754.)[1] Due to his multiple mental illnesses, petitioner could not recall the events on the night of the murder and had no memory of having sexual intercourse with the victim. (22 Reporter's Transcript (RT) 3336.) Trial counsel nonetheless conceded the rape charge during his closing arguments. (31 RT 4688.) With no explanation provided for why petitioner had acted the way he did on the night of the murder, the jury convicted petitioner of first degree murder and rape. It also found the rape special circumstance, the allegations that defendant personally used a deadly weapon to commit the crimes, and that he had served a prior prison term as true.

Trial counsel's presentation in the penalty phase was similarly deficient. Petitioner's family and their medical, school, and social service records; petitioner's friends; and petitioner's 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. They also vividly demonstrate the progression of petitioner's mental illness.

Unfortunately, petitioner's jury did not hear this compelling evidence. The incomplete picture of petitioner's life that the jury received failed to give the jury a

[1] Respondent lodged petitioner's exhibits to the state petition for habeas corpus in this Court on April 26, 2010. (Doc. 29.) In this Motion, these supporting exhibits are cited as "NOL C2 Ex. ___."

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, and organizing and sequencing. Most importantly, the jury did not hear how petitioner's 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" (NOL C2 Ex. 127 at 2565), and that there was no compelling reason to vote for life. (NOL C2 Ex. 133 at 2645).

As set out in more detail below, petitioner is entitled to an evidentiary hearing to further develop the factual record and to show that relief is required.

RELEVANT PROCEDURAL HISTORY

On April 7, 1995, petitioner was sentenced to death in Los Angeles County. 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). 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, 124 S. Ct. 395, 157 L .Ed. 2d 286 (2003). Petitioner filed petitions for writ of habeas corpus with the California Supreme Court on October 21, 2002 (case number S110791) (NOL C.1) and October 16, 2007 (case number S159235) (NOL D.1). On March 11, 2009, the California Supreme Court denied petitioner's writs of habeas corpus (NOL C7 & D6).

On March 10, 2010, petitioner filed a Petition for Writ of Habeas Corpus by a Prisoner in State Custody (28 U.S.C. § 2254) (Doc. 26). Respondent filed an Answer on April 6, 2010. (Doc 28). The parties submitted a joint briefing schedule on April 8, 2010. (Doc. 30). Pursuant to this Court's June 8, 2010 order (Doc. 43), the parties met

and conferred regarding discovery. The parties were unable to reach an agreement regarding discovery, but agreed to resolve discovery disputes after the motion for an evidentiary hearing has been resolved. The parties further agreed to adhere to the briefing schedule as previously outlined in the April 8, 2010 joint stipulation. (Doc. 46.) In accordance with this Court's Order, filed February 2, 2011, petitioner submits this motion.

I. STANDARD FOR GRANTING AN EVIDENTIARY HEARING.

An evidentiary hearing is required if petitioner "(1) has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts [.]" *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *see also Scott v. Schriro*, 567 F.3d 573, 583 (9th Cir. 2009). Because the Petition was filed after the effective date of the Anti-Terrorism and Death Penalty Act, *see* 28 U.S.C. § 2254, petitioner's entitlement to an evidentiary hearing is also dependent on whether he diligently developed the factual basis of his claims in state court. *Id*. at §2254(e)(2). In Section I.B., *infra*, petitioner addresses the substantive standard as it applies to each of his claims by establishing that the "alleged facts . . . entitle him to habeas relief," *Williams v. Woodford*, 384 F.3d at 586. In this Section, petitioner sets for the basis for concluding that he was diligent in developing the factual record in the state court, despite the California Supreme Court's refusal to afford him "a full and fair opportunity to develop" the facts or resolve any factual disputes.

A. The State Court's Fact-Finding Procedures Were Defective.

With each state petition, petitioner requested that the state court "order an evidentiary hearing at which petitioner [could] offer this and further proof in support of the allegations herein," and requested leave to conduct discovery to more fully develop the factual basis for the claims of error. (Notice of Lodging ("NOL") C1 at 427; D1 at

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18.) The state court denied petitioner's request for an evidentiary hearing, (see NOL B7; C6), and failed to address his request for leave to conduct discovery.[2]

The state court's failure to "afford [petitioner] a full and fair hearing," *Townsend v. Sain*, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770 (1963) *overruled on other grounds in Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S. Ct. 1715, 1717, 118 L. Ed. 2d 318 (1992), resulted in "an unreasonable determination of the facts" which thus allows "the federal court [to] independently review the merits of that decision by conducting an evidentiary hearing." *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005).

Respondent does not deny that the state court failed to extend the benefit of full and fair factual development through an evidentiary hearing; however, he does assert that unless petitioner's claims "be adjudicated on the basis of the record before the California Supreme Court" an evidentiary hearing will "render his claim unexhausted, and a sound application of § 2254(d) impossible." (Doc. 28, filed Apr. 6, 2010, at 22; *see also, e.g.*, id at 31-32, 41, 48-49, 56-57, 61-62, 69-70.) Respondent's argument, which relies on the United States Supreme Court's holdings in *Holland v. Jackson*, 542 U.S. 649, 542 U.S. 934, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004), and *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct 1933, 1940, 167 L. Ed. 2d 836 (2007)), fails for two reasons. First, and most simply, neither case supports respondent's argument. Unlike here, the petitioner in *Holland v. Jackson* was granted a hearing in state court and given the opportunity to fully develop the factual record. 542 U.S. at 650, 124 S. Ct. at 2736-37, 159 L. Ed. 2d 683. Similarly, respondent's reliance on *Landrigan* is misplaced. The *Landrigan* Court did not address the proposition that allowing petitioner to "more fully develop the factual basis of his claim" would render that

[2] Petitioner attempted to alert the state court to the immediate need for the preservation of witness testimony in his second petition, through allegations that described the increasing unavailability of declarant witnesses. (NOL D1 at 11-17.) Petitioner was informed by court staff that these allegations were not allowed in his pleading and must be removed. (NOL D5 at 2 n.1.)

claim unexhausted (Doc. 28 at 22; *see also, e.g., id* at 31-32, 41, 48-49, 56-57, 61-62, 69-70). To the contrary, the *Landrigan* Court held that the district court did not abuse its discretion by deciding that, even by expanding the factual record through an evidentiary hearing, petitioner "could not develop a factual record that would entitle him to habeas relief." 550 U.S. at 475, 127 S. Ct. at 1940, 167 L. Ed. 2d.

Second, respondent's argument fails because the United States Supreme Court recently explained why its prior decision in *Holland* cannot be interpreted to mean that "a proper application of § 2254(d) requires that the claim be adjudicated on the basis of the record before the California Supreme Court." (Doc. 28 at 22; *see also, e.g., id* at 31-32, 41, 48-49, 56-57, 61-62, 69-70). Contrary to respondent's interpretation of *Holland*, the Court in *Wellons v. Hall*, __ U.S. __, 130 S. Ct. 727, ___ L. Ed. 2d ___ (2010), clearly explained the unfair catch-22 situation that results from respondent's interpretation:

> Indeed, it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous. If that were the case, then almost no habeas petitioner could ever get an evidentiary hearing: So long as the state court found a fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures[.]

Id. at 730 n.3.

The state court's defective fact-finding procedures deprived petitioner the opportunity to fully and fairly develop the factual basis for his claims in state court.

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B. Petitioner Was Diligent in Developing the Factual Bases for Each Claim for Relief.

Each of the claims in this Motion (and the Petition) was fairly presented to the state court (*see* Doc. 30, filed Apr. 8, 2010, at 2).[3] Regardless, respondent asserted with respect to every claim that petitioner "failed to exercise due diligence within the meaning of § 2254(e), and cannot otherwise meet the stringent requirements of § 2254(e)(2)." (NOL Doc. 28 at 22; *see also, e.g., id* at 31-32, 41, 48-49, 56-57, 61-62, 69-70.) This assertion, which lacks any factual support, is in error. Despite the state-imposed restrictions on time, money, and access to formal discovery, petitioner diligently developed the factual basis for each of his claims in state court.

"Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435 (2000). Petitioner repeatedly requested that the state court order an evidentiary hearing. As discussed above, the state court expressly denied petitioner's requests for an evidentiary hearing. (NOL C7; D6.) Diligence "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend … upon whether those efforts could have been successful." *Williams v. Taylor*, 529 U.S. at 435, 120 S. Ct. at 1490, 146 L. Ed. 2d 435. Petitioner, therefore, cannot be penalized for the state court's refusal to subject his claims to a full and fair fact-finding process, such as an evidentiary hearing.

In addition to repeatedly requesting an evidentiary hearing, petitioner repeatedly requested that the state court give him access to routine discovery tools, such as those in the Federal Rules of Civil of Procedure. (*See, e.g.*, NOL C1 at 427; D1 at 11-17,

[3] These claims were denied solely on the merits, with the exception of a single *Brady* sub-claim. (NOL C7, D6.) The state court purported to procedurally bar this sub-claim with the explanation that it could have been but was not raised on appeal. (NOL C7.)

18.) The state court ignored his requests for greater factual development through formal discovery procedures. (*See* NOL C7; D6.)

Petitioner timely availed himself of the significantly less rigorous statutorily available post-conviction discovery. Cal. Penal Code § 1054.9 (West 2011). Petitioner filed his first motion for post-conviction discovery in the California Supreme Court soon after filing his first informal reply and prior to the California Supreme Court's opinion in *In re Steele*, 32 Cal. 4th 682, 10 Cal. Rptr. 3d 536 (2004), the opinion that first interpreted the scope of the post-conviction statute. (NOL F4.) Respondent's assertion that petitioner was not diligent in state court belies the facts: the trial court granted petitioner's discovery motion; petitioner was engaged in post-conviction discovery with respondent for over five years; petitioner spent the vast majority of that time waiting and repeatedly inquiring on the status of discovery requests. (*See* NOL D1 at 1-3; D5 at 5-8.) Because the state took so long to complete discovery, petitioner filed his second petition, alleging the prosecution's unconstitutional failure to disclose material exculpatory evidence, prior to the close of post-conviction discovery, a claim that arose out of the post-conviction discovery proceedings. Petitioner filed his second petition prior to the close of the state discovery only because he was concerned about protecting his right to federal court review of that claim. (NOL D5 at 6-7.)[4] Petitioner diligently attempted to develop the basis of his claims in state court, *despite* the state's dilatory tactics and failures to promptly heed the trial court's discovery order.

To the extent petitioner was unable to develop the factual basis for his claims in state court, he was unable to do so despite diligent effort. Section 2254(e), therefore,

[4] Petitioner did not know when the state court would rule on his first petition. Since petitioner believed he had to supplement his first petition with the additional post-conviction discovery claims, he was concerned that if the state court ruled on his first petition prior to the filing of any claims that arose out of post-conviction discovery, the additional claims may be deemed to be procedurally barred from both state and federal court review. (*Id*.)

does not bar petitioner's entitlement to an evidentiary hearing. *Williams v. Taylor*, 529 U.S. at 437, 120 S. Ct. at 1491, 146 L. Ed. 2d 435.

C. Petitioner Is Entitled to an Evidentiary Hearing on Each of His Claims Presented in This Motion.

The Ninth Circuit has repeatedly held that alleging a colorable claim for relief is a "low bar." *Earp v. Ornoski*, 431 F.3d at 1169; *see Phillips v. Woodford*, 267 F.3d 967, 979 (9th Cir. 2001) (the requirement for obtaining an evidentiary hearing is "far less onerous" than establishing entitlement to habeas relief). Establishing a colorable claim for relief does not require that petitioner prove each element of the claim. *Earp v. Ornoski*, 431 F.3d at 1169. A colorable claim for relief requires only that petitioner "allege specific facts which, if true, would entitle him to relief." *Id*. at 1167 n.4 (inner quotation omitted). Petitioner has, at a minimum, alleged a colorable claim for relief for each of the claims and sub-claims in the Motion. Thus, petitioner has established his entitlement to an evidentiary hearing on the claims presented in this Motion.

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II. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM ONE: TRIAL COUNSEL RENDERED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE.

The Petition sets forth detailed factual allegations at pages 21 to 92 that petitioner was deprived of the effective assistance of counsel throughout the planning, development, investigation and presentation of the evidence in the guilt phase in violation of his Sixth Amendment right to counsel. As detailed in the Petition, trial counsel unreasonably made momentous decisions based on little or no investigation or expert consultation. As a result, he unreasonably failed to present readily available defenses to the capital charges or challenge the prosecution's evidence, witnesses, theory of the case, or misconduct. Moreover, trial counsel unreasonably allowed the jury to be instructed with inadequate and incomplete guilt phase instructions and to be given misleading and incomplete verdict forms. Trial counsel has admitted that he had no tactical reason for performing below the standard of care in several instances (*see* NOL C2 Ex. 12 at 106-10; NOL C2 Ex. 150 at 2730-32; NOL D1 Ex. 181 at 3161). In light of the lack of evidence of rape, felony murder rape, or the rape special circumstance against petitioner, counsel's deficient performance was prejudicial.

Despite trial counsel's admissions and the voluminous exhibits supporting this claim, respondent has failed to admit or deny any of the facts alleged in the Petition. (*See, e.g.*, Doc. 28, filed Apr. 6, 2010 at 4 ("Respondent denies, or lacks sufficient knowledge to admit or deny, every factual allegation made in support of Petitioner's thirty claims for relief (including all subclaims)".) Petitioner, therefore, requests an evidentiary hearing on this claim, since respondent has placed in issue the facts upon which it relies.

Petitioner is entitled to a hearing on Claim One if the allegations demonstrate "a colorable claim" that trial counsel's representation was deficient and prejudicial. *Schriro v. Landrigan*, 550 U.S. 465, 468, 127 S. Ct. 1933, 1937, 167 L. Ed. 2d 836 (2007). A petitioner is entitled to relief based on an ineffective assistance of counsel

claim by demonstrating that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability that petitioner's jury would not have convicted him of the rape or felony murder rape charges, found true the rape special circumstance, or sentenced him to death. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Trial counsel's performance must be judged by the prevailing standard of care exercised by capital defense attorneys. *Id*. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."); *see also Rompilla v. Beard*, 545 U.S. 374, 380, 125 S. Ct. 2456, 2469, 162 L. Ed. 2d 360 (2005) ("[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.").[5] A reasonable probability of a different result is one that is "sufficient to undermine confidence in the outcome actually reached" at trial. *Rompilla*, 545 U.S. at 393, 125 S. Ct. at 2469 (inner quotation omitted).

At an evidentiary hearing on this Claim, petitioner will present the following evidence in support of the following:

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[5] The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are "standards to which [the United States Supreme Court] long ha[s] referred as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2537, 156 L. Ed. 2d 471 (2003); *Strickland*, 466 U.S. at 688; *see also* American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("1989 ABA Guidelines"); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. 2003) ("2003 ABA Guidelines"). At the evidentiary hearing, petitioner also intends to establish the prevailing norms through expert testimony. *See, e.g.*, Declaration of James Thomson, attached as Exhibit ("Ex.") D; Declaration of Quin Denvir, Ex. E.

A. Trial Counsel Unreasonably and Prejudicially Failed to Investigate, Develop, and Present Compelling Expert and Lay Witness Testimony Concerning Petitioner's Mental State at the Time of the Crime.

After he "review[ed] the reports of Mr. Jones's two prior offenses," trial counsel understood that petitioner was mentally ill, and that petitioner's serious mental illness "had to be the crux of the defense to the charged crimes." (NOL C2, Ex. 12 at 107.) Indeed, trial counsel understood that 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." (NOL C2 Ex. 12 at 107.)

Despite this recognition, trial counsel unreasonably failed to present the testimony of a mental health expert to explain petitioner's serious mental illnesses, the effect they had on his functioning, and the important connection between petitioner's mental health history, family background, and mental state at the time of the crime. *See, e.g., Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005) (counsel ineffective for failing to present evidence of petitioner's mental illness at the guilt phase). Trial counsel similarly failed to present any testimony from lay witnesses and any documentary evidence to describe petitioner's life-long struggle with brain dysfunction and mental illness. *Id.* Counsel's failure to investigate, develop, and present lay and expert witness testimony to corroborate and explain petitioner's severely compromised mental functioning, and intensifying mental illness, that resulted in a psychotic break at the time of the crime, was patently unreasonable and well below the standard of care for any criminal defense attorney. *See Strickland v. Washington*, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d 674 ("counsel has a duty to make reasonable investigations"); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (triggering facts put counsel on notice to investigate mental health issues when defending against first degree murder charge); 1989 ABA Guideline 11.4.1(A) ("[c]ounsel should conduct independent investigations relating to the guilt-innocence phase and to the penalty

phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.").

As demonstrated below and in the Petition at pages 22-37, petitioner has stated a colorable claim for relief as a result of trial counsel's unreasonable failure to reasonably investigate and challenge the rape and felony murder rape charges and the special circumstance allegations.

1. Trial Counsel's Failure To Develop And Present Lay and Expert Mental State Evidence Was Objectively Unreasonable.

Reasonably competent counsel, aware of petitioner's severe and longstanding mental illness, would have timely hired, consulted, and presented the testimony of a mental health expert who could have explained to the jury how petitioner's severe mental illness affected his actions the night of the crime. *See, e.g., Bloom v. Calderon*, 132 F.3d 1267, 1271 (9th Cir. 1997) ("The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance."); *see also* 1989 ABA Guidelines, Commentary to Guideline 11.4.1 ("The assistance of one or more experts (e.g., social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome, as set out in Guideline 11.4.1(a) and 11.4.1(7)."); *see also* 2003 ABA Guidelines, Commentary to Introduction ("In particular, mental health experts are essential to defending capital cases."). Similarly, reasonably competent counsel would have interviewed and presented the testimony of 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. *See, e.g., Richard v. Quarterman*, 566 F.3d 553, 570-71 (5th Cir. 2009) (finding prejudicially deficient performance when counsel failed to interview important prosecution witnesses prior to trial and spoke with some witnesses for the first time in the courthouse on the day of trial).

Trial counsel, however, presented neither expert testimony nor lay witnesses during the guilt phase of petitioner's trial. Indeed, the only evidence presented to the jury about petitioner's severe and untreated mental illness in the guilt phase came from petitioner's own psychosis-influenced testimony about the night of the offense. He testified that at a moment of stressful confrontation with the victim, who had threatened him with a knife and a rifle, he heard a voice 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.) As petitioner wielded a knife, he blacked out. He awoke crying, curled up in the fetal position, next to the victim. (*Id*.) Later that evening, when petitioner drove towards the hills, he heard voices telling him "they" were going to kill him. (*Id*. at 3344.) With the voices telling him "they're going to kill you, they're going to kill you," petitioner shot himself point blank in the chest, in a frantic suicide attempt. (*Id*. at 3345.) This was the sum of petitioner's memory, and he was unable to offer any insight into what had triggered this unusual series of events. (*Id*. at 3335-36; NOL C2 Ex. 178 at 3150.) Petitioner's lack of memory and insight are not surprising from a mental health perspective. However, these deficiencies were damning to a jury that was not given any basis with which to assess whether petitioner's experience was plausible.[6]

[6] During petitioner's testimony, the trial court erroneously ruled that petitioner could only testify to certain mental health events, including any prior counseling and medication during 1992, but that he was not permitted to testify as to his background and mental health history. (22 RT 3358-60.) Reasonably competent counsel would have sought to mitigate the effects of a trial court ruling that "gutted [his] only defense to the charge of capital murder." (NOL C2 Ex. 12 at 109.) Despite the importance of this testimony, trial counsel 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 previous trance-like state." (*Id*. at 107-08.) Trial counsel's admission that he did not even consider putting lay or expert witnesses on the stand to testify to petitioner's mental health history and current mental illness is confirmed by his unreasonable failures to request clarification of the trial court's ruling. Counsel unreasonably failed to determine whether the ruling barring testimony by petitioner about his mental health equally applied to the presentation of other lay witness

a. Counsel Unreasonably Failed to Consult And Present Expert Witnesses.

Reasonably competent counsel would have presented expert witness testimony about petitioner's mental state at the time of the crime in the guilt phase. *See, e.g.*, *Bloom*, 132 F.3d at 1277 (counsel ineffective for hiring guilt phase mental state expert days before trial and failing to adequately prepare him for mental state defense). In several respects, trial counsel failed to represent petitioner in accordance with this standard of care.[7]

Trial counsel hired a mental health expert, Claudewell Thomas, M.D., to evaluate petitioner, with respect to his mental state at the time of the crime, among other things. (NOL C2 Ex. 154 at 2748.) Dr. Thomas found that petitioner suffered a psychotic break at the time of the crime and as a result he was unable to control his actions. (30 RT 4433-35.) Inexplicably, trial counsel presented Dr. Thomas's testimony only at the penalty phase of petitioner's trial and thus the jury was unaware of this vital mental state testimony during its guilt phase deliberations. Trial counsel had no informed strategic reason not to present this evidence during the guilt phase, as counsel admits:

> I did not present a mental health expert during the guilt phase in addition to Mr. Jones's testimony . . . 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.

(NOL C2 Ex. 150 at 2732.)

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testimony (22 RT 3353-58); and, he failed to request clarification as to whether the ruling equally applied to the presentation of other lay witness testimony that could corroborate petitioner's permissible testimony. (*Id*. at 3359-69.) Finally, trial counsel failed to request a continuance in light of the trial court's ruling to obtain the services and present the testimony of an expert witness.

[7] Section VI concerning petitioner's right to a hearing on Claim 16 provides an in-depth discussion of trial counsel's failure to develop expert testimony for the penalty phase.

Trial counsel's failure to develop and present expert testimony at the guilt phase stems from his unreasonable failure to retain any mental health expert in the case with sufficient time to make informed, strategic decisions. Trial counsel did not speak or meet with Dr. Thomas until August 1994. (NOL C2 Ex. 154 at 2748.) At that time, a trial date already had been set, and jury selection began on November 30, 1994. (1 Clerk's Transcript ("CT") 214.) Given the shortness of time, Dr. Thomas was able to interview petitioner only once—in September 1994—before jury selection began. (II Supp. 23 CT 6452.) Dr. Thomas interviewed petitioner again on December 7, 1994, after jury selection began, and he sent to trial counsel a written report on the same date. (30 RT 4435.) Dr. Thomas's report expounded on petitioner's lack of insight into his own delusional beliefs and petitioner's efforts to explain significant and traumatic events in his life by minimizing or normalizing them. (*See id*. at 4436.) Only after the guilt phase verdict was returned did trial counsel arrange for Dr. Thomas to re-interview petitioner. On February 1, 1995, almost a week after the guilt phase verdict was rendered (2 CT 365-76), trial counsel applied for additional funds so that Dr. Thomas (II Supp. 23 CT 6519-21), could re-interview petitioner in February 1995 (30 RT 4529). It was not until this third interview that Dr. Thomas discussed with petitioner the flashback image of his mother and petitioner's entrance into a trance or dissociative state, a subject trial counsel elicited from petitioner on the stand in the guilt phase. (*Id*. at 4529.)

Moreover, trial counsel unreasonably failed to timely retain and present the testimony of a competent neuropsychologist. Had counsel performed competently, he would have hired a neuropsychologist and provided the expert with sufficient time and information upon which to complete a full evaluation of petitioner's cognitive functioning. After Dr. Thomas interviewed petitioner, he recommended a battery of neuropsychological testing for petitioner. (NOL C2 Ex. 150 at 2732.) 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, before he provided counsel with a report of his findings on November 11, 1994, nineteen days before trial began. (30 RT 4429; NOL C2 Ex. 150 at 2732.)

Finally, 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. In fact the effect of drugs on petitioner's behavior the night of the crime was part of the mental state defense. Nonetheless, trial counsel failed to timely consult with a substance abuse expert to conduct a mental state investigation and evaluation. *Jennings v. Woodford*, 290 F.3d 1006 (reasonable counsel would have investigated mental health and drug-related issues when defending against first degree murder charge). Trial counsel 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.) Trial counsel's unreasonable delay in consulting with a substance abuse expert precluded the possibility of an adequate evaluation of petitioner. Trial counsel had failed to obtain the wealth of readily available information about petitioner's drug consumption and history of mental illness and brain dysfunction prior to retaining Dr. Siegel, and he was in trial at the time he retained Dr. Siegel, which left him no time to obtain these vital materials, had he thought to do so. Trial counsel also unreasonably limited Dr. Siegel's inquiry to that of cocaine ingestion.

With respect to each of the three experts that trial counsel did retain, he unreasonably and prejudicially failed to provide them with materials and information necessary to their assessments. 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. (NOL C2 Ex. 154 at 2750, 2756-57.) These materials would have provided the mental health experts a complete, accurate, and reliable description of petitioner's life history and background. (*Id.* at 2757 (this material includes, but is not limited to "personal and family medical and vital records; family

school records, additional jail medical records, Los Angeles County Coroner reports for family members; and … witness declarations from family members, friends and others familiar with Mr. Jones's family").)

Trial counsel told petitioner's jury that he "felt guilty" for his failure to put on expert testimony in the guilt phase. (31 RT 4681.) Counsel has further conceded that he had no strategic reason for unreasonably failing to investigate, develop, and present expert testimony on petitioner's mental state at the time of the crime, in the guilt phase of the trial:

> 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.

(NOL C2 Ex. 150 at 2732.) In light of trial counsel's admissions, any attempt to describe his "conduct as 'strategic'" renders that term meaningless. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994); *see also Bloom v. Calderon*, 132 F.3d at 1277.

b. Trial Counsel Unreasonably Failed To Develop And Present Lay Witness Testimony.

Reasonably competent counsel would have presented readily available lay witness testimony about petitioner's mental state at the time of the crime in the guilt phase. People who knew petitioner and witnessed his mental functioning on a daily basis could have provided substantial accounts of his personal history of impaired functioning, paranoia, delusional beliefs, hallucinations, depression, and dissociative episodes. Lay witness testimony could have provided highly relevant evidence regarding petitioner's social and family history including, but not limited to: petitioner's family history of mental illness; the dysfunctional dynamics of petitioner's

immediate, maternal and paternal families; the infliction of traumatic physical, psychological, and sexual abuse on petitioner and others in his family; the widespread incidence of chemical dependency by petitioner and his family; and, the traumatic and chaotic environment outside the family home.

The trial court ruling that improperly limited petitioner's testimony "eviscerated [trial counsel's] sole defense to the one special circumstance for which we had no defense to the charged underlying felony." (NOL C2 Ex. 12 at 110.) Counsel admits that despite having his "sole defense" to capital murder "eviscerated" he "did not consider requesting a continuance to find lay witnesses . . . to support Mr. Jones's critical testimony." (*Id*.) As such, counsel unreasonably failed to "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 (emphasis added).) Counsel's failure to "consider putting lay witnesses on the stand" to support petitioner's sole defense to capital murder was not, and could not, have been strategic. "Describing [counsel's] conduct as 'strategic' strips that term of all substance." *Sanders v. Ratelle*, 21 F.3d at 1456.

2. Trial Counsel's Failure To Develop And Present Lay and Expert Mental State Evidence Was Prejudicial.

Trial counsel's decision not to present expert testimony regarding petitioner's mental state at the time of the crime misled the jury into thinking there was no explanation, or no helpful explanation, for petitioner's behavior. (26 RT 3905 (prosecution asks during guilt closing: "Where is the psychiatrist who could tell us what his mental state was?"); *see also* 31 RT 4681 (counsel reminds jury prosecution questioned absence of defense psychiatrist in guilt phase and states he feels guilt for not having put one on).) Petitioner's testimony alone was insufficient to enable the jury to understand the breadth and consequences of petitioner's mental impairments. Petitioner's own mental health expert explained:

> 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.

(NOL C2 Ex. 154 at 2753.)

Had trial counsel performed reasonably and developed and presented compelling expert testimony at the guilt phase, the jury would have received a coherent, compelling, and expert description of petitioner's mental functioning and impairments and the effects those impairments had on his behavior at the time of the crime. 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; NOL C2 Ex. 178 at 3156-57.) Trial counsel's unreasonable failures prevented the jury from including in their guilt phase deliberations Dr. Thomas's expert opinion that petitioner "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[.]" (NOL C2 Ex. 154 at 2755; *see also* NOL C2 Ex. 178 at 3157.) Similarly, had counsel performed reasonably and consulted with and retained a neuropsychologist with sufficient time to perform a thorough evaluation, petitioner's jury would have been presented with compelling testimony that petitioner suffers from profound impairments, particularly to his frontal lobes. (NOL C2 Ex. 175 at 3066-69 ("All of Mr. Jones's deficits reflect significant signs of brain damage, and all are particularly strong indicators of frontal lobe damage.").) Moreover, the jury would have heard that petitioner has a full-scale IQ of no higher than 77 (NOL C2 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 (NOL C2 Ex. 125 at 2552).

Trial counsel's failure to investigate, develop, and present compelling lay witness testimony about petitioner's mental state at the time of the crime, which would have necessarily included corroborative historical evidence, was particularly prejudicial. Evidence regarding petitioner's worsening mental state would have included, at a minimum, the following:

- Upon his release from prison in 1991, petitioner's mental condition had deteriorated, and he often behaved bizarrely. (*See, e.g.*, NOL C2 Ex. 10 at 97-100; NOL C2 Ex. 21 at 226-27; NOL C2 Ex. 124 at 2543-44.)
- He needed mental health treatment, but he did not have the skills to access it or to cope with his problems on his own, and his family preferred to simply try to avoid upsetting him. (NOL C2 Ex. 135 at 2666.)
- Sometimes, petitioner seemed the same as he had been growing up, polite, sweet, and gentle; he was not bitter about prison, and eager to start out again and make his life better. (NOL C2 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. (NOL C2 Ex. 10 at 97.)
- He reacted irrationally to everyday situations. (*Id*.)
- At times, petitioner's 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. (*Id*. at 97-98; NOL C2 Ex.21 at 226.)

- Even though he was unable to learn the basics required of a car mechanic, his uncle Thomas gave him work at his transmission shop. Petitioner lacked the mental capacity to repair cars, so he was given janitorial jobs and ran simple errands. Petitioner was not given enough work to be around the shop full-time because many of the shop employees thought he was too strange. (NOL C2 Ex. 21 at 226-27; NOL C2 Ex. 10 at 97-98.)
- Petitioner needed support and guidance, but his uncles who worked at the transmission shop, as well as other employees, tried to avoid him by giving him a few dollars, in an effort to try and make him go away. (NOL C2 Ex. 10. at 98.)
- During the Los Angeles riots, in the summer of 1992, his uncle asked him to help watch over the transmission shop and gave him a gun to do so. (NOL C2 Ex. 10 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. (NOL C2 Ex. 21 at 227.) Petitioner sat in the dark, for four to five hours at a time, staring out the window. (*Id*.)
- 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*.)

- 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. (NOL C2 Ex. 10 at 99-100.)
- His paranoia increased, to the point he felt compelled to tape-record telephone conversations. (NOL C2 Ex. 124 at 2544.) He played a taped conversation, for his sister Gloria, of her talking to Pam Miller on the telephone. (*Id*.) When the tape finished, he instructed Gloria that she was not to talk about him on the telephone. (*Id*.) Petitioner then sat mutely on Gloria's couch "staring right through [her] with blank scary eyes." (*Id*.)
- Days before the crime, petitioner's dissociative trances significantly increased. (*Id*. at 2544; NOL C2 Ex. 10 at 99.)
- 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 further conversation or explanation. He had a glazed expression and his voice was low, deep, and strange. (NOL C2 Ex. 124 at 2544.)
- The day before he was arrested, petitioner's conversations had become nonsensical. (NOL C2 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*.)

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.

Had trial counsel developed and presented this evidence, the jury would have understood petitioner's compromised mental functioning and his dissociative, non-volitional mental state at the time of the crime. 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. (NOL C2 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 an accurate and comprehensive account of the origin and etiology of petitioner's mental impairments, and a context in which to place petitioner's account of the incident that the jury was given. (*Id*. at 2753.)

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 (NOL C2 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).

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, absent counsel's deficient performance, there is a reasonable probability that the result of petitioner's trial would have been different. *Strickland v. Washington*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 80 L. Ed. 2d 674; *Rompilla v. Beard*, 545 U.S. at 393, 125 at 2469, 162 L. Ed. 2d 360.

B. Trial Counsel Failed to Investigate, Develop, and Present a Coherent and Persuasive Defense to the Rape and Rape Felony-Murder Charges and the Rape Special Circumstance.

In support of the capital murder and rape charges, the prosecution contended that petitioner killed the victim after he bound and raped her. Materials provided to trial counsel in discovery demonstrated that both sexual contact, and the binding of the victim's wrists and ankles, occurred post-mortem. Despite possessing evidence that negated the prosecution's theory that petitioner raped the victim, trial counsel unreasonably failed to conduct any meaningful investigation into whether or not the victim was raped, and he ultimately failed to present any defense to the rape charge. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *reversed on other grounds*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (counsel's failure to rebut forensic evidence of rape was deficient); *see Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998) (counsel's failure to investigate and prepare defense was unreasonable) (*see* Ex. D at 23 ("the prevailing standard of care of attorneys appointed to represent criminal defendants included the duty to conduct a reasonable investigation of the circumstances of the case and explore all avenues leading to facts relevant to potential guilt or penalty defenses.").) Had trial counsel conducted such an investigation, petitioner would not have been convicted of raping the victim post-mortem, *People v. Kelly*, 1 Cal. 4th 495, 525, 3 Cal. Rptr. 2d 677, 693 (1992), and, absent a finding that petitioner formed the specific intent to rape the victim while she was still alive, *People*

v. Lewis, 46 Cal. 4th 1255, 1300, 96 Cal. Rptr. 3d 512, 556 (2009)—the crux of trial counsel's guilt phase defense—the rape felony murder charge and rape special circumstance allegation could not have been found to be proved.

Instead, trial counsel made the wholly uninformed, and therefore unreasonable, decision not to investigate the rape because he erroneously believed the DNA results unerringly implicated petitioner on each element of the rape related allegations. (NOL C2 Ex. 12 at 106 ("If I was unable to prevent the jury from hearing the DNA evidence, I had no choice other than to concede the rape charge. I did not envision a defense to the rape charge and the rape felony murder charge once the DNA evidence was admitted."); *id*. at 107 ("we had no defense to the rape charge, I needed Mr. Jones to admit the rape"); NOL C2 Ex. 150 at 2730 ("My guilt-phase defense strategy [to challenge petitioner's ability to form specific intent] was dictated in large part by the admissibility of the DNA evidence. For all practical purposes, I believed the court's ruling on this evidence foreclosed any other possible defense.").) Trial counsel was deficient for failing to investigate readily available evidence that petitioner could not have raped the victim, prejudicially depriving him of a strong and compelling defense to capital murder. *Strickland v. Washington*, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d 674 ("counsel has a duty to make reasonable investigations"); *Thompson v. Calderon*, 120 F.3d at 1053 ("By not rebutting the prosecution's rape evidence, [trial counsel] unnecessarily risked [petitioner's] life.")

As demonstrated below and in the Petition at pages 37-48, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to reasonably investigate and challenge the rape and felony murder rape charges and the special circumstance allegations.

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1. Trial Counsel Provided Constitutionally Deficient Representation By Failing To Investigate, Develop And Present Evidence That Any Sexual Contact Occurred Post-Mortem.

Trial counsel knew it was critical to determine whether or not the victim was alive at the time of the sexual contact because "the law requires that the victim be alive at the time of the rape." (II Supp. 1 CT 83 (Notice of Motion To Set Aside Information Pursuant To Penal Code Section 995); *see also id*. ("There is no evidence whatsoever in that regard.").) Trial counsel possessed, yet unreasonably failed to develop and present, evidence that the victim had died prior to any sexual contact, which would have presented a strong and persuasive defense to the rape-related charges. The police and autopsy reports and crime scene photographs trial counsel received in discovery provided the foundation for a defense based on four inter-related issues: (1) the placement of the victim's clothing when she was first discovered; (2) the correspondence between the abdominal wounds and the slashes in the victim's nightgown; (3) the victim's rapid death after the assault began; and, (4) the manner in which the victim was bound.

a. Placement of Victim's Clothing.

Trial counsel received reports from the Los Angeles County Coroner and the Los Angeles Police Department that, when found, the victim was wearing a robe over a nightgown. The robe was open, and both the robe and the nightgown were pulled above her abdomen. (NOL C2 Ex. 103 at 2123.)

b. Slashes In Nightgown Correspond To Abdominal Wounds.

Among the reports trial counsel received from the Coroner was the Investigator's Report, which noted the condition of the victim's body upon discovery. Coroner's Investigator Shepard noted "The dec'ds nightgown had been pulled up, above her waist….The nightgown had cuts through the front, which correspond with some of the wounds in the dec'ds abdomen and chest." (NOL C2 Ex. 103 at 2123.)

In their ten-page preliminary investigation report, the investigating detectives similarly noted "original position of the pink nightgown was above the stab wounds. An extended view of the gown revealed numerous knife tears that correspond with the torso stab wounds." Similarly, Deputy Medical Examiner, Stephen Scholtz, stated in the autopsy report that the nightgown had "multiple frontal wounds effectively corresponding in number and location to those on the body." (NOL C2 Ex. 171 at 3038; *see also id*. at 3049 (Dr. Scholtz illustrated knife wounds that matched rents in nightgown).) However, because she was found with her nightgown pulled above her abdomen, which was the location of the majority of the knife wounds (NOL C2 Ex. 171 at 3033, 3038), it was necessary to pull the victim's nightgown down, to properly cover her abdomen, to line up the knife wounds with the tears in the fabric. (*Id*. at 3038.)

c. The Victim's Rapid Death Soon After the Assault Began.

Petitioner did not remember much about the events of the night Mrs. Miller was killed. He has no memory of their fight after Mrs. Miller is on the floor and he "picks up the knife" and starts to stab her. (22 RT 3335.) Petitioner testified on cross-examination that he first stabbed the victim before he "did anything else," and that he had no memory of "raping" her. (23 RT 3484.) Petitioner's last memory of that horrible night—of specifically stabbing the victim—was another fact that pointed to the improbability of the prosecution's theory that the victim was bound and raped prior to being killed.

The autopsy report indicated that only a few of the victim's stab wounds exhibited signs of hemorrhaging. (NOL C2 Ex. 171 at 3033-34; NOL C2 Ex. 177 at 3087.) Even though the medical examiner stated that one of the two serious neck wounds was fatal, he noted "relatively little bleeding locally in the tissues in relation to these wounds and limited blood at the scene indicates that these wounds were of a perimortem nature." (NOL C2 Ex. 171 at 3032.) Of the twelve labeled abdominal wounds, only two, C3 and D1, revealed any signs of hemorrhage. (*Id*. at 3033-34.)

Because the "lack of hemorrhaging indicates that the victim's heart was not circulating blood when she sustained the wound and that she was dead by the time the wound was inflicted" (NOL C2 Ex. 177 at 3087), the autopsy report provides further evidence that the victim died before the stabbing attack ended.

d. Manner In Which Victim Was Bound.

Trial counsel's discovery materials included numerous photographs of the crime scene. Several of these photographs showed how the victim was bound and the type of materials used as ligatures. (III Supp. CT 3, 4 (People's Trial Ex's. 5 A and B show the wrist bindings); *id*. at 8 (People's Trial Ex's. 5F show the ankle bindings).) Trial counsel also had access to the coroner's autopsy and investigator's reports that described the nature and effect of the bindings. (NOL C2 Ex. 171 at 3044; NOL C2 Ex. 103 at 2125.) The victim's wrists were snugly bound above her head by a purse strap and telephone cord that were wrapped around her left wrist twenty times and around her right wrist sixteen times. The purse strap was knotted only on the left wrist and the two male ends of the telephone cord were tucked under other strands on the left wrist. An electrical cord had been wrapped around each ankle once, and knotted on the inside of the ankle; the electrical cord did not connect the ankles. The ankles were connected by a blue nightgown that was also knotted on the inside of each ankle, close to or on top of the electrical cord knot. Despite the extent of the binding and the materials used to bind the victim, the medical examiner reported that 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 binding." (NOL C2 Ex. 171 at 3038.) That these ligatures were capable of causing "crease marks" on the victim's wrists, but not abrasions or internal hemorrhaging indicates that the ligatures were applied to a victim that was no longer alive and capable of struggling. (*See* NOL C2 Ex. 177 at 3086.)

The manner in which the ligatures were applied is further evidence the victim was not bound to facilitate a sexual assault. The ligatures allowed the victim's ankles

to be separated no more than twelve to fifteen inches. (NOL C2 Ex. 172 at 3052; 17 RT 2775.) The coroner's report described the victim as "grossly obese"; she was 5'3" tall and weighed 224 pounds. (NOL C2 Ex. 171 at 3031.) 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 without any abrasions or other "disturbances" to the skin around her ankle ligatures. (*See* III Supp. CT 8 (People's Trial Ex. 5F).)

Despite possessing substantial evidence that the victim was not alive at the time of the sexual assault, trial counsel unreasonably did not present it at trial. "Describing [counsel's] conduct as 'strategic' strips that term of all substance[,]" because evidence that the sexual contact was post-mortem was rife in the crime scene discovery. *Sanders v. Ratelle*, 21 F.3d at 1456.

2. Trial Counsel Unreasonably Failed To Consult With Necessary Experts To Determine Whether The Victim Had Been Raped.

Trial counsel understood the crucial importance of determining whether or not the victim was first killed or first sexually assaulted. (*See* II Supp. 1 CT 83 ("Notice of Motion To Set Aside Information Pursuant To Penal Code Section 995".) Despite acknowledging the importance of determining whether the victim was alive prior to the sexual assault, trial counsel's consultation with an expert consisted of a brief and inadequate consultation with medical examiner Scholtz. In memos dated December 2, 1993, and July 1, 1994, trial counsel noted that he asked Dr. Scholtz if he could tell if (1) the semen was deposited and (2) the victim was bound pre or post mortem. The December 2, 1993 memo stated that Dr. Scholtz could not tell when the semen was deposited, but he warned trial counsel that he was not an expert in this area. According to counsel's July 1, 1994 memo, Dr. Scholtz was unable to "give an opinion as to whether or not the victim was tied up before or after death." Trial counsel unreasonably failed to consult an independent medical expert with expertise in these areas, *Duncan v. Ornoski*, 5285 F.3d 1222, 1236 (9th Cir. 2008) (counsel ineffective

for failing to hire expert, especially since evidence in question played a "central role" and was "potentially exculpatory"), and his failure to do so was not the result of a reasoned strategic decision. (NOL D1 Ex. 181 at 3161 (counsel would have introduced evidence of post-mortem sexual contact if he had it); *see also* NOL C2 Ex. 12 at 107 ("I needed Mr. Jones to admit the rape … I believed I would lose the rape charge anyway."); Ex. 150 at 2730 (admissibility of DNA evidence foreclosed any defense to rape charge).)

3. Trial Counsel Unreasonably, And Without Adequate Prior Investigation, Conceded The Charge Of Rape.

Without a factual basis for doing so, trial counsel conceded at trial that petitioner raped the victim. (31 RT 4688.) Because he failed to conduct a minimally adequate investigation, trial counsel erroneously believed he "had no choice other than to concede the rape charge." (NOL C2 Ex. 12 at 106, 107; *see* Ex. 150 at 2730.) Trial counsel's concession effectively pled petitioner guilty to rape, and by doing so exponentially increased his chances of a rape felony murder conviction and a true rape special circumstance finding.

Petitioner never testified that he raped the victim; when asked if he had any memory of having sex with the victim, petitioner answered "no, but I know it had to be me, though." (22 RT 3336.) Despite petitioner's speculation that he had sex with the victim, not that he raped her, trial counsel failed to object when the prosecution asked petitioner "Do you remember raping her?" (23 RT 3484.) Trial counsel objected to the prosecution's question "did you rape her before or after you stabbed her," not because petitioner never admitted to raping the victim, but because petitioner "said he didn't remember raping her." (*Id*. at 3484.)

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4. Trial Counsel's Failure To Investigate, Develop, And Present A Coherent And Persuasive Defense To The Rape Charges And Allegations Was Prejudicial.

a. Trial Counsel's Failure To Investigate And Present A Post-Mortem Sexual Contact Defense Was Prejudicial.

Had trial counsel conducted a minimally adequate investigation he would have been able to present a strong defense to the rape charge based on evidence discovered at the crime scene. A minimal investigation, including reviewing the police reports and crime scene photographs would have revealed the significant inconsistencies with the theory that the victim had been bound, raped then killed. (*See, e.g.*, NOL C2 Ex. 103 at 2123; Ex. 171 at 3038.) In order for the crime scene to fit the prosecution's *rape* theory, the attacker would have had to pull the victim's nightgown up to facilitate the rape, pull the gown down before stabbing her, and then finally pull the gown above her waist, in order to leave her as she was found. Such a scenario is neither probable nor consistent with the other evidence, which trial counsel failed to demonstrate and argue to petitioner's jury.

The autopsy and coroner's investigator's reports further support the theory that any sexual contact by petitioner was post-mortem. The coroner's investigator carefully noted both of the victim's wrists were extensively bound with both a leather purse strap and a telephone cord (NOL C2 Ex. 172 at 3053), and her ankles were each wrapped with electric cord, over which a piece of fabric bound them together. The autopsy report noted that the ligatures left only "crease" marks on the wrist. (NOL C2 Ex. 171 at 3038.) The complete lack of abrasions, bruises, or any other "skin disturbance" supports the theory that the victim was bound post-mortem and calls into question the validity of the prosecution's theory that the victim was bound pre-mortem. The prosecution's theory was that the victim was bound as a result of her struggling during the sexual assault. (26 RT 3902 ("If he killed her first, she's lying there dead, you don't need to tie her up.").) In light of the extensive use of ligatures, if the victim

was alive and struggling, as posited by the prosecution, she would have suffered at a minimum an abrasion at a ligature site, and more likely bruising and hemorrhaging. If the prosecution's theory was viable, and the victim was bound in order to curtail her struggling, the victim would have continued to struggle with her attacker as the bindings were repeatedly wrapped around her wrists and ankles, a process that could not be quickly accomplished as a result of the number of ligatures used and the number of times each was wrapped around the victim's wrists and ankles. The prosecution's pre-mortem bind-to-facilitate-rape theory does not and cannot account for the complete lack of bruising, hemorrhaging, or even light abrasion from the ligatures. The nature of the ligatures, the extreme manner in which they were applied to the victim, and that they left no other mark except creased flesh is fully consistent with a post-mortem binding theory. The autopsy findings regarding the undisturbed state of the ligature sites strongly supports the theory that the ligatures were applied post-mortem. (*See* NOL C2 Ex. 177 at 3086.)

The victim's relatively quick death, as determined by the number of non-hemorrhaging knife wounds, likewise supports a post-mortem sexual contact theory. At trial, the medical examiner failed to discuss the significance that the majority of wounds lacked any sign of hemorrhage, and trial counsel unreasonably failed to question him about this exculpatory fact. That the victim died quickly after the assault, also helps to explain the lack of blood, both at the crime scene and on petitioner. There was "minimal blood loss at the [crime] scene" (NOL C2 Ex. 103 at 2123, because the majority of the stab wounds were abdominal, and the victim had a two and half inch layer of fat in her abdomen (17 RT 2783) that caused the blood to pool in the abdominal area instead of flow to the surface of her body. (*Id*. at 2802, 2815-16.)

Petitioner's recollection further supports post-mortem sexual contact. Before he blacked out, petitioner recalled "swinging the knife" at the victim. (22 RT 3335.) In light of the fight between petitioner and Mrs. Miller and the manner in which she was discovered, petitioner's story is credible. What is not credible (or consistent with the

physical evidence) is that petitioner, in the heat of fighting and stabbing the victim, set the knife aside to rummage for a purse strap, telephone and electric cords, a gown, and scarves; returned to the victim, who did not struggle while he bound her wrists and ankles and gagged her; sexually assaulted her; ensured her nightgown was properly pulled down; stabbed her multiple times; and, before leaving the scene, pulled the victim's night gown above her abdomen.

b. Trial Counsel's Failure To Consult With Necessary Experts Was Prejudicial.

In addition to explaining the critical significance of the evidence discussed above, a qualified, independent expert would have prepared counsel to adequately cross-examine the medical examiner, Dr. Scholtz. Consultation with the proper expert would have allowed trial counsel to cross-examine Dr. Scholtz on his false and prejudicial testimony regarding the wrist bindings. The autopsy report specifically states "The wrist bindings leave crease marks but no other disturbance on the skin." (NOL C2 Ex. 171 at 3038.) Dr. Scholtz testified that the left wrist suffered "a bruising or abrasion which could have been caused from the bindings." (17 RT 2446.) Dr. Scholtz's testimony directly contradicted the autopsy report, and it remained unchallenged by trial counsel. Had counsel reasonably consulted an expert, he would have known to question Dr. Scholtz about his failure to take tissue samples where the ligatures had been placed to determine whether there were any signs of internal hemorrhage.

Consultation with a qualified independent expert would have alerted trial counsel to the fact that the prosecution's accusation that the victim suffered a "vaginal wound" was patently in error and as such, highly inflammatory. As documented in the autopsy report, the victim suffered "a wound that penetrated the victim's peritoneum and entered her uterus." (NOL C2 Ex. 177 at 3087; NOL C2 Ex. 171 at 3033.)

An expert could have provided both direct testimony and assistance with cross-examining Dr. Scholtz on the issue of how quickly the victim died once the attack

started. Dr. Scholtz testified that the neck wounds were the last ones inflicted. (17 RT 2804.) He based his opinion on "the apparent small amount of blood loss from the neck wounds as well as the fact that these two weapons were found in place in that location which seems to represent of [sic] some sort of finality." (*Id*.) Dr. Scholtz's opinion could have been, but was not, challenged on the basis of the findings in the autopsy report he authored. Dr. Scholtz noted only a few areas in the victim's abdomen that revealed any signs of hemorrhage (NOL C2 Ex. 171 at 3033-34 (wounds C3 and D1)); he failed to note any sign of hemorrhaging at the other wound sites (*id*.; *see also* NOL C2 Ex. 177 at 3087). Since he did note signs of hemorrhaging in the neck wounds, albeit small, it is clear that the victim was still alive when she received those wounds, but she was not alive when she received the majority of the abdominal wounds.

c. Trial Counsel's Concession of the Rape Charge Was Prejudicial.

In his closing statement trial counsel erroneously informed the jury that petitioner "got up on the witness stand and told you he killed Mrs. Miller and he had raped Mrs. Miller." (31 RT 4688.) Petitioner never admitted to raping the victim or even speculated that he may have done so. Petitioner consistently testified that he stabbed the victim before he "did anything else" (23 RT 3484; 22 RT 3335); therefore, the only evidence adduced at trial on this issue did not support trial counsel's concession. Regardless, it allowed the prosecution to tell the jury that "Mr. Manaster conceded the rape." (27 RT 3963.)

Despite the strong evidence that pointed to sexual contact occurring only after the victim's death, trial counsel failed to investigate this critical defense. But for trial counsel's failure to investigate and present this defense there is a reasonable probability that the jury would have had, at a minimum, a reasonable doubt as to petitioner's guilt of the charges of rape, felony murder rape and that the rape special

circumstance was true. *Strickland v. Washington*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 80 L. Ed. 2d 674.

C. Trial Counsel Unreasonably Failed to Investigate, Develop, and Challenge the Admissibility and Reliability of the Dna Evidence.

Trial counsel believed that if DNA evidence was admitted at trial it would be "quite damaging to our case," because he "could not envision a defense to the rape charge and the rape felony murder charge once the DNA evidence was admitted." (NOL C2 Ex. 12 at 106.) Trial counsel "did not completely understand DNA testing" so he sought assistance from "another lawyer at the Public Defender's office," who also served as the "office's forensics consultant." (*Id*. at 106-07.) The Public Defender's Office's forensics consultant "assisted [trial counsel] in the hearings on the admissibility of the DNA evidence." (*Id*. at 107.) Despite this assistance, and even though the admissibility of the DNA evidence resulted in trial counsel's decision to concede the rape charge, trial counsel failed to challenge the admissibility of the DNA evidence. *Strickland v. Washington*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 80 L. Ed. 2d 674; *see Duncan v. Ornoski*, 528 F.3d 1222 (trial counsel's failure to hire expert unreasonable).

As demonstrated below and in the Petition at page 48-58, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to meaningfully challenge the DNA evidence.

1. Trial Counsel Unreasonably Failed to Present An Objectively Reasonable Pre-Trial Challenge To The Admissibility Of The DNA Evidence.

a. Trial Counsel Unreasonably Failed To Use DNA Expert.

Trial counsel retained Dr. Simon Ford, Ph.D. in November 1993 (NOL C2 Ex. 176 at 3078), after the prosecution completed DNA testing. (*Id*.) Because Mr. Ford was hired after the DNA testing was completed, there was no opportunity for him to

observe the actual testing. At no time did trial counsel request the prosecution to have an expert observe the testing, or to wait to run the DNA tests until he could retain an expert. Trial counsel unreasonably allowed the testing to continue without a defense expert to observe the testing process and procedures.

One of trial counsel's most inexplicable and prejudicial actions was his failure to heed the advice of, and utilize information from, his DNA expert, Dr. Ford.[8] Despite Dr. Ford's late entry into the case, after reviewing the data and reports produced by the prosecution's DNA laboratory, Cellmark, he uncovered several areas for trial counsel to challenge. (*Id*. at 3078-83.) In March 1994, 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; its 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 (*id*. at 3080-83);
- Cellmark acknowledged it had a "very high error rate" of approximately one in two hundred (*id*. at 3081);
- The testing in petitioner'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); and,

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[8] At the time he was consulting on petitioner's case, Dr. Ford was also one of the expert DNA consultants hired by the O.J. Simpson defense team. (*Id*. at 3078.)

- He "strongly" recommended 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).

In addition, Dr. Ford advised counsel about potential challenges to the statistical method employed by Cellmark, the interim ceiling approach ("ICA"), and provided the names of experts who could testify that the ICA was highly controversial and that its use was not generally accepted in the relevant scientific community. The experts Dr. Ford suggested to trial counsel had either testified or were about to testify on similar issues in Los Angeles County. (*Id*. at 3084.) Despite this expert advice, trial counsel unreasonably failed to seek to have the samples retested by a defense expert or to follow up on the potential flaws in Cellmark's testing procedures that were pointed out by Dr. Ford.

Trial counsel's failure to develop compelling evidence of the possible contamination of the samples, unreliability of the testing procedures, flawed application of the testing procedures, unacceptable error rates of the laboratory that conducted the testing, and the unreliability of the statistical analysis used to link the samples to petitioner was objective unreasonable. Trial counsel had no tactical reason for failing to fully investigate the admissibility of the DNA evidence and employ and follow the advice of Dr. Ford. (*Id*. at 2730-31.) *Duncan v. Ornoski*, 528 F.3d at 1225 ("when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance").

b. Trial Counsel Unreasonably Failed To Object To The Trial Court's Use Of The Incorrect Legal Standard In Determining The that ICA Was Admissible.

Trial counsel filed a motion seeking to exclude the DNA evidence on the limited grounds that the statistical method employed, the ICA, was not generally accepted in the relevant scientific community. (II Supp. 1 CT 106-23.) After briefing and

arguments, the court held that the ICA was generally accepted in the scientific community. (1 RT 665.) Prior to this ruling, the trial court informed counsel that if the prosecution made a prima facie showing of general acceptance, the burden shifted to the defense to rebut it. (1 RT 648.) The standard employed by the court was incorrect. The proper preponderance of the evidence standard, unlike the standard suggested by the trial court, does not unfairly shift or lighten the prosecution's burden of proof. Trial counsel knew or reasonably should have known that the trial court had enunciated and intended to employ an incorrect legal standard, one that shifted some of the prosecution's burden of proof onto the defense, and unreasonably failed to object or otherwise bring this error to the court's attention. Consequently, the trial court failed to apply the proper burden of proof in determining whether the ICA was generally accepted and thus never properly ruled on whether the prosecution had demonstrated general acceptance by a preponderance of the evidence.

c. Trial Counsel Unreasonably Failed to Make, And Support, A Motion To Exclude DNA Evidence.

The prosecution filed a motion requesting that in determining whether the ICA, a 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.) Trial counsel opposed the motion on the grounds that the requested procedure violated petitioner's confrontation rights and because 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; 1 RT 564.) The court granted the prosecution's motion in part, and protected the defense's right to call the expert

witness in question for cross-examination. (1 RT 571-72.) After making his ruling, the trial court informed both parties that he was "willing to take judicial notice"; however, he "would prefer to have the witnesses here live." (*Id*. at 573.)

Despite the trial court's clear preference for live witnesses and Dr. Ford's recommendations of readily available expert witnesses (NOL C2 Ex. 176 at 3084-83), trial counsel unreasonably 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.)

Following the court's ruling, defense counsel informed the court that the defense would file a motion challenging the accuracy of the particular testing procedures employed by Cellmark. (*Id*. at 666.) Immediately prior to trial, trial 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.) This motion sought a hearing involving live expert testimony about the unreliability of the ceiling principle, error rates, and the methodological deficiencies found in DNA testing and analysis process. (*Id*. at 632-34.) Trial counsel stated in the motion that the experts he intended to call as witnesses were unavailable at the time of the previous hearing, however, he unreasonably failed to state why these experts had been previously unavailable and why he did not request to have the original hearing continued in order to accommodate their schedules. (*Id*. at 631.) On November 18, 1994, without an evidentiary hearing, the trial court denied the motion to reconsider. (1 CT 201; 1 RT 722-23.)

d. Counsel Unreasonably Failed To Request Necessary Discovery.

To petitioner's detriment, trial counsel relied on informal discovery for information related to the DNA testing. Trial counsel filed a standard discovery

motion on May 18, 1993, in which he requested "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.) Trial counsel informed the trial court that, although he filed the motion, he was not requesting that the court take any "action on it at this point" (1 RT 30), and counsel never requested that the court rule on it. Trial counsel completed, signed, and dated October 6, 1993 another "Notice Of Motion For Pretrial Discovery" that requested information relating to the DNA testing, 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. This motion, which requested some of the information required by counsel's expert (*see, e.g.*, NOL C2 Ex. 176 at 3081-83) was inexplicably never filed with the court, nor ruled on.[9] Trial counsel unreasonably failed to request and obtain additional relevant information such as 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. (*See, e.g., id*. (trial expert given only Cellmark's report and underlying data; he never received, *inter alia*, raw data, lab and bench notes, proficiency tests, contamination logs).) Trial counsel's failure to obtain the necessary data prior to making a determination of whether or not the DNA evidence was accurate and admissible was neither reasonable nor strategic.

[9] 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* Petition Claim Twenty-nine.)

e. Trial Counsel's Unreasonable Failure To Challenge The Reliability Of The DNA Evidence At Trial, Fell Below The Standard Of Care.

Trial counsel's failure to challenge the testimony of the prosecution's DNA expert at trial was objectively unreasonable. After the prosecution finished the direct examination of its DNA expert, trial counsel informed the court "I have no questions." (20 RT 3130.) Foregoing cross-examination of the DNA expert was objectively unreasonable in light of the inaccuracies and falsehoods in the prosecution expert's testimony. No tactical reason existed to forego cross-examination, and by doing so to allow the prosecution's DNA evidence to appear stronger and more compelling than it actually was. Trial counsel possessed or had access to, and yet failed to utilize resources that could have aided and assisted him in a devastating cross-examination of the DNA expert. Aside from access to his considerable expertise, Dr. Ford had provided counsel with a detailed memorandum "outlining potential areas for cross-examining DNA experts." (NOL C2 Ex. 176 at 3078.) At a minimum, trial counsel could have looked to the cross-examination of the DNA expert conducted at the Evidence Code section 402 hearing for guidance. (19 RT 2931 *et seq*.)

Trial counsel's failure to move to exclude the improper testimony and inferences from the prosecution expert was objectively unreasonable. Trial counsel had a duty to object and move to exclude the following inaccurate, misleading and/or false evidence from the prosecution's DNA expert:

- Inaccurate and false testimony concerning the DNA "match" (*see* NOL C2 Ex. 176 at 3079-80):
- Testimony that the "DNA banding pattern of Ernest Jones did match the bands in the sample from the vaginal swabs." (20 RT 3129);
- Testimony that petitioner "matched" the samples taken from the victim misled the jury into believing that a comparison between the

crime scene DNA and petitioner's DNA excluded all other donors. (*See id*.);

- The prosecutor's questions and testimony that falsely conveyed to the jury that the different banding patterns were "identical." (20 RT 3130; *but cf* NOL C2 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).)
- Testimony 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.);
- Testimony that improperly and falsely conveyed to the jury that there was a 1 in 78 million chance that petitioner did not commit the rape. (*See id*.)

Counsel, instead, unreasonably failed to cross-examine, move to exclude, or correct the prejudicially erroneous and misleading testimony of the prosecution's DNA expert witness, and he had no strategic reason for failing to do so. (NOL C2 Ex. 150 at 2730 (if counsel had "understood" the DNA testing was unreliable he would have challenged it at trial).

f. Trial Counsel Unreasonably Failed To Investigate And Challenge The Prosecution's Analysis Of The Rape Kit.

Trial counsel unreasonably and prejudicially failed to investigate, develop, and present challenges to the use of blood analysis. Trial counsel knew that the prosecution's case would rely substantially on the testimony of blood analysis conducted on the sperm and semen found on the victim's body. (*See, e.g.*, 1 RT 508; *see also* 1 CT 125-30 (the prosecution moved the court for an order requiring petitioner to provide saliva and blood samples.) Trial counsel was informed, by a report by William Moore, dated, November 25, 1992, that initial blood typing

identified petitioner as a potential donor of the sperm collected from the victim, and that the prosecution intended to conduct a DNA analysis on the sample.

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 preliminary hearing testimony of William Moore. (II Supp. 23 CT 6348-49 (Declaration of Counsel); *id*. at 6346-47 (Order).) Ms. Hunter informed trial counsel that the notes concerning the sexual assault kit Mr. Moore 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.

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).) Despite being informed that the bench notes for the rape kit from the Los Angeles Police Department were incomplete, trial counsel unreasonably failed to obtain a complete set of the documents regarding the Los Angeles Police Department's analysis.

Before Ms. Hunter had the opportunity to reanalyze the rape kit, trial counsel withdrew his request for her appointment because of the results of the prosecution's DNA analysis. In his memorandum to the court, trial counsel stated that he intended "to have [the DNA] results examined." (*Id*. at 6355.) Trial counsel's decision to forego re-testing the rape kit was objectively unreasonably. The prosecution presented testimony from William Moore regarding his testing of the rape kit. Mr. Moore's testimony linked petitioner to the semen swabbed from the victim. (28 RT 2869.) This testimony stood essentially unchallenged in light of trial counsel's unreasonable failure to request Mr. Moore's complete bench notes and to re-test the rape kit. Trial counsel's decision to withdraw funding for Ms. Hunter to re-test the rape kit and his

failure to obtain all the bench notes associated with the prosecution's testing of the rape kit was neither reasonable nor strategic.

2. Trial Counsel's Deficient Representation Was Prejudicial.

Trial counsel had a duty to consult with an expert since DNA was an area in which "he has no knowledge or expertise[,]" *Duncan v. Ornoski*, 528 F. 3d at 1236. Had trial counsel performed reasonably and filed and litigated a formal discovery motion that requested all relevant information necessary to challenge to the admissibility of DNA evidence and followed Dr. Ford's advice, he would have been armed with both the information and the additional experts to successfully litigate his motion to exclude the DNA evidence as not generally accepted in the relevant scientific community and unreliable; be prepared to present such testimony before the jury, if necessary; and, have prevented the admission of unreliable and prejudicial testimony concerning the statistical calculations used in the analysis.

Trial counsel could have presented strong evidence that—contrary to the prosecution's assertions—the ICA was neither generally accepted in the scientifically community nor the most conservative statistic possible. Cellmark reported that a statistical analysis known as the "counting method yielded a probability statistic of only 1 in 800 versus the ICA's astronomical statistic of 1 in 78 million." (NOL C2 Ex. 176 at 3079; *see also* NOL C2 Ex. 170 at 3029.) Like the ICA, the "counting method is another method for indicating the rarity of a random match proposed by the 1992 NRC Report." (NOL C2 Ex. 176 at 3079.) Because trial counsel failed to give Dr. Ford the transcripts from the admissibility hearing, Dr. Ford did not know, and could not assist counsel in countering the prosecution's blatantly false argument. (*Id*. at 3078, 3079.)

Had trial counsel followed the advice of his expert, he could have excluded the DNA evidence, or at a minimum, the grossly misleading and false testimony that petitioner's DNA "matched" the sample DNA.

In light of the way the victim was discovered at the crime scene, the prosecution had no substantive evidence that the victim was raped. Indeed, the evidence pointed to sexual contact occurring after the victim's demise. The dearth of evidence, the admission of the DNA evidence, and the misleading testimony regarding petitioner matching the DNA sample taken from the victim rendered counsel's failure highly prejudicial.

D. Trial Counsel Unreasonably Failed to Investigate, Develop, and Enter a Plea of Not Guilty by Reason of Insanity.

Reasonable trial counsel, convinced that the client's crime was the result of a serious mental illness, whose client stated that he could not remember the entire crime, and who received expert opinions that the client was psychotic at the time of the crime, would investigate, develop, and present a defense of not guilty by reason of insanity ("NGI"). Trial counsel, aware of each of these facts regarding petitioner, performed below the standard of care, and severely prejudiced petitioner by his objectively unreasonable failure to conduct a minimally adequate investigation, to develop, and present an NGI defense. *Strickland v. Washington*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 80 L. Ed. 2d 674; *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (counsel possessed information that would have put a reasonable attorney "on notice" to investigate mental health issues); *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002) (counsel ineffective for failing to investigate competency and consider NGI plea).

As demonstrated below and in the Petition at pages 58-50, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to investigate and present an NGI defense.

1. Defense Counsel's Performance Was Deficient For Failing To Investigate and Enter A NGI Plea.

Counsel understood that petitioner's mental state at the time of the crime was the lynchpin to the case: "Due to the nature of the crime and the prior offenses for

which Mr. Jones had been arrested, I wanted a mental health expert to explore Mr. Jones's state of mind at the time of the crime." (NOL C2 Ex. 150 at 2731.) Trial counsel hired two mental health experts, Dr. Thomas, and Dr. William Spindell, and specifically asked them both to assess petitioner's mental state at the time of the crime. (NOL C2 Ex. 154 at 2748.) Counsel asked Dr. Thomas "to opine on Mr. Jones's mental status at the time of the offense." (*Id*.) Similarly, in a letter dated November 12, 1994, counsel asked Dr. Spindell for "an opinion regarding [petitioner's] mental condition at the time of the offense involved in this proceeding."[10] Both doctors alerted trial counsel that around the time of the crime, 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) (West 1994). Dr. Thomas informed counsel that petitioner "suffered a psychotic break at the time of the incident, dissociating from external reality and rational consciousness, and responding instead only to an unconscious, internal world of memories and messages over which he had no control" (NOL C2 Ex. 154 at 2750), and Dr. Spindell similarly opined that petitioner suffered from schizophrenia. (30 RT 4501.) Trial counsel admits that "Dr. Thomas concluded that due to Mr. Jones's mental impairments, he could not predict in advance, plan, or control his dissociative episodes. Dr. Thomas also made it clear that this dissociative status had a critical impact on Mr. Jones's state of mind during his encounter with Mrs. Miller." (NOL C2 Ex. 150 at 2731.) Trial counsel unreasonably failed to comprehend the import of Dr. Thomas's expert medical opinion. Counsel believed it supported only a defense to those charges and allegations that required specific intent. (*Id*.)[11] It was objectively

[10] At a November 9, 1995 hearing on defense counsel's motion for continuance, he informed the court that he was considering an NGI defense as a result of Dr. Thomas's preliminary findings, and that there may be such a plea "depending on the results of this test." (1 RT 715.)

[11] Counsel recognized Dr. Thomas's opinion directly related to petitioner's ability to form the specific intent for felony murder and the special circumstances. As

unreasonable for trial counsel not to investigate and present an NGI defense in light of all the facts that triggered counsel's duty to investigate further. *See, e.g., Jennings v. Woodford*, 290 F.3d at 1016.

"As a result of reading the reports of [petitioner's] two prior offenses, I became convinced that [petitioner's] offense[s] were the result of mental illness." (NOL C2 Ex. 12 at 107.) Despite understanding the importance of mental illness to the case, trial counsel unreasonably failed to enter and support an NGI plea. As discussed above, trial counsel's failure to timely consult with a mental health expert fell well below the standard of care in a case that counsel knew depended heavily on petitioner's mental state at the time of the crime. (NOL C2 Ex. 154 at 2748, 2749.) Reasonably competent counsel alerted to the possibility that his client may have a tenable NGI defense would have interviewed the client's family and friends for descriptions of the client's behavior at and around the time of the crime. Trial counsel's failure to interview people who knew petitioner well and were in contact with him during this time was objectively unreasonable and not the product of a tactical decision. *See, e.g., Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998) (counsel unreasonably failed to investigate the extent or possible ramifications of petitioner's mental illness).

2. Petitioner Was Prejudiced By Trial Counsel's Unreasonable Failure To Offer An NGI Defense.

Petitioner's guilt phase jury was never informed that, as a result of a severe mental illness, over which he had no control, petitioner

> was not in control of any of his actions during [the] 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. The

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discussed above, he unreasonably failed to call any mental health expert to explain petitioner's mental state to the jury in the guilt phase of the trial.

> emotional encounter with Mrs. Miller, her casual dress in a bathrobe, and her statement "[g]ive it to me," pushed to the surface his deeply rooted ambivalence towards his own mother, and provoked the symbolic image of that ambivalence, the image of her in bed with another man, setting off the dissociative process and psychosis after which he had no control over either his thoughts or actions.

(NOL C2 Ex. 154 at 2755.)

If trial counsel had more timely hired and consulted with mental health experts, petitioner would not have been deprived of a mental state defense that included a plea of NGI. (*See* NOL C2 Ex. 154 at 2754 (trial counsel failed to ask Dr. Thomas if petitioner satisfied the criteria for an NGI plea "If he had, I would have testified that Mr. Jones was not in control of any of his actions during the incident. … He was therefore not in a position to appreciate the moral quality of his behavior, or distinguish right from wrong in those moments.").) Despite the paucity of information (*id*. at 2756-57), time (*id*. at 2749), and guidance (*id*. at 2749, 2753-55) given to Drs. Thomas and Spindell by trial counsel, petitioner's mental illness and its clear effect on his behavior at the time of the crime were obvious, and quickly determined by them. (*Id*. at 2750.) Had trial counsel performed reasonably and timely hired the necessary mental health experts, they would have had the time to assist him in investigating, preparing and presenting a plea of NGI. (*See id*. at 2749 ("By the time that I was retained, Mr. Manaster had very little time to prepare a mental state defense.").)

Neither the mental health experts, nor petitioner's jury heard how "strange" and "bizarre" petitioner acted in the days and months before the crime, behavior that was consistent with petitioner ultimately being "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) (West 1994). Several witnesses could have given trial counsel important information about petitioner's functioning in the months leading up to the crime. For example, during the riots that erupted after the

Rodney King verdict, petitioner's behavior was especially bizarre. He was asked to protect his uncle's transmission shop, he was "given a gun" and directed "to stand guard all night." (NOL C2 Ex. 10 at 99). Petitioner "lived in the shop for three days straight wearing army pants tucked into combat boots and a beret." (*Id*.) During this time, petitioner was hyper-vigilant, if "he heard the smallest of noises, he over-reacted, as if he was being personally attacked. He could not keep still and was really pumped up. He had that strange glassy, faraway look in his eyes that he got when he talked about prison. . . Meso thought he was at war." (*Id*.; *see also* NOL C2 Ex. 21 at 227.) Eugene Maxwell, who worked for petitioner's uncle, vividly recalled that "[d]ays before his arrest, I became increasingly concerned about Meso. One day, he showed up at my door in the middle of the afternoon. It was frightening because he looked like a different person. His eyes were glazed over and unfocused. He really scared me that day." (NOL C2 Ex. 10 at 99.) Mr. Maxwell saw petitioner the day before he was arrested, and noted that from "the look in his eyes and his babbling speech, it seemed like he was talking to someone other than me." (*Id*. at 100.) Petitioner's Uncle Thomas similarly recalled how petitioner's mental illness affected his behavior days before the crime:

> Meso was working at my shop in the days leading up to his arrest. He was acting strange, and was jumpy and agitated, as if he was wired on some drug. His speech did not make sense, and he was literally talking nonsense. He was convinced that people were talking about him behind his back. He was also convinced that no one cared about him and that there was no reason to go on living.

(NOL C2 Ex. 21 at 227.)

Had the jury been presented with this strong and compelling evidence supporting an NGI defense, which counsel had no strategic reason not to develop and present, it is more likely than not that the result of the trial would have been different. *See, e.g., Rompilla v. Beard*, 545 U.S. at 393, 125 S. Ct. at 2469, 162 L. Ed. 2d 360.

E. Trial Counsel Unreasonably Failed to Conduct a Constitutionally Adequate Voir Dire.

Trial counsel unreasonably conducted a superficial and constitutionally inadequate voir dire examination of all prospective jurors. Trial counsel failed to object to the trial court's use of a defective jury questionnaire, for which critical questions on the death penalty were drafted by the prosecutor. Trial counsel's failure to conduct and ensure an adequate and meaningful voir dire of potential jurors was objectively unreasonable and prejudicial. *See, e.g., Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (conviction reversed for various instances of ineffectiveness, including counsel's performance in failing to conduct adequate voir dire); *see Irvin v. Dowd*, 366 U.S. 717, 81 1639, 6 L. Ed. 2d 751 (1961) (constitutional right to jury trial requires fair and impartial jurors).

As demonstrated below and in the Petition at pages 60-63, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to conduct a reasonable and meaningfully voir dire.

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).) The questionnaire failed to also inquire whether or not a prospective juror would automatically impose either sentence for felony murder. (*See, e.g., id*; 7 RT 1462.) Trial counsel was aware of this major defect in the juror questionnaire and unreasonably failed to correct it or bring it to the court's attention on his own accord. Trial counsel admitted that he unreasonably abdicated his responsibility to ensure voir dire resulted in fair and impartial jurors when he informed the court that he had "agreed" to the questions the prosecution drafted. (7 RT 1462.)

Trial counsel prepared petitioner's case as if a penalty phase was a foregone conclusion: early in his representation he decided to concede the rape charge before investigating it (*see* NOL C2 Ex. 12 at 107; Ex. 150 at 2730) and the only mental health experts he hired were for the penalty phase. (NOL C2 Ex. 150 at 2731.) In light of the manner in which trial counsel prepared the case the unreasonableness, and resulting prejudice, of trial counsel's abdication of responsibility in drafting critical sentencing based juror questionnaire questions was magnified.

Trial counsel compounded his failure to ensure the juror questionnaire contained all questions relevant to the facts and legal theories of the case by questioning prospective jurors with incomplete statements of the law. Trial counsel incompletely stated the law as to first degree murder in an attempt to reflect the poorly drafted juror questionnaire. As a result of his dependence on the questions inadequately drafted by the prosecution, trial counsel misstated the law when he asked a potential juror "if you got to the penalty phase we would be talking about guilt of intentional, deliberate first degree murder[.]" (7 RT 1458.)

Trial counsel's approach to the case was that felony murder was the predominant theory of murder. (*See, e.g.*, NOL C2 Ex. 12 at 107; Ex. 150 at 2730.) Abdicating responsibility to the prosecution to draft vital questions for the juror questionnaire regarding a prospective juror's potential sentencing bias against those convicted of both a felony and a murder was objectively unreasonable.

Had trial counsel undertaken minimal steps to ensure a fair and legally complete juror questionnaire, the jury chosen to render petitioner's guilt and penalty verdicts would have been impartial. Unfortunately, counsel's failure to ensure that only jurors who were not biased, understood, and agreed to follow the law sat on petitioner's jury, resulted in verdicts that can only be explained by the jury's inability to follow, or worse, their blatant disregard for the law. Several of the jurors based their verdicts on their emotional reaction to the case, and not on the law. (*E.g.*, NOL C2 Ex. 9 at 94-96 (Declaration of Emil Ruotolo); NOL C2 Ex. 139 at 2693 (Declaration of Blanche

Harris-Goosby).)[12] Trial counsel's deficient performance in jury selection "undermine[s] confidence in the outcome actually reached" at trial. *Rompilla v. Beard*, 545 U.S. at 393, 125 S. Ct. at 2469, 162 L. Ed. 2d 360 (inner citation omitted.)

F. Trial Counsel Unreasonably and Prejudicially Failed to Investigate and Impeach Pamela Miller, a Critical Prosecution Witness.

In December 1993, trial counsel requested that the trial court order the prosecution to disclose "RAP" sheets (criminal histories) for the prosecution's witnesses, arguing "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." (1 RT 529.) Although counsel understood the importance of Ms. Love to the prosecution's case; he unreasonably failed to conduct even a minimal investigation into her criminal background or the status of any pending cases against her. *See, e.g.*, *Thompson v. Calderon*, 120 F.3d 1045 (counsel unreasonably failed to discover and present impeachment evidence); *see also Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. … One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness.").

As demonstrated below and in the Petition at pages 64-67, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim

[12] Jurors Rutolo's and Harris-Goosby's declarations are not offered to impeach the verdict based on revelations concerning the jurors' subjective thought processes. *See* Fed. R. Evid. 606(b); *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (juror affidavits are admissible only to show "external" matters, i.e., "improper outside influences" and the introduction of extraneous information). Rather, their observations are proffered to show how the question of the appropriate sentence, "apparent to one on the spot," was viewed. *Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S. Ct. 546, 552, 98 L. Ed. 2d 568 (1988).

for relief as a result of trial counsel's unreasonable failure to investigate and present evidence to impeach the testimony and credibility of Ms. Love.

1. Trial Counsel Unreasonably Failed to Investigate And Develop Criminal History and Other Evidence To Impeach A Key Prosecution Witness Was Prejudicial.

Ms. Love testified at the preliminary hearing that she was selling drugs to petitioner at least four to five months prior to the crime. (1 CT 45.) Trial counsel knew that she could give the same false testimony at trial and was, therefore, on notice of his duty to demonstrate that she was not a credible, reliable, or unbiased witness.

Trial counsel knew that Ms. Love had a criminal history worthy of further investigation. Counsel obtained a police report, dated October 26, 1992, that detailed a police raid of Ms. Love's home and her subsequent arrest. (NOL C2 Ex. 120.) On October 26, 1992, two months before she was to testify at petitioner's preliminary hearing, the police executed a search warrant at Ms. Love's home and found illegal drugs and a .12 gauge shotgun. (*Id*. at 2467.) Ms. Love was arrested for the unlawful possession of controlled substances—a quantity of cocaine (approximately 6 grams) and marijuana (approximately 38 grams) of sufficient size to merit felony charges. Three days after her arrest, the same District Attorney's Office that was preparing to prosecute petitioner declined to prosecute Ms. Love, and instead dismissed all charges against her. (*Id*. at 2474.) Her case was allegedly referred to the City Attorney's office for a simple misdemeanor prosecution. (*Id*.) A California Law Enforcement Telecommunication System printout revealed that on November 2, 1992, all charges against Ms. Love had been dropped in the "Interest of Justice."

Trial counsel knew, or reasonably should have known, Ms. Love had received highly favorable treatment by the prosecution, but he unreasonably failed to question her about it. There was no tactical reason for counsel's failure to ask Ms. Love if she received such favorable treatment in exchange for her false, inculpatory testimony against petitioner. Trial counsel's failure to question Ms. Love about the dismissal of

her drug charges by the same agency prosecuting petitioner was objectively unreasonable.

Trial counsel further unreasonably failed to impeach Ms. Love's testimony and corroborate petitioner's testimony with official records and a law enforcement witness. Trial counsel possessed a copy of petitioner's official parole records, and he had spoken to petitioner's parole agent, Rolondo Sizemore. The official parole record could have served as formal documentation and Mr. Sizemore could have testified to each of petitioner's clean drug tests. Since "[t]his was a cast of characters and witnesses of such a nature that corroboration most certainly would have been of critical value to the jury,"[13] trial counsel's failure to use official evidence from official documents and witnesses to support petitioner's testimony was objectively unreasonable and prejudicial. *Riley v. Payne*, 352 F.3d 1313, 1324 (9th Cir. 2003).

2. Trial Counsel's Failure to Investigate And Develop Criminal History and Other Evidence To Impeach A Key Prosecution Witness Was Prejudicial.

Trial counsel's failure to investigate, develop, and present evidence to impeach Ms. Love's credibility and impartiality, damaged the defense case. By failing to impeach Ms. Love with her windfall dismissal of drug charges, counsel failed to discredit her testimony regarding petitioner's early drug use. The only potential evidence that supported petitioner's testimony, that prior to the day of the crime he had not used cocaine since 1985 (24 RT 3593-94), was petitioner's additional uncorroborated testimony that he had been subjected to random drug tests while he was on parole. (22 RT 3296.) Aside from coming from petitioner with no corroboration, this testimony required jurors to know that a single positive drug test was sufficient to revoke his parole and result in him being returned to prison. That she

[13] Prosecution witnesses Pamela Miller's and Shamaine Love's relationship with petitioner gave them an aura of false credibility. For example, when Ms. Love testified that "she was a good friend of Mr. Jones and the victim's daughter," one juror "realized she did not have any reason to lie." (NOL C2 Ex. 9 at 93.)

received the dismissal of potential felony drug charges for no apparent reason would have assisted the jury in properly determining Ms. Love's credibility and bias. By failing to impeach Ms. Love's testimony, trial counsel failed to support and corroborate petitioner's credibility and testimony, and that part of the mental state defense that relied on his recent drug use. *See, e.g., Riley v. Payne*, 352 F.3d at 1324 (counsel's failure to interview and offer testimony corroborating self-defense theory was prejudicial). But for trial counsel's failure to impeach Ms. Love and support petitioner's testimony, credibility and mental state defense the result of the trial would have been different. *Id*.

G. Trial Counsel Unreasonably Failed to Investigate and Fully Litigate the Admissibility of Prior Crimes Evidence.

Trial counsel was aware that the prosecution intended to use petitioner's prior crimes at trial; however, he unreasonably and prejudicially failed to adequately investigate the prior crimes, their admissibility, and potential defenses to them. *See Rompilla v. Beard*, 545 U.S. at 383, 125 S. Ct at 2464, 162 L. Ed. 2d 360 (counsel's failure to investigate petitioner's prior convictions he knew would be used in aggravation "fell below the level of reasonable performance."); (Ex. D at 35 (the standard of care at the time of petitioner's trial "required defense counsel to conduct an investigation of the defendant's criminal history and account for the possibility that the prosecution might seek to introduce evidence about the defendant's prior criminal conduct at the guilt or penalty phases of the trial.")). 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.

As demonstrated below and in the Petition at pages 67-71 and 144-54, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to investigate, litigate, and mitigate the prior crimes evidence.

1. Trial Counsel Unreasonably Failed To Investigate Prior Crimes Evidence.

Trial counsel unreasonably and prejudicially failed to investigate and mitigate petitioner's prior crimes. 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. (NOL C2 Ex. 150 at 2731.)

a. Harris Conviction.

In light of trial counsel's ultimate concession to the admission of the facts of the Doretha Harris case at the guilt phase (2 RT 724), counsel had a duty to investigate this prior conviction in an effort to mitigate its effect on the jury. Trial counsel failed to obtain easily discoverable facts about petitioner's deteriorating mental state around the time of the Harris crime. Had trial counsel performed reasonably and interviewed petitioner's friends and family, he could have presented compelling evidence of petitioner's mental deterioration immediately prior to the crime. Trial counsel's failure to conduct a constitutionally adequate investigation deprived petitioner's jury from hearing and considering important evidence such as petitioner's increased drug use, homelessness, and his increasingly irrational behavior prior to his assault on Mrs. Harris.

Mrs. Harris told the police that she heard glass breaking when she was in her kitchen making lunch (NOL C2 Ex. 136 at 2669), and that petitioner asked her to kill him with a knife that he picked up near the bedroom's hallway door. (*Id*. at 2670.) Mrs. Harris never reported or testified that petitioner entered her home armed. (*Id*. at 2669; 20 RT 3163-64, 3176.) Instead, Mrs. Harris had the knife when she encountered petitioner in her hallway. The vital fact that Mrs. Harris was armed with a nine inch knife when she first encountered petitioner was not included in her testimony at petitioner's trial. (20 RT 3163, 3170-72.) The addition of this critical fact helps demonstrate why petitioner's psychotic break was triggered—he felt his life was

threatened when he was confronted by Mrs. Harris holding a nine inch kitchen knife. (*See also* NOL C2 Ex. 178 at 3152, 3155 (stressful events petitioner perceives as threatening trigger dissociative episodes).)

b. Kim Jackson.

Trial counsel was impressed with Kim Jackson'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. (NOL C2 Ex. 12 at 107.) Despite this, trial counsel unreasonably made only a token attempt to contact and interview this witness who could have given compelling mitigating evidence.

Similar to the instant crime, petitioner did not initially perceive a threatening situation, during the 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, and unable to regulate, his actions.

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. (NOL C2 Ex. 178 at 3146.) As he became more unstable, petitioner felt that he had to leave, so Ms. Jackson left the room to retrieve his coat. (*Id*.) The drugs and alcohol he had consumed exacerbated petitioner's mental illness. Despite their longstanding friendship, he misperceived Ms. Jackson's comments and abrupt departure to retrieve his coat as threats to his safety. (*Id*. at 3156-57.) Without drugs and alcohol, petitioner's mental illness and severe brain damage made him highly susceptible to misperceiving social cues (*see, e.g.*, NOL C2 Ex. 175 at 3065), the addition of drugs and alcohol significantly increased this vulnerability. Already in a compromised mental state, petitioner's tenuous grasp on reality disintegrated and he experienced a psychotic episode. (NOL C2 Ex. 178 at 3155-56.)

Prior to the incident with Ms. Jackson, petitioner behaved in the same odd and bizarre manner as he did before the Miller crime. His family noticed that he "began to live in his own world more often." (NOL C2 Ex. 16 at 167.) Petitioner would often sit awake all night "in the dark, silent and by himself, for hours, just staring out and saying nothing." (*Id*. at 168.) It was difficult to talk to petitioner because often "he did not remember later that you had tried to talk to him" and he appeared to be "lost somewhere in his own mind." (*Id*. at 167.)

These compelling facts that mitigate the prior convictions and corroborate petitioner's mental state defense were not heard by petitioner's jury because of trial counsel's wholly unreasonable failure to investigate the Harris and Jackson prior convictions.

2. Trial Counsel Unreasonably Failed To Present Meritorious Reasons to Exclude Evidence of the Harris Crime.

Trial counsel unreasonably and prejudicially failed to investigate, and marshal available evidence, in support of his opposition to the prosecution's motion to introduce the facts of the Doretha Harris sexual assault case, pursuant to Evidence Code section 1101(b). Trial counsel's failure to develop a strategy for addressing the prosecution's use of this evidence, in the event that it was held admissible in the guilt phase, and to ensure that the jury received all necessary instructions to prevent the impermissible use, or influence, of the prior crimes evidence fell below the standard of care for capital defense attorneys. *See, e.g., Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996), *superseded by statute on other grounds, as stated in Van Tran v. Lindsay*, 212 F.3d 1148 (9th Cir. 2000) (counsel unreasonably failed to object to highly prejudicial testimony that was likely inadmissible.)

The prosecution filed a motion to allow the introduction of the facts of the Harris sexual assault to help establish identity, intent, and common scheme or plan for the rape charge in the capital case. (II Supp. 1 CT 1-9.) Trial counsel opposed the motion, both in writing and orally; however, in doing so he unreasonably failed to set

forth critical facts and explain how they prevented the Harris crime from having any legally permissible evidentiary value to the current crime. Reasonably competent counsel would have presented the following reasons for denying the prosecution's motion.

a. The Harris Attack Was Not Probative Of A Common Plan or Scheme.

Petitioner's mental illness precluded any ability to plan the Harris crime. (NOL C2 Ex. 178 at 3155-54.) Petitioner's actions during the entirety of the Harris incident, a chaotic and disturbed series of events, demonstrated his inability to plan. At that time, petitioner was homeless and experiencing extreme stress and mental turmoil. (NOL C2 Ex. 8 at 88; NOL C2 Ex. 14 at 137.) The day of the crime, 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. (NOL C2 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 against entering the home just moments earlier, along with voices in his head—which had become overwhelming—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. (*See also* NOL C2 Ex. 154 at 2754-55 (Dr. Thomas determined at the time of the Miller crime petitioner "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.").) The tragic encounter that took place that day was the direct result of petitioner's psychosis, paranoia, and stress and fear induced dissociation. (NOL C2 Ex. 178 at 3155-54.)

Petitioner's inability to plan a crime at this time is evidenced by the rash and erratic nature of his encounter with Mrs. Harris. In broad daylight, he smashed and

crawled through a bedroom window (20 RT 3162-63); when he saw Mrs. Harris in the hallway with a knife, he engaged in an abrupt and disjointed assault on her. (*Id*. at 3163-69.) Following the assault, he curled up on the bed and fell asleep rather than try to leave (NOL C2 Ex. 136 at 2670; 20 RT 3169). When he awoke, he still did not leave; he sat with Mrs. Harris and cried while viewing a picture of himself with Glynnis and Tristan. (20 RT 3171.) 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 picked up the knife Mrs. Harris dropped, pressed it to his stomach, and pleaded with her to kill him. (*Id*.; *see also* II Supp. 1 CT 47 (preliminary hearing testimony of Mrs. Harris); NOL C2 Ex. 136 at 2669-70 (police report).) Petitioner "became remorseful and expressed sorrow" over Mrs. Harris's injuries. (II Supp. 1 CT 19 (Harris police report).) He obtained alcohol and cotton and applied alcohol to the injuries on Mrs. Harris's neck with the cotton. Mrs. Harris declined his offer to "apply alcohol to [her] eye and face." (*Id*.) Those who observed petitioner following his arrest recognized that the confusing, disordered, and bizarre events were the product of mental illness rather than methodical thought. (NOL C2 Ex. 104 at 2177 (an in-custody evaluation of petitioner concluded his offense reflected "underlying mental and emotional problems"); *id*. at 2184 (investigating officer said petitioner was mentally ill).)

Trial counsel's mental health expert determined, at the time of the instant crime, petitioner suffered a psychotic break. (30 RT 4428, 4442.) Trial counsel had no tactical reason for not presenting this evidence to the trial court to demonstrate that the Harris attack could not show a common plan or scheme for the capital crime. At the time of his attack on Mrs. Miller, petitioner "was not in control of any of his actions," (NOL C2 Ex. 154 at 2755); therefore, he was unable to plan, or rely upon any hypothetical previously conceived plan.

Trial counsel possessed the facts of the Harris case, the opinions of law enforcement that petitioner's crime was the result of mental illness, and the expert

opinion of Dr. Thomas. (NOL C2 Ex. 136; NOL C2 Ex. 104 at 2177, 2184; NOL C2 Ex. 154.) The crucial information from petitioner and his family and friends regarding his highly impaired functioning at the time of the crime was readily available had counsel performed reasonably and conducted a minimally adequate investigation of this prior crime and timely hired mental health experts.

b. The Harris Attack Was Not Sufficiently Similar To The Miller Case To Be Probative Of The Disputed Issues At Trial.

Petitioner had a friendly relationship with Julia Miller (16 RT 2556), and was involved in a casual relationship with her daughter, Pam Miller, at the time of the crime (*see* 22 RT 3297 (petitioner knew Ms. Miller was having an affair with Sonny Brooks)). In contrast, Mrs. Harris and petitioner had a strained, distrustful relationship (NOL C2 Ex. 14 at 136), and petitioner was estranged from her daughter, Glynnis, at the time of the attack (*id*. at 137; 20 RT 3162).

The Harris crime involved petitioner entering the home without permission, and the assault ensuing 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.)

Petitioner was the initial aggressor in the Harris incident; Mrs. Harris never fought back. (*See Ex*. 136; 20 RT 3163 *et seq*.) Mrs. Miller, after a congenial chat with petitioner, began yelling and suddenly attacked him with a knife, and threatened to kill him with a rifle. (22 RT 3329-30, 3333.)

At the time of the Harris crime, petitioner had no job and no source of income. (NOL C2 Ex. 14 at 136-37.) He took forty dollars from the victim's purse, but he did not take jewelry or other items. (NOL C2 Ex. 136 at 2670.) In contrast, at the time of the capital crime, petitioner was receiving over $150 a month from the county General Relief program. (22 RT 3381; NOL C2 Ex. 8 at 89.) He did not take credit cards or checks from the victim despite the availability of these items in Mrs. Miller's purse. (17 RT 2719.)

Most significantly, the different nature of the crimes themselves precluded the Harris crime from having any probative value as to the capital crime. The prior crime did not involve a homicide. 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. (NOL C2 Ex. 136; II Supp. 1 CT 19-24.) By contrast, the pivotal factual issues in the second crime were intent and timing: Did petitioner form the intent to rape Mrs. Miller prior to her death and was she attacked and killed before she was ever penetrated sexually.

Trial counsel possessed the above information and unreasonably failed to demonstrate the utter dissimilarity of the prior and capital crimes.

c. The Prior Crime Was Not Probative On The Issue Of The Specific Intent Required For The Capital Charges.

The Harris rape was a general intent crime; the requisite elements consisted of the commission of particular acts. (*See, e.g.*, 2 CT 314 (CALJIC 10.00 - Rape of Non-Spouse).) The formation of specific intent is required for rape felony murder (*id*. at 291 (CALJIC 8.21 First Degree Felony Murder)) and the rape special circumstance (*id*. at 307 (CALJIC 8.80.1 (1993 Revision) Special Circumstances). Thus, the prior rape, a general intent crime, could have no probative value on the disputed issues in petitioner's capital trial.

d. The Prior 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 was admissible in the capital case. (1 RT 686.)

Counsel's failure to investigate the prior crime and his failure to use the facts and evidence in his possession, to demonstrate the dissimilarity between the prior and capital crimes, was not tactical. A tactical decision could not have been made since defense counsel failed to "conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d

1446, 1456 (9th Cir. 1994); *see Strickland v. Washington*, 466 U.S. at 690-691, 104 S. Ct. at 2066-67, 80 L. Ed. 2d 674 (only "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Aside from his failure to adequately investigate, that counsel "did not want any evidence of the facts surrounding Mr. Jones's prior conviction for the rape of his girlfriend's mother to come before the jury at all" (NOL C2 Ex. 12 at 108), strips any semblance of strategy from his failure to reasonably investigate and demonstrate the dissimilarities between the Harris prior and the capital crime to prevent admission of the Harris prior in the guilt phase.

3. Trial Counsel Unreasonably Failed To Object To The Trial Court's Use of The Wrong Legal Standard In Determining Whether to Admit the Harris Crime.

After the trial court held that the prior crimes evidence was probative of intent, identity, and common plan or scheme, he deferred the Evidence Code section 352 ruling. The judge stated "obviously your biggest concern on behalf of your client in a setting of discussion [sic] 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).) Trial counsel unreasonable failed to object to the trial court's use of the incorrect standard. No tactical reason existed for trial counsel's failure to inform the court that the proper legal standard - one much more favorable to petitioner - was that the probative value of the evidence sought to be admitted must substantially outweigh the probability that admission will create a substantial danger of prejudice. Cal. Evid. Code § 352 (West 1994).

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4. Trial Counsel Unreasonably Failed To Ensure That The Jury Was Properly And Adequately Instructed On The Limited Purpose For Which The Prior Crimes Evidence Was Admitted.

Trial counsel unreasonably failed to ensure the jury received only instructions that would properly limit its use and consideration of the prior crimes evidence. *See, e.g.*, *White v. McAninch*, 235 F.3d 988 (6th Cir. 2000) (counsel ineffective for failing to seek limiting instructions on, *inter alia*, evidence of uncharged offense). As a result of trial counsel's deficient performance, petitioner's jury received two instructions, CALJIC 2.50 and CALJIC 17.18, (2 CT 270, 323-24, respectively), that encouraged them to use the Harris sexual assault as propensity evidence.

CALJIC 2.50 was modified by deleting this crucial sentence: "You are not permitted to consider such evidence for any other purpose." (*Id*. at 270.) As modified, CALJIC 2.50 allowed petitioner's jury to consider the prior crimes evidence in determining virtually every facet of the case: motive, intent, identity, and common scheme or plan. The instruction absolutely failed to prevent the jury from drawing improper propensity inferences because it specifically informed the jurors that the prior crimes evidence could be used to determine the issues before them. CALJIC 17.18 ("Defendant Served Prior Term in Prison"), an instruction that should not have been given, compounded the error and prejudice of CALJIC 2.50 by repeating the prior crimes evidence and instructing the jury to consider this evidence for improper purposes. (*Id*. at 323-24.)

Petitioner was further prejudiced when the court improperly gave the jury CALJIC Instruction 17.18 ("Defendant Served Prior Term in Prison"). (2 CT 323-24.) The court modified this instruction by adding, to the sentence "You shall not consider such allegation or evidence offered thereon in your determination of the defendant's guilt of the crimes for which he is now on trial," the clause "except for the limited purposes as stated previously in these instructions." (*Id*. at 323.) Where, as here, "Defendant admits prior conviction and service of prison term and testifies on his own

behalf," CALJIC Instruction 17.18 should not be given. CALJIC, Use Note to CALJIC No. 17.18 (5th ed. 1988) at 446. This instruction thus was improper under the circumstances and, with the court's amendment, reiterated to the jury that the irrelevant and prejudicial prior crimes evidence could be considered when deliberating every element of each "crime for which [petitioner] is now on trial." (2 CT 323.)

Trial counsel's objectively unreasonable failure to request the appropriate limiting instructions, prevented the jurors from being able to make the crucial legal distinction that the prior crimes evidence must not be considered in evaluating the elements of the capital case.

5. Trial Counsel Unreasonably Failed To Request Reconsideration Of The Admissibility Of The Prior Crimes Evidence.

The prosecution argued that it needed the prior crimes evidence to help prove that Mrs. Miller was raped. (1 RT 680-81.) The prosecution stated the prior crimes evidence would be unnecessary if trial counsel conceded the rape. (*Id*.) Once the DNA evidence was held admissible, trial counsel planned his defense around conceding the rape charge. (NOL C2 Ex. 12 at 106, 107; NOL C2 Ex. 150 at 2730.) Trial counsel's failure to request reconsideration of the prior crimes evidence in light of his intention to concede that the victim had been raped was unreasonable. Trial counsel planned to concede the rape charge and he tried to prevent the admission of the prior crimes evidence. (NOL C2 Ex. 12 at 108 ("I did not want any evidence of the facts surrounding Mr. Jones's prior conviction for the rape of his girlfriend's mother to come before the jury at all.").) No tactical reason could exist, therefore, for counsel's failure to prevent the admission of this highly prejudicial evidence.

6. Trial Counsel Unreasonably Failed To Object To The Prosecution's Improper Use Of The Prior Crimes Evidence As Propensity Evidence.

The prosecution egregiously violated petitioner's constitutional rights to due process and a fair trial by continually encouraging the jury to consider the prior crimes

evidence to draw impermissible conclusions. The prosecution was allowed to make repeated and unjustified references to petitioner's conviction for the prior crimes, and by doing so effectively shifted the burden of proof from the prosecution onto petitioner, as a result of defense counsel's patently unreasonable, and continual, failure to object. Counsel's unreasonable failure to object permitted the prosecution to use, and urge the jury to use, the prior crimes evidence, as unadulterated, improper propensity evidence.

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:

- 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." (27 RT 3991-92.) Such a request was deliberately misleading and dishonest as specific intent to rape was not an element of the prior crimes; however, trial counsel unreasonably failed to object.
- 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.)
- 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.)

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- 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.)
- 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.)
- Discussing petitioner's 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.)

Trial counsel had no tactical reason for failing to protect petitioner from the prosecution's unlawful use of propensity evidence, as well as its prejudicial exhortation to the jury to impermissibly use propensity evidence to convict petitioner of rape and find the rape special circumstance true.

7. Trial Counsel's Deficient Performance Was Prejudicial.

Trial counsel admits that the bizarre nature of petitioner's prior convictions triggered his interest in pursuing a mental state defense. (NOL C2 Ex. 150 at 2731.) Despite counsel's recognition that the prior crimes were bizarre, he unreasonably failed to investigate them. Counsel's failure to investigate the prior crimes deprived petitioner of vital evidence regarding his mental state during each of his priors that would have supported his mental state defense as well as Dr. Thomas' testimony and opinion, demonstrated the impossibility that the Harris prior revealed a common scheme or plan, and provided rich mitigation evidence.

Investigation of the prior convictions revealed facts that 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 Mrs. Miller was murdered. No tactical or logical reason exists for reasonably competent

trial counsel to fail to present corroborated expert mental health evidence that petitioner was unable to form the requisite intent for the charged crimes. If he had investigated and obtained these facts, trial counsel could have presented a mental health expert to the jury to explain 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. (NOL C2 Ex. 178 at 3156.) 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.

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. 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.) 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.) Petitioner's "heightened paranoia" created and fed the delusion that Glynnis Harris and her mother "were out to get him" and were plotting to keep his son Tristan from him. (NOL C2 Ex. 178 at 3147.) Trial counsel's failure to investigate the Harris case, or even to listen to his client's trial testimony, led to an unnecessary, erroneous, and highly prejudicial concession that allowed the prosecution to argue that even according to his attorney, petitioner was lying about the facts of the Harris case. (27 RT 3976 ("Mr. Manaster said there's no doubt he committed the burglary back when he went into Mrs. Harris' location. . . .Mr. Jones didn't even own up to that in front of you.").)

The prosecution's evidence against petitioner was weak in the absence of the improper propensity evidence. Critically, the jury rejected all counts relating to burglary and robbery, leaving rape the only special circumstance they found to be true. (2 CT 365.) The disputed issues regarding the rape-related allegations—whether

petitioner had the specific intent for rape felony murder and whether the sequence of events supported a rape special circumstance—were similarly weak. There was no evidence presented to counter petitioner's defense of mental disturbance and intoxication, and no testimony supporting the prosecution's argument that Ms. Miller had been raped before she was killed.

Counsel failed to conduct sufficient investigation from which he could reasonably determine no further investigation was necessary. *See, e.g., Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. at 2065, 80 L. Ed. 2d 674; *Sanders v. Ratelle*, 21 F.3d at 1456. Trial counsel, therefore, had no tactical reason for failing to investigate the prior crimes evidence, adequately litigate its admissibility, use the evidence to support guilt and penalty defenses, object to its repeated misuse by the prosecution, and to ensure the jury was instructed on its sole and proper use.

As a result of counsel's deficient performance, the jury was instructed to rely on evidence that suggested petitioner had the propensity to rape his girlfriend's mothers, this unconstitutional tipping of the balance in favor of conviction and a finding that the rape special circumstance was true, "undermine[s] confidence in the outcome actually reached at trial." *Rompilla v. Beard*, 545 U.S. at 393, 125 S. Ct. at 2469, 162 L. Ed. 2d 360 (inner citation omitted).

H. Trial Counsel Unreasonably Failed to Request Necessary and Proper Jury Instructions and Verdict Forms.

Trial counsel unreasonably failed to request appropriate and necessary jury instructions on the substantive crime of rape and failed to ensure the jury had adequate and complete verdict forms for the special circumstance allegations. *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002) (deficient performance found where counsel put on evidence to show petitioner was unable to premeditate and failed to request diminished capacity instruction); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d at 1438 (among the deficiencies that amounted to cumulative error was counsel's "failure to propose, or except to, jury instructions").

As demonstrated below and in the Petition at pages 75-81, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to request all necessary jury instructions and ensure the verdict forms are complete.

1. Counsel Failed To Request Appropriate And Necessary Jury Instructions For The Crime Of Rape.

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. 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 victim must be alive when the property is taken in order to constitute robbery. (26 RT 3803-05; 2 CT 318.) Counsel's failure to request a similar instruction for the substantive crime of rape was objectively unreasonable. Not only was this a crucial factor in the case, that the jury received such an instruction regarding robbery, but not rape, would lead it to believe that unlike robbery a rape does not require a living victim.

Trial counsel was acutely aware of the high potential for juror confusion. He requested clarifying instructions on the special circumstances, including the rape special circumstance, (2 CT 352-54), and he expressed concern that the differing intent requirements for the rape charge and allegations would be confusing for the jury (22 RT 3361-62.) Counsel's failure to request a clarifying instruction of equal importance is inexcusable, and particularly egregious in light of his valid concern for juror confusion.

2. Counsel Failed To Ensure The Verdict Forms Were Complete.

Trial counsel's representation was objectively deficient because he failed to ensure that the verdict forms were accurate, complete, and actually provided for each of the charged offenses, allegations, and special circumstance allegations.

Petitioner's jury received no verdict forms for special circumstance findings. The homicide verdict form was titled "Verdict (Guilty) Count One," and bore a footer that read "Verdict (Guilty)." (2 CT 365.) It 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, robbery, and whether or not petitioner had sustained a prior conviction within five years. (*Id.*) The term "special circumstance" appeared nowhere on the verdict form. Trial counsel reviewed the verdict forms and unreasonably informed the court "they appear to be accurate" even though they were missing the special circumstance allegations. (27 RT 4005-06.)

The guilty-murder verdict form returned by petitioner's jury only indicated that the jury found petitioner guilty of first degree murder. (2 CT 365.) The jury indicated on the "murder" verdict form it found petitioner guilty of felony murder rape, by writing in "first" to indicate the degree of murder and checking the rape allegation. There were no verdict forms that asked the jury whether or not the special circumstances were true. Accordingly, the jury never made, and could not have made, a special circumstance finding. (*See* 2 CT 307 ("You will state your special findings … on the form that will be supplied").)

3. Trial Counsel Unreasonably Allowed The Court To Illegally Subject Petitioner To A Penalty Phase Trial.

Even though the jury made no special circumstance findings, the trial court allowed the verdict to be interpreted as if a special circumstance had been found true by the jury. Trial counsel unreasonably allowed the court erroneously to interpret the jury's felony murder rape verdict as a verdict that included a true special circumstance finding, and failed to object to the verdict as insufficiently specific to meet the requirements of the law. Trial counsel also performed unreasonably for failing to object to the trial court's violation of Penal Code section 190.4, which requires a jury to make a true finding on at least one special circumstance in order for a case to

proceed to the penalty phase, or to move that petitioner be sentenced according to the jury's returned verdict of first degree felony murder with no special circumstances.

4. Counsel's Failures Were Prejudicial.

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, there is a reasonable probability that petitioner would not have been convicted of rape, felony murder rape, the rape special circumstance found true, nor would he have been exposed to a sentence of death. Moreover, the failure to object to the absence of a special circumstance finding or to the case proceeding to a penalty phase in the absence of the valid special circumstance unquestionably constitutes prejudice warranting relief. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d 674.

I. Trial Counsel Unreasonably and Prejudicially Failed to Object to Numerous Instances of Prejudicial Prosecutorial Misconduct.

Trial counsel unreasonably failed to object to several instances of prejudicial prosecutorial misconduct that included: the elicitation of false testimony and inferences; closing arguments rife with misstatements of both the evidence and the law; arguing 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. Counsel's failure to ensure petitioner's jury was not subjected to false and misleading evidence and statements of law and grossly inflammatory appeals to vengeance and passion prejudicially violated petitioner's federal constitutional rights to confrontation, due process, a fair trial by an unbiased jury, and the effective assistance of counsel. *See, e.g.*, *Harris ex rel Ramseyer v. Wood*, 64 F.3d 1432 (counsel deficient for, inter alia, failing to make appropriate objections*); Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)

(counsel's failure to object to several serious instances of prosecutorial misconduct established cause and prejudice for procedural default); *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001) (counsel ineffective for failure to object to prosecution's rebuking petitioner's exercise of Sixth Amendment right of confrontation by arguing petitioner forced the victim to testify).

As demonstrated below and in the Petition at pages 81-85 and 196-204, petitioner has demonstrated his entitlement to an evidentiary hearing by alleging a colorable claim for relief as a result of trial counsel's unreasonable failure to object to prejudicial prosecutorial misconduct.

1. Trial Counsel Unreasonably Failed to Object To The Prosecution's Presentation of False Evidence And Inferences.

The prosecution violated petitioner's federal constitutional rights by eliciting, and failing to correct, false testimony and inferences regarding the nature of the injuries sustained by the victim. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002). Trial counsel was, or reasonably should have been, aware of the falsity of the testimony, yet unreasonably failed to object to the prosecution's failure to correct it.

Trial counsel knew, or reasonably should have known, that the prosecution knew two of its witnesses lied during their testimony about petitioner's drug use. Shamaine Love testified at petitioner's preliminary hearing that she sold drugs to petitioner at least four months before the crime (1 CT 45), and testified at his trial that she sold drugs to petitioner throughout the month of August 1992 (16 RT 2621). Pamela Miller similarly testified that she knew petitioner was using drugs several months before the capital crime. (28 RT 4135.) Like the prosecution, trial counsel possessed petitioner's parole file (*see, e.g.*, NOL C2 Ex. 82), and knew that petitioner was drug free from at least February 6, 1992, through August 5, 1992. (*Id*. at 1690.) Trial counsel's failure to object to the prosecution's elicitation of, and failure to

correct, this materially false testimony from Ms. Love and Ms. Miller was objectively unreasonable.

Trial counsel similarly failed to object to the prosecution's false and prejudicial inference and argument that the physical evidence proved that petitioner raped the victim with a knife. The victim sustained a stab wound to her peritoneum that entered her uterus. (NOL C2 Ex. 177 at 3087.) The prosecution elicited testimony from the medical examiner that this stab "penetrated into the left side of the vulva." (17 RT 2797.) Despite this specific testimony, the prosecution thereafter mischaracterized the doctor's testimony and referred to that wound as a "vaginal wound," or a wound to the victim's vagina. (*Id*. at 22804, 813; 26 RT 3892, 3936.) Even though the medical examiner never referred to the stab wound as a "vaginal wound," in either the autopsy report or his trial testimony, trial counsel never objected to the prosecution's prejudicial and gross mischaracterization of this wound. Trial counsel's failure to object to the prosecution's misconduct in falsely mischaracterizing the victim's wound, was objectively unreasonable.

Trial counsel knew, or reasonably should have known, that the wrist ligatures left "crease marks but no other disturbance on the skin" (NOL C2 Ex. 171 at 3038), because he received in discovery the autopsy report in which this was specifically noted by Medical Examiner Dr. Steven Scholtz. 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.) Trial counsel's failure to object to Dr. Scholtz's demonstrably false testimony, and the prosecution's failure to correct it, was patently unreasonable because it went to a material issue of the case, the timing of events in relation to the victim's death, and as such could not have been strategic.

Trial counsel's failure to object to the false testimony of Ms. Love and Ms. Miller was prejudicial. Ms. Love and Ms. Miller's testimony regarding petitioner's

alleged pre-crime drug use contradicted petitioner's testimony that the day of the crime was the first day he used cocaine since he got out of prison. (24 RT 3593-94.) Part of petitioner's mental state defense at trial involved the strong effect the drugs he used that day had on him as a result of abstaining from drug use for so long. The mental state defense was petitioner's only defense to the murder charge and special circumstance allegations. Trial counsel's failure to object allowed the prosecution to present false testimony that defeated petitioner's sole defense to a capital murder conviction. Had trial counsel objected, the false and prejudicial testimony would have been removed from the record and the jury would have had the opportunity to observe Ms. Love and Ms. Miller willfully lying on the stand at a capital murder trial.

The prosecution's false and inflammatory description of the victim's wounds was prejudicial. As a result of counsel's failure to object, by the time prosecution gave his closing argument, the alleged "vaginal wound" had transmogrified into a "rape with the knives." (26 RT 3892.) During closing arguments, the prosecutor elevated this stab wound from an actual wound (albeit a mischaracterized "vaginal wound") to the manner in which the victim was raped. Trial counsel had no strategic reason for failing to object when the prosecution falsely argued "[t]here's a knife in the vaginal area. These knives are part and parcel of the sexual assault," and that petitioner had committed a "rape with the knives." (*Id*. at 3892.) The jury's consideration and reliance on the prosecution's blatantly false description of the stab wound as a "vaginal wound" and ultimately as a "rape with the knives" was especially prejudicial because petitioner was charged with having raped the victim. This misleading, false, and highly inflammatory characterization of the knife wound prejudiced petitioner in that there was virtually no evidence of rape and 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. This false, but hugely prejudicially

argument enabled petitioner's jury to find him guilty of rape, felony murder rape, and the rape special circumstance true, despite the lack of evidence of rape and petitioner's intent to commit rape. Trial counsel had no strategic reason for failing to object to the prosecution's gross and prejudicial distortion of the facts, and his failure to do so "unnecessarily risked [petitioner's] life." *Thompson v. Calderon*, 120 F.3d at 1053.

By failing to object to the prosecution's failure to correct the medical examiner's false testimony, trial counsel 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. There was no evidence to support the prosecution's theory of the crime that petitioner bound the victim, raped her, and killed her. The physical evidence, including the victim's autopsy, strongly indicated events happened in reverse order: the victim was killed, there was sexual contact with her body, and only after was she was bound. (*See* NOL C2 Ex. 177 at 3086.) Trial counsel's failure allowed 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), resulting in the jury convicting petitioner and finding a special circumstance true based on materially false evidence. Had it not been for trial counsel's unreasonable failure to object to the prosecution's failure to correct Dr. Scholtz's false and misleading testimony, the jury would have clearly understood that the victim's death preceded all other events. (*See id*.) The ligatures, an afterthought, were the product of petitioner's severe mental illness rather than a calculated effort to subdue a live victim.

But for counsel's failure to object to this false testimony, there is a reasonable probability that petitioner's jury would not have convicted him and found true the special circumstance. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed .2d 674.

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2. Trial Counsel Unreasonably Failed To Object To Prejudicial Misstatements Of Governing Law.

Trial counsel's performance was constitutionally deficient for unreasonably failing to object to the incorrect statements of the law that governed the case. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993) (improper for prosecution to shift its burden of proof).

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.) This argument is not only a patently incorrect statement of the law, it unconstitutionally 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 instructed. Trial counsel unreasonably failed to request that the jury be properly instructed that it could find petitioner guilty of a lesser-included-offense if it found the prosecution failed to prove that petitioner was guilty of committing a first-degree murder beyond a reasonable doubt, regardless of whether or not they believed petitioner.

Trial counsel also unreasonably permitted the prosecution to conflate the general intent requirement for the crime of rape with the specific intent requirement for the crime of felony murder rape and the rape special circumstance. By doing so, the prosecution again unconstitutionally lightened its burden of having to prove, beyond a reasonable doubt, that petitioner harbored the specific intent necessary for first-degree felony murder rape and the rape special circumstance. (27 RT 3992.) With no objection, counsel allowed the prosecution to argue, "[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." (27 RT 3991-92.) The prosecution finished his rebuttal closing argument with this erroneous and prejudicial statement of law, which trial counsel's

patently unreasonable failure to object, allowed to ring in the jurors' ears as they retired to deliberate.

No strategic reason existed for counsel's unreasonable failure to object to these prejudicial misstatements of law. These misstatements not only served to remove the burden of proving every element of each offense, beyond a reasonable doubt, they also rendered irrelevant petitioner's mental state defense, which was his sole defense to the murder charge and special circumstance allegations. Trial counsel's unreasonable failure to object was exacerbated by the timing of these statements, which came at the end of the prosecution's rebuttal 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.)

Counsel's failure to object permitted the prosecution to erroneously conflate the Harris rape case with the capital crime. The manner in which the prosecution compared the two dissimilar cases informed the jury that the general intent for the substantive crime of rape was all they need find in order to find petitioner guilty of first-degree felony murder rape. The prosecution's argument was neither cured nor mitigated by the jury instruction, because trial counsel unreasonably failed to request that the jury be instructed that a dead body cannot be raped.

Counsel's prejudicial failures to object stripped petitioner of his "only defense to the charge of capital murder" (NOL C2 Ex. 12 at 109), and thus were not strategic. (*See id.* at 107 ("Although I was unable to attack the rape charge. I planned to defend against the rape special circumstance"); *accord id*. at 109; Ex. 150 at 2730.)

3. Trial Counsel Unreasonably Failed to Object When The Prosecution Argued Facts Not In Evidence.

The prosecution violated petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights by arguing facts that were not in evidence. *See, e.g., Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 631, 79 L. Ed. 1314 (1935) (improper to misstate and argue facts not in evidence); *United States v. Molina*, 934 F.2d 1440,

1446 (9th Cir. 1991) (improper to argue facts not in evidence). Even though the prosecution's "undignified and intemperate, [argument] containing improper insinuations and assertions calculated to mislead the jury," *Berger v. United States*, 295 U.S. at 85, 55 S. Ct. at 633, 79 L. Ed. 1314, challenged vital parts of the defense case, trial counsel unreasonably failed to object to it.

Trial counsel admits that he believed his only defense in the guilt phase was based on petitioner's mental health. (NOL C2 Ex. 12 at 109; Ex. 150 at 2730, 2731.) Even specious and improper attacks on this defense, however, went unchallenged by trial counsel. 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.) Compounding the prejudice, the prosecution continued arguing, with no objection from trial counsel, "Is it possible he is getting these pills and palming them or giving them to another inmate?" (*Id*. at 3972.) Despite the utter lack of any evidentiary foundation for these arguments that attacked petitioner's sole defense to capital murder, counsel unreasonably did not object.

The prosecution's prejudicial and unfounded arguments that petitioner was faking his mental illness and did not need psychotropic medication 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 was indefensible and not the result of a reasoned strategic decision. (NOL C2 Ex. 12 at 107 ("Although I was unable to attack the rape charge. I planned to defend against the rape special circumstance"); *see also id*. at 109; NOL C2 Ex. 150 at 2730.)

The prejudice petitioner suffered as a result of counsel's failure to object to the prosecution's argument, including extra-record facts, was compounded because these extra-record facts were demonstrably false. 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. But for counsel's unreasonable failure to object there is a reasonable probability that petitioner's jury would not have convicted him and found the special circumstance true. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d 674.

J. Trial Counsel Rendered Ineffective Assistance of Counsel as a Result of His Disabling Conflict of Interest.

Petitioner's Sixth Amendment right to the effective assistance of counsel in his capital case were in direct conflict with the arbitrary and unfair Los Angeles County Public Defender ("LACPD") staffing policy, and this conflict adversely affected trial counsel's performance. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 1244 n.5, 152 L. Ed. 2d 291 (2002); *Strickland v. Washington, 466* U.S. at 692, 104 S. Ct. at 2067, 80 L. Ed. 2d 674.

1. The LACPD's Refusal To Adequately Staff Petitioner's Capital Case Resulted In A Conflict Of Interest.

The LACPD prevented petitioner's capital case from being adequately investigated and viable and compelling guilt and penalty phase defenses developed because of its arbitrary and unreasonable staffing policy. At the time of petitioner's trial, it was the policy and practice of the LACPD to assign a single attorney to special circumstance cases. The staffing assignment was not changed once it was determined the prosecution would seek a death sentence nor when it was determined the case involved complex scientific, forensic, and mental health issues. (*See* NOL C2 Ex. 12 at 105; NOL C2 Ex. 150 at 2730; *see also* 1 RT 715 (trial court expresses concern about defense counsel's case load weeks before the start of trial; Ex. D at 26 (representing a capital client is "a complex and time-consuming endeavor," in which counsel must "understand and analyze the evidence" against his client, while concurrently developing an "effective theory of the case and defense strategy for either phase of the trial.").)

2. The Conflict Of Interest Created By The LACPD Adversely Affected Trial Counsel's Performance.

As evident from the discussion of trial counsel's performance in the guilt and penalty phases, there were numerous instances in counsel's workload that adversely affected his representation of petitioner. Trial counsel conducted virtually no investigation into the actual crime. Petitioner's capital guilt phase defense was decided by default: once the DNA evidence was held admissible, trial counsel believed that he had to concede the rape charge and that the only viable defense was a mental state defense. (NOL C2 Ex. 150 at 2739; *see also* NOL C2 Ex. 12 at 107; NOL D1 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. Despite strong physical evidence, trial counsel failed to investigate whether or not the victim was alive when she was bound and had sexual contact. Trial counsel unreasonably conceded the rape in his closing argument, essentially pleading petitioner guilty to a crime to which he pled innocent and which he did not commit.

Trial counsel hired two mental health experts and specifically asked them both to assess petitioner's mental state at the time of the crime. (NOL C2 Ex. 154 at 2748.) Trial counsel was informed that the assessment revealed that, at the time of the crime, petitioner was legally insane. (*Id*. at 2750; 30 RT 4501.) Trial counsel did not further investigate or develop a plea of not guilty by reason of insanity.

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. Even though he was warned against doing so by his own mental health expert (NOL C2 Ex. 154 at 2754), trial counsel "decided that Mr. Jones would have to testify on his own behalf during the guilt phase" (NOL C2 Ex. 150 at 2732) and called petitioner to testify as the primary guilt phase witness. After the trial court ruled petitioner could not testify to his mental

health history prior to 1992 (22 RT 3359), trial counsel failed to request a continuance so that he could find and prepare lay and expert witnesses to testify about petitioner's mental state at the time of the crime.

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. Trial counsel did not understand DNA and sought the assistance of the LACPD's forensic consultant. (NOL C2 Ex. 12 at 106-07.) The LACPD consultant failed to adequately consult and utilize the DNA expert the LACPD hired to assist trial counsel. (NOL C2 Ex. 176 at 3078-79, 3083-84.) As a result, 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.

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 deprived petitioner of, among other things, not being tried while incompetent to stand trial; a defense to the charged crimes based on a full investigation; and, non-conceded pleas of innocence. 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.

K. Petitioner Is Entitled to a Hearing on Each Claim of Ineffective Assistance to Establish Cumulative Prejudice.

With the understanding that together, "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," *Strickland* requires that a reviewing court assess the cumulative prejudicial impact of counsel's deficient performance. 466 U.S. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d. At each stage of petitioner's capital trial, he was denied adequate protection from the numerous constitutional violations attributable to the action and inaction of his counsel. These 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. The dearth of evidence of petitioner's guilt presented at trial and counsel's deficient performance that included, but was not limited to, an unreasonable and uninformed decision to forego investigating the actual crime, failing to adequately prepare the one defense he chose to pursue against a capital murder conviction, failing to develop an NGI plea, pleading petitioner guilty to a rape he could not have committed, and failing to ensure the jury was properly instructed and provided with complete verdict forms, cumulatively undermine any confidence in the guilt verdicts actually reached at trial. *Id.* at 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d 674.

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III. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM THREE: THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY MATERIAL EVIDENCE.

The Petition sets forth detailed factual allegations at pages 98 to 107 that the prosecution denied petitioner the ability to meaningfully defend against the charges brought against him by suppressing evidence that was exculpatory and material. The prosecution's action, whether knowing or not, violated petitioner's federal constitutional rights to due process of law, a fair trial, the assistance of counsel, and a non-arbitrary jury determination of guilt and penalty.

Respondent has failed to admit or deny any of the facts alleged in the Petition. (*See, e.g.*, Doc. 28, filed Apr. 6, 2010 at 4 ("Respondent denies, or lacks sufficient knowledge to admit or deny, every factual allegation made in support of Petitioner's thirty claims for relief (including all subclaims)".) Petitioner, therefore, requests an evidentiary hearing on this claim, since respondent has placed at issue all facts upon which it relies.

Petitioner is entitled to a hearing on Claim Three if the allegations demonstrate that he is entitled to relief because of the prosecution's prejudicial failure to disclose exculpatory material. The constitution mandates that the prosecution disclose all exculpatory evidence, including impeachment evidence, to the defense, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). The "prosecutor's office is an entity and as such it is the spokesman for the Government," therefore, what is known by one member of the prosecutor's office "must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. at 154, 92 S. Ct. at 766, 31 L. Ed. 2d 104. The intent behind the violation is irrelevant—if the undisclosed evidence is material and exculpatory, whether maliciously, recklessly, or innocently withheld, the prosecution's failure to disclose it equally deprives a criminal defendant of due process and requires that relief be granted. *See, e.g.*, *Brady v.*

Maryland, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d 215; *Jackson v. Brown*, 513 F.3d 1057 (9th Cir. 2008). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been properly disclosed, *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985), and a reasonable probability of a different outcome is demonstrated when the suppressed evidence "undermines confidence in the outcome of the trial," *id*. at 678, 105 S. Ct at 3381, 87 L. Ed. 2d 481. Finally, materiality does not require a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict," instead materiality is determined by looking collectively at all withheld evidence and deciding whether cumulatively the effect of the constitutional violation is to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434-37, 115 S. Ct. 1555, 1565-1567, 131 L. Ed. 2d 490 (1995); *see also Benn v. Lambert*, 282 F.3d 1040, 1053 & n.9 (9th Cir. 2000) (and cases cited therein).

At an evidentiary hearing, to prove the factual allegations the prosecution unconstitutionally withheld exculpatory material evidence, petitioner will present the following evidence in support of the following:

A. The Prosecution Unlawfully Failed to Disclose Petitioner's 1984 Beverly Hills Medical Record.

The prosecution possessed, and withheld from 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 blackout at the time of the crime, and fully supported his guilt phase mental state defense and the penalty phase testimony of Dr. Claudewell Thomas. The facts set forth below establish "a colorable claim to relief" and, therefore, entitlement to an evidentiary hearing. *Earp v. Ornoski*, 431 F.3d at 1170.

1. The Prosecution Possessed And Failed to Disclose the 1984 Beverly Hills Medical Record.

The prosecution first disclosed this medical record to petitioner during formal post-conviction discovery proceedings, pursuant to Penal Code section 1054.9, on August 20, 2004. (NOL D1 at 2, 10.) Neither trial counsel nor habeas counsel was aware of this exculpatory record prior to its disclosure by the prosecution in August 2004. (*Id*. at 10; NOL D5 at 5; NOL C2 Ex. 181 at 3161-62.)

2. The 1984 Beverly Hills Medical Record Was Exculpatory.

The guilt phase defense at trial was that petitioner was unable to form the specific intent for felony murder or the special circumstances. The defense presented evidence, in the form of petitioner's testimony, that petitioner dissociated and was unaware of, and thus unable to govern, his actions. (22 RT 3335-36.) Dr. Claudewell Thomas testified in the penalty phase 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.) The Beverly Hills Medical report fully supported both petitioner's and Dr. Thomas's testimony. *See Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor violated *Brady* by withholding exculpatory evidence and pursuing conviction based on withheld evidence).

3. The Beverly Hills Medical Record Was Material.

Petitioner's mental state at the time of the crime was the primary issue at trial: with the exception of the rape charge, the jury had to determine that petitioner had the intent to commit the charged crime before they could find him guilty or the special circumstances true. Trial counsel decided to concede the rape charge and focus on presenting a mental state defense to the rape felony murder charge and rape special circumstance allegation. (NOL C2 Ex. 12 at 107; NOL C2 Ex. 150 at 2730; *see also* NOL D1 Ex. 181 at 3161 (if he had it, trial counsel would have presented evidence victim not raped which was compatible with psychiatric defense).) The importance of evidence that supported petitioner's sole defense to the charges of which he was

ultimately convicted, rape and rape felony murder, and the rape special circumstance that was found true, cannot be overstated.

The Beverly Hills Medical Center physician who saw petitioner noted that he had a history of "transient memory loss." (NOL D1 Ex. 180 at 3159.) Even with the limited information available to him, this doctor was able to diagnose petitioner—consistent with Dr. Thomas's diagnosis of "schizoaffective schizophrenia" (30 RT 4414) with dissociative features (*id*. at 4435)—as suffering from "transient memory lapse." (NOL D1 Ex. 180 at 3159.) This undisclosed medical record was highly material because it gave documented historical medical support to both the guilt phase mental state and penalty phase mental health defenses.

The prosecution took gross advantage of his failure to properly disclose this exculpatory and material medical record. The prosecution falsely implied during cross-examination and argued during closing arguments, that petitioner not only did not suffer from a dissociative disorder as he testified, but in an attempt to avoid a capital murder conviction petitioner blatantly lied about blacking out at the time of the crime. (*See*, *e.g*., 23 RT 3481 (cross-examination); 26 RT 3905-06, 3972 (closing); 27 RT 3969 (closing ("He only blacks out the times that he can't – he has no other explanation for")).) Similarly, during the penalty phase, the prosecution falsely argued to the jury that Dr. Thomas's diagnosis of petitioner was not one that was medically supported and with which other experts could agree:

> Another psychiatrist would come in here and might say something very different. And that's not to say that Dr. Thomas is not a very bright man who is not doing some good with what he does when he does therapy, but it does say question a diagnosis here, question to what extent he can tell you what is going on in this man's mind in 1992.

(31 RT 4645.) The medical records unconstitutionally withheld by the prosecution laid bare the false premise of the prosecution's argument that Dr. Thomas's diagnosis was not medically supported.

> The materiality of the withheld medical record is made clear by trial counsel: Given the nature of the information contained in the Beverly Hills Medical Center emergency room record, I would have used it at Mr. Jones's trial. This medical record is strong evidence, which would have supported my guilt phase defense that Mr. Jones was unable to form the requisite intent to commit a felony murder or to commit any of the charged special circumstances. If I had this document, I would have given it to Dr. Thomas to support his expert opinion in the penalty phase. Dr. Thomas testified that Mr. Jones had a propensity to dissociate in certain situations and he discussed how this dissociation was directly relevant to his psychosis.

(NOL D1 Ex. 181 at 3162.) The result of the proceeding would have been different had the prosecution properly disclosed petitioner's 1985 emergency room medical record. *See, e.g.*, *United States v. Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381, 87 L. Ed. 2d 481.

Petitioner has made a colorable showing that the prosecution's suppression of the Beverly Hills medical record "undermines confidence in the outcome of the trial," *United States v. Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381, 87 L. Ed. 2d 481, and is, therefore, entitled to an evidentiary hearing on this claim. *See, e.g.*, *Williams v. Ryan*, 623 F.3d 1258, 1266-67 (9th Cir. 2010) (holding that the district court abused its discretion for failing to hold an evidentiary hearing on a *Brady* claim); *Earp v. Ornoski*, 431 F.3d at 1170.

B. Petitioner Is Entitled to an Evidentiary Hearing on the Prosecution's Suppression of Material, Exculpatory Portions of Petitioner's Los Angeles County Jail Medical Record.

Despite trial counsel's request for petitioner's complete jail medical records, the prosecution withheld, and continues to withhold, exculpatory, material documents, including those that detailed an evaluation of petitioner's mental health functioning; the clinical basis for prescribing Haldol, a powerful antipsychotic medication, to treat

symptoms of psychosis; descriptions of petitioner's symptoms; the reasons why the antipsychotic drug Haldol was prescribed; and, the date Haldol was first prescribed.

1. The Prosecution Possessed And Failed To Disclose Material Exculpatory Portions Of Petitioner's Jail Medical Records.

Trial counsel requested but never received petitioner's complete jail medical file. Petitioner had been in the care and custody of the State since his arrest on August 25, 1992. Prior to and during trial, the Los Angeles County Sheriff's Department was solely responsible for providing him medical and psychiatric care and had been the custodian and caretaker of petitioner's medical and psychiatric records. Although the Sherriff's Department is a separate entity, the Los Angeles District Attorney's Office was responsible for ensuring petitioner's exculpatory jail medical records were preserved and properly disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 131 L. Ed. 2d (the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *Maxwell v. Roe*, 628 F.3d 486, 509 (9th Cir. 2010) (acting on behalf of the government, the prosecution's duty to disclose includes exculpatory evidence in the custody of the police); *Jackson v. Brown*, 513 F.3d 1057, 1072 (9th Cir. 2008) ("the prosecutor's duty to disclose evidence favorable to the accused extends to information known only to the police."). The prosecution withheld at the time of trial, and continues to withhold, exculpatory portions of petitioner's medical jail file that include the clinical basis for the jail medical staff's determination that petitioner required anti-psychotic medication, how much and what medication was prescribed to him, and when such medication was determined to be medically necessary.

2. The Jail Medical Records Were Exculpatory.

Petitioner's guilt phase defense to the rape felony murder and rape special circumstance was solely based on his mental state at the time of the crime, which was a direct function of his mental illness at the time of the crime, which continued through the time of trial. Petitioner's jail medical records could have corroborated his guilt

phase trial testimony by documenting his severe mental illness. (*See* 23 RT 3562 (without the suppressed medical records trial counsel was unable to establish the initial circumstances under which Haldol was prescribed; the symptoms petitioner was experiencing at the time it was prescribed; or the diagnostic basis for the prescription).) *See Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor violated *Brady* by withholding exculpatory evidence and pursuing conviction based on withheld evidence).

3. The Jail Medical Records Were Material.

The prosecution knew that the jail mental health staff found it necessary to prescribe psychiatric medication for petitioner, within months of his arrival at the Los Angeles County jail. (Declaration of Floyd Nelson, Ex. A, at 4.) By unconstitutionally suppressing the exculpatory portions of petitioner's jail medical records, petitioner was prevented from bolstering his testimony with admissible documentary evidence, lend material credence to his mental state defense, and enhance his credibility. The prosecution took further advantage of his failure to properly disclose the exculpatory medical record by engaging in several patently false arguments that went to the very heart of petitioner's only defense to capital murder. The prosecution falsely argued that petitioner lied and did not receive the strong anti-psychotic medication Haldol in 1992, as he testified, because the only records disclosed show Haldol prescribed in June 1993. (27 RT 3971 (guilt closing); 31 RT 4652 (penalty closing).) The prosecution used his failure to properly disclose the jail medical records to falsely argue that petitioner (1) lied about when he first received the medication (27 RT 3971 (guilt closing); 31 RT 4652 (penalty closing)); (2) received the mediation only because he requested it (27 RT 3971-72 (guilt phase closing)); and, (3) specifically requested the medication in order to fake a mental illness in order to manufacture a psychiatric defense to the charged crimes (27 RT 3971-72 (guilt closing); 31 RT 4652 (penalty closing)). The prosecution's failure to disclose this

material exculpatory evidence "undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381, 87 L. Ed. 2d 481.

As petitioner has established his entitlement to relief on this claim, an evidentiary hearing is warranted. *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010) ("an evidentiary hearing is required where the petitioner's allegations, if true, would entitle him to relief, and the petitioner has satisfied the requirements of *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct., 745, 9 L. Ed. 2d 770 (1963)).

C. Petitioner Is Entitled to an Evidentiary Hearing on the Prosecution's Suppression of Exculpatory Impeachment Material.

The prosecution unconstitutionally and prejudicially withheld exculpatory impeachment evidence for key prosecution witnesses Shamaine Love and Pamela Miller. Both of these witnesses were known drug users; Ms. Love was also a drug dealer.

1. The Prosecution Possessed And Failed to Disclose Exculpatory Impeachment Evidence.

a. Shamaine Love.

On July 11, 1993, Ms. Love signed a statement for the prosecution, informing them that she would alter her testimony to ensure petitioner's conviction. (NOL C2 Ex. 169.) The prosecution failed to disclose this exculpatory statement made by this key witness.

b. Johnnie Anderson and Pamela Miller.

On December 7, 1994, the police and prosecution interviewed Mrs. Johnnie Anderson. (21 RT 3203.) During the interview, Mrs. Anderson provided strong impeachment evidence against Pamela Miller. The prosecution provided the defense with a police report that detailed the interview with Mrs. Anderson. The prosecution, however, excluded Mrs. Anderson's exculpatory statement from the police report. 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. The Impeachment Evidence Was Exculpatory.

a. Shamaine Love.

Ms. Love wrote and signed a statement for the prosecution that stated, 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.]." (NOL C2 Ex. 169.)

b. Johnnie Anderson and Pamela Miller.

During her interview, Mrs. Anderson confessed to the prosecution that she "loves Pam very much, [but] Pam lies." (21 RT 3213; *see also id*. at 3199.)

3. The Impeachment Evidence Was Material.

Part of petitioner's mental state defense involved the unusual effect the cocaine and marijuana he consumed had on him on the day of the crime. Petitioner testified that the day of the crime was the first time he had used cocaine or the combination of cocaine, marijuana, and alcohol since 1985 (24 RT 3593-94) and, as a result, the drug had a significant effect on him. (*See, e.g.*, 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.").) The only potential evidence that petitioner did not use drugs as frequently as Ms. Love and Ms. Miller said he did came from petitioner when he testified that he was drug tested every month and subjected to random drug tests. (22 RT 3296.) Both Shamaine Love and Pamela Miller gave testimony that questioned petitioner's veracity and the guilt and penalty phase defenses that relied on petitioner's significantly impaired mental state at the time of the crime as a result of his drug use. *See Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986) ("When the evidence shows that the government's only witnesses lied under oath, it is contrary to reason that confidence in the outcome of the case would not objectively be undermined."); *see also Jackson v. Brown*, 513 F.3d 1057 (*Brady* violated for failure to disclose favorable)*; Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002) (failure to disclose impeachment evidence violated *Brady*).

a. Shamaine Love.

Ms. Love, an admitted drug user and dealer, testified that she sold illegal drugs to petitioner. Ms. Love testified that she sold cocaine to petitioner on the day of the crime, as well as throughout August 1992. (16 RT 2621.) According to Ms. Love, petitioner consumed approximately $40 to $60 of cocaine a week, throughout the month of August. (*Id*.) Ms. Love essentially testified that petitioner lied on the witness stand regarding his drug use and there was no reason, therefore, for petitioner to have reacted as strongly to the drugs as he said he did. Ms. Love's biased testimony was allowed to challenge an important part of petitioner's mental state defense by remaining unimpeached.

b. Pamela Miller.

Pamela Miller testified in the penalty phase that after she and petitioner moved in together, in May 1992, she became aware that he used both marijuana and cocaine. (28 RT 4135.) She further testified that during the time they were together, including the night of the crime, petitioner never told her that he heard voices, acted like he heard voices, or appeared to be talking to voices. (*Id*. at 4136.) Ms. Miller's testimony, by contradicting petitioner's guilt phase testimony regarding his lack of drug use and auditory hallucinations as well as challenging the basis for Dr. Thomas's diagnosis that petitioner suffered from schizoaffective disorder, gave the jury reason to dismiss significant mitigating factors such as any lingering doubt they may have had about petitioner's mental state defense and Dr. Thomas's testimony that "the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," Cal. Penal Code § 190.3(d) (West 1994).

It is significant that the jury received evidence that cast doubt on Ms. Love's and Ms. Miller's credibility regarding the burglary and robbery charges, and the jury acquitted petitioner of those charges. For, example, despite the testimony of Ms. Love and Ms. Miller, the jury apparently concluded that petitioner did not attempt to steal the victim's jewelry, possibly believing that the timing of Ms. Love's transactions with

petitioner appear to have taken place prior to Mrs. Miller's death. Had the exculpatory impeachment evidence not been unconstitutionally suppressed, petitioner would have been able to similarly impeach Ms. Love's and Ms. Miller's general credibility and their specific testimony regarding petitioner's mental state at the time of the crime.

Petitioner has demonstrated a colorable showing that the prosecution's suppression of material, exculpatory evidence that impeached his two key witnesses "undermines confidence in the outcome of the trial" and is, therefore, entitled to an evidentiary hearing on this claim. *See, e.g.*, *Williams v. Ryan*, 623 F.3d at 1266-67; *Earp v. Ornoski*, 431 F.3d at 1170.

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IV. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON 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 Petition sets forth detailed factual allegations at pages 107 to 124 that petitioner's constitutional rights were violated because the state prosecuted, convicted, and sentenced him while he was unable to comprehend the proceedings against him or effectively communicate and assist trial 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, thus violating petitioner's Fifth Amendment right to due process of law and a fair trial, Sixth Amendment right to counsel, confrontation, compulsory process, testify competently in his own defense, and Eighth Amendment protections against cruel and unusual punishment.

A criminal defendant has a due process right to be competent when tried. *See Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *Pate v. Robinson*, 383 U.S. 375, 377-78, 86 S. Ct. 836, 838, 15 L. Ed. 2d 815 (1966). The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* 362 U.S. at 402. 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, including 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 convictions and sentence are invalid because he was incompetent in fact.

Moreover, trial counsel's performance fell below the prevailing Sixth Amendment norms because counsel failed prejudicially to continue to evaluate petitioner's competency during the course of the trial, and failed to follow the advice of his expert, having petitioner testify after being advised by his expert that petitioner was incompetent to do so. "Counsel's failure to move for a competency hearing violates the defendant's right to effective assistance of counsel when there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered." *Stanley v. Cullen*, ___ F.3d ___, 2011 WL 285218, *7, 11 Cal. Daily Op. Serv. 1415, 2011 Daily Journal D.A.R. 1790 (9th Cir. Jan. 31, 2011) (citing *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001) (internal quotation marks omitted)).

Respondent generally denies or alleges insufficient knowledge to admit or deny the allegations in support of petitioner's claim. (Answer at 26, Doc. 28, filed Apr. 6, 2010.) Given respondent's general denials, petitioner cannot determine which facts are in dispute. Therefore, a hearing is warranted. In any event, petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial where he presents sufficient facts to create a substantial doubt as to his competency, even if those facts were not presented at trial. *See, e.g.*, *Deere v. Woodford*, 339 F.3d 1084, 1086 (9th Cir. 2003) (citing *Boag v. Raines*, 769 F.3d. 1341, 1343 (9th Cir. 1985)). "Substantial doubt" as to a petitioner's competency to stand trial exists when there is substantial evidence of incompetence. *Id*. "Even if the evidence before the trial judge was insufficient to raise a good faith doubt with respect to [a defendant's] competency, he

would still be entitled to [a hearing] if it now appears that he was in fact incompetent." *Id*. (citing *Steinsvik v. Vinzant*, 640 F.2d 949, 954 (9th Cir. 1981) (citation omitted)).

At an evidentiary hearing on this Claim, petitioner will present the following evidence in support of the following:

A. Petitioner Suffered From a Severe Mental Illness That Prevented Him From Comprehending or Participating in the Pre-Trial and Trial Proceedings.

1. Petitioner's Multiple Mental Impairments Raised A Substantial Doubt As To His Competency To Stand Trial.

The evidence as to competence must be taken together as a whole; in determining whether a substantial doubt has been raised, a trial judge must evaluate the probative value of each piece of evidence and view it in light of the others. *Chavez v. United States*, 656 F.2d 512, 517-18 (9th Cir 1981). When weighing the evidence of incompetence, "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but ... even one of these factors standing alone may, in some circumstances, be sufficient" to raise a genuine doubt as to competency. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 102 (1975). Evidence of a history of mental illness and psychiatric treatment create a doubt as to competence. *See, e.g*., *Pate* 383 U.S. at 386, 86 S. Ct. 842, *Boag*, 769 F.2d at 1343, *Chavez v. United States*, 656 F.2d at 519.

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, including a suicide attempt immediately prior to his arrest for the instant offenses. (NOL C2 Ex. 154 at 2750-52, 2757, 2760-61; NOL C2 Ex. 178 at 3152-55; *see also* Petition at P.2.a.(15)-(16).) The trial court, trial counsel, and state

authorities were aware of petitioner's history of suicide attempts and suicidal ideation. (16 RT 2504; 20 RT 3172; 22 RT 3343-45.)

Petitioner's behavior prior to and during trial revealed the severity of his mental illnesses and the resulting deterioration of his mental functioning. 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. (NOL C2 Ex. 33 at 637.) 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.) On November 6, 1992, the Municipal Court entered an order directed to the Sheriff of the County of Los Angeles and Medical Services of 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.) Medical personnel at the jail observed that petitioner was "paranoid," displayed "agitation," and experienced sleep disturbances. (NOL C2 Ex. 33 at 651.)

During the course of his pretrial detention, jail medical personnel prescribed petitioner the following psychiatric medications: 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. On November 5, 1992, medical personnel prescribed 200 milligrams of Sinequan once a day. (*Id*. at 674.) Petitioner's treatment was reviewed on several subsequent occasions and found to be medically indicated. Medical personnel prescribed Sinequan for petitioner continuously from November 5, 1992, through trial and sentencing. (NOL C2 Ex. 33 at 663, 669 (entries for August 3, 1993, and September 21, 1993); *id*. at 647-48, 669-71; *see also id*. at 596, 600, 602-604, 606, 608, 610, 613, 616, 618, 620, 622, 624-25, 628, 630, 632, 634; NOL C2 Ex. 34 at 678, 680, 682, 685.)

On June 8, 1993, petitioner was examined by Dr. E. Eugene Kunzman, a psychiatrist at the jail. Petitioner stated that he wanted vitamins; Dr. Kunzman determined that petitioner required Atarax for "nerves." (NOL C2 Ex. 33 at 648, 670.) Petitioner received 50 milligrams of Atarax for two months. (*Id*. at 622, 647, 669-70.) 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; NOL C2 Ex. 34 at 678, 685.)

On June 30, 1993, petitioner began taking 10 milligrams of Haldol two times a day. (NOL C2 Ex. 33 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. Two weeks later, Dr. Kunzman noted petitioner's erratic behavior and the need to further evaluate petitioner for a possible underlying mental disorder. (NOL C2 Ex. 33 at 641.)

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, just twenty-eight days before jury selection began. 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.)[14] 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 and Cogentin, which continued through sentencing and until April 15, 1995. (*Id*. at 682, 690, 693.) (*See also* Ex. 33 at 596, 600, 602-04, 606, 608, 610, 613, 616, 618, 620, 622; Ex. 34 at 680, 682, 685, 690, 694.) Adverse effects of

[14] 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. (NOL C2 Ex. 34 at 678.)

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 1995. Sinequan was prescribed to petitioner to "counter symptoms of depression and facilitate[] sleeping." (23 RT 3560.)

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.) 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. 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 that 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 mental competence. The evaluations also did not include any information from the Los Angeles County Jail medical staff. More significantly, the evaluations predated jail staff's observations of petitioner's psychosis in June 1993.

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. 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. (NOL C2 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.) 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 his testing supported a "diagnosis of chronic schizophrenia." (30 RT 4432.)

The trial court heard testimony that petitioner reported hearing voices that were consistently and relentlessly intruding into his thinking. 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.) 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.)

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.) *See de Kaplany v. Enomoto*, 540 F.2d 975, 983-84 (9th Cir. 1976) (psychiatric testimony is further evidence supporting a bona fide doubt as to petitioner's competence to stand trial).

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. 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 petitioner was able to attend to the external reality of his trial sufficiently to meet the requirement that he be mentally present. *Pate*, 383 U.S. at 385-87, 86 S. Ct. at 842-43; *see also Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991).

2. Petitioner Did Not Have A Rational And Factual Understanding Of The Proceedings Against Him.

Petitioner's bizarre behavior in the courtroom raised serious doubts about his ability to understand the proceedings and assist his counsel and to testify on his own behalf. At a pre-trial 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, waiving time was not an issue because 60 days had not elapsed since the preliminary hearing on December 10, 1992, and neither the trial court nor trial counsel had asked petitioner to do so. (1 RT 3-4.) 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.)

On April 14, 1993, petitioner declared a conflict with his attorney which was construed as a motion brought pursuant to *People v. Marsden*, 2 Cal.3d 118, 84 Cal. Rptr. 156 (1970). (1 RT 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.)

Petitioner dissociated at critical times during the course of his trial. (NOL C2 Ex. 144 at 2707). Even the jury noted his strange demeanor. (NOL C2 Ex. 138 at 2689.) At other times, petitioner became agitated over insignificant and irrelevant issues. (*Id*.) Because of his mental impairments, the trial paralegal frequently had to repeat herself to petitioner so he could understand what action the defense team was taking. (NOL C2 Ex. 19 at 207.) Petitioner had difficulty concentrating, as evidenced by his statements to the prosecutor that 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.) Trial counsel also noticed 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." (NOL C2 Ex. 150 at 2733.) Wanda Keith, who visited petitioner at the jail after she had testified, observed that petitioner "seemed like he was really climbing the walls, and was not actually understanding all of what was going on." (NOL C2 Ex. 24 at 246.)

Petitioner's medications during the guilt phase also precluded his ability to communicate with defense counsel in a meaningful manner to assist in developing his

capital defense. Petitioner suffered significant prejudice to his trial rights due to being involuntarily medicated with Atarax and Sinequan at the guilt phase of the trial. He was unable to testify persuasively about his mental state prior to, or at the time of the crimes. Moreover, his demeanor was adversely affected by the medically unsound manner in which the psychiatric medication prescribed to him was given and withheld. 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." (NOL C2 Ex. 154 at 2762.)

B. Trial Counsel Unreasonably and Prejudicially Failed to Declare a Doubt as to Petitioner's Competence to Stand Trial.

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. Trial counsel's failure to do so fell below the minimum constitutional standards. *See United States v. Howard*, 381 F.3d 873, 881 (9th Cir. 2004) (counsel may be ineffective for failure to investigate when counsel has reason to question his client's competence); *see also Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (counsel has an obligation either to investigate possible defenses or make reasonable decisions that particular investigations are unnecessary); *Burt v. Uchtman*, 422 F.3d 557, 565-70 9 (7th Cir. 2005) (counsel ineffective for

failing to request a second competency hearing where defendant's mental status had changed, including that his medications changed significantly between the time of his competency evaluation and his trial).

1. Trial Counsel's Failure to Have Petitioner Evaluated for Competence Was Unreasonable.

Trial counsel 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. 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. (NOL C2 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 . . .").) 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.").)

Trial counsel's failure to request the trial court to declare a doubt as to petitioner's competence to stand trial was professionally unreasonable because he had access to additional information that petitioner was incompetent. 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."

(NOL C2 Ex. 154 at 2754.)

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.*)

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. (NOL C2 Ex. 150 at 2733).

Trial counsel's failure to request a competency evaluation in light of petitioner's deteriorating mental health symptoms and the evidence and his own expert's opinion

was unreasonable. *See, e.g., Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990) (ruling that petitioner was entitled to an evidentiary hearing on the basis of a colorable claim that counsel was ineffective for failing to evaluate his competency prior to changing his plea from not guilty to guilty; counsel failed to seek a psychiatric examination based on a misunderstanding of the applicable legal standard of a competent guilty plea); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (counsel ineffective for failing to seek a pretrial competency determination when he knew of his client's history of mental problems, including a previous determination that he was incompetent, knew that he was being medicated prior to trial, and observed his client's bizarre behavior; instead, counsel unreasonably relied on a finding that his client was competent from an unrelated proceeding two years before the relevant time period in determining that it was not worthwhile to seek a competency determination pretrial); *Owsley v. Peyton*, 368 F.2d 1002, 1003 (4th Cir. 1966) (trial counsel's failure to raise the issue of competency rendered his representation ineffective to the point of depriving the defendant of his Constitutional right to counsel).

2. Trial Counsel's Deficient Representation Was Prejudicial.

Had trial counsel apprised the court of the fact that his expert believed petitioner was incompetent to stand trial under the provisions of California Penal Code Section 1368, and that petitioner "should be treated until he is free of hallucinations and delusional thought," there is a reasonable probability that petitioner would have been found incompetent to stand trial. *Hull v. Kyler* 190 F.3d 88, 111 (3rd Cir. 1999) (where evaluations indicate that petitioner is incompetent, prejudice to a defendant is manifest when defendant's attorney fails to effectively use the procedures to determine competency that are mandated by Supreme Court precedent). Even more prejudicially, trial counsel offered to stipulate to petitioner's competence immediately preceding the testimony of Dr. Thomas. (30 RT 4404-05.) Trial counsel's "agreement" that petitioner was competent to stand trial amounts to "constructive denial of the

assistance of counsel altogether[, which] is legally presumed to result in prejudice." *Hull v. Kyler*, 190 F.3d at 112 (internal citation omitted).

Moreover, without petitioner receiving the benefit of adequate mental health treatment, 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. These errors and omissions had a substantial and injurious effect or influence on the jury's determination of the verdicts at the guilt and penalty phases.

C. Trial Counsel Unreasonably and Prejudicially Failed to Ensure Petitioner Was Competent and Prepared to Testify or to Advise Him About the Possible Consequences of Testifying.

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." (NOL C2 Ex. 12 at 107; *see also* Ex. 150 at 2731-32.) 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 rape special circumstance." (NOL C2 Ex. 12 at 107.) Trial counsel performed unreasonably by basing an important part of the trial defense on the testimony of his mentally ill, psychotic client, and by not ensuring petitioner could competently testify, and was prepared to testify.

1. Trial Counsel's Failure To Ensure Petitioner Was Competent And Prepared To Testify Fell Below The Standard Of Care.

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. 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. (NOL C2 Ex. 19 at 208.) Even though petitioner had never been capable of recounting accurately or completely the events on the night of the crime (NOL C2 Ex. 154 at 2752), trial counsel continued to consider petitioner his primary defense to the rape and felony murder special circumstance allegations. (NOL C2 Ex. 12 at 107, 109.)

Questioned by trial counsel, petitioner essentially admitted his guilt, when in fact he was unable to genuinely state that he knew what he had done:

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.)

Trial counsel acted unreasonably by calling petitioner as a witness, after Dr. Thomas expressly informed him that petitioner was not competent to testify at trial and that petitioner's psychosis would interfere with his ability to comprehend and answer, in a rational manner, questions posed to him. (NOL C2 Ex. 154 at 2752; *see id*. at 2754.) 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.

(NOL C2 Ex. 154 at 2752.) 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. 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. 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.

Trial counsel knew 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, e.g.*, Ex. 154 at 2754 (Dr. Thomas informed counsel "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.").) The Los Angeles County Jail staff prescribed petitioner an inappropriate and fluctuating medication regimen. 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. (NOL C2 Ex. 150 at 2733.) Trial counsel's unreasonable failure to adequately interview and prepare the jail psychiatrist, Dr. Kunzman, to testify prevented him from discovering the problems with petitioner's medication regimen. (*Id.*)

2. Trial Counsel's Deficient Representation Was Prejudicial.

Petitioner's jury did not know he was not competent to stand trial, or that his medication regimen had been suddenly and dangerously changed, or that "[b]ecause 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." (NOL C2 Ex. 154 at 2752.)

Even though trial counsel premised the mental state defense on petitioner's testimony, which included the flashback to petitioner's childhood, "[w]ith 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.*, NOL C2 Ex. 140 at 2694 (trial juror found petitioner's testimony regarding flashback "didn't make sense" and required corroborative evidence); NOL C2 Ex. 138 (juror needed information about petitioner); NOL C2 Ex. 9 (juror concerned about lack of explanation for petitioner's behavior).) Dr. Thomas was readily available to testify and explain the significance of petitioner's flashback. Instead of arguing the compelling evidence presented to him by Dr. Thomas (NOL C2 Ex. 154 at 2753-55), in response to the prosecution's query regarding the whereabouts of the psychiatrist (26 RT 3905), trial counsel asked the

jury "not to blame Mr. Jones, you know for maybe a witness that I did not put on[.]" (26 RT 3951).

Regardless of whether trial counsel under certain circumstances may make a tactical decision to present a client's testimony, trial counsel's decision to have petitioner testify was unreasonable because counsel learned that petitioner's mental illness rendered him not competent to testify. *See Deere v. Cullen*, 713 F. Supp. 2d 1011 (C.D. Cal. 2010) ("Where there are 'sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency,' counsel must request the trial court to order a hearing or evaluation on the issue of the defendant's competency" to satisfy due process and provide effective assistance (internal quotation marks omitted)). But for trial counsel's unreasonable failures, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d 674.

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V. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM FIVE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BECAUSE HE WAS MEDICATED AT THE TIME OF TRIAL.

The Petition sets forth detailed factual allegations at pages 124 to 130 that petitioner's constitutional rights were violated because, 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, and during trial, he was medicated involuntarily with Atarax, Cogentin, Haldol, and Sinequan in violation of petitioner's Fifth and Fourteenth Amendment right to due process of law and a fair trial, Sixth Amendment right to counsel, confrontation, compulsory process, testify competently in his own defense, and Eighth Amendment protections against cruel and unusual punishment.

Respondent generally denies or alleges insufficient knowledge to admit or deny the allegations in support of petitioner's claim. (Answer at 28, Doc. 28, filed Apr. 6, 2010.) Given respondent's general denials, petitioner cannot determine which facts are in dispute.

In *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), the United States Supreme Court held that the forced administration of antipsychotic medication during trial violated a defendant's right to due process, unless the trial court made findings that the medication was necessary for the sake of the defendant's safety or the safety of others and that there were no other reasonable alternatives available. No such findings were made in petitioner's case. In order to determine which facts are in dispute and whether the administration of psychotropic drugs was necessary, an evidentiary hearing is warranted. Furthermore, trial counsel's performance fell below the prevailing Sixth Amendment norms because trial counsel unreasonably and prejudicially failed to object to the drug regimen, and failed to object

to the capital murder trial proceedings on the ground that petitioner could not obtain a fair trial while being medicated with antipsychotic drugs.

At an evidentiary hearing on this Claim, petitioner will present the following evidence in support of the following:

A. Petitioner Is Entitled to Relief Because He Was Improperly Medicated.

In order to justify the forced medication of a defendant against his will, prior to the administration of the medication, a determination must be made that psychotropic medication is medically appropriate and no "less intrusive alternatives" exist to ensure that defendant does not pose a danger to himself or others. *Riggins*, 504 U.S. at 135. In *Riggins*, the court also held that it was entirely possible that the side effects of antipsychotic drugs not only had an impact on the defendant's "outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id*. at 137. Under these circumstances, where the precise consequences of forcibly medicating the defendant cannot be shown from the record, prejudice is presumed. *Id*.

In *Sell v. United States*, 539 U.S. 166, 123 S. Ct 2174, 156 L. Ed. 2d 197 (2003), the United States Supreme Court held that a defendant's right to due process is not violated where antipsychotic drugs are administered to a mentally ill defendant facing serious criminal charges where those drugs are substantially likely to render him competent to stand trial. However, in order to do so, the court must find that (1) the administration of drugs furthers an important government interest; (2) the involuntary medication of a defendant will further those interests; (3) involuntary medication is necessary to further those interests; and (4) the court must find that the administration of the drugs is medically indicated, in the best interests of the defendant in light of his medical condition. See *United States. v. Hernandez-Vasquez*, 513 F.3d 908, 913 (9th Cir. 2008) (citing *Sell*). Furthermore, in *Sell* the Court stated that the treatment must not have side effects that "interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." 539 U.S. at

181. The administration of the drugs must be in the best interests of the defendant given his medical condition. *Id*. The Court also noted that the exact type of medication may be important as, "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id*.

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 (phenobarbitol), a barbiturate.

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. (NOL C2 Ex. 33 at 622, 647, 648, 669, 670; Ex. 34 at 678, 685.)

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. (NOL C2 Ex. 33 at 622, 640, 663, *see also id*. at 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.*, NOL C2 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.

This same pattern of abrupt discontinuation and abrupt resumption 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. (NOL C2 Ex. 33 at 640, 663; *see also id*. at 596, 600, 602, 604, 606, 608, 610, 613, 616, 618, 620, 622.) 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. (NOL C2 Ex. 34 at 680, 682, 685, 690, 693.)

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. (NOL C2 Ex. 33 at 663, 669, 674; Ex. 34 at 678, 680, 682, 685.)

Petitioner received Theodrine from approximately October 1993, through April 15, 1995. (NOL C2 Ex. 33 at 596, 600, 602, 604, 606, 608, 610, 613, 618, 620; Ex. 34 at 678, 680, 682, 685.) Theodrine can cause psychosis. (NOL C2 Ex. 154 at 2754.)

Petitioner's involuntary medication, and interruptions in his medication regimen, induced distortions of his demeanor that negatively influenced jurors' perceptions of him. (*See, e.g*., NOL C2 Ex. 138 at 2689.) In addition, these distortions 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 of the murder. (*See, e.g.*, NOL C2 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.

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.

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 reinstating of these medications immediately following petitioner's testimony in the guilt phase. (NOL C2 Ex. 33 at 640, 663; NOL C2 Ex. 34 at 690.) 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.

(NOL C2 Ex. 154 at 2754.) Prior to abrupt changes in the medication regimen, petitioner received a relatively higher dosage of 5 milligrams at a time, (*id.*), which ensured that the clinically inappropriate fluctuations had an even more deleterious impact.

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. *See Riggins,* 504 U.S. at 137-38, 112 S. Ct. at 1816-17 (having an expert testify about the effects of the drugs on defendant's demeanor was not sufficient to cure the possibility that the drugs affected defendant's testimony, interactions with counsel, or his comprehension at trial).

Petitioner also suffered significant prejudice to his trial rights at the penalty phase due to the involuntary administration of antipsychotic drugs during the proceedings and the effects of the severe interruptions in his medication regimen. The jurors necessarily assessed his mental state before, during, and after the commission of

the offenses in reaching their determination of penalty. (*See* Petition 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.

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. 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 the most convincing proof of petitioner's mental dysfunction, i.e., his presentation in an unmedicated state, the state in which he had been prior to and during the offenses, was never seen by the jury. (*See, e.g.*, NOL C2 Ex. 138 at 2689 (petitioner's behavior led one juror to inform other jurors petitioner was medicated with antidepressants).)[15]

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 they were 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

[15] In *Benson v. Terhune*, 304 F.3d 874, 881 (9th Cir. 2002), the court noted that even antidepressants and tranquilizers could "alter the chemical processes of the brain" and produce side effects such as "sedation, drowsiness, agitation, aggression and inappropriate behavior and anxiety."

of the antipsychotic medication he was being administered and the effects suffered by the interruption of his medication regimen.

Petitioner is entitled to have his guilt and penalty verdicts invalidated, even if the administration of antipsychotic drugs had been 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.

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. *See Benson v. Terhune*, 304 F.3d at 883-84 (consent to treatment must be knowing and voluntary).

B. Trial Counsel Unreasonably and Prejudicially Failed to Object to the Drug Regimen, and Failed to Object to the Capital Murder Trial Proceedings on the Ground That Petitioner Could Not Obtain a Fair Trial While Being Medicated With Antipsychotic Drugs.

1. Trial Counsel's Failure To Object To The Inappropriate Administration Of Psychotropic Drugs Was Unreasonable.

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. *See, e.g., Wilson v. Gaetz*, 608 F.3d 347, 355 (7th Cir. 2010) (counsel was deficient for

failing to have a psychiatrist evaluate petitioner after he had been treated with antipsychotic medication; remanded for evidentiary hearing on prejudice); *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010) (ruling, in the context of whether to approve involuntary medication of a defendant, the fact that a medication regimen is designed to reduce delusions does not make it likely that it will do so in order to render a defendant competent to stand trial). 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. (NOL C2 Ex. 150 at 2733.)

2. Trial Counsel's Deficient Representation Was Prejudicial.

Since petitioner's mental illness was his sole defense to the crimes (NOL C2 Ex. 12 at 107), it was critical for the jury to understand his mental state and its manifestations in his behavior. Trial counsel's failure to assert petitioner's constitutional right to present himself to the jury in an unmedicated state resulted in the jurors being unable to assess fairly petitioner's true demeanor and mental state during the trial. Had the jury been able to do so, there is a reasonable probability that they would not have found him guilty of the crimes charged and sentenced him to death.

Moreover, the state's interference in petitioner's ability to assist counsel in his defense by involuntarily medicating him resulted in a per se denial of the right to counsel. *See Perry v. Leeke*, 488 U.S. 272, 280, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989). Therefore, a prejudice analysis under *Strickland* is not required. *Perry*, 488 U.S. at 280, 109 S. Ct. at 600 ("'Actual or constructive denial of the assistance of counsel altogether,' is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.") (internal citation omitted).

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VI. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM FIFTEEN: TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT FOR FAILING TO OBJECT TO NON-STATUTORY AGGRAVATING EVIDENCE AND FAILURE TO INVESTIGATE AND MITIGATE THE STATE'S AGGRAVATORS.

The Petition sets forth detailed factual allegations at pages 207 to 223 that petitioner's convictions and sentence of death were rendered in violation of his 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. 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.

Trial counsel's performance fell below the prevailing Sixth Amendment norms because he failed to investigate potential aggravation; failed to object to the prosecution's late and insufficient notice of the aggravation; failed to request a more specific proffer of the intended aggravating evidence; and, failed to request a continuance to prepare for this newly announced aggravation.

Respondent generally denies or alleges insufficient knowledge to admit or deny the allegations in support of petitioner's claim. (Answer at 47, Doc. 28, filed Apr. 6, 2010.) Given respondent's general denials, petitioner cannot determine which facts are in dispute. In order to determine which facts are in dispute, an evidentiary hearing is warranted.

At an evidentiary hearing on this Claim, petitioner will present the following evidence in support of the following:

A. Trial Counsel's Failure to Investigate and Challenge the State's Aggravating Circumstances Was Unreasonable.

In a capital case, defense counsel should "personally review all evidence that the prosecution plans to introduce in the penalty phase proceedings, including the records pertaining to criminal history and prior convictions." *Correll v. Ryan*, 539 F.3d 938, 943 (9th Cir. 2008) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005).)

The prosecution was constitutionally and statutorily required to provide notice of the aggravating evidence it intended to introduce a reasonable amount of time before trial. Cal. Penal Code § 190.3 (West 1994). 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 petitioner allegedly made two and a half years after the crime.

On February 1, 1995, the day the jury reached a verdict in the guilt phase, the prosecutor provided petitioner and trial counsel with his 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 intended 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. The prosecution made no further oral or written proffer regarding Ms. Jackson's testimony.

Despite this untimely 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 barbecue 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.)

Trial counsel's deficient performance in investigating the prior incident with Ms. Jackson resulted in false information being presented to, and mitigating aspects concerning the incident being withheld from, the jury. 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.*, *Rompilla v. Beard*, 545 U.S. 374, 377, 125 S. Ct. 2456, 2460, 162 L.Ed.2d 360 (2005) ("lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial"). (*See also* NOL C2 Ex. 183 at 3178; 3184-85.)

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. (NOL C2 Ex. 154 at 2752; *see also* Ex. 150 at 2731.)

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. (NOL C2 Ex. 19 at 204; Ex. 12 at 105.)

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. *See, e.g., Rompilla v. Beard*, 545 U.S. at 377, 125 S. Ct. at 2460. Moreover, trial counsel unreasonably failed to request additional time to perform these essential tasks. *See, e.g., Bigelow v. Williams*, 367 F.3d 562, 572 (6th Cir. 2004) (counsel deficient for failing to investigate leads or request a continuance to do so).

Trial counsel unreasonably failed to locate or interview any further witnesses concerning this prior crime. 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.

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. *See, e.g., Crotts v. Smith*, 73 F.3d 861, 866-67 (9th Cir. 1996) (granting relief for trial counsel's unreasonable failure to object to inadmissible evidence). 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. No more than five days, and only three business days, elapsed between the prosecution's notice of aggravation and Ms. Jackson's testimony.

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. 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. 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.'" (*Id*. at 4181.) 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. (NOL C2 Ex. 102 at 2065-93.) 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.

Trial counsel unreasonably failed to present the mitigating evidence regarding this prior conviction of which he was actually aware. Ms. Jackson's cross-examination testimony spans eleven pages in the trial record, but 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. (NOL C2 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.

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. (*See* Petition at 67-71.) 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.

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 petitioner's traumatic life experiences and the circumstances on the night of the crime, 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."); NOL C2 Ex. 178 at 3146.)

Trial counsel had no strategic reason for failing to conduct such an investigation and make these objections and requests. To the extent that trial counsel made any decisions, they were with without sufficient information. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) ("[a] reasonable tactical choice based on an adequate inquiry is immune from attack under *Strickland*"). In order for the adequate strategic

choice to be considered constitutional, however, the decision must be made after counsel has conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052. "Even if [a] decision could be considered one of strategy, that does not render it immune from attack - it must be a *reasonable* strategy." *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir.1997) (emphasis in original).) When considered objectively, trial counsel's failure to adequately investigate the prior crime and to establish what evidence the prosecutor intended to introduce about the crime cannot be considered reasonable.

Trial counsel's failure to object to the introduction of evidence of petitioner's alleged statement to his sister Gloria Hanks as aggravation, and failure to investigate and explain the context of the statement resulted in false information being presented to, and mitigating aspects concerning the incident being withheld from, the jury. 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 or about New Year's Eve 1994.

Petitioner called his sister to wish her a Happy New Year. During the course of the telephone call, Ms. Hanks told petitioner that she did not want to get involved in his trial or to be a witness for either side because of what she perceived he had done. (28 RT 4151, 4155-57.) Ms. Hanks had consumed a bottle and a half of champagne that evening before the telephone call took place. (*Id*. at 4156.) Ms. Hanks inquired of petitioner whether he cared about Pam Miller's family. Petitioner said that he did, but "what [did] that matter when his own family members [were] trying to turn against him." (*Id*. at 4157.) Ms. Hanks continued to press petitioner on this point, at which stage he allegedly said "he didn't give a fuck about Pamela or her family." (*Id*. at 4154, 4159.) At no time during their conversation did petitioner or Ms. Hanks mention the victim, Mrs. Miller, (*Id*. at 4164), nor did petitioner ask his sister to lie for him or do anything morally questionable (*Id*. at 4157).

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.) Around the first week of January 1995, the prosecutor orally informed defense counsel about the alleged telephone conversation between petitioner and Ms. Hanks, and later provided written notice of his intention to use this evidence as potential remorse rebuttal evidence. (*Id*. at 4084.) However, the prosecutor changed his mind and announced his intention to call Ms. Hanks in his case-in-chief (*id*. at 4073-74), not knowing "if Mr. Jones is going to get on the stand and express remorse" (*id*. at 4112). The prosecution argued that Ms. Hanks's testimony was admissible (1) as 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*.); and (2) that the alleged statement "increases the heinousness of the crime" (*id*. at 4113).

Trial counsel objected to the introduction of this evidence on the following 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); and (5) 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. Over trial counsel's objections, the trial court admitted the irrelevant and highly prejudicial evidence. (*Id*. at 4115-16.)

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. 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.

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. (*Id*. at 4093-108.)

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. (NOL C2 Ex. 178 at 3103-08, 3142 (discussing legacy of family substance abuse); NOL C2 Ex. 124 at 2547-49; NOL C2 Ex. 2 at 16-17; NOL C2 Ex. 21 at 228; NOL C2 Ex. 16 at 164.)

Trial counsel similarly made no effort to interview Ms. Jackson, who reported the telephone call to the prosecution, after the New Year's Eve call and prior to her testimony as a prosecution witness. (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.*, NOL C2 Ex. 102 at 2034 (Jackson believed the incident with her 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.

Trial counsel failed to investigate and present evidence of the inappropriate and dangerous medication regimen that directly affected petitioner's state of mind on the evening of the phone call. At the time of the 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). (NOL C2 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. (NOL C2 Ex. 33 at 663; NOL C2 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 (NOL C2 Ex. 33 at 648, 670; NOL C2 Ex. 34 at 678), and

petitioner did not receive it, or any other anti-anxiety medication, after that date. (NOL C2 Ex. 34 at 678, 680, 682).

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. 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." (NOL C2 Ex. 124 at 2546.) Had trial counsel conducted a minimally competent investigation into petitioner's family history and background, he also would have been able to present 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 (NOL C2 Ex. 178 at 3117, 3152-53; NOL C2 Ex. 151 at 2736; NOL C2 Ex. 16 at 149; NOL C2 Ex. 152 at 2741);

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 (NOL C2 Ex. 152 at 2741-42; NOL C2 Ex. 124 at 2502-03; NOL C2 Ex. 146 at 2714; NOL C2 Ex. 147 at 2719);

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 (NOL C2 Ex. 175 at 3069; NOL C2 Ex. 154 at 2755-56; NOL C2 Ex. 178 at 3154-55);

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Ms. Hanks'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 (NOL C2 Ex. 124 at 2505; NOL C2 Ex. 16 at 170); and

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 (NOL C2 Ex. 151 at 2735-36; NOL C2 Ex. 149 at 2728; NOL C2 Ex. 148 at 2725; NOL C2 Ex. 178 at 3131, 3155).

Trial counsel unreasonably made no attempt to provide any mental health expert with the above information 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. (NOL C2 Ex. 154 at 2750-51.)

Trial counsel failed to explain the importance of mitigation to petitioner's family. 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.

(NOL C2 Ex. 124 at 2547.)

B. Trial Counsel's Deficient Representation Was Prejudicial.

As noted above, there were several meritorious grounds for excluding Kim Jackson's testimony. Had trial counsel adequately raised and argued to exclude the testimony of Kim Jackson, the trial court would have done so and the jury likely would not have voted for death.

In addition, had trial counsel adequately developed and presented the substantial mitigating evidence related to this prior conviction, there is a reasonable probability that of a different sentencing verdict. If trial counsel had taken the time to convey the fundamental concepts of mitigation in a capital trial 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. Similarly, had trial counsel provided the jury with a more truthful and drastically different picture of the New Year's Eve conversation between petitioner and his sister, 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 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; NOL C2 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. *See Summerlin*, 427 F.3d at 643 ("we conclude that the failure of trial counsel to investigate, develop, and present mitigating evidence at the penalty phase hearing has undermined our confidence in the sentence of death imposed by the trial judge"); *Smith v. Stewart*, 189 F.3d 1004, 1011 (9th Cir. 1999) ("Because of [counsel's] failure to provide competent representation, our confidence in the outcome of Smith's sentencing has been undermined."). But for

trial counsel's errors, there is a reasonable probability that, absent this damaging evidence, the result of petitioner's penalty phase would have been different.

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VII. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON 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 Petition sets forth detailed factual allegations at pages 223 to 339 that petitioner was deprived of the effective assistance of counsel throughout the planning, development, investigation, and presentation of the evidence in the penalty phase in violation of his Sixth Amendment right to counsel. Trial counsel failed to conduct a reasonable mitigation investigation on petitioner's development, behavior, functioning, and character; follow up on investigative leads; present compelling mitigation obtained during the penalty phase investigation; prepare and elicit favorable testimony from the witnesses that he did interview; 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; failed to object to the prosecutor's improper arguments, misstatements of both law and evidence, and arguing facts not in evidence; 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'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.*,

Declaration of Quin Denver, Ex. E at 44-45; Ex. D at 23-37.) *See* 1989 ABA Guidelines, Commentary to Guideline 11.4.1 ("The assistance of one or more experts (e.g., social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome, as set out in Guideline 11.4.1(a) and 11.4.1(7)."); *see also* 2003 ABA Guidelines, Commentary to Introduction ("In particular, mental health experts are essential to defending capital cases.").)

> Under the American Bar Association Guidelines, 'preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case.'" ABA Guidelines 11.8.3 (1989). The reason for the ABA's direction is obvious—there must be sufficient time for interviews, research, and adequate testing before strategic planning can even begin. Additionally, if counsel waits until immediately before trial, it is too late to correct any invalid tests or to pursue leads discovered during the testing process, a requirement for counsel to be effective. . . . The rush to prepare will invariably lead to unnoticed and untapped resources.

Wilson v. Summers, 536 F.3d 1064, 1085 (10th Cir. 2008). Trial counsel has admitted to having no strategic reason for failing to present such compelling mitigating evidence to the jury. (NOL C2 Ex. 150 at 2733-34.) Had trial counsel presented such evidence to the jury, the jury would not have sentenced petitioner to death.

Respondent states that he generally denies or alleges insufficient knowledge to admit or deny the allegations in support of petitioner's Claim Sixteen. (Answer at 48, Doc. 28, filed Apr. 6, 2010.) Given respondent's position, petitioner and this court are completely ignorant of which facts are in dispute. Therefore, a hearing is warranted. (*See, e.g., Marshall v. Hendricks*, 307 F.3d 36 (3rd Cir. 2002) (record inadequate to determine if trial counsel's performance is objectively unreasonable; evidentiary hearing required to explore the claimed ineffective assistance of counsel.)) In the alternative, if respondent does not dispute the material facts, petitioner is entitled to summary judgment.

At an evidentiary hearing on this claim, petitioner will present evidence in support of the following.

A. Trial Counsel Rendered Ineffective Assistance by Failing to Present Readily Available Mitigation Evidence.

1. Trial Counsel Wholly Failed To Investigate, Develop, And Present Compelling Mitigation Evidence.

In preparing for the penalty phase of a capital trial, defense counsel has a duty to "'conduct a thorough investigation of the defendant's background'" in order to discover all relevant mitigating evidence. *Correll v Ryan*, 539 F.3d 938, 942 (9th Cir. 2008) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)); *see also Williams*, 529 U.S. at 415, 120 S. Ct. 1495 (O'Connor, J., concurring) (counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances"). This obligation goes beyond acquiring "only rudimentary knowledge of [petitioner's] history from a narrow set of sources." *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2537, 156 L. Ed. 2d 471 (2003); *see also Heishman v. Ayers*, 621 F.3d 1030 (9th Cir. 2010). Reasonably competent counsel in California at the time of petitioner's trial were fully aware of the duty to conduct a reasonable investigation of the circumstances of the case and explore all avenues leading to facts relevant to potential guilt or penalty defenses. (Declaration of James S. Thomson, Ex. at D at 23-24.) Counsel's failure to present mitigating evidence at the penalty phase of a capital trial constitutes ineffective assistance of counsel. *See, e.g., Wiggins v. Smith*, 539 U.S. at 524, 123 S. Ct. at 2537.

Petitioner intends to present evidence at a hearing that trial counsel's performance fell below the prevailing standard of care by failing to investigate, develop, and present compelling mitigation evidence during the penalty phase. Trial counsel unreasonably failed to investigate and present evidence of petitioner's developmental, medical and mental health history, educational history, employment history, and family and social history, including family dynamics and physical and

sexual abuse, and present that history through lay witnesses and appropriate experts, including a social historian. (*See, e.g.*, Ex. D at 23-37; Ex. E at 44-45.) Similarly, trial counsel failed to investigate and present evidence of petitioner's family's developmental, medical, and mental health history, educational history, employment and training history, and family and social history. As a result of counsel's failures, he was unable to present a comprehensive and coherent case in mitigation. Trial counsel readily admits that he had no strategic reason for failing to present or develop this evidence. (NOL C2 Ex. 150 at 2734.)

Trial counsel failed to identify and interview witnesses regarding all potential mitigating themes, including family members, friends, neighbors, teachers, co-workers, and employers. Reasonably competent counsel would have systematically identified and interviewed witnesses and made adjustments to the investigation plan and mitigation themes as information was obtained and witnesses were interviewed. (Ex. D. at 31-32.) Instead, trial counsel unreasonably abdicated much of the responsibility for planning and developing mitigation themes and preparing witnesses to testify to the trial paralegal. (Ex. NOL C2 Ex. 19 at 203, 204-05; *see also* NOL Ex. 12 at 105-06 (the trial paralegal was primarily responsible for collecting and reviewing social history documents, and for identifying and following up interviews of potential penalty phase witnesses).) Trial counsel failed to employ an experienced and knowledgeable investigator to assist in the investigation and preparation of the penalty phase, leaving these tasks to the inexperienced trial paralegal[16] who made decisions about what background information was important and what topics to cover during witness interviews. (NOL C2 Ex. 19 at 203, 204-05.) As a result, trial counsel failed to supervise the penalty phase investigation, and to ensure that key family members were contacted and interviewed in a timely manner and in a manner conducive to airing sensitive information. *See, e.g.*, *Earp v. Ornoski*, 431 F.3d. at 1178 (petitioner

[16] Petitioner's case was one of the first capital cases on which the trial paralegal worked. (NOL C2 Ex. 19 at 202.)

met burden of showing a colorable claim and was entitled to an evidentiary hearing where trial counsel unreasonably curtailed investigation into mitigation evidence. Trial counsel relied on completely her defense investigator and did not direct the investigation or instruct the investigator to investigate specific areas).

Trial counsel failed to fulfill his obligations by limiting the investigation to an unreasonably narrow set of witnesses and by conducting only cursory interviews of those witnesses. (*See generally* Petition at 224-25, 252.) During the penalty phase investigation, the defense paralegal interviewed six family members (petitioner's parents, three sisters and one brother), three extended family members (two of petitioner's paternal uncles and one aunt by marriage), two ex-girlfriends, one friend from junior high school, and one of petitioner's supervisors in the prison industries program at Folsom Prison. Of the family members interviewed, only three appear to have been interviewed individually and in person. The telephonic interview of petitioner's aunt by marriage, who trial counsel knew was a critical witness for the penalty phase, was not conducted until the end of November 1994, while the jury was being selected. On at least one occasion, petitioner's family was interviewed in a group setting, thus compromising the ability to build rapport and precluding an honest and frank recounting of family life in the Jones household.

Because trial counsel did not take an active part in the investigation, he failed to integrate emerging information into the investigation and development of the penalty phase defense, and re-direct questioning of potential witnesses. Trial counsel realized that petitioner's mental health was the key to his defense to the crimes (NOL C2 Ex. 12 at 107), but he failed to develop and present to the jury an accurate and thorough description of petitioner's mental health symptoms, the life-long duration of petitioner's mental illnesses, the debilitating nature of his illnesses, and his deteriorating mental functioning over time and which culminated in a complete psychotic break that resulted in the death of Mrs. Miller. (Petition at 308-20). Although trial counsel presented petitioner's testimony during the guilt phase about his

mental health symptoms, the trial court had erroneously ruled that petitioner could testify only to certain mental health events occurring in 1992. (22 RT 3358-60.) Despite this limitation, trial counsel made no attempt to present lay witness testimony in the penalty phase to describe the evolution of petitioner's mental illness from his childhood through to 1992, or to corroborate petitioner's guilt phase testimony in which he described, as best he could, his own mental health symptoms. *See Riley v. Payne*, 352 F.3d. at 1319-20 (failure to present corroborating evidence of a critical element of defendant's sole defense to the crimes, where such evidence could be obtained with diligent investigation, is objectively unreasonable).

During the penalty phase investigation, trial counsel was made aware of additional friends and family members who could provide the defense with mitigating evidence, but he failed to develop these leads. One such example is petitioner's maternal aunt, Angela, who is just three months older than petitioner.[17] The defense paralegal made one attempt to telephone her and mailed one letter after the initial attempt to reach Angela by phone was unsuccessful. Angela could have provided information regarding petitioner's mother's family, including, but not limited to, her mother's obsessive behaviors; her mother's abandonment of two of her children; her brother Carvis's mentally ill and sexually inappropriate behaviors; her sister Ree's religious fanaticism; her sister Delbra's alcoholism; her brother Ronnie's and sister Jackie's addiction to drugs, and Jackie's expulsion from Ree's house for her improper relationship with her young nephew. (*See* NOL C2 Ex. 3 (Declaration of Angela Ramey).) Indeed, reasonably competent counsel would have interviewed and presented the testimony of the numerous readily available witnesses who knew petitioner throughout the critical stages of his life. (*See, e.g.*, NOL C2 Ex. 1 (Declaration of Alice Jones); NOL C2 Ex. 2 (Declaration of Alvin Jones); NOL C2 Ex. 4 (Declaration of Bertha Mae Jones; NOL C2 Ex. 5 (Declaration of Bobbie Wilson;

[17] Trial counsel failed to interview any of petitioner's mother's family even though her mother, three sisters, and one brother were alive at the time of petitioner's trial.

NOL C2 Ex. 7 (Declaration of Ernest Doc Jones); NOL C2 Ex. 10 Declaration of Eugene Maxwell); NOL C2 Ex. 13 (Declaration of Gloria Russ); NOL C2 Ex. 14 (Declaration of Glynnis Harden); NOL C2 Ex. 15 (Declaration of Henrietta Kyle); NOL C2 Ex. 16 (Declaration of Joyce Jean Chaney); NOL C2 Ex. 17 (Declaration of Juanita Reshell Henderson); NOL C2 Ex. 18 (Declaration of Minnie Pearl Williams); NOL C2 Ex. 20 (Declaration of Roosevelt Jones); NOL C2 Ex. 21 (Declaration of Thomas Jones); NOL C2 Ex. 22 (Declaration of Vernice Talley Baldwin); NOL C2 Ex. 25 (Declaration of William Henry Wright); NOL C2 Ex. 124 (Declaration of Gloria Hanks); NOL C2 Ex. 126 (Declaration of Marsha Binkley); NOL C2 Ex. 128 (Declaration of Samuel Jones); NOL C2 Ex. 129 (Declaration of Sherman Harper); NOL C2 Ex. 132 (Declaration of Cassandra Jones); NOL C2 Ex. 134 (Declaration of Robert Norris); NOL C2 Ex. 135 (Declaration of Vernice M. Baldwin; NOL E2 Ex. 189 (Declaration of Robert Jones); NOL E2 Ex. 191 (Declaration of Emma Louise Bryant).

Finally, trial counsel unreasonably failed to consult with, retain, or present the testimony of an expert social historian to testify on petitioner's behalf in order to synthesize, interpret, and provide a mitigating context of his genetic make-up, environmental factors, traumatic events, and other relevant aspects of his life. At the time of petitioner's trial, reasonably competent counsel understood the importance of presenting expert testimony in mitigation and understood the critical role a social historian could play in explaining the mitigating value of evidence. (Ex. D at 14.) At no time did trial counsel consider consulting with or presenting the expert testimony of a social historian.

2. Trial Counsel Failed Adequately To Prepare Lay Witnesses To Testify And Failed to Call Witnesses Who Could Have Provided Compelling Mitigation Testimony.

Trial counsel has a duty to prepare witnesses for their testimony, to explain the purpose of their testimony, reveal the types of questions he intends to ask, and to

instruct them on what kind of information the jury would find helpful. *See, e.g.*, *Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003) (trial counsel's failure to prepare lay witnesses in order to effectively present their testimony to the jury in a detailed and sympathetic manner constitutes deficient performance).

Petitioner will prove that trial counsel failed adequately to interview and prepare those witnesses who testified. (Petition at 225-41.) For example, because trial counsel failed to devote time to prepare petitioner's father to testify, his testimony left the false impression that petitioner's childhood, while difficult, was not the nightmare that it actually was. Earnest Jones testified that there were some family problems and fights when petitioner was growing up, he had caught his wife in bed with another man, and his wife had once stabbed him in the hand. He also testified that while he had a problem with alcohol during petitioner's childhood, he had become clean and sober when petitioner was in prison. Petitioner's father's reluctance to volunteer information about petitioner's childhood was hardly surprising given his involvement in the abuse suffered by petitioner and his siblings.[18] Nevertheless, he could have provided information about petitioner's learning difficulties; his own impoverished upbringing in the cotton fields of Mississippi and Arkansas; his father's mental breakdown in the 1960s when he attacked family members, pointed a gun at people in the street and sat in the dark talking to people no one else could see; the animosity between his family and his wife's family; mental illness on petitioner's maternal side of the family; and how petitioner had changed when he was released from prison in 1991, appearing more isolated, withdrawn, and introverted. (*See generally* NOL C2 Ex. 8.) Wanda Barrow who testified on behalf of petitioner described giving testimony as "an awful experience." (NOL C2 Ex. 24 at 245.) Trial counsel did not speak to her until minutes

[18] 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. (NOL C2 Ex. 123 at 2485.) He beat the children with belts, extension cords, and his fists, and also attacked them with knives. (NOL C2 Ex. 16 at 155; NOL C2 Ex. 124 at 2502, 2518; NOL C2 Ex. 88 at 1795.)

before she was to testify; when she took the stand she did not know what to expect. (*Id*.) Petitioner's youngest sister, Tanya, was similarly ill-prepared to testify and was surprised by a lot of the questions she was asked while on the stand. (NOL C2 Ex. 131 at 2623.) Petitioner's aunt by marriage, Geraldine White-Jones did not speak to trial counsel until the night before she testified. (NOL C2 Ex. 123 at 2497.) She was surprised and disappointed by trial counsel's lack of interest in hearing more about petitioner's upbringing in a "drunken, violent, crazy, neglectful family." (*Id*.) All three of these witnesses could have provided additional compelling mitigation had they been interviewed and prepared properly for their testimony. (*See* NOL C2 Ex. 123 (Declaration of Geraldine White-Jones); NOL C2 Ex. 131 (Declaration of Tanya Jones; NOL C2 Ex. 24 (Declaration of Wanda Keith).)

Trial counsel failed prejudicially to explain the objective and purpose of mitigation testimony to critical family members, in order to allay their misimpressions or fears about the trial process, including their mistaken beliefs that testifying could only hurt, not assist petitioner. For example, trial counsel was ineffective for not questioning Gloria Hanks, petitioner's oldest sister, about petitioner's background and mental impairments. Trial counsel was aware of Gloria's role in the family and of her bond with petitioner. Trial counsel was aware that Gloria previously witnessed petitioner dissociate "several times." (NOL C2 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, including, information about their parents factious relationship, their chaotic and violent family life, and petitioner's mental deterioration. Nonetheless, trial counsel unreasonably failed to present any of her mitigation testimony. Miss Hanks 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. (NOL C2 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.… [T]he whole reason I did not want to testify was because I did not think I could help." (NOL C2 Ex. 124 at 2547.)

Because trial counsel did not maintain responsibility for the investigation, and delegated strategic decision making to the trial paralegal, trial counsel failed to present compelling mitigation testimony obtained from family members regarding petitioner's long-standing and deteriorating mental health symptoms. (Petition at 308-20). As trial counsel was well aware, petitioner's struggle with mental illness began, and the effects of trauma were visible, while he was still a young boy. When petitioner was just a toddler he hallucinated seeing a man with a hat in the closet.[19] Petitioner's sister, Gloria, told the defense paralegal and defense counsel at a family meeting just days before the guilt phase began that petitioner's uncle Carvis used to terrorize petitioner by locking him in the closet to prove there was no one in there. A number of family members recounted that petitioner was a quiet boy with few friends. Petitioner's sister Gloria told the defense paralegal that her brother was always "different." In that same interview, Gloria recalled that her brother had seemed sad and depressed through most of his teenage years. Petitioner's uncle, Thomas Jones, told the defense paralegal that he noticed that something was wrong with petitioner from the time petitioner was about sixteen or seventeen years of age. Family members were in accord in describing a drastic change in petitioner after the death of his brother Carl in 1983, when petitioner became even more "withdrawn."[20]

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[19] Although trial counsel knew that petitioner had visions of a man with a hat in the closet when he was a child, and that these visions caused him great distress, he did not question petitioner's father or sister about these hallucinations. This evidence only came out on cross-examination of petitioner's sister by the prosecutor. (29 RT 4248-30.)

[20] Trial counsel did not educe testimony about the remarkable change in petitioner following the death of his brother. In fact, he did not raise it until re-direct examination of petitioner's sister, Tanya, and then only because it had been raised by the prosecutor on cross examination. (29 RT 4247, 4248.) Although trial counsel

Moreover, trial counsel knew that the prior crime involving Mrs. Harris occurred as a result of petitioner's chronic mental illness. (30 RT 4423-24.) Trial counsel obtained information and could have presented lay witness testimony describing petitioner's odd demeanor at the time of the Harris incident. In an interview on June 9, 1994, petitioner's uncle Thomas told the defense paralegal that he had seen petitioner on the night before the incident involving Mrs. Harris, and that, at that time, he had observed that petitioner appeared disturbed and had a distant look.

Petitioner's uncle Thomas also could have testified to petitioner's worsening mental health symptoms in the months and days leading up to the capital crime. Thomas Jones described guarding the transmission shop with petitioner at the time of the Los Angeles riots when petitioner drank a fifth of whiskey, which seemed to have no effect on him other than that he became more withdrawn. He also told the defense paralegal that petitioner had appeared "wired up" on the day before the murder. In addition to this critical information regarding petitioner's demeanor in the period leading up to and the day before the crime, trial counsel failed to present lay witness testimony that petitioner was suicidal immediately after the murder. In an interview on June 9, 1994, petitioner's sister, Gloria, told the defense paralegal that her brother had called their father's house sometime after 10:00 pm on the night of the murder, saying it was "all over" and told his brother Al that he was proud of him. Trial counsel's failure to call Thomas or Gloria to testify about petitioner's behaviors that were consistent with, and corroborative of, petitioner's mental illness during this critical period of time was unreasonable.[21] *See Collier v. Turpin*, 177 F.3d 1184, 1204 (11th Cir. 1999) (counsel's deficient performance in sentencing phase of capital murder trial,

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asked petitioner's father about the drastic change in him, Earnest Jones was unable to speak to this matter because he had been out of state at the time of Carl's death and had not seen his family for four years. (29 RT 4377.)

[21] Because trial counsel failed to explain the purpose of mitigation evidence, petitioner's sister, Gloria, felt that her testimony might harm rather than help her brother. (NOL C2 Ex. 124 at 2545.)

including inadequate presentation of mitigating evidence regarding defendant's background, prejudiced defendant, thus constituting ineffective assistance of counsel; jury was not presented with "the particularized circumstances of his past and of his actions on day of the crime that would have allowed them fairly to balance seriousness of his transgressions with the conditions of his life. Had they been able to do so, [ ] it is at least reasonably probable that jury would have returned a sentence other than death.") .

Another example of trial counsel's failure to fully develop the evidence he presented at trial is demonstrated in the death of two of petitioner's brothers. (29 RT 4225.) Trial counsel recognized that these deaths were significant and proper mitigation evidence, yet he failed to obtain records relating to either of the deaths or, at a minimum, present lay witness testimony describing the effects these deaths had on the family and on petitioner. Both deaths occurred as a result of tragic events. Petitioner's younger brother Mario died in 1965 when he was just three months old. (NOL C2 Ex. 27 at 301). Although no one in the family seems to be sure what caused his death, it is clear that his parents were out late partying the night before and when they woke up the next morning, Mario was dead. (NOL C2 Ex. 124 at 2504; NOL C2 Ex. 8 at 82; NOL C2 Ex. 16 at 175; NOL C2 Ex. 155 at 2767.) Petitioner's mother was depressed after the death and, not long afterwards, appeared to give up on motherhood. (NOL C2 Ex. 124 at 2504-05; NOL C2 Ex. 135 at 2658; NOL C2 Ex. 18 at 197; NOL C2 Ex. 123 at 2484.) Trial counsel in his opening statement stated that the death of petitioner's brother, Carl, had a "big effect" on petitioner growing up. But, as discussed above, the discussion of the effect of Carl's death on petitioner was confined to cross-examination by the district attorney. (29 RT 4247, 4248.) Had trial counsel investigated this issue, as was his duty, he could have presented testimony that Carl's death was devastating to petitioner: After Carl's death, petitioner suffered from nightmares, depression, auditory and visual hallucinations, and had dissociative

episodes. (NOL C2 Ex. 178 at 3144; *see also* NOL C2 Ex. 131 at 2615; NOL C2 Ex. 3 at 28; NOL C2 Ex. 135 at 2665; NOL C2 Ex. 16 at 167; NOL C2 Ex. 134 at 2652.)

Trial counsel also understood the importance of investigating petitioner's genetic predisposition to mental illness and to substance abuse. In his penalty phase opening statement, trial counsel told the jury "we have evidence to show that there was an aunt that committed suicide, and the father's grandfather had mental problems, was put in a mental institution for about six months. So there is a pattern from the grandfather through the father of—alcoholism, through Mr. Jones to his son." (29 RT 4232.) Petitioner's father, Earnest Jones, testified to the simple fact that petitioner's maternal aunt committed suicide (29 RT 4387), and that his father "had a few mental problems" (*id.*). This was the sum total of the evidence regarding the multi-generational history of mental illness in petitioner's family. There was no description of the behaviors preceding petitioner's aunt's suicide or his grandfather's institutionalization because trial counsel had failed to investigate these events. Nor did trial counsel investigate and present petitioner's predisposition and early exposure to alcohol and substance abuse despite Geraldine Jones telling the defense paralegal in the November 1994 interview that at "any given point in time, Ernest Sr. had one brother or another living with him, and the Jones children were exposed to marijuana and cocaine smoking in the home."

Trial counsel knew there was a connection between petitioner's mother's treatment of him and the dissociative encounters with Mrs. Harris and Mrs. Miller. (29 RT 4231.) He also knew that petitioner was exposed to sexual behavior at a young age, having been found in bed with his mother and another man. (29 RT 4231, 4363-64.) Although these facts all point to the possibility of sexual abuse, trial counsel failed to follow up on the likelihood that petitioner had been sexually abused as a child. Evidence that petitioner was sexually abused were not limited to these events; further signs of petitioner being a victim of sexual abuse were demonstrated by petitioner's premature sexual behavior as described in the June 9, 1994 interview with

petitioner's Uncle Thomas. Had trial counsel followed up on investigating petitioner's early exposure to sexual conduct and sexuality, he would have learned that petitioner was sexually abused by his mother, starting when he was a small child; and when this happened his defense mechanism was to dissociate. (NOL C2 Ex. 128 at 2579, NOL C2 Ex. 178 at 3129.) Moreover, if trial counsel pursued this area of investigation, he could have presented lay witness testimony that petitioner's mother had herself been sexually abused; that petitioner's father had been exposed to his own father's sexual abuse of his daughters and other sexual infidelities; and that all the children in petitioner's family were affected by sexual abuse and inappropriate sexual behavior. (Petition at 270-73; NOL C2 Ex. 3 at 22, 25; NOL Ex. 4 at 56; NOL C2 Ex. 6 at 67, 68, 69; NOL C2 Ex. 7 at 72; NOL C2 Ex. 8 at 80, 82, 84; NOL C2 Ex. 13 at 113, 114; NOL C2 Ex. 18 at 188; NOL C2 Ex. 20 at 215; NOL C2 Ex. 21 at 221; NOL C2 Ex. 28 at 332-33; NOL C2 Ex. 109 at 2259; NOL C2 Ex. 123 at 2481; NOL C2 Ex. 124 at 2516; NOL C2 Ex. 128 at 2568; NOL C2 Ex. 129 at 2586; NOL C2 Ex. 132 at 2636; NOL C2 Ex. 178 at 3128-29; NOL E2 Ex. 189 at 3395.)

Trial counsel knew that petitioner's home life was chaotic as a result of domestic violence, sexual infidelity, and physical abuse in the home. (29 RT 4228.) As petitioner's uncle Robert informed the defense paralegal, "it was a regular hell-hole." In a feeble attempt to illustrate the violence in petitioner's home, trial counsel presented evidence of two incidents: one in which petitioner's father beat his mother and dragged her around the neighborhood after finding her in bed with another man (31 RT 4570); and another incident when petitioner's mother stabbed his father[22] (29 RT 4379-80). Had trial counsel conducted even a minimal investigation, however, he

[22] Although trial counsel knew that petitioner's mother was on welfare (29 RT 4227), he never requested social services records. Had he obtained the records, he could have presented evidence that shortly after petitioner's mother's arrest for stabbing her husband, a referral was made to 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. (NOL C2 Ex. 88 at 1795.)

would have discovered that these were not isolated incidents in the Jones household, and that petitioner had been exposed to unremitting, extreme physical violence from birth. (Petition at 278-88). Trial counsel could have presented lay witness testimony showing that the level of violence between petitioner's father and mother was remarkable, even in the violent and crime-infested neighborhood of South Central Los Angeles where they lived. (NOL C2 Ex. 178 at 3108-10; *see also* NOL C2 Ex. 132 at 2628; NOL C2 Ex. 131 at 2606.) Much of the violence perpetrated in the Jones household was related to sexuality.[23] (Petition at 281-83.) However, even mundane events were filled with brutality. For example, during family meals, petitioner's father kicked his wife under the table until her legs were bloody and she could not stand. (NOL C2 Ex. 126 at 2559.) Trial counsel could have presented lay witness testimony on how exposure to this constant, extreme violence affected petitioner: that from an early age, he began to experience dissociative episodes. (NOL C2 Ex. 178 at 3118.)[24]

Trial counsel knew that petitioner was raised by alcoholic parents (RT 4226-27), but he failed to follow up on the most basic facts emanating from this information, such as, the fact that petitioner's mother drank while pregnant with him. (NOL C2 Ex. 178 at 3091.) Trial counsel could have presented evidence that as a result of both parents' alcoholism, the Jones children were frequently neglected and went hungry.[25] Even when they were sober, petitioner's parents neglected the Jones children, and petitioner suffered the effects of neglect, abuse and poverty from the time he was an infant. (Petition at 298-301.)

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[23] Trial counsel did not investigate petitioner's father's sexual infidelities even though petitioner's mother had told the defense paralegal that her husband had affairs.

[24] This behavior was observed by onlookers as petitioner staring vacantly, standing away from everything and everyone, wearing a "faraway" or "glazed" expression. (NOL C2 Ex. 16 at 146, 148, 149; NOL C2 Ex. 1 at 2.)

[25] Mr. and Mrs. Jones were incapable of performing simple tasks, such as getting the children ready for school or buying groceries. (NOL C2 Ex. 132 at 2714; NOL C2 Ex. 124 at 2512.)

3. Trial Counsel Failed To Investigate, Research, Collect, Present, And Admit Into Evidence Pertinent Records Regarding Petitioner's Background Or History.

Obtaining readily available documentary evidence of a defendant's background is fundamental to preparing for the penalty phase of a capital trial, and failure to do so constitutes ineffective assistance of counsel. *See, e.g.*, *Robinson v. Schriro*, 595 F.3d 1086, 1108-09 (9th Cir. 2010) (citing *Ainsworth v. Woodford*, 268 F.3d 868, 877 (9th Cir. 2001)). While trial counsel obtained some records on petitioner, he made no attempt to gather records pertaining to other family members and caretakers. He also failed completely to obtain multi-generational social history records. Reasonably competent counsel at the time of petitioner's trial knew that the collection of such records was essential to provide contemporaneous evidence of the events and influences affecting a client's life, and were potential sources of witnesses and leads to other documents. (Ex. D at 30.)

At a hearing, petitioner will present evidence that trial counsel obtained petitioner's school records, prior prison records, trial records from his two prior crimes, treatment records from Kedren Community Mental Health Center, general relief records, and an incomplete set of jail records. However, trial counsel unreasonably and prejudicially failed to present to the jury the substantial mitigating information contained in the documents he obtained. (Petition at 243-51.). Petitioner's school records alone contain rich material documenting his longstanding history of compromised cognitive functioning; poor academic performance; intelligence testing in the intellectual disability range of functioning; placement in Special Education and remedial classes throughout his time at school; his unpredictable school pattern; his extended absences from school; and his parents' neglect. (NOL C2 Ex. 50 (Education Records Ernest Dewayne Jones, L.A. Unified School District); NOL C2 Ex. 51 (Education Records Ernest Dewayne Jones (Testing),

L.A. Unified School District.) Trial counsel unreasonably failed to introduce petitioner's school records as exhibits at trial.

The prosecutor repeatedly and prejudicially characterized petitioner's perceived failure to take advantage of psychiatric treatment and systemic support as aggravating evidence. (31 RT 4640-41.) Trial counsel failed to object to this mischaracterization of the evidence, which he readily could have done had he reviewed the records from Kedren. Trial counsel was ineffective for failing to present evidence from the Kedren records as follows: Petitioner was seen at Kedren on three occasions. (NOL C2 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.) Trial counsel was ineffective for failing to use these records to illustrate that only two months had elapsed between petitioner's first treatment session and the offense involving Mrs. Harris. And that far from being put on "a psychological treatment program" which he had "refused to go along with" (31 RT 4640-41), petitioner was offered only six hours of counseling. (NOL C2 Ex. 30 at 375.)

Trial counsel also was ineffective for failing to use the records he obtained to support evidence of symptoms of petitioner's mental illness. The diagnostic study performed on petitioner in 1986 at Tehachapi prison contains evidence that petitioner exhibited signs and symptoms consistent with dissociation (e.g., periods in which he carried on activities without knowing later what he had been doing; he had blank spells during which his activities were interrupted and he did not know what was going on around him; he often felt as if things were not real) and psychosis (e.g., evil spirits possessed him at times; much of the time his head seems to hurt all over; he had strange and peculiar thoughts). (NOL C2 Ex. 87 at 1699.) Trial counsel failed also 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. (NOL C2 Ex. 33 at 593-677.)

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. (NOL C2 Ex. 150 at 2733.)

Trial counsel unreasonably failed to review the records he received 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. (*See* NOL C2 Ex. 125 (Declaration of Linda Schumitzky); NOL C2 Ex. 130 (Declaration of Sylvia Dean).) Trial counsel believed that petitioner's poor grades were the result of a bad home environment. (29 RT 4228.) 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, such as petitioner's. (*See* Exs. 125 and 130.) The only evidence the jury heard regarding petitioner's school performance was presented through the testimony of Dr. Thomas. Dr. Thomas testified that, according to the school records, petitioner performed below age expectation, and petitioner had self-reported what amounted to a conduct disturbance and a disruption in the classroom. (30 RT 4449-50.)

The jury was left with 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. An accurate, complete and reliable portrait of petitioner's performance and struggles in school from education personnel would have

included information that petitioner was placed in an Educably Mentally Retarded ("EMR") program for three years commencing in the first grade, when he was six years old. (NOL C2 Ex. 50 at 1103.) 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; reversed many numerals and letters in writing; had poor listening skills and was slow in responding to directions; and did not work well in group activities. (NOL C2 Ex. 125 at 2552.) 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. (NOL C2 Ex. 125 at 2552-53; NOL C2 Ex. 50 at 1103; NOL C2 Ex. 51 at 1158.) Placement in the EMR program enabled petitioner to attend school in a much smaller classroom, of typically 12 to 15 students. (NOL C2 Ex. 130 at 2599-600.) Petitioner adjusted well to the small class size with individualized instruction. (NOL C2 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. (NOL C2 Ex. 130 at 2600.)

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. (NOL C2 Ex. 51 at 1153.) At El Camino, he was assessed to have an IQ of 84 on the Wechsler Adult Intelligence Scale (WAIS). (NOL C2 Ex. 51 at 1149.) His academic achievement was extremely poor, ranging from the second to the sixth grade level. (NOL C2 Ex. 130 at 2601-02.) Petitioner was sent to his school of residence (Crenshaw) for the eleventh grade where he had all his classes in the Educationally Handicapped Program. (NOL C2 Ex. 125 at 2556-57.) 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. (NOL C2 Ex. 52 at 1168.) He had four remedial classes and two non-academic classes. (NOL C2 Ex. 125 at 2557.)

Petitioner's inability to benefit from the special education programs or succeed in school may have been exacerbated by his frequently changing schools. 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. (NOL C2 Ex. 130 at 2602-03.)

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 an injury to his left hand. From his first semester in tenth grade, petitioner's inability to keep up with the regular program was obvious. 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. (NOL C2 Ex. 125 at 2557-58.)

4. Trial Counsel's Failure To Present This Mitigation Evidence Was Prejudicial.

The jury heard testimony as to only a few of the numerous adverse experiences that petitioner suffered as a child, and heard relatively little about their effect on him. Trial counsel's failure to present a full account of petitioner's background, and to convey the true terror and trauma of his childhood, resulted in the jury thinking that petitioner's life was not all that bad. (NOL C2 Ex. 127 at 2565; *see also* Ex. 138 at 2690; NOL C2 Ex. 9 at 95.) 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, including a social historian, would have more completely attested to petitioner's

longstanding mental disorders and impairments. Trial counsel's failure to build a picture of petitioner's mental illness, delusional beliefs, and dissociative symptoms allowed the prosecutor to argue that petitioner was a liar who, as he was about to testify, conveniently invented a story about flashing back to a time when he was a child.[26] (31 RT 4651). Moreover, trial counsel's failure to obtain a complete set of jail records meant that the jury did not know that at the time petitioner testified he was not receiving his antipsychotic, anti-anxiety, or anticholinergic medication.[27]

The evidence that trial counsel could have presented on petitioner's behalf describing the legacy of multi-generational sexual, physical, psychological and emotional abuse, neglect, poverty, addiction, mental illness and impaired cognitive functioning was powerful and moving. As Dr. Matthews, a psychiatrist retained by habeas counsel explains,

> The tragic combination of Ernest's traumatic experiences, neglect and isolation, genetic predisposition to the development of a major mental illness, numerous head injuries, and alcohol and drug abuse, thwarted Ernest Jones's ability to develop and function adequately as an adult and impaired his mental functioning throughout his life.

Ex 178 at 3157.

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

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[26] In contrast, documents and lay witness accounts amply demonstrate that petitioner's dissociation was his only means of coping with his horrifying childhood. Petitioner's response to the overwhelming and constant fear and trauma of psychological, physical and sexual abuse was one of mentally shutting down and psychological numbing. (NOL C2 Ex. 178 at 3118, 3129, 3137, 3153, 3154.) Petitioner continues to dissociate through to this day. (*Id*. at 3129.)

[27] The jury also never heard that the New Year's Eve phone call between petitioner and his sister Gloria, which was admitted in aggravation as evidence of petitioner's lack of remorse, was the result of petitioner's untreated mental illness. (NOL C2 Ex. 34 at 678-94.)

tools to understand the connection between petitioner's mental health history, and in particular his dissociative defense mechanism 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 and provided the jury with knowledge of the "development of the person who committed the crime" with a reasonable probability that the result of the proceedings would have been different. *Ainsworth v. Woodford*, 268 F.3d 868, 878 (9th Cir 2001).

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; 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. The evidence that petitioner

intends to present at a hearing in support of allegations contained in paragraphs P.2.e. of the Petition includes, but is not limited to, the following:

Petitioner was predisposed to developing a mental illness due to the existence of mental illness, including major depression, psychotic disorders, attention deficit hyperactivity disorder, learning disabilities, chemical dependency and posttraumatic stress disorder, on both the maternal and paternal sides of the family. (NOL C2 Ex. 178 at 3103.) Petitioner's grandfather, Ernest "Doc" Jones, suffered from mental dysfunctions that produced erratic, psychotic, violent, controlling and dysfunctional behavior. He exhibited violent outbursts and beat his family with switches, belts, or extension cords, leaving bloody, painful welts on their bodies. In the early 1960s, his behavior had become so irrational that his father, petitioner's great grandfather, had him committed to a state hospital after he knocked his daughter unconscious, pulled guns on family members, tried to run over animals in the street, experienced auditory hallucinations, and acted like a dog. His erratic and violent behavior continued after his institutionalization. (*See id*. at 3103-34.)[28]

Petitioner's maternal family suffered from similar mental problems. 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. She became easily anxious and agitated; she had delusional beliefs about dirt; she was obsessed with cleaning, order, and neatness; and she developed rituals around cleaning. (NOL C2 Ex. 178 at 3104.)[29]

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[28] *See also* NOL C2 Ex. 1 at 3, 7; NOL C2 Ex. 4at 45; NOL C2 Ex. 6 at 65-66; NOL C2 Ex. 8 at 78; NOL C2 Ex. 17 at 179; NOL C2 Ex. 18 at 186-87; NOL C2 Ex. 20 at 212; NOL C2 Ex. 21 at 218-19; NOL C2 Ex. 42 832-840; NOL C2 Ex. 108 at 2258; NOL C2 Ex. 128 at 2569-72; NOL C2 Ex. 135 at 2655; NOL E2 Ex. 191 at 3410.

[29] *See also* NOL C2 Ex. 2 at 9; NOL C2 Ex. 3 at 24; NOL C2 Ex. 4 at 48, 49; NOL C2 Ex. 6 at 66-67, 68; NOL C2 Ex. 8 at 79-80; NOL C2 Ex. 18 at 189-91; NOL C2 Ex. 48 at 939, 989, 1019, 1024, 1028-29, 1032-33, 1043, 1045-46; NOL C2 Ex. 123 at 2478-79; NOL C2 Ex. 135 at 2653.

Miss Vernice received treatment for depression and anxiety for many years and was prescribed anti-depressant and anti-anxiety medication. (*Id*. at 3015.) Other maternal family members exhibited symptoms consistent with mood disorders; obsessive compulsive tendencies; delusional thinking; grandiosity; violent and erratic behaviors; and suicidal ideation. (*Id*.)[30] 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. After her death, the family found scraps of paper with delusional writings scattered throughout the apartment where she had been living. (*Id*. at 3105-06.)[31]

Petitioner's immediate family all exhibit symptoms of serious mental illness, including depression, mood disorders and the effects of severe traumatization. Petitioner's mother, Joyce Beatrice Jones, had multiple mental health impairments, including delusional thinking, auditory and visual hallucinations, mood disorders, and exhibited violent, obsessive compulsive, and abusive behaviors. (NOL C2 Ex. 178 at 3106, 3122-23).[32] Like her mother, Joyce was obsessed with cleanliness and went on irrational cleaning rampages, including getting the children out of bed in the middle of the night to clean. Joyce's mental impairments made her unpredictable and violent: 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. She

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[30] *See generally* NOL C2 Ex. 8 at 83; NOL C2 Ex. 13 at 112-13, 117, 120-21, 125, 128-29; NOL C2 Ex. 20 at 214; NOL C2 Ex. 21 at 223, 224; NOL C2 Ex. 22 at 233; NOL C2 Ex. 123 at 2479, 2480; NOL C2 Ex. 129 at 2584, 2589, 2590, 2593; NOL C2 Ex. 132 at 2628; NOL C2 Ex. 135 at 2657; NOL E2 Ex. 189 at 3396.

[31] *See also* NOL C2 Ex. 3 at 35-36; NOL C2 Ex. 13 at 130; NOL C2 Ex. 22 at 237; NOL C2 Ex. 21 at 223; NOL C2 Ex. 27 at 305; NOL C2 Ex. 97 at 1944, 1948; NOL C2 Ex. 124 at 2537-38); NOL C2 Ex. 128 at 2568; NOL C2 Ex. 129 at 2586, 2588; NOL C2 Ex. 135 at 2662-63; NOL C2 Ex. 147 at 2721.

[32] *See also* NOL C2 Ex. 3 at 26; NOL C2 Ex. 13 at 119; NOL C2 Ex. 16 at 156, 157; NOL C2 Ex. 18 at 190, 197, 200; NOL C2 Ex. 21 at 220; NOL C2 Ex. 22; NOL C2 Ex. 123 at 2482-84, 2507; NOL C2 Ex. 124 at 2506; NOL C2 Ex. 145 at 2710; NOL C2 Ex. 146 at 2713; NOL C2 Ex. 152; NOL C2 Ex. 155 at 2766.

also suffered from severe moods swings; she was quick to anger and could be seen crying one minute and cursing someone out in the next. (*Id.*)[33]

Petitioner's father, Earnest Lee Jones, exhibited behaviors consistent with hypomania. He engaged in spending sprees, literally spending every dime he had to impress people and leaving himself penniless. (NOL C2 Ex. 25 at 249.) He gambled, drank, partied, and had numerous affairs throughout his marriage to petitioner's mother. (NOL C2 Ex. 18 at 195; NOL C2 Ex. 25 at 249; NOL C2 Ex. 124 at 2512.) He frequently called family meetings in the middle of the night when he ranted to petitioner and his siblings about what a bad person their mother was. (NOL C2 Ex. 124 at 2517.) In addition to these behaviors, he had an explosive temper: once his rage took hold, there was no way of stopping him. (NOL C2 Ex. 189 at 3397; NOL C2 Ex. 190 at 3403.) People walked on eggshells around him because they did not know what might set off his anger. (NOL C2 Ex. 190 at 3403, 3404-05, NOL C2 Ex. 124 at 2518).

All of petitioner's siblings exhibit signs of the long-term effects of massive and continuous trauma, as well as battling depression and other mental health problems. (NOL C2 Ex. 178 at 3107.)[34] Petitioner's sister, Jean, has battled depression for many years and attempted suicide when she was only a teenager. (*Id.*)[35] Gloria inherited her mother's obsessive behaviors and cleans compulsively, often in the middle of the night. (NOL C2 Ex.143 at 2703; NOL C2 Ex. 2 at 17.) Petitioner's sister, Cassandra or "Bam," is an irrational drunk, like her mother. She even threatened her husband at

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[33] *See also* NOL C2 Ex. 3 26-27; NOL C2 Ex. 16 at 157; NOL C2 Ex. 18 at 197; NOL C2 Ex. 22 at 237-38; NOL C2 Ex. 123 at 2480; NOL C2 Ex. 124 at 2504; NOL C2 Ex. 135 at 2658.

[34] *See also* NOL C2 Ex. 2 at 17; NOL C2 Ex. 124 at 2548-49; NOL C2 Ex. 131 at 2621; NOL C2 Ex. 143 at 2704; NOL C2 Ex. 145 at 2712; NOL C2 Ex. 146 at 2716; NOL C2 Ex. 16 at 162.

[35] NOL C2 Ex. 16 at 169, 171-72; NOL C2 Ex. 123 at 2490-91; NOL C2 Ex. 164 at 2980.

knifepoint. (NOL C2 Ex. 153 at 2745.) Cassandra was diagnosed with major depression after an attempted suicide. (NOL C2 Ex. 39 at 801-06.)

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. Petitioner's paternal grandparents were illiterate. (NOL C2 Ex. 123 at 2477.) Petitioner's father and his older siblings had very little formal education because they missed so much school working in the cotton fields. (NOL C2 Ex. 18 at 187; NOL C2 Ex. 4 at 42-43.) Petitioner's uncle, Robert Jones, had an IQ score of 66, placing him within the range of an intellectual disability. (NOL C2 Ex. 72 at 1504.) 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. (NOL C2 Ex. 6 at 65.) Miss Vernice's brother, Artis Talley, had a speech problem. He was difficult to understand because his words sounded jumbled. (NOL C2 Ex. 22 at 232.)

Petitioner's immediate family displayed evidence of impaired cognitive functioning, severe intellectual impairments, intellectual disability, and learning and speech disorders. Petitioner's mother, Joyce, had an intellectual disability (formerly referred to as mental retardation). Joyce twice scored an IQ of 61 on mental ability tests, which placed her squarely in the intellectual disability range of functioning. (NOL C2 Ex. 69 at 1498.) Those who knew her believed that her mind never matured and observed that she acted as though she had stopped maturing at fifteen years old, about the age she first became a mother. (NOL C2 Ex. 123 at 2483-84; NOL C2 Ex. 25 at 249.) Joyce was uneducated, and was unable to learn to read. (NOL C2 Ex. 142 at 2698; NOL C2 Ex.143 at 2701; NOL C2 Ex. 152 at 2740; NOL C2 Ex. 156 at 2777.) She had difficulty telling time from a regular clock; had difficulty following rules and simple instructions; and got stuck on things, unable to let things go. (NOL C2 Ex. 147 at 2719; NOL C2 Ex. 142 at 2698; NOL C2 Ex. 143 at 2701; NOL C2 Ex. 124 at 2528-29; NOL C2 Ex. 22 at 235; NOL C2 Ex. 3 at 26.) Petitioner's siblings

Gloria, Jean, Carl, and Alvin, along with petitioner, all attended Special Education classes at some point. (NOL C2 Ex. 16 at 144; NOL C2 Ex. 132 at 2642.) Gloria, Jean and Carl were assessed for eligibility in the Educably Mentally Retarded (EMR) program in elementary school. (NOL C2 Ex. 66 at 1476, 1479; NOL C2 Ex. 118 at 2443, 2449; NOL C2 Ex. 119 at 2449, 2452, 2453, 2454, 2455, 2457, 2461; NOL C2 Ex. 56 at 1419; NOL C2 Ex. 57 at 1423-24, 1427.) Petitioner's youngest brother, Alvin, was unable to apply simple concepts, and as a young boy had trouble making his way to school on his own. (NOL C2 Ex. 124 at 2536.) He exhibited signs of hyperactivity and did not calm down until the sixth or seventh grade. (NOL C2 Ex. 16 at 158.) Alvin also exhibits signs of poor adaptive functioning and an inability to live as an independent adult. (NOL C2 Ex. 146 at 2716; NOL C2 Ex. 2 at 16.)

Petitioner's maternal and paternal family history is replete with instances of sexual abuse, incest, and deviant sexual practices. Petitioner's maternal grandmother, herself a victim of sexual abuse, believed that sexual abuse was something that "happen[ed] to everyone." (NOL C2 Ex. 129 at 2592.) Joyce's sister, Ree, was molested by one of her uncles and coerced by her brother, Carvis, into having sex with him. (NOL C2 Ex. 129 at 2584-85.) Carvis's sexual deviancy was notorious in the family. He hung up women's dirty underwear in his bedroom after he slept with them, hung up nude photos of himself in his house (including life-sized photos), and constantly talked about sex, and what he liked to do sexually. (NOL C2 Ex. 135 at 265; NOL C2 Ex. 3 at 30; NOL C2 Ex. 132 at 2626; NOL C2 Ex. 128 at 2582; NOL C2 Ex. 147 at 2723-24; NOL C2 Ex. 134 at 118, 121-22; NOL C2 Ex. 25 at 248; NOL C2 Ex. 155 at 2770.) Joyce's sister, Jackie, repeatedly orally copulated her nephew, Ree's son Reggie, when he was about seven years old. (NOL C2 Ex. 129 at 2587; NOL C2 Ex. 135 at 2662.) Jackie also spent a good deal of time with petitioner; after being thrown out of Ree's home for molesting Reggie, Jackie went to live with petitioner and his family. (NOL C2 Ex. 135 at 2663; NOL C2 Ex. 129 at 2587.)

Petitioner's paternal grandfather, Doc Jones, began sexually abusing his eldest daughter, Bertha Mae, from the time she was a very young girl. (NOL C2 Ex. 4 at 50.) 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. (NOL C2 Ex. 4 at 52; NOL C2 Ex. 1 at 6-7; NOL C2 Ex. 6 at 66; NOL C2 Ex. 18 at 188; NOL C2 Ex. 25 at 247.) 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. He pulled the children onto his lap and made them squirm until he had an erection. (NOL C2 Ex. 16 at 173; NOL C2 Ex. 123 at 2494; NOL C2 Ex. 124 at 2507.) He also openly masturbated in front of the children. (NOL C2 Ex. 124 at 2516.) Thomas's sexual abuse was not confined to 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. (NOL C2 Ex. 178 at 3113-14.)

In petitioner's immediate family there is a history of sexual abuse, exposure to sexually inappropriate behavior, and sexual promiscuity. Petitioner's mother, Joyce, was sexually molested when she was a girl. (NOL C2 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. (NOL C2 Ex. 4 at 48; NOL C2 Ex. 6 at 67.) Miss Vernice's affairs were numerous and well-known in the small farming community where she lived. (NOL C2 Ex. 13 at 113; NOL C2 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 believed that Miss Vernice's daughter, Delbra, was Doc's daughter. (NOL C2 Ex. 6 at 67; NOL C2 Ex. 3 at 25.) Not surprisingly, Joyce quickly became sexually active as a young teenager and was obsessed with attracting men at a very young age. (NOL C2 Ex. 8 at 82; NOL C2 Ex. 6 at 68.) It appears that she was

about eleven or twelve years old when she first experienced consensual sexual intercourse. (NOL C2 Ex. 6 at 68; NOL C2 Ex. 20 at 215.) At age fifteen, Joyce gave birth to petitioner's oldest sister, Gloria. (NOL C2 Ex. 26 at 270.) About the same time that Joyce was pregnant with Gloria, Miss Vernice was pregnant by a man named Toby Reynolds, who was known as Jack. (NOL C2 Ex. 26 at 272; NOL C2 Ex. 22 at 234.)

Earnest Lee was exposed to his father'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. (NOL C2 Ex. 7 at 72.) In fact, when he married Virgie Lee, he was still married to his first wife whom he did not divorce until June 15, 1973. (NOL C2 Ex. 28 at 332-33; NOL C2 Ex. 109 at 2259.) Doc did not try to hide his affairs and they were a source of constant strife between Earnest Lee's parents. (NOL C2 Ex. 4 at 44-45; NOL C2 Ex. 18 at 188.) Doc encouraged his boys to be like him, drinking and chasing girls. (NOL C2 Ex. 6 at 69.) Like Joyce, Earnest Lee became sexually active from a very young age. (NOL C2 Ex. 6 at 215; NOL C2 Ex. 20 at 215.)

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. (NOL C2 Ex. 124 at 2516; NOL C2 Ex. 8 at 84; NOL C2 Ex. 21 at 221.) His father also had many girlfriends; neither parent did much to hide their infidelities. (NOL C2 Ex. 21 at 221; NOL C2 Ex. 123 at 2481; NOL C2 Ex. 129 at 2586.) Because the family lived in a two-bedroom apartment, the younger children had to sleep in their parents' bedroom, while the older children shared the other bedroom. (NOL C2 Ex. 189 at 3395.) When the children were older, and petitioner was a teenager, Joyce claimed the living room as her bedroom, and had sex there with her long-term boyfriend Horace Jenkins, or any other man she brought in from off the street. (NOL C2 Ex. 178 at 3128-29; NOL C2 Ex. 132 at 2636.)

The children in the family were traumatized and affected by sexual abuse and exposure to inappropriate sexual behavior. Cassandra was barely a teenager when she began having sex and quickly earned a reputation for being sexually promiscuous. (NOL C2 Ex. 16 at 161; NOL C2 Ex. 124 at 2530; NOL C2 Ex. 155 at 2774.) When she got older, Cassandra was arrested on prostitution charges for soliciting a plainclothes police officer. Jean also turned to prostitution, at times, to support her drug habit. (NOL C2 Ex. 129 at 2593; NOL C2 Ex. 134 at 2648.) Alvin too displayed the effects of being constantly exposed to his parents' sexual exploits; he often tried to grab his sister on her private parts. (NOL C2 Ex. 134 at 2647.)

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. (NOL C2 Ex. 128 at 2579, NOL C2 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. (NOL C2 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. (NOL C2 Ex. 123 at 2495.)

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. Petitioner's father, Earnest Lee Jones, was the eldest of thirteen children born to Doc and Virgie Lee. (NOL C2 Ex. 26 at 267.) With a family of twelve children and little money from sharecropping, the Jones family lived in dismal poverty with no running water or plumbing and slept four or five to a bed. (NOL C2 Ex. 18 at 184-85; NOL C2 Ex. 20 at 213; NOL C2 Ex. 21 at 217; NOL C2 Ex. 128 at 2568; NOL C2 Ex. 4 at 42.) 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. (NOL C2 Ex. 18

at 188; NOL C2 Ex. 17 at 179.) Doc brooked no disagreement from any family member. From the time when he came home in the evening, he expected that his every whim be indulged; he expected his wife and daughters to shave him, remove his shoes and socks, and have his meals ready as he demanded. (NOL C2 Ex. 15 at 141-42; NOL C2 Ex. 17 at 179; NOL C2 Ex. 18 at 186; NOL C2 Ex. 21 at 218; NOL C2 Ex. 123 at 2478.) 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. (NOL C2 Ex. 128 at 2569-70; NOL C2 Ex. 21 at 218.)

Petitioner's mother was raised in similarly impoverished and violent circumstances in the same cluster of hamlets on the Arkansas/Missouri state line. Petitioner's maternal family was principally of mixed African American and Native American descent. Petitioner's grandmother's grandfather, John Talley, was white, and several of petitioner's great aunts and uncles were fair-skinned. (NOL C2 Ex. 22 at 229.) 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. (NOL C2 Ex. 132 at 2625-26; NOL C2 Ex. 6 at 68; NOL C2 Ex. 18 at 189-90.) Joyce was the darkest-skinned child in her family, and was not the recipient of her mother's affection, encouragement, or pride. (NOL C2 Ex. 4 at 49; NOL C2 Ex. 18 at 190.)

When Joyce was about six years old, her mother married Chester Baldwin who proved to be a violently abusive, unfaithful spouse, and father figure. (NOL C2 Ex. 22 at 234; NOL C2 Ex. 135 at 2653; NOL C2 Ex. 3 at 20-21.) During her marriage to Chester, Miss Vernice had four children: Carvis, Vernice, Delbra; and Ronnie. (NOL C2 Ex. 26 at 262, 294, 266, and 284; NOL C2 Ex. 135 at 2653.) Miss Vernice gave up Delbra, Ronnie, and Jackie for adoption when they were young children. (NOL C2 Ex. 6 at 68; NOL C2 Ex. 135 at 2654-55.) Delbra was so unhappy in her new home that the family who adopted her returned her to Miss Vernice within the year. (NOL

C2 Ex. 6 at 68.) All of the siblings were deeply scarred by their mother's abandonment of the two young children.

Miss Vernice's family looked down on petitioner's paternal family, the Jones family, in part as a result of skin color. (NOL C2 Ex. 7 at 75; NOL C2 Ex. 123 at 2479; NOL C2 Ex. 135 at 2655.) When Joyce became pregnant with Gloria, her mother was furious because Earnest Lee is dark-skinned. (NOL C2 Ex. 132 at 2625-26.) The families sat down and fought over what should be done. (NOL C2 Ex. 4 at 50.) Miss Vernice's brother L.J. did not approve of the relationship. (NOL C2 Ex. 135 at 2655; NOL C2 Ex. 7 at 75; NOL C2 Ex. 8 at 81.) L.J. planned to send Gloria away when they saw that her skin was dark. Before this plan could succeed, L.J. died suddenly. (NOL C2 Ex. 7 at 75; NOL C2 Ex. 124 at 2499.)

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. (NOL C2 Ex. 18 at 186; NOL C2 Ex. 4 at 43.) Joyce was raised by a mentally ill, physically abusive, irrational mother who beat her, cursed at her and treated her more like a maid than a daughter. (NOL C2 Ex. 4 at 50; NOL C2 Ex. 18 at 190-91; NOL C2 Ex. 21 at 219.) When petitioner's parents had their own family, they 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. Petitioner was exposed to physical and psychological violence from birth. 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. (NOL C2 Ex. 124 at 2502.) His parents did not speak to each other in a regular voice, they yelled at each other. (NOL C2 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. (NOL C2 Ex. 155 at 2771; NOL C2 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. (NOL C2 Ex. 178 at 3111.) 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. (NOL C2 Ex. 18 at 195-96; NOL C2 Ex. 124 at 2501; NOL C2 Ex. 4 at 55.)

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. (NOL C2 Ex. 155 at 2768.) The family did not talk things over; if someone was upset, there was a fight. (NOL C2 Ex. 132 at 2629.) After the fight, no one talked about that either. Everyone acted as though nothing had happened. (NOL C2 Ex. 132 at 2631.)

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. (NOL C2 Ex. 16 at 154.) Joyce was ceaselessly angry about Earnest Lee's affairs, at the same time she was having her own. (NOL C2 Ex. 123 at 2482; NOL C2 Ex. 124 at 2503, 2512.) 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. (NOL C2 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. (NOL C2 Ex. 124 at 2527-28; NOL C2 Ex. 132 at 2630; NOL C2 Ex. 131 at 2608; NOL C2 Ex. 178 at 3136; NOL C2 Ex. 88 at 1795.)

Still other times, petitioner's mother went after Earnest Lee's girlfriends directly, cursing and beating them, or smashing their cars or homes. (NOL C2 Ex. 132 at 2630; NOL C2 Ex. 16 at 155; NOL C2 Ex. 128 at 2577; NOL C2 Ex. 145 at 2711; NOL C2 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. (NOL C2 Ex. 135 at 2660-61; NOL C2 Ex. 132 at 2630; NOL C2 Ex. 131 at 2606-07; NOL C2 Ex. 16 at 155.)

Petitioner's father's violence against his wife was likewise linked to his anger over her sexual transgressions. 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. (NOL C2 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 the door 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. (NOL C2 Ex. 124 at 2514-15; NOL C2 Ex. 123 at 2484-85.) A neighbor who witnessed part of the fight was awakened by breaking glass and yelling. (NOL C2 Ex. 155 at 2768.) Before petitioner's mother was taken to 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. (NOL C2 Ex. 124 at 2515; NOL C2 Ex. 16 at 152; NOL C2 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. (NOL C2 Ex.124 at 2515-16.)

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. (NOL C2 Ex. 124 at 2516.) This one event changed not only the marital landscape, but also forever tainted the mother-son relationship. Petitioner's mother blamed, and never forgave, petitioner for unlocking the door that night for his father. (NOL C2 Ex. 123 at 2484-85.) As he grew up, his mother singled out petitioner for abuse and punishment. (NOL C2 Ex. 124 at 2513; NOL C2 Ex. 123 at 2495.)

After this incident, 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. (NOL C2 Ex. 145 at 2710-11.) The apartment was too small for any children to escape the fighting while inside. (NOL C2 Ex. 135 at 2660.) When the fighting exploded, the younger children looked to the older children to protect them from harm's way. (NOL C2 Ex. 128 at 2577; NOL C2 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." (NOL C2 Ex. 178 at 3110.)

Petitioner's parents constantly were angry with one another, and became enraged over the most minor of events. (NOL C2 Ex. 146 at 2713.) Joyce fought

using any close at hand household object—such as, knives, dishes, pots and pans, and heavy, deadly marble ashtrays—as a weapon. (NOL C2 Ex. 18 at 194-95; NOL C2 Ex. 132 at 2629; NOL C2 Ex. 25 at 250; NOL C2 Ex. 16 at 155; NOL C2 Ex. 124 at 2502, 2512, 2521; NOL C2 Ex. 123 at 2483; NOL C2 Ex. 128 at 2578.) Even in the violent and frightening neighborhood where they lived, the battles between petitioner's father and mother stood out. (NOL C2 Ex. 132 at 2628; NOL C2 Ex. 131 at 2606; NOL C2 Ex. 178 at 3108-10.) They fought as if they were fighting to the death. (NOL C2 Ex. 124 at 2502.) Their fights were so loud people could sometimes hear the physical blows, not just the screaming. (NOL C2 Ex. 132 at 2629.) 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. (NOL C2 Ex. 124 at 2521; NOL C2 Ex. 132 at 2629; NOL C2 Ex. 147 at 2718.) The family lost more than one apartment because of their parents' violence. (NOL C2 Ex. 132 at 2628.) This deadly cycle of violence was exacerbated by their alcoholism, and they were almost always drunk. (NOL C2 Ex. 131 at 2604; NOL C2 Ex. 132 at 2629; NOL C2 Ex. 124 at 2502.)

Petitioner's parents regularly took out their anger on their children and turned their attention to their children to punish them. (NOL C2 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. (NOL C2 Ex. 143 at 2701; NOL C2 Ex. 145 at 2711.)

Petitioner's mother in particular singled out petitioner for her most constant physical assaults, which could come at any time, without warning. (NOL C2 Ex. 124 at 2513; NOL C2 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. (NOL C2 Ex. 124 at 2513; NOL C2 Ex. 21 at 221; NOL C2 Ex. 123 at 2489; NOL C2 Ex. 128 at 2576; NOL C2 Ex. 155 at 2770-71.) Her mentally ill,

irrational behavior and her alcoholism made her a random, violent, and unpredictable assailant. (NOL C2 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. (NOL C2 Ex. 155 at 2770-71.)

Joyce rained down curses and screamed at her children from the moment they walked in the door until the moment they left the house. (NOL C2 Ex. 16 at 157.) She called her children "bitches," "bastards," "whores," "motherf---ers," and other derogatory words. (NOL C2 Ex. 25 at 251; NOL C2 Ex.143 at 2702; NOL C2 Ex. 123 at 2486; NOL C2 Ex. 18 at 194.)

Joyce spent her days "drinking beer, smoking cigarettes, cleaning, and screaming at her children." (NOL C2 Ex.155 at 2766.) Joyce's alcoholism amplified her mental illness. (NOL C2 Ex. 152 at 2740.) She angered easily, even asking her to repeat an instruction could trigger one of her vicious, obscenity-laden diatribes or a beating. (NOL C2 Ex. 143 at 2702; NOL C2 Ex. 155 at 2771.)

Petitioner's father was equally uncompromising in his verbal assaults. Petitioner's father, though not progressing past the fifth grade himself, often screamed at the children that they were dumb and stupid. (NOL C2 Ex. 16 at 144; NOL C2 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. (NOL C2 Ex. 132 at 2636-37.)

Petitioner's father was brutal physically as well. He beat the children with belts, extension cords, and his fists. (NOL C2 Ex. 16 at 155; NOL C2 Ex. 124 at 2502.) Petitioner's father made petitioner strip naked before he beat him bloody with a belt. (NOL C2 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. (NOL C2 Ex. 124 at 2518; NOL C2 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. (NOL C2 Ex. 2 at 16, 18; NOL C2 Ex. 20 at 216; NOL C2 Ex. 16 at 147.)

Earnest Lee ranted that Joyce was a terrible mother, a "bitch" and a "whore," from the time petitioner was a little boy. In order to provide "leadership," petitioner's father convened "family meetings," often in the middle of the night, the agenda of which was exclusively their mother's bad character. (NOL C2 Ex. 124 at 2503; NOL C2 Ex. 8 at 87.) The meetings could last for hours, and when the children fell asleep their father would wake them up again. 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. When petitioner's father was displeased with them for falling asleep during the meeting, or for some other reason, he sent them to school without lunch money or a bus pass. (NOL C2 Ex. 124 at 2517-18.)

For petitioner, the tentacles of violence reached far beyond his mother and father. Petitioner was also subject to physical abuse at the hands of his siblings, other mentally ill relatives, and neighbors. 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." (NOL C2 Ex. 155 at 2765; *see also* NOL C2 Ex. 152 at 2741-42.) The constant violence resulted in a persistent state of agitation, anxiety, and emotional overload for petitioner.

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. (NOL C2 Ex. 132 at 2635; NOL C2 Ex. 124 at 2532.) Carl became another bully like their father Earnest Lee, and a fighter like both his mother and father. (NOL C2 Ex. 142 at 2699; NOL C2 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. (NOL C2 Ex. 126 at 2561; NOL C2 Ex. 142 at 2699. Carl

was so out of control that he even burglarized his own relatives. (NOL C2 Ex. 156 at 2778-79; NOL C2 Ex. 155 at 2773.)

At home, Carl took over his father's role of ordering his family around, and expecting them to follow his rules. (NOL C2 Ex. 152 at 2741-42.) He acted just like Earnest Lee: he wanted everyone to take his orders, but did nothing fatherly or affectionate. (NOL C2 Ex. 152 at 2742.) Carl beat up petitioner, who always lost those fights, and tried to avoid the fight until Carl forced him to defend himself. (NOL C2 Ex. 155 at 2771.) Typically, petitioner emerged from those fights with a bloody mouth or nose. (NOL C2 Ex. 2 at 13). Carl was "very mean" to petitioner, yet petitioner revered his brother and did not treat Carl badly. (NOL C2 Ex. 156 at 2778.) 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. (NOL C2 Ex. 134 at 2650-51; NOL C2 Ex. 126 at 2560; NOL C2 Ex. 124 at 2537.)

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. On his father's side, both his paternal grandparents, petitioner's father, and most of petitioner's paternal aunts and uncles were alcoholics. (See, *e.g.*, NOL C2 Ex. 123 at 2492-94; NOL C2 Ex. 128 at 2574; NOL C2 Ex. 131 at 2614-15; NOL C2 Ex. 1 at 6; NOL C2 Ex. 2 at 14-15; NOL C2 Ex. 115 at 2365-76.) Several of petitioner's paternal aunts and uncles also succumbed to drugs, or both, often as early as their pre-teenage years. (NOL C2 Ex. 18 at 187; NOL C2 Ex. 128 at 2573, 2579; NOL C2 Ex. 123 at 2492-93; NOL C2 Ex. 3 at 35; NOL C2 Ex. 131 at 2614-15.)

On the maternal side of petitioner's family, a number of family members also abused alcohol and drugs. Petitioner's maternal grandmother kept jugs of homemade

wine in her living room. (NOL C2 Ex. 11 at 103.) Alcohol-related diseases were contributing conditions to the death of Miss Vernice's brothers, William and Charles. (NOL C2 Ex. 27 at 313; NOL C2 Ex. 157 at 2780.) Petitioner's maternal uncle, Carvis, and maternal aunt Delbra were both alcoholics. (NOL C2 Ex. 3 at 33; NOL C2 Ex. 124 at 2547; NOL C2 Ex. 129 at 2593; NOL C2 Ex. 168 at 3027 NOL C2 Ex. 124 at 2547; NOL C2 Ex. 27 at 304; NOL C2 Ex. 135 at 2653; NOL C2 Ex. 21 at 222.) 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. (NOL C2 Ex. 44 at 885.) Ronnie died at thirty-five of complications related to AIDS. (NOL C2 Ex. 27 at 311.1; NOL C2 Ex. 3 at 34.) Petitioner's maternal aunt, Jackie, quickly became addicted to drugs when she moved to Los Angeles. (NOL C2 Ex. 21 at 223; NOL C2 Ex. 129 at 2588.) Jackie freebased cocaine and used PCP. (NOL C2 Ex. 3 at 35; NOL C2 Ex. 16 at 173.) Not long after this, she shot herself in the head using her brother Carvis's gun. (NOL C2 Ex. 21 at 224.)

Most of petitioner's family members have relied on self-medicating the symptoms of mental dysfunction and long-term effects of traumatization through the use and abuse of alcohol or drugs. Petitioner's 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. (NOL C2 Ex. 21 at 221.) Petitioner and his siblings watched his father drink constantly. While Joyce loved beer, Earnest Lee drank hard liquor and "[i]t got to the point where he drank gin like it was water." (NOL C2 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. (NOL C2 Ex. 8 at 87; NOL C2 Ex. 145 at 2710; NOL C2 Ex. 123 at 2487.) Of the jobs he did secure, he lost at least three of them due to his drinking; eventually, he could not hold a job at all. (NOL C2 Ex. 145 at 2710.) Due to alcoholism, he often cannot remember events from his own children's upbringing. (NOL C2 Ex. 124 at 2501.)

Petitioner's mother's alcoholism was chronic and extreme. She drank from morning to night and at all hours in between, and throughout her pregnancies. (NOL C2 Ex. 146 at 2714; NOL C2 Ex. 18 at 195, 196; NOL C2 Ex. 155 at 2766-67; NOL C2 Ex. 124 at 2523.) When she drank, she became loud, vulgar, angry, violent, and frequently irrational. (NOL C2 Ex. 152 at 2740; NOL C2 Ex. 21 at 221; NOL C2 Ex. 18 at 195-96; NOL C2 Ex. 145 at 2710; NOL C2 Ex. 143 at 2702.) 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. "She used food stamps to buy something small at a store so that she could use the change to buy beer." (NOL C2 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. (NOL C2 Ex. 21 at 222.) Petitioner would try to get his mother to come home when he found her drunk out on the street. (NOL C2 Ex. 131 at 2612.) Often, she was so inebriated she urinated all over herself, leaving the children to clean up after her. (NOL C2 Ex. 123 at 2488; NOL C2 Ex. 126 at 2560.) Joyce drank until she died. (NOL C2 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. (NOL C2 Ex. 124 at 2545.)

Several of petitioner's siblings have recurrent and often severe problems with drug and alcohol abuse. (NOL C2 Ex. 131 at 2621; NOL C2 Ex. 21 at 228.) Petitioner's sister, Jean, started using drugs in the 1970s. Jean was addicted to marijuana laced with PCP; she smoked even more PCP after Carl was murdered. (NOL C2 Ex. 152 at 2741.) In addition to her drug addiction, Jean also has a history of chronic alcoholism. (NOL C2 Ex. 146 at 2716; NOL C2 Ex. 163 at 2961-65; NOL C2 Ex. 164 at 2980.) 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. (NOL C2

Ex.143 at 2703-04; NOL C2 Ex. 145 at 2712; NOL C2 Ex. 124 at 2549.) Gloria also drinks to excess, and has been arrested for Driving Under the Influence. (NOL C2 Ex. 2 at 17.)

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. (NOL C2 Ex. 134 at 2650; NOL C2 Ex. 16 at 164; NOL C2 Ex. 131 at 2610; NOL C2 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. (NOL C2 Ex. 16 at 164; NOL C2 Ex. 132 at 2638; NOL C2 Ex. 126 at 2561-62.)

The constant traumas petitioner experienced did not end at the Jones's family doorstep. The neighborhood where petitioner grew up was blighted by poverty, violence, street crime, drugs, and gangs. Growing up, petitioner's neighborhood in and around the Eighth Avenue section of South Central Los Angeles, where his family most often resided, was violent, gang-ridden, and drug-infested. (NOL C2 Ex. 25 at 251.) Shootings, stabbings, police helicopters, and police sirens were routinely seen and heard. (NOL C2 Ex. 151 at 2737; NOL C2 Ex. 134 at 2648; NOL C2 Ex. 124 at 2526.) As a child, petitioner watched, stunned, as a neighbor shot her husband five times in the chest point blank with a .22 caliber pistol. (NOL C2 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. (NOL C2 Ex. 134 at 2649-59; NOL C2 Ex. 153 at 2744; NOL C2 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. (NOL C2 Ex. 178 at 3138-39.)

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. (NOL C2 Ex. 142 at 2700.) 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. (NOL C2 Ex. 151 at 2737.) A few blocks east of petitioner's neighborhood, between Vernon and Florence Streets, gang members congregated and confronted one another. Drive-by shootings and other killings occurred more frequently there. (NOL C2 Ex. 152 at 2741.)

Petitioner suffered from devastating neglect, abuse, and extreme poverty from the time he was an infant. As early as 1966, following the birth of Casssandra, petitioner's mother showed little sign of any desire to parent. (NOL C2 Ex. 124 at 2504-05.) 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. (NOL C2 Ex. 132 at 2714.) 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. (NOL C2 Ex. 135 at 2659; NOL C2 Ex. 124 at 2505.) 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. (NOL C2 Ex. 18 at 198; NOL C2 Ex. 135 at 2659; NOL C2 Ex. 21 at 221.) From approximately 1971, petitioner's father no longer permanently lived with the family. (NOL C2 Ex. 124 at 2521.) However, he came by to see them, and when he did, he usually caused trouble. (NOL C2 Ex. 155 at 2770; NOL C2 Ex. 128 at 2576; NOL C2 Ex. 88 at 1796; NOL C2 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. (NOL C2 Ex. 124 at 2534; NOL C2 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. (NOL C2 Ex. 132 at 2633.) While he was gone the family's only income was from Joyce's welfare checks, which she spent on alcohol. (NOL C2 Ex. 123 at 2488; NOL C2 Ex. 131 at 2610.) Occasionally, Earnest Lee sent money to Cassandra, but not to anyone else, because she was his special daughter. (NOL C2 Ex. 124 at 2530; NOL C2 Ex. 131 at 2610.) 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. (NOL C2 Ex. 147 at 2719.) Neighbors knew of their plight and often let the Jones children eat a meal with them. (NOL C2 Ex. 126 at 2560.) As a teenager, petitioner and his younger siblings often lacked electricity. (NOL C2 Ex. 135 at 2661.) When the electricity was turned off due to unpaid utility bills, they ran extension cords from a neighbor's apartment in order to run appliances and have light. (NOL C2 Ex. 126 at 2560.) 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. (NOL C2 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. (NOL C2 Ex. 16 at 163-64; NOL C2 Ex. 131 at 2610.)

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. (NOL C2 Ex. 132 at 2628; NOL C2 Ex. 124 at 2523-24.) The family moved constantly; sometimes petitioner's father lived with them, and sometimes he did not. (NOL C2 Ex. 124 at 2503; NOL C2 Ex. 178 at 3112.) At several points during petitioner's childhood, his family had no place to live. When this happened, the children were often split up among various

relatives and friends, for days, weeks, or months at a time. (NOL C2 Ex. 124 at 2523.) Petitioner sometimes stayed with his aunt, Geraldine, at least once for a number of months, but inevitably, his mother would make him return home so she could keep receiving welfare. (NOL C2 Ex. 123 at 2495-96.)

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. (NOL C2 Ex. 135 at 2661.) Petitioner moved from place to place, and often had to find his own place to live. (NOL C2 Ex. 135 at 2661; NOL C2 Ex. 14 at 134.) Prior to the death of his brother Carl, petitioner went to live with his Uncle Thomas and his wife, Kim Jones, for several months. (NOL C2 Ex. 124 at 2539.) Just before petitioner's arrest for assaulting Mrs. Harris, petitioner, his father, and sister slept on the floor of Thomas's auto shop. (NOL C2 Ex. 16 at 167.)

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. (NOL C2 Ex. 124 at 2501; NOL C2 Ex. 4 at 55; NOL C2 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 (NOL C2 Ex. 124 at 2512; NOL C2 Ex. 29 at 345), and the physical abuse suffered at the hands of family members (NOL C2 Ex. 155 at 2769; NOL C2 Ex. 21 at 221; NOL C2 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. (NOL C2 Ex. 16 at 147-48; NOL C2 Ex. 124 at 2511-12.)

Petitioner exhibited other classic signs of organic impairment early in his life. He was a clumsy little boy, always running or bumping into things. (NOL C2 Ex. 16

at 146.) Growing up, some of his friends noticed he had a strange speech pattern and that his language was not fluid. (NOL C2 Ex. 148 at 2727; *see also* NOL C2 Ex. 149 at 2728.) In addition to language, 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. (NOL C2 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 beat him. (NOL C2 Ex. 16 at 146; NOL C2 Ex. 178 at 3132.)

As a boy, petitioner was curious about how things worked, and took things apart, but was unable to reassemble them. (NOL C2 Ex. 124 at 2513; NOL C2 Ex. 155 at 2775; NOL C2 Ex. 8 at 85; NOL C2 Ex. 132 at 2637; NOL C2 Ex. 131 at 2609.) Petitioner's mother's response to these failures was to beat him. (NOL C2 Ex. 124 at 2513.) This curiosity persisted into adulthood, but petitioner never mastered the skills necessary to put things back together. (NOL C2 Ex. 124 at 2539.)

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. (NOL C2 Ex. 16 at 145.) 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. (NOL C2 Ex. 8 at 85.) 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. (NOL C2 Ex. 21 at 226; NOL C2 Ex. 10 at 97.)

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. (NOL C2 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. (NOL C2 Ex. 125 at 2552; NOL C2 Ex. 51 at 1159.) He also showed weaknesses in vocabulary, description and comprehension, visual memory, perceptual discrimination, spatial relationships and psychomotor coordination. (NOL C2 Ex. 51 at 1158.)

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. (NOL C2 Ex. 125 at 2552-53; NOL C2 Ex. 50 at 1104.)

Petitioner did not learn how to write his own name until the third grade. (NOL C2 Ex. 16 at 145.) After three years in the EMR program, petitioner was found ineligible for Special Education classes based solely upon IQ test scores, despite his significant lag on achievement tests. (NOL C2 Ex. 130 at 2600; NOL C2 Ex. 125 at 2553-54.) Petitioner was returned to the fourth grade into the larger, mainstream classes where he faltered again, and achieved no real success in school after that. (NOL C2 Ex. 130 at 2600.)

By the fifth grade, he was still having trouble reading whole sentences while his sister Cassandra, his junior by two years, was reading books. (NOL C2 Ex. 132 at 2636-37.) He received remedial reading in both the fifth and sixth grades. (NOL C2 Ex. 125 at 2554.) He was markedly below average in all academic subjects, which caused him a great deal of frustration. (NOL C2 Ex. 125 at 2554.) By the end of elementary school, petitioner's signs of distress were apparent in his grades and his behavior. (NOL C2 Ex. 125 at 2557.)

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. (NOL C2 Ex. 16 at 146, 175; NOL C2 Ex. 131 at 2609.) Others noticed that petitioner was not as mature or as smart as his siblings (NOL C2 Ex. 143 at 2703), and was, generally, mentally slower than children his age (NOL C2 Ex. 16 at 147). He played with his much younger cousin as if he was his peer. (NOL C2 Ex. 123 at 2491-92.) Children in the neighborhood took advantage of his gullibility and used him as a foil to their schemes. (NOL C2 Ex. 16 at 148-49.)

Petitioner 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. (NOL C2 Ex. 14 at 134; NOL C2 Ex. 123 at 2486; NOL C2 Ex. 131 at 2610.) At Horace Mann Junior High School, where he attended the seventh and part of the 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. (NOL C2 Ex. 124 at 2525-26; NOL C2 Ex. 134 at 2649; NOL C2 Ex. 155 at 2772, 2774.)

From his first semester in seventh grade, petitioner's academic performance deteriorated. 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. (NOL C2 Ex. 125 at 2557-58.)

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. (NOL C2 Ex. 130 at 2601; NOL C2 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. (NOL C2 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. (NOL C2 Ex. 125 at 2556; NOL C2 Ex. 51 at 1154.)

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. (NOL C2 Ex. 125 at 2556-57; NOL C2 Ex. 14 at 133-34.)

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. (NOL C2 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. (NOL C2 Ex. 16 at 163-64.)

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. (NOL C2 Ex. 16 at 147-48; NOL C2 Ex. 124 at 2511.) As he got into his teens and as an adult, he often misinterpreted behavior and interactions with women. (NOL C2 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. (NOL C2 Ex. 147 at 2723.)

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." (NOL C2 Ex. 175 at 3072.)

In addition to organic brain damage, petitioner suffers from a severe and debilitating mental illness, and exhibits symptoms consistent with exposure to chronic trauma. 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. (NOL C2 Ex. 155 at 2765.) Practically from birth, petitioner often seemed to be "not there," with no one paying much attention to him at all, he was the "invisible child." (NOL C2 Ex. 146 at 2715.)

Petitioner began exhibiting signs of mental impairment when he was barely a toddler. 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." (NOL C2 Ex. 124 at 2508.) 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. (NOL C2 Ex. 124 at 2508; NOL C2 Ex. 16 at 146.) Petitioner exhibited early signs of paranoid tendencies, expressing irrational fears, sleep disturbances, and heightened anxiety. (NOL C2 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. (NOL C2 Ex. 16 at 147.) Rather than address petitioner's emerging mental health problems, his caretakers aggravated their effect on him. Petitioner's Uncle Carvis used to lock petitioner in the closet, telling him 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. (NOL C2 Ex. 124 at 2508-09; NOL C2 Ex. 16 at 147.)

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. (NOL C2 Ex. 178 at 3116.) Petitioner also experienced constant and terrifying nightmares all throughout his childhood, including one dream where he was being chased by a dark presence. (NOL C2 Ex. 178 at 3116.) Petitioner woke up screaming and yelling from these nightmares; they became so frequent that his parents ignored his screams. (NOL C2 Ex. 16 at 146; NOL C2 Ex. 178 at 3115-16; NOL C2 Ex. 123 at 2496.)

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. (NOL C2 Ex. 178 at 3118.) Neighbors could see petitioner's struggle, and his dissociation.

> Meso 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.

(NOL C2 Ex. 152 at 2742.)

Even when engaged in some other activity, petitioner could not stop the dissociative process: witnesses sometimes described this as petitioner being "lost in his own thoughts" or having a "glazed expression" (NOL C2 Ex.142 at 2700; NOL C2 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. (NOL C2 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. (NOL C2 Ex. 16 at 148; NOL C2 Ex. 1 at 2.)

As a young boy and as a young man, numerous witnesses describe petitioner as quiet, sweet, kind, polite, respectful and shy. (NOL C2 Ex. 142 at 2699; NOL C2 Ex. 14 at 132; NOL C2 Ex. 126 at 2563; NOL C2 Ex. 132 at 2635; NOL C2 Ex. 16 at 147; NOL C2 Ex. 149 at 2728.) Unlike any of his siblings, he was a "homebody" who kept to himself. He stayed close to wherever he was living, watching television or helping out in the house. (NOL C2 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. (NOL C2 Ex. 147 at 2723.) He did not initiate conversations but would speak when spoken to. (NOL C2 Ex. 147 at 2722.) His demeanor stood out because he was a very serious little boy, thinking rather than taking much interest in having fun. (NOL C2 Ex. 151 at 2735.) 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. (NOL C2 Ex. 151 at 2737.)

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. (NOL C2 Ex. 124 at 2511.) 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. (NOL C2 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. (NOL C2 Ex. 51 at 1164; NOL C2 Ex. 50 at 1116.)

Petitioner also 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. (NOL C2 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. (NOL C2 Ex. 124 at 2527.)

Petitioner was uncomfortable in groups, or around strangers, unsure of how to behave. (NOL C2 Ex. 123 at 2497.) He spent most of his time alone, and did not have a lot of friends, but treasured those he had. (NOL C2 Ex. 149 at 2728; NOL C2 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. (NOL C2 Ex. 142 at 2699; NOL C2 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 talk about, let alone seek assistance, for his pain. (NOL C2 Ex. 151 at 2736.) Even when his own brother Carl beat him up, petitioner acted like nothing bad had happened. (NOL C2 Ex. 143 at 2704.) At most, he "acted like he had a lot on his mind." (NOL C2 Ex. 151 at 2736.)

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. (NOL C2 Ex. 124 at 2527.) Overhearing conversations and his parent's fights was the only way the issue was ever raised to him. (NOL C2 Ex. 123 at 2496-97; NOL C2 Ex. 128 at 2579; NOL C2 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. (NOL C2 Ex. 8 at 82.) Earnest Lee did not want to accept that petitioner was not his son (NOL C2 Ex. 135 at 2658), and the prospect upset him enough that he avoided the topic with petitioner. (NOL C2 Ex. 147 at 2719.)

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. (NOL C2 Ex. 124 at 2529-30, 2539; NOL C2 Ex. 131 at 2615.) Drugs or alcohol did not induce these altered states of consciousness. (NOL C2 Ex. 124 at 2530; NOL C2 Ex. 147 at 2722.)

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. (NOL C2 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. (NOL C2 Ex. 178 at 3143.)

The death of petitioner's older brother, Carl, was another blow to petitioner's already fragile mental condition. (NOL C2 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. (NOL C2 Ex. 124 at 2526, 2540; NOL C2 Ex. 131 at 2615; NOL C2 Ex. 27 at 300.) Carl's body lay in the street for several 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. (NOL C2 Ex. 123 at 2491; NOL C2 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. (NOL C2 Ex. 131 at 2615.) Although this tragedy affected everyone in the family, petitioner seemed to suffer the most. (NOL C2 Ex. 3 at 28.) For a long time afterwards, he was agitated, trying to figure out who had done this. (NOL C2 Ex. 135 at 2665; NOL C2 Ex. 16 at 167.)

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. (NOL C2 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.

(NOL C2 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*.)

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. (NOL C2 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. (NOL C2 Ex. 14 at 135.) After a barbecue, Ernest and Kim Jackson went back to her apartment and smoked marijuana and talked about Carl. (NOL C2 Ex. 102 at 2009-11, 2032, 2065, 2080; NOL C2 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. (NOL C2 Ex. 102 at 2033, 2068-69.) Petitioner turned himself into the police. (NOL C2 Ex. 14 at 135.) Immediately following his arrest, petitioner was taken to Beverly Hills Medical Center by LAPD officers, complaining of transient memory loss. (NOL C2 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. (NOL C2 Ex. 102 at 2034.) Petitioner was sentenced to 104 days jail time and ordered to cooperate with the probation department for mental health treatment. (NOL C2 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. (NOL C2 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. (NOL C2 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. (NOL C2 Ex. 21 at 226; NOL C2 Ex. 124 at 2542-43.) Petitioner did not receive the medical treatment he needed for his severe mental disorders. (NOL C2 Ex. 178 at 3146.)

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. (NOL C2 Ex. 14 at 134-35; NOL C2 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. (NOL C2 Ex. 14 at 136.) Petitioner had

dissociative episodes and heard voices telling him to do things when no one else was in the room. (NOL C2 Ex. 14 at 137.) He could not find a job and as his relationship faltered, his paranoia deepened, and he believed that Glynnis and her mother were plotting against him. (NOL C2 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. (NOL C2 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. (NOL C2 Ex. 14 at 137; NOL C2 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. (NOL C2 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. (NOL C2 Ex. 16 at 167-68.)

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. (NOL C2 Ex. 178 at 3147.)

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. (NOL C2 Ex. 83 at 1691; NOL C2 Ex. 84 at 1694-95.) During his evaluation, petitioner was noted to have experienced symptoms consistent with delusional thoughts and dissociation. (NOL C2 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.[36] (NOL C2 Ex. 10 at 97.) Petitioner was not placed in a mental health treatment program nor did he receive mental health treatment during his incarceration.

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. (NOL C2 Ex. 135 at 2666; NOL C2 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. (NOL C2 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. 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. (NOL C2 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. (NOL C2 Ex. 10 at 98.)

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

[36] *See, e.g.*, Declaration of Jimmy Camel, Ex. C at 15; Declaration of Larry Williams, Ex. B at 10.

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. (NOL C2 Ex. 21 at 227; NOL C2 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, as if 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. (NOL C2 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. (NOL C2 Ex. 21 at 227.) 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. (NOL C2 Ex. 21 at 227.)

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. (NOL C2 Ex. 10 at 99.) His paranoia increased, and he began taping telephone conversations. His sister Gloria recalls that he played a 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." (NOL C2 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. (NOL C2 Ex. 124 at 2544.) The day before he was arrested, his conversations were nonsensical. When asked if he was okay, Ernest 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.

(NOL C2 Ex. 10 at 99-100.)

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. (NOL C2 Ex. 178 at 3156-57; NOL C2 Ex. 154 at 2754-55.)

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. A neighbor who remembered petitioner as a "quiet, gentle child" explained, "I was not too surprised when I found out the victim was his girlfriend's mother. Meso 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." (NOL C2 Ex. 152 at 2742-43.)

On the night of the murder, during the car chase that ensued, petitioner heard multiple voices telling him to kill himself. (NOL C2 Ex. 178 at 3150.) Overcome with guilt and shame, petitioner shot himself in the chest. (NOL C2 Ex. 154 at 2752; NOL C2 Ex. 178 at 3156.)

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 Hadol for hearing voices. (NOL C2 Ex. 33 at 647.) Petitioner received the Haldol and Cogentin for sixteen months, but immediately prior to trial these medications were abruptly discontinued. (NOL C2 Ex. 33 at 596-620; NOL C2 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. (NOL C2 Ex. 34 at 690, 678-85.)

Although petitioner grew up in a violent environment with fighting all around him, he was not a fighter. (NOL C2 Ex. 16 at 147.) 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. (NOL C2 Ex. 2 at 13; NOL C2 Ex. 132 at 2635.) Petitioner also tried hard to be obedient, and respectful; he was always respectful to his parents even when they were drinking and acting in ways that did not demand respect. (NOL C2 Ex. 21 at 228; NOL C2 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. (NOL C2 Ex. 14 at 132.)

Petitioner participated in athletics and football at school, even though he was not a natural athlete. (NOL C2 Ex. 124 at 2532; NOL C2 Ex. 155 at 2774; NOL C2 Ex. 21 at 226; NOL C2 Ex. 16 at 150; NOL C2 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. (NOL C2 Ex. 16 at 150; NOL C2 Ex. 124 at 2538.). Then, he suffered an injury and could no longer play. (NOL C2 Ex. 21 at 226; NOL C2 Ex. 8 at 86.) Being unable to play football was devastating to petitioner because he was not good at many things: after his injury, what he perceived as his "only chance to succeed at something [] vanished." (NOL C2 Ex. 16 at 150-51.)

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. (NOL C2 Ex. 126 at 2563; NOL C2 Ex. 14 at 133-34.) However, petitioner persevered at school despite attending numerous schools and having inconsistent attendance.[37] 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. (NOL C2 Ex. 16 at 145; NOL C2 Ex. 14 at 133-34; NOL C2 Ex. 124 at 2538.) By the time 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. (NOL C2 Ex. 14 at 133; NOL C2 Ex. 131 at 2610; NOL C2 Ex. 2 at 14; NOL C2 Ex. 178 at 3133-34.)

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. (NOL C2 Ex. 132 at 2638; NOL C2 Ex. 16 at 151; NOL C2 Ex. 142 at 2700; NOL C2 Ex. 134 at 2651; NOL C2 Ex. 123 at 2495-96; NOL C2 Ex. 126 at 2563; NOL C2 Ex. 102 at 2026.)

Petitioner was a loyal and devoted friend to the few friends he had. (NOL C2 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. (NOL C2 Ex. 151 at 2735-36.)

[37] Petitioner attended two elementary schools, four junior high schools, and three high schools. (NOL C2 Ex. 125 at 2557-58.) In the sixth grade he was absent sixty days and in fourth grade he missed twenty-three days of school. (NOL C2 Ex. 130 at 2602-03.)

Although she was new to the school, petitioner made her feel safe there. (NOL C2 Ex. 151 at 2736.)

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. (NOL C2 Ex. 146 at 2717; NOL C2 Ex. 147 at 2723; NOL C2 Ex. 148 at 2725; NOL C2 Ex. 149 at 2728; NOL C2 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. (NOL C2 Ex. 148 at 2725.) His female friends felt protected and taken care of when they were with him. (NOL C2 Ex. 149 at 2728.)

Many witnesses noted that the incidents involving Ms. Jackson and Mrs. Harris were uncharacteristic for petitioner, and were shocked by his arrest. (NOL C2 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. (NOL C2 Ex. 84 at 1695.) However, without support petitioner simply lacked the skills and ability to seek out resources himself, and his family was unwilling or incapable of assisting him in getting appropriate treatment for his multiple mental impairments. (NOL C2 Ex. 135 at 2666; NOL C2 Ex. 10 at 98.)

In addition to failing to locate the numerous witnesses that would have provided the jury with this compelling mitigation, 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 failing to discover compelling mitigation evidence.[38] A reasonable attorney would have obtained these records, or at minimum, obtained records of which he was aware, or should have been aware existed. For

[38] As with the social history investigation, trial counsel handed over the responsibility of obtaining and reviewing social history records to the defense paralegal. (NOL C2 Ex. 12 at 105; NOL C2 Ex. 19 at 203.)

example, trial counsel knew that petitioner's grandfather, Doc, had been institutionalized on account of some mental problems but never tried to obtain the records. Had trial counsel obtained the records he could have presented evidence that Doc's father filed a charge of insanity against him and that after his arrest, Doc was examined by a doctor and found to be insane. (NOL C2 Ex. 108 at 2258.) During his stay in hospital, he was also diagnosed with syphilis. (NOL C2 Ex. 42 at 832.)

Trial counsel also knew that petitioner's aunt, Jackie, had committed suicide but failed to request any records relating to this event. Had he done so, he could have presented evidence that Jackie had multiple tears or cuts on her left wrist consistent with prior suicide attempts, and that she had been depressed prior to killing herself. (NOL C2 Ex. 97 at 1848, 1950-51.)

Although trial counsel presented evidence that petitioner's mother, Joyce, was on welfare and used her welfare money to buy alcohol instead of paying her bills, trial counsel did not obtain social services records. Had he done so, he could have presented evidence that documented Joyce'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." (NOL C2 Ex. 88 at 1795.)

Examples of additional records that trial counsel should have obtained include, but are not limited to, the following:

- Childhood medical records of petitioner, indicating abuse and neglect 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." (NOL C2 Ex. 29 at 336-58.)
- Medical records of petitioner's siblings describing petitioner's mother suffering from dizziness and headaches during pregnancy, and

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- documenting neglect and abuse of the Jones children.[39]
- Medical records and court records chronicling alcoholism, substance abuse, and drunk driving with respect to various family and extended family members.[40]
- Petitioner's siblings' school records, demonstrating low intellectual functioning of several of petitioner's siblings, including referral to special education classes; vision problems; 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*.[41]
- School records of petitioner's parents and their siblings, attesting to low average intellectual functioning, as well as lack of education and difficulty progressing in school.[42]

Finally, trial counsel's failure to employ the services of a social history expert precluded the jury from understanding the severe effect that the chaotic and abusive upbringing and multiple traumas had on petitioner. Had trial counsel reasonably investigated, developed, and presented an adequate penalty phase defense based on

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[39] *See* NOL C2 Ex. 37 at 707-15; NOL C2 Ex. 40 at 815-18; NOL C2 Ex. 35 at 695-99.

[40] *See* NOL C2 Ex. 106 at 2234; NOL C2 Ex. 43 at 845; NOL C2 Ex. 45 at 891-97; NOL C2 Ex. 46 at 898; NOL C2 Ex. 44 at 885-90; NOL C2 Ex. 36 at 700-05; NOL C2 Ex. 163 at 2961-70.

[41] *See* NOL C2 Ex. 53 at 1171-73; NOL C2 Ex. 54 at 1174-1395; NOL C2 Ex. 56 at 1401-22; NOL C2 Ex. 57 at 1423-27; NOL C2 Ex. 61 at 1435-54; NOL C2 Ex.66 at 1467-86; NOL C2 Ex. 76 at 1509-20; NOL C2 Ex. 118 at 2436-51; NOL C2 Ex. 119 at 2452- 66.

[42] *See* NOL C2 Ex. 55 at 1397; NOL C2 Ex. 59 at 1429-32; NOL C2 Ex. 63 at 1463; NOL C2 Ex. 64 at 1464-65; NOL C2 Ex. 69 at 1497-500; NOL C2 Ex. 71 at 1502; NOL C2 Ex. 72 at 1503-05; NOL C2 Ex. 73 at 1506; NOL C2 Ex. 74 at 1507; NOL C2 Ex. 75 at 1508; NOL C2 Ex. 77 at 1527; NOL C2 Ex. 79 at 1676-79.

readily available evidence, presented percipient witnesses who would have testified in accordance with the above facts, and a social historian to explain the effects of these events, he would have been able to argue and the jury would have considered compelling mitigation factors.

> All of the available evidence constituted classic mitigation evidence that certainly had the potential to persuade "an objective fact-finder" that [petitioner] was, at the time of the crimes, incapable of appreciating the wrongfulness of his conduct. *Summerlin*, 427 F.3d [623, 643 (9th Cir. 2005)]. To use the Supreme Court's words, '[h]ad[a] jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. *Wiggins*, 539 U.S. at 537, 123 S. Ct. 2527'."
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> *Correll v. Ryan*, 539 F.3d 938, 954 (9th Cir. 2008).

B. Trial Counsel Rendered Ineffective Assistance for Failing to Retain, Consult, and Prepare Mental Health Experts During the Penalty Phase.

Trial counsel has a duty to conduct a thorough investigation and to present "mitigating evidence of mental impairment" during the penalty phase of a capital trial. *Bean v Calderon*, 163 F.3d 1074, 1080 (9th Cir. 1998). Failure to conduct sufficient preparation and to explain "the significance of all available [mitigating] evidence" constitutes ineffective assistance of counsel. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 399, 120 S. Ct. 1495, 1516 (2000). A trial attorney's failure to obtain and prepare a psychiatric witness constitutes deficient performance. *Bloom v. Calderon*, 132 F.3d at 1277. Moreover, trial counsel has "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). This duty extends beyond providing the expert with specific information that he requests and requires defense counsel to seek out information about a defendant's background to

bring to the attention of his experts. *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir.1999).

Petitioner will present evidence at a hearing that trial counsel failed to adequately retain and consult with appropriate experts; failed to provide experts with whom he did consult with information about petitioner's background in order for them to develop a complete picture of petitioner's mental health and cognitive functioning; failed to prepare his mental health expert to testify; failed to explain the role of mitigation in a capital trial; and failed to develop and present compelling expert testimony at the penalty phase, thereby violating petitioner's right to the effective assistance of counsel. The evidence that petitioner will present at a hearing includes, but is not limited to, the following:

1. Trial Counsel Failed To Adequately Retain, Consult, And Prepare Mental Health Experts.

As early as 1993, trial counsel knew from the nature of the crime and petitioner's prior offenses that retaining a mental health expert was of the utmost necessity. (NOL C2 Ex. 150 at 2731.) Despite this recognition, trial counsel failed to provide his experts with adequate time to conduct their evaluations or develop sufficient information to frame the correct referral question. Trial counsel did not retain Dr. Thomas until August 1994. At that time, trial counsel asked Dr. Thomas to evaluate petitioner, and in particular, 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.

(NOL C2 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.)

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; NOL C2 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. (NOL C2 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.)

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. (NOL C2 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.

(NOL C2 Ex. 154 at 2749.)

Trial counsel further unreasonably failed to prepare Dr. Thomas for his 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. (NOL C2 Ex. 154 at 2752-53.) Trial counsel's failure to apprise Dr. Thomas of petitioner's testimony, to consult with Dr. Thomas regarding petitioner's testimony, to have Dr. Thomas sit in while petitioner testified, or at a minimum, provide the doctor with petitioner's testimony, was unreasonable.

Trial counsel failed to provide his expert with materials already available to him, including the testimony of key penalty phase witnesses, such as, petitioner's father, petitioner's sister, petitioner's aunt, Mrs. Harris, and Ms. Jackson. Further, trial counsel failed to investigate, develop and convey to the expert the results of a minimally competent investigation into petitioner's history and background. 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. (NOL C2 Ex. 150 at 2733-34; NOL C2 Ex.154 at 2750.)

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.
>
> (NOL C2 Ex. 154 at 2755.)

Trial counsel failed to present to the jury many of Dr. Thomas's relevant psychiatric findings. 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 he 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.)

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. (NOL C2 Ex. 178 at 3155-56.)

Trial counsel failed to have Dr. Thomas explain and testify to the family dynamic at work during the critical telephone call between petitioner and his oldest sister Gloria on New Year's Eve, 1994.[43] He also failed to provide his expert with critical social history information to enable 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. (NOL C2 Ex. 154 at 2750-51.) Moreover, trial counsel's failure to obtain a complete copy of petitioner's jail medical records meant that he was unable to mitigate the aggravating nature of this call by showing that petitioner was not 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.

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*, 1.d.), to render "a more complete diagnosis

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[43] An explanation of the phone call would have included a discussion of the Jones family communication style, which was one of confrontation and physical violence; petitioner's poor intellectual and cognitive functioning; Gloria's role in petitioner's life as caretaker, and petitioner's ethic of family loyalty. (NOL C2 Ex. 178 at 3117, 3131, 3152-53, 3154-55; NOL C2 Ex. 151 at 2735-36; NOL C2 Ex. 16 at 149, 170; NOL C2 Ex. 152 at 2741-42; NOL C2 Ex. 124 at 2502-03, 2505; NOL C2 Ex. 146 at 2714; NOL C2 Ex. 147 at 2719; NOL C2 Ex. 175 at 3069; NOL C2 Ex. 154 at 2750, 2751, 2755-56, 2761; NOL C2 Ex. 149 at 2728; NOL C2 Ex. 24 at 245.)

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." (NOL C2 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.

2. Trial Counsel's Deficient Performance Was Prejudicial.

As trial counsel admitted, Dr. Thomas's testimony was the "cornerstone" of the penalty phase defense. (NOL C2 Ex. 12 at 110.) In fact, Dr. Thomas was the only mental health expert to testify in the penalty phase. Trial counsel's failure to prepare Dr. Thomas to testify resulted in the jury not hearing how mentally ill Mr. Jones really is. (*See id*.) More importantly, trial counsel's failure to prepare his expert and provide him with information needed to develop an accurate profile of the defendant's mental health, including records of family members and a minimally competent social history, left Dr. Thomas vulnerable on cross-examination and undermined his medical conclusions in the eyes of the jury, as evidenced by the following exchange:

> Q: Let me ask you this:
>
> If what the grandfather's illness was was [sic] related to a stress breakdown late in life, would that necessarily have been a genetic predisposition to schizophrenia?
>
> No
>
> Q: Do you have any medical records to talk about what the grandfather' s illness was?
>
> A. I don't have medical records, no.
>
> Q. Do you have any independent verification of that other than what you got from the defendant or from the other statements that were in the report?
>
> A. You mean the relative statements?
>
> Q . The relative statements.

A. No, that is purely based on that kind of information.

Q. And then with respect to the paternal aunt who committed suicide, would it make a difference if it was a maternal aunt?

A. I understood it was a maternal aunt.

Q. Would that make any difference to you?

A. It would mean the two sides of the family now contribute to the disease, not one.

Q. Would it make any difference to you under the circumstances in which the aunt committed suicide, for instance, if she had a lifetime of depression and killed her [sic] or if there was a single traumatic incident that took place just before the suicide caused her to kill herself with no hint of mental illness? Would that be important?

A. It would be important.

Q. Do you have any of those kind of details?

A. No.

30 RT 4518-19. Unquestionably, the prosecutor's attack on Dr. Thomas's lack of knowledge of basic background facts affected the jury's sentencing decision.

Similarly, had trial counsel prepared Dr. Thomas for his testimony, and provided him with petitioner's testimony and evidence corroborating petitioner's testimony, he could have anticipated the prosecutor's cross examination and explained why petitioner's actions and experiences on the night of the murder, and his subsequent testimony and recounting of those events, were consistent with someone who suffered from delusions and a thought disorder with dissociative states and not the mendacities of someone trying to build a psychiatric defense. (31 RT 4652.)

The prosecutor also argued that petitioner lacked remorse. (RT 4658-60.) Had Dr. Thomas been properly prepared, he could have explained that petitioner's lack of insight was a symptom of his mental illness. He also could have explained that

petitioner's tendency to dissociate and his appearance while he is in a dissociative state, e.g., lack of emotion or expression, or blank, staring eyes, might leave the impression that he lacked remorse.[44] Petitioner dissociated during his trial (NOL C2 Ex. 144 at 2707) and it is likely that the jury, observing his demeanor, was influenced by the prosecutor's argument, leading them to impose the death penalty because they believed that petitioner posed a future danger.

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. The jury, therefore, was not afforded the benefit of expert testimony explaining the effects that petitioner's mental impairments, which are of long-standing etiology and predated the crime, had on his ability to comprehend events, plan responses, and control his behavior, particularly during stressful situations. By explaining that petitioner's dissociation affected that part of his brain governing rational thought, rendering him incapable of forming the mental construct to make sense of what happened to him, the jury would have found that he could not form the intent to kill or rape, thereby reducing his moral culpability. There is a reasonable probability that, but for trial counsel's deficient performance, the jury would not have sentenced petitioner to death.

3. Trial Counsel Failed To Consult With, Retain And Provide Materials To Dr. William Spindell Or Obtain The Services Of Another Neuropsychologist.

Trial counsel unreasonably failed to consult with, retain, and provide materials to a competent neuropsychologist with an adequate referral question. Trial counsel unreasonably failed to provide the expert with direction as to what constituted legally cognizable mitigation in order to guide his assessment of petitioner's functioning and

[44] 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. (NOL C2 Ex. 138 at 2689.)

behavior in assisting him to prepare a defense. Petitioner will present evidence at a hearing that after Dr. Thomas recommended that neuropsychological testing be conducted, trial counsel requested and had appointed Dr. William Spindell immediately before the trial began. Trial counsel wrote to Dr. Spindell asking him to

> administer[] psychological and neuropsychological tests, and give[] me your opinion regarding the defendant's mental condition at the time of the offense. In particular, I would like to know whether you believe he 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.

With almost no time and incomplete materials, Dr. Spindell completed a partial battery of neuropsychological tests on petitioner and provided a report to trial counsel on November 11, 1994, just nineteen days before trial began. Dr. Spindell offered his diagnosis, based on the administration of the Minnesota Multiphasic Personality Inventory (MMPI), that petitioner suffered from schizophrenia. Trial counsel failed to have Dr. Spindell testify either during his case-in-chief or as a rebuttal witness. 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. (NOL C2 Ex. 150 at 2732-33.)

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, asked the neuropsychologist to investigate the possibility of organic brain damage in addition to mental illness, 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. (NOL C2 Ex. 175 at 3065-66.)

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. (NOL C2 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. (NOL C2 Ex. 150 at 2732.)

4. Trial Counsel's Failure To Present The Evidence Of A Neuropsychologist In The Penalty Phase Resulted In Prejudice.

Dr. Spindell's diagnosis of schizophrenia conformed with and corroborated Dr. Thomas's findings and medical conclusions. Given the complete agreement of these two experts that petitioner suffered from a major mental illness at the time of the crime, trial counsel's failure to present evidence of petitioner's mental state during the guilt phase proceedings deprived petitioner of a compelling defense to the murder. Had trial counsel presented this evidence to the jury, it is likely that they would have found that petitioner lacked the ability to form the necessary intent for first degree murder. Trial counsel's failure to present this evidence at the penalty phase in order to mitigate the circumstances of the crime, and the special circumstances which rendered petitioner eligible for the death sentence, was even more egregious and prejudicial.

The prosecutor constantly branded petitioner as a liar who had fabricated symptoms of mental illness in order to avoid responsibility for the crimes. (31 RT 4652.) The prosecutor made much of Dr. Thomas's reliance on the MMPI in forming his opinion, and asked Dr. Thomas a number of questions about the administration of the test, which version of the test had been administered, the reliability of the test, and the fact that Dr. Thomas used the results of the test but was not an expert in the MMPI. (30 RT 4493-4517.) These questions were not within the doctor's area of expertise, but would have been within Dr. Spindell's. The prosecutor's attack on Dr. Thomas undermined his credibility as a witness and the reliability of his diagnoses with the jury. Had trial counsel called Dr. Spindell to testify he could have answered the prosecutor's questions and lent support to Dr. Thomas's findings. Had Dr. Spindell testified to corroborate Dr. Thomas's findings, there is a reasonable probability that the jury would not have sentenced petitioner to death.[45]

The jury heard nothing about petitioner's cognitive functioning during the trial. Trial counsel had speculated that petitioner's functioning and poor academic performance were the result of Attention Deficit Disorder (ADD). A competent neuropsychologist prepared with available evidence could have provided the following compelling information: that petitioner's organic brain damage was longstanding and developed early in life (NOL C2 Ex. 175 at 3073-75); [46] petitioner suffers from frontal lobe damage, which has produced cognitive rigidity, distorted perception, and an inability to inhibit unwanted responses; petitioner suffers from damage to the frontal

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[45] *See* NOL C2 Ex. 140 at 2694 (no evidence presented to support doctor's conclusions).

[46] Petitioner likely developed brain damage as a result of his mother's heavy alcohol consumption and smoking while she was pregnant, numerous serious head injuries sustained as a child, and malnutrition and neglect. (NOL C2 Ex. 124 at 2501, 2505, 2511, 2512; NOL C2 Ex. 4 at 55; NOL C2 Ex. 18 at 195; NOL C2 Ex. 29 at 345; NOL C2 Ex. 16 at 147-48; NOL C2 Ex. 123 at 2488; NOL C2 Ex. 131 at 2610; NOL C2 Ex. 147 at 2719; NOL C2 Ex. 155 at 2769; NOL C2 Ex. 126 at 2560; NOL C2 Ex. 156 at 2778.)

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 (*Id.* at 3076); and "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" (NOL C2 Ex. 175 at 3072). Had the jury heard that this type of brain damage, coupled with petitioner's severe mental illness, history of trauma, physical and sexual abuse, and drug and alcohol intake on the day of the crime, rendered petitioner incapable of controlling his behavior, forming the specific intent to commit the crimes, or otherwise modulate his behavior to conform to the law, there is a reasonable probability that they would not have sentenced him to death. *See Detrich v. Ryan*, 619 F.3d 1038, 1060-62 (9th Cir. 2010), (failure to introduce evidence of the effect of petitioner's neuropsychological dysfunctions and abusive childhood on his mental state was prejudicial).

C. Trial Counsel Rendered Ineffective Assistance During the Penalty Phase by His Failure to Object to Prosecutorial Misconduct.

Trial counsel failed to object to the prosecutor urging the jury to consider non-statutory aggravating evidence. Under the guise of discussing petitioner's age as a factor in aggravation, the prosecutor argued that petitioner had agreed to receive treatment after the Kim Jackson incident in order to get a reduced sentence. The prosecutor argued that petitioner had either refused treatment or they had been unable to treat him, and advised the jury to "think about that and his lack of participation in the program." (31 RT 4640-41.) Petitioner's failure to take advantage of mental health resources is not a proper factor to consider in aggravation, yet trial counsel failed to object and ensure that the jury was properly instructed not to consider such evidence in aggravation. Moreover, trial counsel's repeated failures to object permitted the prosecutor to argue facts that were not in evidence. For example, the prosecutor falsely argued that the victim experienced blood pooling in her mouth as a result of the stab wounds. (31 RT 4661.) Not only was this argument false (NOL C2

Ex. 171 at 3034-35), it was also a highly prejudicial appeal to the jury's emotions. Trial counsel failed to object on either of these two grounds.

Trial counsel failed to object to several acts of misconduct regarding the presentation of correctional consultant, James Park's, testimony, or to present testimony to rebut the prosecutor's mischaracterization of petitioner. For instance, the prosecutor informed the court that he would like to bring out the fact that gangs have a potential violence problem while in prison because petitioner had gotten into a fight "over Crip business" during his prior incarceration. (29 RT 4215.) The prosecutor then introduced this evidence, for which there was no support, in order to characterize petitioner as a gang member with a predisposition to commit acts of violence. (*Id*. at 4307-08.) Trial counsel, rather than objecting to this harmful evidence, merely informed the jury that he "resent[ed] the implication Mr. Jones is a gang member." (31 RT 4684.) Moreover, had trial counsel conducted an adequate investigation into petitioner's background, he would have discovered that not only was the evidence improper it was demonstrably false.[47]

Trial counsel failed to object to the prosecutor's appeal to the jury to ignore the law and evidence. Under the guise of victim impact, the prosecutor counseled the jury to sentence petitioner to death solely on the grounds that they had already convicted him of murder. Under factor (k) of California Penal Code section 190.3, the prosecutor urged the jury that if they were considering showing petitioner sympathy, they should show him the same sympathy that he had shown Mrs. Miller. (31 RT 4643; *see also id.* at 4657 [same argument].) He also told the jury that the police had saved the defendant's life after he had shot himself, but there was no one to save the

[47] 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. (NOL C2 Ex. 142 at 2700; NOL C2 Ex. 153 at 2744; NOL C2 Ex. 134 at 2648-51; NOL C2 Ex. 124 at 2525.)

victim. (31 RT 4661.) Trial counsel had no strategic reason for failing to object to these prejudicial instances of prosecutorial misconduct.

Trial counsel offered petitioner's past incarceration history as evidence that he would not be a danger in prison. The prosecutor's improper and false argument that petitioner was a violent gang member in fact affected and undermined the presentation of this evidence. Because trial counsel failed to object to this mischaracterization of petitioner, the jury was more likely to believe the prosecutor that petitioner was a gang member and, therefore, a future danger. *See United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985) (a "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence"); *see also Berger v. United States*, 295 U.S. 78, 88-89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Likewise, by failing to object to the prosecutor's false statement that petitioner refused mental health treatment or was untreatable, the jury was left with the impression that petitioner posed a future danger.

The prosecutor's remarks regarding the victim's death were calculated to incite the passions and prejudices of the jury. The prosecutor requested that the jury sentence petitioner to death on the basis that the victim's death required petitioner's death. The jury, therefore, made their sentencing decision not on the law or the evidence before them, but on emotion, thereby undermining confidence in the verdict. *See Saffles v. Parks*, 494 U.S. 484, 493, 110 S. Ct. 1257, 108 L.Ed.2d 415 (1990) ("capital sentencing must be reliable, accurate, and nonarbitrary"). Petitioner's constitutional rights to a fair trial, due process of law, confrontation, and a reliable guilt and penalty verdict were thus violated by trial counsel's failure to object to the prosecutor's misconduct. But for trial counsel's errors there is a reasonable probability that the jury would not have sentenced petitioner to death.

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VIII. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM EIGHTEEN: THE JURY COMMITTED PREJUDICIAL MISCONDUCT.

Petitioner was tried in the shadow of an unusual media circus atmosphere due to two high profile cases—the criminal prosecutions of O.J. Simpson and Heidi Fleiss—which were being tried at the same time.[48] As a result, petitioner's trial took place in an environment that made the jury highly susceptible to considering impermissible and extraneous evidence in its deliberations. Both of petitioner's presiding judges, acutely aware of this risk, 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 obligations to (1) render their verdict following consideration of only the evidence presented in the case; (2) avoid discussing petitioner's case with anyone other than fellow deliberating jurors; (3) avoid premature discussions with other jurors; (4) avoid prejudging the case before the presentation of all evidence; (5) avoid inserting their own untested knowledge of expert matters into the deliberation process; (6) pay close attention to all of the evidence presented at trial; and, (7) follow the law as laid out in the instructions. Because it "is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment[,]" *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892), the jury's failure to do so violated petitioner's Sixth, Eighth, and Fourteenth Amendment rights, *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S. Ct. 546, 550, 13 L. Ed. 2d 424 (1965), and had "a substantial and injurious effect" on the outcome of the trial, *Brecht v. Abrahamson*, 507 U.S. at 638, 113 S. Ct. at 1722, 123 L. Ed. 2d 353.

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[48] O.J. Simpson was being tried "just down the hall" (NOL C2 Ex. 127 at 2764; *see also* NOL C2 Ex. 133 at 2645; 138 at 2689), and petitioner's jurors "saw many of the main players in O.J.'s case, either in the hallway, the cafeteria, or on the elevator" (NOL C2 Ex. 127 at 2764).

Respondent has failed to admit or deny any of the facts alleged in the Petition. (*See, e.g.*, Doc. 28, filed Apr. 6, 2010 at 4 ("Respondent denies, or lacks sufficient knowledge to admit or deny, every factual allegation made in support of Petitioner's thirty claims for relief (including all sub-claims)".) Petitioner, therefore, requests an evidentiary hearing on this claim, since respondent has placed at issue all facts upon which it relies.

At an evidentiary hearing on this Claim, petitioner will present the following evidence in support of the following:

A. The Trial Court Instructed Petitioner's Jury About Its Obligations.

Throughout the trial, the court repeatedly instructed the jurors 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 deliberations 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. 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 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.

(13 RT 2331-33.) In addition to the form instructions he read to them, the trial court explained to the jury in explicit terms what types of behavior constituted misconduct and that jurors were expected to immediately report anyone that committed misconduct during the trial.

Prior to the guilt phase deliberations, Judge Ferns read the jury CALJIC 1.00, which instructed the jury to base its 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.) The second instruction read by the court, CALJIC 1.03, reinforced the idea in CALJIC 1.00 for the jury to base its decision on the evidence presented at trial and further instructed the jurors they were not to consult non-jurors or reference works for additional information. (26 RT 3819-20; 2 CT 258.) 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 [verify] is what you got in here and the instructions that I'm giving to you that you'll take into the jury room.

(26 RT 3820.)

The court expressly instructed the jury not to consider petitioner's penalty during guilt-phase deliberations: "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.)

Prior to the penalty phase deliberations, the court 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, both presiding judges had felt it necessary to reinforce and emphasize this instruction to the jury. 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.)

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. (2 CT 338 (CALJIC 17.53); *see, e.g.*, 16 RT 2546; 23 RT 3457; 31 RT 4697.) Before each and every recess, the jurors were again instructed not to discuss the case with anyone. (2 CT 337 (CALJIC 17.52); *see, e.g.*, 18 RT 2892; 24 RT 3688; 29 RT 4287.)

Despite these clear and emphatic admonitions repeated throughout the trial, several jurors committed clear and highly prejudicial misconduct by: considering evidence extraneous to that presented at trial, discussing the case prematurely among themselves and with third parties, and considering and determining petitioner's penalty during the guilt phase of the trial.

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B. Petitioner's Jury Committed Prejudicial Misconduct by Introducing Extraneous Information Into Deliberations.

Jurors committed prejudicial misconduct by injecting extraneous evidence and 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. *See, e.g.*, *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) ("A juror's communication of extrinsic facts implicates the Confrontation Clause."); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 1999).

1. Jurors Introduced Extraneous Evidence Into Guilt and Penalty Deliberations.

Despite the trial court's concern about outside influences, it did not order petitioner's jury not to watch television newscasts; therefore, they "were aware of what was happening in O.J.'s trial." (NOL C2 Ex. 127 at 2564.) Several of petitioner's jurors were impressed by the testimony of a DNA expert in the Simpson trial. (NOL C2 Ex. 9 at 93; NOL C2 Ex. 127 at 2564.) They "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." (*Id*.; *see* NOL C2 Ex. 127 at 2564.) The fact that the prosecution's DNA expert attended the same school as the DNA expert in the Simpson trial, entered into petitioner's jury's deliberations despite being evidence learned from an extraneous source—the televised Simpson trial—not from the evidence adduced at petitioner's trial. (NOL C2 Ex. 9 at 93.)

During penalty deliberations, Juror Youssif Botros, an Egyptian Coptic Christian, informed the other jurors about consulting with his priest about petitioner's case. Mr. Botros told the other jurors "His priest told him to read the Bible for guidance." (NOL C2 Ex. 127 at 2565.) Mr. Botros also informed the other jurors

"that he read the section of the Bible that spoke about 'an eye for an eye' and was therefore able to vote for death." (*Id*.) 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.

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.

(NOL C2 Ex. 138 at 2689.)

2. The Jurors' Introduction Of Extraneous Evidence Into Guilt And Penalty Deliberations Was Prejudicial.

DNA evidence played a crucial role in petitioner's case. As a result of the jury's misconduct, the testimony of the prosecution's DNA expert was unfairly and improperly bolstered by extraneous evidence that positively connected her to the high-profile O.J. Simpson trial that had "enormous amounts of resources" (NOL C2 Ex. 133 at 2645) with which to hire the best experts (*see* NOL C2 Ex. 122 at 2645 (discussing financial disparities between petitioner's and Simpson's trial); NOL C2 Ex. 139 at 2692 (same)). 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 and left uncorrected by trial counsel. (*See*, *supra*, Claim II.C (counsel ineffective for failing to challenge DNA).)

Juror Muhammad's injection of his own specialized, yet untested and potentially inaccurate, knowledge about petitioner's medications and their effects on him, rendered Mr. Muhammad an unsworn witness at the trial, violating petitioner's fundamental Sixth Amendment right to cross-examine and confront witnesses against him. *See, e.g.*, *Mach v. Stewart*, 137 F.3d 630, 634 (9th Cir. 1997). 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. 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. Juror Muhammad, and the rest of the jurors, committed prejudicial misconduct by considering extraneous, unreliable evidence in determining petitioner's guilt.

Juror Botros's introduction of a passage from the Bible ("an eye for an eye") into the deliberative process constituted the introduction of a particularly prejudicial type of extraneous evidence—the Bible. *See, e.g.*, *Oliver v. Quartermain*, 541 F3d 329, 339 (5th Cir. 2008) (by introducing bible passages into deliberations "the juror has crossed an important line."); *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989). This misconduct was compounded by the remaining jurors. By failing to follow the trial court's explicit instructions, and not immediately reporting Juror Botros's misconduct and his improper injection of Biblical tenets into petitioner's penalty deliberations, the remaining jurors committed further misconduct.

The introduction of "extraneous prejudicial information," Fed. R. Evid. 606(b), into the deliberative process at petitioner's trial had a substantial and injurious effect on the outcome of petitioner's trial. *Brecht v. Abrahamson*, 507 U.S. at 638, 113 S. Ct. at 1722, 123 L.Ed.2d 353; *Mach v. Stewart*, 137 F.3d at 634.

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C. The Jurors Committed Prejudicial Misconduct by Prematurely Deliberating and Prejudging the Case.

Several other jurors directly violated the trial court's admonition to avoid premature discussion with fellow jurors and prejudgment of the charges against petitioner and any potential penalty.

1. Jurors Prematurely Deliberated And Judged The Case.

Before they even retired for guilt phase deliberations many, if not all, of the jurors had considered and decided that petitioner deserved a sentence of death:

> Two men were extremely vocal about voting for the death penalty from the moment we stepped into the Jury Room for the guilt deliberations. . . . 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.

(NOL C2 Ex. 138 at 2690-91.) A juror, whose wife and two daughters were of similar ages to the victim and her two daughters, blatantly ignored the court's instruction and decided guilt and penalty early in the trial:

> 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.

(NOL C2 Ex. 9 at 93.)

Petitioner's jury not only discussed the case prematurely, and in direct contravention of the court's explicit order, they discussed it with someone who was not one of the twelve seated jurors. Alternate Juror Virginia Surprenant discussed the case with the seated jurors often enough that she was aware most of them planned to vote for a sentence of death. (NOL C2 Ex. 23 at 240.) Ms. Suprenant shared those jurors' concern about another juror who obeyed the court's admonition and refused to discuss the case:

> 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.

(*Id*.)

2. The Jurors' Premature Deliberations And Judging Of The Case Was Prejudicial.

These jurors committed prejudicial misconduct by deciding petitioner was both guilty of capital murder and deserved a sentence of death during the presentation of guilt phase evidence, in direct contravention of the trial court's clear instructions. The verdicts from petitioner's jury were not based on the evidence presented in the guilt phase and the existence and weight of mitigating and aggravating factors in the penalty phase. These verdicts were the prejudicial and unconstitutional result of jurors who ignored the trial court's clear instructions and allowed passion and outrage to guide their judgment. (*See* NOL C2 Ex. 9 at 93 (during guilt deliberations a juror "said right then and there, after hearing the daughter, he knew he had to vote for death."); NOL C2 Ex. 138 at 2690 ("Two men were extremely vocal about voting for the death penalty from the moment we stepped into the Jury Room for the guilt deliberations.").) The jury's failure to abide by the trial court's instructions and discuss the case only

during deliberations, not to deliberate outside of the jury room, and not to arrive at an opinion until the close of evidence had a substantial and injurious effect on the guilt and penalty phase deliberations and verdicts. *Brecht v. Abrahamson*, 507 U.S. at 638, 113 S. Ct. at 1722, 123 L.Ed.2d 353; *Mach v. Stewart*, 137 F.3d at 634.

D. The Jurors Committed Prejudicial Misconduct by Failing to Follow the Court's Instructions.

Jurors may not disregard the law or the court's instructions regarding the law. In particular, when instructed on the meaning of legal terms and concepts, jurors must accept the definitions and explanations as offered to them by the court and must apply the law as set forth in the court's instructions. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 735-46, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (a juror who does not "follow the dictates of law" creates an unacceptable risk that a capital verdict is not fair and impartial); *see also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984) (a fair trial requires an impartial jury that will follow the court's instructions and decide the case solely on the evidence).

1. Jurors Failed To Follow The Court's Instructions.

During guilt phase deliberations, petitioner's jury committed egregious misconduct by ignoring the court's clear instruction not to discuss possible sentences. Several jurors had determined petitioner's guilt and death sentence during the prosecution's case-in-chief; for those who had not, it was decided during guilt deliberations that "the case was all about the guilt phase because once we decided that we knew we had to vote for death." (NOL C2 Ex. 138 at 2690.) Moreover, by prematurely determining petitioner's penalty, the 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. 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.

(NOL C2 Ex. 9 at 96.) The jury did not follow the court's instructions regarding its ultimate responsibility for petitioner's fate, and instead based its decision upon the unfounded assumption that a sentence of death would not be carried out. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. at 735-46, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (a juror who does not "follow the dictates of law" creates an unacceptable risk that a capital verdict is not fair and impartial); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct 2633, 2639, 86 L. Ed. 2d 231 (1985) ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere").

2. The Jurors Failure To Follow The Court's Instructions Was Prejudicial.

Petitioner's jurors demonstrated a patent disregard for the law. Their unwillingness to follow the trial court's instructions resulted in a jury primed to render an unreliable and arbitrary death sentence based on unfounded and erroneous conjecture. This multi-layered juror misconduct–discussing the inevitability of a death sentence while engaged in guilt phase deliberations; the failure to follow the court's instructions; and, the introduction of extraneous, erroneous, prejudicial evidence regarding whether or not a sentence of death is a real sentence, in the penalty phase deliberations–constitutes misconduct of a magnitude higher than that of a single instance of misconduct by a jury. The entire jury was tainted by this blatant disregard for the court's instructions and misapplication of the law, which had a substantial and injurious effect on the guilt and penalty phase verdicts. *Brecht v. Abrahamson*, 507 U.S. at 638, 113 S. Ct. at 1722, 123 L. Ed. 2d 353*; Mach v. Stewart*, 137 F.3d at 634.

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E. Juror Ruotolo Committed Prejudicial Misconduct by Falling Asleep During the Testimony of Petitioner's Sole Mental Health Expert.

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.

1. Juror Rutolo Committed Misconduct By Falling Asleep During Trial.

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.

(NOL C2 Ex. 9 at 95.)

2. Petitioner Was Prejudiced By Juror Ruotolo's Misconduct.

A sleeping juror is an absent juror. *United States v. Olano*, 62 F.3d 1180, 1189 (9th Cir. 1995). Juror Ruotolo's 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. Juror Ruotolo's sleeping during the testimony of the sole mental health expert had a substantial and injurious effect on the penalty verdict. *Brecht v. Abrahamson*, 507 U.S. at 638, 113 S. Ct. at 1722, 123 L. Ed. 2d 353; *see United States v. Barnett*, 703 F.2d 1076, 1083 (9th Cir. 1983) (court abused discretion by failing to investigate the "'sleeping'- juror question").

Petitioner has alleged a colorable claim for relief as to each of his jury misconduct sub-claims. These sub-claims were fairly presented to the state court (*see* NOL, Doc 30, filed Apr. 8, 2010, "Joint Stipulation Re: Briefing Schedule at 2), and without "a full and fair opportunity to develop" the facts for this claim, the state court denied it solely on the merits. (NOL C7.) Petitioner has established his entitlement to an evidentiary hearing on each of the five sub-claims of jury misconduct.

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IX. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM TWENTY-THREE: PETITIONER'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT BECAUSE OF HIS MENTAL RETARDATION AND MENTAL IMPAIRMENTS.

The Petition sets forth detailed factual allegations at pages 382 to 393 that petitioner is ineligible for the death sentence under *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because petitioner's low and lifelong level of functioning falls squarely within the range of intellectual disability. Moreover, 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 in violation of his Eighth and Fourteenth Amendment rights to be free of cruel and unusual punishment.

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. 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." 536 U.S. at 314-21, 122 S. Ct. at 2249-52. 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, 122 S. Ct. at 2250.

Respondent generally denies or alleges insufficient knowledge to admit or deny the allegations in support of petitioner's claim. (Answer at 60, Doc. 28, filed Apr. 6, 2010.) Given respondent's general denials, petitioner cannot determine which facts are in dispute. In order to determine which facts are in dispute and whether petitioner

suffers from an intellectual disability such that he is ineligible for the death penalty a hearing is warranted. *See Walker v. True*, 399 F.3d 315, 326-27 (4th Cir. 2005) (evidentiary hearing necessary to determine whether petitioner is mentally retarded when petitioner did not have the opportunity to develop facts in state court). At an evidentiary hearing, to prove the factual allegations that petitioner is ineligible for the death penalty, is plagued with deficits in functioning, has severely limited adaptive functioning, and, from early childhood, tested in the mentally retarded range of functioning, petitioner will present evidence in support of the following:

A. Petitioner Meets the Criteria for an Intellectual Disability

Petitioner suffers from an intellectual disability. In *Atkins*, the Supreme Court noted the definition of mental retardation provided by the American Association on Mental Retardation ("AAMR")[49] in Mental Retardation: Definitions, Classification, And Systems Of Supports (9th ed. 1992) ("Mental Retardation I"). 536 U.S. at 309 n.3, 318, 122 S. Ct. 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.

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

[49] The AAMR is an organization of professionals and citizens concerned about intellectual and developmental disabilities. The AAMR currently is known as the American Association on Intellectual and Developmental Disabilities.

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 ("Mental Retardation II") (10th ed. 2002) at 1.

On September 18, 2009, the American Association on Intellectual and Developmental Disabilities ("AAIDD") released the eleventh edition of its publication, replaced the term "mental retardation" 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 ("AAIDD 2010") (11th ed. 2010) at 3.

The American Psychiatric Association utilizes a definition that is "similar" to the AAMR's 1992 definition, *Atkins*, 536 U.S. at 309, n.3, 122 S. Ct. at 2245 n.3, and defines mental retardation as:

> [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).

Diagnostic And Statistical Manual Of Mental Disorders (4th ed. 2000) ("DSM-IV-TR") at 41.

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, 122 S. Ct. at 2250. 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." Cal. Penal Code § 1376(a) (West 2011).

1. Petitioner Has Significantly Subaverage Intellectual Functioning.

Petitioner has been administered IQ tests approximately eight times, at ages 6, 9, 16, 20, 21, 30, 37, and 46. The Full Scale IQ (FSIQ) scores, before adjustment for the Flynn effect[50] are 68, 87, 84, Low/Normal, 79, 87, 77, 75. When adjusted for the Flynn effect, the scores are 65, 80, 77, 78, 76, 75, all placing petitioner in the borderline mentally retarded range of functioning.

Test	Date Given	FSIQ	Date of Publication	Flynn Adjusted IQ
Stanford Binet	03/31/1971	68	1960	65
Wechsler Intelligence Scale for Children (WISC)	02/22/1974	87	1949	79.8
Wechsler Adult Intelligence Scale (WAIS)	04/21/1981	84	1955	76.8
Ammons Picture Vocabulary Test of Intelligence	05/02/1985	Low/ Normal	1962	Unknown
Shipley Hartford[51]	12/20/1985	79	Unknown	Unknown
Ammons Quick Test of	11/12/1994	87	1962	77.4

[50] The Flynn effect accounts for the increase in IQ scores over time that result when older tests are used. In the United 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, Encyclopedia of Human Intelligence 617-23 (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).

[51] The Shipley Hartford tests were developed as brief screening tests for organic brain damage, but have been used as a rough estimate of functional intelligence. It is unclear which test was administered to petitioner.

Test	Date Given	FSIQ	Date of Publication	Flynn Adjusted IQ
Intelligence				
WAIS III	06/25/2002	77	1997	75.5
WAIS IV	06/30/2010	75	2008	75

Toward the end of first grade, petitioner was tested and found to have a full scale IQ score of 68 on the Stanford Binet, and was placed in the Educably Mentally Retarded (EMR) program at Hyde Park Elementary School. (NOL C2 Ex. 50 at 1103.) After three years in the EMR program, petitioner was found ineligible to continue receiving special education services, based solely on his IQ score of 87 on the WISC. (NOL C2 Ex. 130 at 2600.) Petitioner did not earn enough credits to graduate from junior high school, and received a special transfer to senior high school. (NOL C2 Ex 125 at 2554.) During his sophomore year at El Camino High School, petitioner was re-referred for special education services. Petitioner was administered the WAIS in April 1981, and scored an IQ of 84. At Crenshaw High School during the first semester of eleventh grade, petitioner had all his classes in the Educationally Handicapped (EH) program. (NOL C2 Ex. 125 at 2556.) When he transferred to Workman High for the second semester of eleventh grade, he had four remedial classes and two non-academic classes. (*Id* at 2557.) Petitioner returned to the EH program at Crenshaw for twelfth grade, but dropped out of school before graduating.

Petitioner's performance on the WAIS IV placed his overall level of intellectual ability within the borderline range. These findings indicate that petitioner functions intellectually at a level below 95 percent of the population. Significant limitations in intellectual functioning are met by "an IQ score that is approximately two standard deviations below the mean, considering the standard of error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." AAIDD 2010 at 6. The DSM-IV-TR notes that "there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75)."

DSM-IV-TR at 41. As a result, petitioner's Full Scale IQ score of 75 means that, with a 95 percent degree of confidence, his true IQ will fall within the range of scores between 70 and 80. Petitioner thus meets the first criterion for an intellectual disability as his general intellectual functioning is significantly subaverage.

2. Petitioner Has Significant Deficits in Adaptive Behavioral Skills.

Adaptive behavior is defined as, "the collection of conceptual, social and practical skills that have been learned and are performed by people in their everyday lives." AAIDD 2010 at 15. These three skill types are further characterized as follows:

- Conceptual skills: language; reading and writing; money, time, and number concepts; and self-direction.
- Social skills: interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obey laws, avoids being victimized, and social problem solving.
- Practical skills: activities of daily living (personal care), occupational skills, use of money, safety, travel/transportation, schedules/routines, and use of the telephone.

Id. at 44. In a retrospective assessment of mental retardation, among other things, it is essential to conduct a thorough social history; conduct a thorough review of school records; and use multiple informants in assessing adaptive behavior. User's Guide: Mental Retardation: Definition, Classification, and Systems of Supports – 10th Edition (AAIDD 2007) at 18-20.

Petitioner's social history reveals that his subaverage intellectual functioning is not an isolated case within his family. Almost all of his siblings attended special education classes. (NOL C2 Ex. 16 at 144; NOL C2 Ex. 132 at 2642; NOL C2 Ex. 54; NOL C2 Ex. 57; NOL C2 Ex. 66; NOL C2 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. (NOL C2

Ex. 124 at 2548; NOL C2 Ex. 8 at 90; NOL C2 Ex. 146 at 2716.) Petitioner's mother was intellectually disabled as well; twice during high school she received full scale IQ scores of 61. (NOL C2 Ex. 69 at 1498.) Petitioner's mother also suffered severe limitations in her adaptive functioning: Joyce could not tell time on an analog clock (NOL C2 Ex. 147 at 2719), and was illiterate (NOL C2 Ex. 142 at 2698; NOL C2 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. (NOL C2 Ex. 142 at 2698; NOL C2 Ex.143 at 2701; NOL C2 Ex. 123 at 2488; NOL C2 Ex. 16 at 157.) She was constantly involved in car accidents because she was unable to learn and apply the tasks required to drive a car safely. (NOL C2 Ex. 124 at 2528-29.)

Numerous lay witnesses and childhood friends observed petitioner's limitations in adaptive behavior and functioning from an early age. Friends noticed problems in petitioner's speech pattern (NOL C2 Ex. 148 at 2727; NOL C2 Ex. 149 at 2728), his poor communication skills, and his genuine difficulty in initiating conversation or expressing abstract emotional concepts (NOL C2 Ex. 16 at 149; NOL C2 Ex. 132 at 2636; NOL C2 Ex. 143 at 2703; NOL C2 Ex. 147 at 2722; NOL C2 Ex. 151 at 2736; NOL C2 Ex. 152 at 2741); and his inability to learn from the experience of mistakes (NOL C2 Ex. 124 at 2508; NOL C2 Ex 2 at 15).

Witnesses describe petitioner's immaturity at various stages of his development. (*E.g.*, Ex. 123 at 2491-92; NOL C2 Ex. 143 at 2703; NOL C2 Ex. 124 at 2541.) Petitioner had difficulty picking up on spoken and unspoken cues, and lacked the capacity to understand the reactions of others or protect himself from threats. (NOL C2 Ex. 132 at 2637-38; NOL C2 Ex. 19 at 207; NOL C2 Ex. 178 at 3116-17; NOL C2 Ex. 16 at 147-48).

Petitioner was unable to complete simple errands. For example, 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. (NOL C2 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 accompany him to ensure he received the correct change. (NOL C2 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. (NOL C2 Ex. 155 at 2766.)

As he grew older, petitioner displayed his inability to live independently. (NOL C2 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. (NOL C2 Ex. 147 at 2723; NOL C2 Ex. 16 at 150, 174-75; NOL C2 Ex. 142 at 2698-99.) The only known time he lived alone was for a brief period when he lived in the garage behind Mrs. Harris's home.

Petitioner had no stable employment history, and most of the time held no job at all. Petitioner could perform very simple, unskilled tasks, but was unable to develop any special skills, and never was entrusted with more complicated tasks. (NOL C2 Ex. 10 at 97; NOL C2 Ex. 21 at 226.) Petitioner's inability to obtain even non-skilled employment was a frequent and contentious 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. (NOL C2 Ex. 14 at 136.) Petitioner liked to take mechanical items apart, but he could not 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. (NOL C2 Ex. 124 at 2539.)

Deeply concerned over how others perceive him (NOL C2 Ex. 154 at 2751), petitioner has engaged in behaviors, typically referred to as "masking" behaviors, designed to hide his shortcomings. Throughout his life, he has been eager to please, reluctant to disagree with others, and preferred to be the listener, rather than the talker. (NOL C2 Ex. 141 at 2697; Ex. 147 at 2722; NOL C2 Ex. 16 at 148-49; NOL C2 Ex.

152 at 2742.) He consistently avoided challenging environments, such as large groups of people, interactions with strangers, as well as the intimidating environment of school. (NOL C2 Ex. 148 at 2726; NOL C2 Ex. 151 at 2735; NOL C2 Ex. 132 at 2638; NOL C2 Ex. 134 at 2651; NOL C2 Ex. 123 at 2497; NOL C2 Ex. 14 at 134.)

Petitioner's school records confirm lay witnesses' descriptions of petitioner's disabilities. When petitioner was first assessed for placement in the EMR program at Hyde Park Elementary school, he had limited language skills and some difficulty following directions. He displayed weaknesses in vocabulary, description and comprehension, visual memory, perceptual discrimination, spatial relationships and psychomotor coordination. (NOL C2 Ex. 125 at 2553.) He had difficulty communicating and playing with his peers, and did not work well in groups. (*Id*. at 2552; Ex. 51 at 1159.) A Wide Range Achievement Test (WRAT) was administered at the same time as the Stanford Binet. A review of the test data reveals that petitioner appeared to have difficulty writing the letters of the alphabet, did not know most beginning consonant sounds, and had difficulty recognizing very basic sight words, such as cat or dog. (NOL C2 Ex. 125 at 2552; Ex. 130 at 2599.) His low ratings on the behavior scales indicated problems with making appropriate decisions, caring for self, and responding age appropriately to social situations. (NOL C2 Ex. 130 at 2599.) Although chronologically petitioner should have been functioning at a first grade level, his reading was at a mid-kindergarten level (GE K6), spelling was at a beginning first grade level (GE 1.1), and his arithmetic was at a beginning kindergarten level (GE K.2). (NOL C2 Ex. 50 at 1103; NOL C2 Ex. 51 at 1158, 1161, 1162; NOL C2 Ex. 125 at 2552-53.) Petitioner achieved modest success in the EMR program, learning to read at a second grade level. (NOL C2 Ex. 125 at 2553; Ex. 50 at 1105.)

At the time of his triennial assessment in February 1974, petitioner was given a battery of tests. His academic skills were two years below his expected fourth grade level: both reading and spelling were at a low second grade level and arithmetic was at a high second grade level. (NOL C2 Ex. 51 at 1163-64, Ex. 125 at 2553.) Despite his

obvious subaverage performance, however, based on his IQ score, he was returned to regular class although he continued to receive remedial reading in fifth and sixth grade. (NOL C2 Ex. 125 at 2554.) While petitioner was eligible to have been placed in fifth grade when he exited the EMR program, he was retained in the fourth grade. (NOL C2 Ex. 125 at 2553.) As soon as he returned to the regular class, petitioner once again began to experience academic difficulties and was unable to conform his behavior to the larger class setting. (*Id*.; Ex. 50 at 1106.) By the sixth grade, he was markedly below average in all academic subjects which seemed to cause him a great deal of frustration. (NOL C2 Ex. 50 at 1106; Ex. 125 at 2554.)

Petitioner was bussed to El Camino High School for tenth grade. In the first semester, he passed only two classes. In March 1981 at El Camino High School, petitioner's academic achievement was once again assessed using a battery of tests. Petitioner was found to be performing between a third and sixth grade level. The results of the Peabody Individual Achievement (PIAT) showed that petitioner's general information was at a sixth grade level (GE 6.3); Mathematics (reasoning) (GE 4.2) Reading Recognition (GE 4.1), and Reading Comprehension (GE 4.4) were at a fourth grade level (GE 4.2); and Spelling (recognition) (GE 3.8) was at a third grade level. On the WRAT, petitioner's academic skills ranged from the second to fifth grade level: Reading (sight words) (GE 5.2); Spelling (recall) (GE 3.3); Arithmetic (computation) (GE 2.3). (NOL C2 Ex. 125 at 2556; NOL C2 Ex. 51 at 1154.) The instructional goals on his Individualized Education Plan (IEP) were to master functions of addition, subtraction, multiplication and division; to read a paragraph silently and answer comprehension questions; and to write sentences with correct structure, spelling, punctuation and grammar. (NOL C2 Ex. 51 at 1152.) Petitioner also was assessed to have "poor expressive and receptive language." (NOL C2 Ex. 51 at 1155.) At this time, petitioner was found to meet eligibility criteria for Learning Disability. (NOL C2 Ex. 125 at 2556.)

At Crenshaw High School in the first semester of eleventh grade, all of his classes were in the Educationally Handicapped program. (NOL C2 Ex. 52 at 1168; Ex. 125 at 2556) Petitioner attended Workman High School for the second semester where he had four remedial classes and two non-academic classes. He received the following grades: reading (NM), math (D-), language (F), history (B), auto shop (F) and track (A). (NOL C2 Ex. 52 at 1168). Petitioner returned to Crenshaw for twelfth grade, but never graduated.

Various mental health professionals have also documented petitioner's impairments through testing and evaluation. Petitioner has basic problems understanding and processing information, and fundamental problems with judgment and impulse control. (NOL C2 Ex. 178 at 3154-57.) 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. (NOL C2 Ex. 175 at 3064-66.) Petitioner exhibits little ability to engage in abstract thinking. (NOL C2 Ex. 175 at 3065-66; NOL C2 Ex. 154 at 2761; NOL C2 Ex. 178 at 3155.)

3. The Onset of Petitioner's Significantly Subaverage Intellectual Functioning Occurred Before Age Eighteen.

In addition to testing in the mentally retarded and borderline mentally retarded range of functioning during elementary school and high school, petitioner's deficits were evident long before he turned eighteen. The Eighth Amendment, therefore, prohibits his execution. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242.

B. Petitioner Is Ineligible for the Death Penalty Because He Is Mentally Ill and Suffers From Organic Brain Damage.

Apart 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. 536 U.S. at 318, 122 S. Ct. 2250

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* Petition ¶ P.2.) 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 id*. 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. 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. (NOL C2 Ex. 154 at 2754-55; NOL C2 Ex. 178 at 3155-57.)

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. at 321, 122 S. Ct. at 2252. Petitioner faced this risk as a result of his mental illness because 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. (NOL C2 Ex. 1 at 2; NOL C2 Ex. 10 at 97; NOL C2 Ex. 131 at 2615; NOL C2 Ex. 16 at 146; NOL C2 Ex. 124 at 2530; NOL C2 Ex. 147 at 2722.) Moreover, he experienced such dissociation during his trial. (NOL C2 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. (NOL C2 Ex. 138 at 2689.)

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. (NOL C2 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." (NOL C2 Ex. 175 at 3072.) 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. (NOL C2 Ex. 175 at 3076.) 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*.)

Petitioner's organic brain impairment is longstanding and developed early in life. Petitioner's mother drank excessively and smoked while pregnant with him. (NOL C2 Ex. 124 at 2501; NOL C2 Ex. 4 at 55; NOL C2 Ex. 18 at 195.) After birth, petitioner suffered numerous head injuries as a result of physical abuse and accidents, many before he was of school age. (NOL C2 Ex. 124 at 2512; NOL C2 Ex. 29 at 345; NOL C2 Ex. 16 at 147-48; NOL C2 Ex. 124 at 2511, 2512.) 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. (NOL C2 Ex. 124 at 2505, 2512; NOL C2 Ex. 123 at 2488; NOL C2 Ex. 131 at 2610; NOL C2 Ex. 147 at 2719; NOL C2 Ex. 155 at 2769; NOL C2 Ex. 126 at 2560; NOL C2 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. (NOL C2 Ex. 124 at 2504-05; NOL C2 Ex. 123 at 2483; NOL C2 Ex. 129 at 2583; NOL C2 Ex. 146 at 2714; NOL C2 Ex. 18 at 198; NOL C2 Ex. 135 at 2659; NOL C2 Ex. 21 at 221.)

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. (NOL C2 Ex. 16 at 146; NOL C2 Ex. 148 at 2727; *see also* NOL C2 Ex. 149 at 2728; NOL C2 Ex. 125 at 2552-53; NOL C2 Ex. 50 at 1103; NOL C2 Ex. 51 at 1158; NOL C2 Ex. 124 at 2518; NOL C2 Ex. 178 at 3132.) 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 previous psychological testing. Petitioner was administered a personality test, the Minnesota Multiphasic Personality Inventory, after the incident involving Mrs. Harris. The psychologist who administered the testing noted that petitioner was a very concrete individual, had great difficulty with abstract ideas, and functioned best under structured conditions. (30 RT 4419.) 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. (NOL C2 Ex. 154 at 2761.)

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. (NOL C2 Ex. 175 at 3076.) 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.

Apart from the Court's decision and reasoning in *Atkins*, petitioner's mental impairments equally prevent the 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, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859 (1972) (joint opinion of Stewart, Powell and Stevens, JJ.). 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* NOL C2 Ex. 154 at 2754-55; NOL C2 Ex. 178 at 3155-57), and was unable to plan, organize, initiate, regulate, or monitor his behavior (NOL C2 Ex. 175 at 3065-66, 3069), petitioner's execution is barred by the Eighth Amendment's requirement of proportionality.

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X. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON CLAIM TWENTY-FOUR: CALIFORNIA'S DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF PEOPLE ELIGIBLE FOR THE DEATH PENALTY.

The Petition sets forth detailed factual allegations at pages 394 to 401 that petitioner's death sentence is unconstitutional because it was imposed pursuant to the statute that fails to comport with the Eighth Amendment's requirement that a state's capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty.

To comport with the Eighth Amendment, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty, *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) (plurality opinion); *see also Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and cannot wantonly and freakishly choose a few persons for the ultimate sanction from among the thousands of prosecuted murderers. *Furman*, 408 U.S. at 309-10, 96 S. Ct. at 2762 (Opinion of Justice Stewart). The United States Supreme Court consistently has held that the Eighth Amendment requires that capital punishment statutes meet two obligations: death-penalty statutes must "genuinely narrow" the subclass of offenders who can be subjected to a sentence of death at the election of prosecutors and juries,[52] and a death penalty statute may not permit the wanton and freakish application of the ultimate sentence on a small percentage of death-eligible defendants. *See, e.g.*, *Gregg*, 428 U.S.

[52] S*ee, e.g.*, *Gregg*, 428 U.S. at 188-89, 96 S. Ct. at 2932-33; *Zant*, 462 U.S. at 877, 103 S. Ct. at 2742; *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 554, 98 L. Ed. 2d 568 (1988); *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542, 123 L. Ed. 2d 188 (1993); *Atkins v. Virginia*, 536 U.S. 304, 319-20, 122 S. Ct. 2242, 2251-52, 153 L. Ed. 2d 335 (2002); *Roper v. Simmons*, 543 U.S. 551, 568-69, 125 S. Ct. 1183, 1194-95, 161 L. Ed. 2d 1 (2005).

at 182 n.26 (plurality opinion) ("It has been estimated that before *Furman* less than 20 percent of those convicted of murder were sentenced to death in those states that authorized capital punishment."); *id*. at 222 (White, J. concurring) (if juries "impose the death penalty in a substantial portion of the cases so defined . . . it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device"); *Furman*, 408 U.S. at 309-10, 92 S. Ct. at 2762 (opinion of Justice Stewart)).

Contrary to this constitutional mandate, the California death penalty statute was designed without regard to any limitation as to its scope or narrowing considerations. (*See, e.g*., NOL C2 Ex. 187 at 3329-51.) Indeed, the statute is so broad as to permit ninety-five percent of first-degree murders to be charged capitally. (Declaration of David Baldus, Ex. F.) Under such circumstances, California's death penalty statute fails to genuinely narrow the class of persons eligible for the death penalty and to reasonably justify the imposition of a more severe sentence upon petitioner, as compared to others found guilty of murder, thus rendering petitioner's death sentence freakish, wanton, arbitrary, and capricious.

Respondent has failed to admit or deny any of the facts alleged in the Petition. (*See, e.g*., Doc. 28, filed Apr. 6, 2010 at 4 ("Respondent denies, or lacks sufficient knowledge to admit or deny, every factual allegation made in support of Petitioner's thirty claims for relief (including all subclaims)".) Petitioner, therefore, requests an evidentiary hearing on this claim, since respondent has placed at issue all facts upon which it relies.[53]

[53] The question of whether California's capital sentencing scheme genuinely and constitutionally narrows the class of death eligible offenders is currently in litigation in federal court. *See, e.g., Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. filed Feb. 17, 1993); *Riel v. Ayres*, No. 2:01-cv-00507-LKK-KJM (E.D. Cal. Filed Mar. 14, 2001); *Frye v. Ayers*, No. 2:99-cv-00628-LKK-KJM (E.D. Cal. Mar. 29, 1999). The evidentiary hearing in *Ashmus* has been completed and briefing is scheduled to be completed by July 1, 2011.

At an evidentiary hearing, to prove the factual allegations that California's death penalty statute unconstitutionally fails to perform its narrow functioning, petitioner will present evidence in support of the following:

A. The California Death Penalty Statute Was Enacted and Amended Without Regard to Eighth Amendment Requirements.

In 1977, the California Legislature enacted a death penalty statute, in which 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. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative," the statute under which petitioner was tried and convicted in 1995. The drafter's express objective of the Briggs Initiative was to make the law as broad and inclusive as possible. (NOL C2 Ex. 185 at 3314-15; *see also* Legislative History Material Regarding California's Death Penalty Statutes, Ex. M, at 708, 826-27, 878-91, 920-21, 1228-43, 1257; News Articles Regarding Death Penalty Statutes, Ex. N, at 1535, 1539, 1547, 1550, 1552, 1559-60, 1563, 1565, 1572, 1579-80, 1582-83, 1585, 1596, 1654-55, 1666-67.) 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 as then defined by California Penal Code section 189. (Declaration of Donald H. Heller, Ex. J at 262-63.) The Briggs Initiative achieved 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. (NOL C2 Ex. 187 at 3333.) Indeed, under the Briggs Initiative, the

majority of the special circumstances in section 190.2 have no homicide *mens rea* requirement for the actual killer.

Legislative amendments and this Court's jurisprudence have further extended the statute's reach since its enactment. (Declaration of Gerald F. Uelman, Ex. I at 230-32.) At the time of the crime for which petitioner was charged was committed, California Penal Code section 190.2 contained twenty-six different crimes punishable by death.[54] As a result of the original drafting and subsequent amendments, California's death penalty statute contains none of the measured restrictions in its application required by the Eighth Amendment. Professor Gerald F. Uelman, who provided expert testimony before the United States District Court in *Ashmus*, concluded:

> After following and studying the enactment, amendment, litigation and interpretation of the California death penalty law for the past 39 years, I have concluded that the California death penalty law imposes no meaningful limitations on the broad discretion of prosecutors and juries to seek and impose the death penalty for first degree murders in California. There is nothing "special" about the special circumstances in California's death penalty law; they have been deliberately designed to encompass nearly all first degree murders. This has resulted in widespread geographic and racial disparity in the administration of California's death penalty law.
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> (Ex. I at 245.)

B. California's Death Penalty Statute Does Not Perform Constitutionally Required Narrowing.

Empirical evidence demonstrates that the overwhelming majority of murders in California could be charged as capital murders and in virtually all of them, at least one

[54] 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 (Declaration of Steven F. Shatz, Ex. H, at 201 n.5.)

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 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.

Professor David Baldus studied 27,453 first degree murder, second degree murder, or voluntary manslaughter convictions in California with an offense date between January 1, 1978, and June 30, 2002 ("Baldus Study"). (Declaration of David Baldus, Ex. F.) The study demonstrated that the special circumstances enumerated in Penal Code section 190.2 fail to perform the narrowing function required by the Eighth and Fourteenth Amendments. (*Id*. at 48, 59.) Among persons convicted of first degree murder between January 1978 and June 2002, ninety-five percent would have been eligible for the death penalty based on facts of the offense under the 2008 California law.[55] (*Id*. at 59, 62 (Table 2), 81.) When the ninety-five percent death-eligibility rates are compared with the one-hundred percent of first degree murders that were death eligible under pre-*Furman* Georgia law, the resulting five percent narrowing rate confirms the inability of California law to constitutionally limit death eligibility in accordance with *Furman* and its progeny. (*Id*. at 62, 16.) Among persons convicted of first degree murder, second degree murder, and voluntary manslaughter between

[55] 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 57, 60 (Table 1).) 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, 197 Cal. Rptr. 79 (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, 240 Cal. Rptr. 585 (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.

January 1978 and June 2002, fifty-nine percent would have been eligible under the 2008 law, and fifty-five percent under the *Carlos* Window. (*Id*. at 59-60.) The Baldus Study establishes that California's death sentencing rate, or the rate at which persons that were factually eligible for the death penalty and *actually* received a death sentence, was 4.6 percent. (*Id*. at 73, 74 (Fig. 2), 75 (Table 5), 77-81.) 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 79.)

Two studies conducted by Steven F. Shatz, a Professor at the University of San Francisco School of Law, confirm Professor Baldus's findings. (Ex. H.) The results from Professor Shatz's studies verify 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. (*Id*. at 206-17.) Professor Shatz's studies also demonstrate that California's death sentencing rate falls below the fifteen to twenty percent rate deemed unconstitutional in *Furman*. (*Id*. at 200, 216-17.)

The studies of Professors Baldus and Shatz independently confirm other each because of their strikingly similar statistical results. For example, when Professor Shatz excludes juveniles from both of his studies and uses 2000 California law, 91.4 percent of the cases in the Statewide Study and 91.5 percent of the cases in the Alameda Study were death-eligible (*id*. at 204, 209, 212); whereas, using a different data set Professor Baldus found a death-eligibility rate of ninety-five percent (Ex. F at 59, 62 (Table 2), 81.) The nearly identical rates obtained using differing sources of information—appellate decisions, court files, and data from the California Department of Corrections and Rehabilitation—serve to confirm the accuracy of Professors Baldus's and Shatz's statistical findings.

Several measures demonstrate that no other state possesses a death penalty statutory scheme as broad as California's or its astronomical death eligibility rate among California homicides. First, the rate of death eligibility among California homicides is by far the highest among death penalty jurisdictions. (Ex. F at 71-73.)

Second, California's death-eligibility rate is so much higher than any other death penalty jurisdiction, that it can be described as a statistical outlier. (*Id*.; Amended Declaration of George Woodworth, Ph.D., Ex. G, at 174-78.) Third, the rate at which California's death penalty statute narrows death-eligibility from pre-*Furman* Georgia law to 2008 California law, is far lower than similar rates for other states. (Ex. F at 81-82.)

Petitioner has made a colorable showing that the present death penalty law in California is unconstitutional because it 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. *Earp v. Ornoski*, 431 F.3d at 1170. Petitioner specifically requests that this Court order an evidentiary hearing on this claim, or, in the alternative, allow the record and future findings in *Ashmus v. Wong*, 3:93-CV-00594 TEH (N.D. Cal) to be accepted as part of petitioner's evidentiary proffer for this claim.

CONCLUSION

For these reasons, this Court should grant petitioner's Motion for An Evidentiary Hearing.

Dated: February 17, 2011

Respectfully submitted,

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