IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re JAMES EDWARD HARDY, On Habeas Corpus	No. S022153

SUPPLEMENTAL ALLEGATIONS TO CONFORM THE PLEADINGS TO THE PROOF

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

JAMES EDWARD HARDY, currently confined on death row at the California State Prison at San Quentin, through the undersigned counsel, hereby supplements the petition for writ of habeas corpus currently pending before this Court and requests that this Court issue a writ of habeas corpus ordering that his convictions and sentences in Los Angeles Superior Court case no. A-148767, including his conviction for capital murder and his sentence of death, be vacated.

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I

INTRODUCTION

These supplemental allegations flow from the evidence produced at the reference hearing held in this case by order of this Court. The record of that hearing proves beyond any question that petitioner is entitled to relief on the ground that the representation which he received from his trial attorney at the penalty phase of his trial was constitutionally inadequate. Although all of the testimonial and documentary evidence presented at the reference hearing was relevant to that question and within the scope of this Court's reference order herein, that testimonial and documentary evidence also established other grounds on which petitioner is entitled to relief, and in fact shows that the entire judgment, not simply the penalty determination, must be reversed. The evidence now shows that petitioner's conviction and sentence were obtained only by virtue of multiple violations of petitioner's constitutional and statutory rights.

Petitioner's trial attorney, Michael Demby, failed miserably to represent petitioner effectively at the guilt phase as well as the penalty phase of petitioner's trial. His investigation failed to uncover a wealth of evidence which was available at the time of trial to show that petitioner was not, as the prosecution contended, the killer, as well as a virtual storehouse of mitigating evidence which would have shown that petitioner was not deserving of the death penalty. In spite of the extensive evidence which could have been presented, Mr. Demby called no witnesses at either the guilt or the penalty phase. Petitioner, although unschooled in the law, recognized that he was not being represented effectively and, both before and during his trial, made repeated attempts to bring to the trial court's attention that he was not receiving effective representation, that Mr. Demby

was violating his ethical and constitutional duties as petitioner's counsel (as well as petitioner's express desire to present a defense at both guilt and penalty phases), and that petitioner's very life and liberty required that Mr. Demby be relieved as counsel.

Meanwhile, the state, including the investigating police officers and the prosecutor, Deputy District Attorney Jeffery Jonas, engaged in innumerable unethical, unconstitutional and unfair practices in developing a case against petitioner without regard for the truth. Despite the many indications that Calvin Boyd and a man identified only as Marcus, and not petitioner, committed the killings, law enforcement's investigation and petitioner's prosecution forged ahead as a juggernaut, driven by its own momentum and by the willingness of state actors to employ any means necessary to prove that petitioner was the killer.

Mr. Jonas' conduct made petitioner's trial a mockery of justice. By dint of his fervency, his willingness to misuse his authority, and the absence of any countervailing force to prevent him from running roughshod over petitioner's constitutional rights, Mr. Jonas carried the witnesses and the jury along in his determination to obtain a conviction and death judgment at all costs. He took full advantage of the unfairness of a joint trial and the law of conspiracy.[1] He engaged in innumerable acts of misconduct, including suppressing and destroying evidence, suborning perjury, communicating with the trial court ex parte and presenting evidence which he knew to be false and misleading.

The evidence against petitioner was entirely circumstantial and

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[1]See *Harrison v. United States* (2nd Cir. 1925) 7 F.2d 259, 263 [the general conspiracy statutes are the "darling of the modern prosecutor's nursery."].)

consisted almost wholly of hearsay. The record of the reference hearing held herein establishes that virtually every aspect of Mr. Jonas' case against petitioner, and the evidence relied upon by this Court in its opinion affirming the judgment on automatic appeal, was false and/or misleading. Every aspect of Mr. Jonas' case against petitioner was subject to attack and/or explanation, had petitioner only been represented by competent counsel. The salient defects in Mr. Jonas' case against petitioner are as follows:

At the guilt phase, Calvin Boyd testified for the prosecution, having received an undisclosed grant of immunity for his admittedly false testimony at petitioner's preliminary hearing, other undisclosed benefits and the expectation of additional future benefits in his own substantial contacts with the criminal justice system. On automatic appeal, this Court summarized Boyd's testimony as follows:

> "In the days following the crime, Boyd [had] pressed Reilly to reveal the name of the actual killer. Reilly eventually told him that he and Hardy killed the victims, but asked Boyd not to tell Hardy that Boyd knew. Later, Hardy confronted Boyd and said he had been asking too many questions." (*People v. Hardy* (1992) 2 Cal.4th 86, 120.)

The evidence presented at the reference hearing shows that this testimony was false and was motivated by Boyd's desire to deflect attention from the fact that he, not petitioner, was the actual killer. Had Mr. Demby only conducted reasonable investigation, he would have found, inter alia, that: Boyd had made admissions that he was the killer and that his associate, Marcus had been the driver; Boyd carried a knife which matched the description of the murder weapon; Boyd had committed numerous prior assaults with a knife; Boyd's purported alibi was false and the individuals (including Boyd's own wife) who purported to confirm it prior to trial did

so only out of the well-founded fear that Boyd would harm them if they did not; Boyd and Marcus were seen leaving the Vose Street Apartments on the night of the killing, when Boyd falsely claimed to have been so drunk that he could not walk; and, after the killings, Boyd was seen to have cuts on his hands consistent with having committed a knife assault, had guilty knowledge regarding the killings and evinced behavior demonstrating marked consciousness of guilt. Boyd was a thrice-convicted felon utterly lacking in credibility, whose testimony against petitioner was fabricated at the behest of law enforcement.

Mr. Jonas' case against petitioner also relied heavily on the testimony of Colette Mitchell, petitioner's girlfriend at the time of the killings. Ms. Mitchell had spent the night of the killings with petitioner, Steve Rice and petitioner's codefendant Reilly at the Vose Street Apartments, consuming large quantities of cocaine and alcohol. Prior to trial, Ms. Mitchell had maintained that she was with petitioner the entire night of the killings and that she was certain that he never left the Vose Street Apartments. However, as a result of the fact that Ms. Mitchell was "questioned" by law enforcement over 20 times, was repeatedly told that scientific evidence indicated that she was lying, was repeatedly threatened with prosecution, was then promised immunity in exchange for particular testimony against petitioner, and was provided with information by so many sources (including law enforcement) that she could not even identify what she had heard from whom, she was, by the time of trial, convinced that her own memory of the night in question should give way to law enforcement's purported belief that petitioner had participated in the killings. Ms. Mitchell's testimony at trial diverged significantly from her prior statements and testimony. At trial, she claimed that, although she had just consumed

so much cocaine that she would have been kept awake for hours, she had fallen asleep at around 2:00 or 3:00 a.m. on the night of the killings and could not account for petitioner's whereabouts thereafter.

At trial, Ms. Mitchell further claimed that, although petitioner told her repeatedly that he was innocent and Reilly told her repeatedly that petitioner was not the killer, petitioner also made a variety of statements, which, although inconsistent with each other, strongly suggested that he had been at the victims' house on the night of the killings and that he had taken something to make the crime look like a robbery. Ms. Mitchell also testified that petitioner had instructed her to dispose of certain evidence: i.e., a rifle which had belonged to codefendant Morgan and a pair of petitioner's boots. The documentary evidence presented at the hearing shows that, to the extent Ms. Mitchell's testimony indicated the foregoing alleged admissions on the part of petitioner, it was false and/or misleading and was the product of a campaign of coercion, persuasion and suggestion on the part of law enforcement (including highly improper conduct by Mr. Jonas at trial), in combination with Ms. Mitchell's own particular vulnerabilities to such conduct. Through the use of pressure, intimidation, promises, suggestion and sheer force of will, Mr. Jonas and the investigating police officers caused Ms. Mitchell to revisit and recharacterize every material fact which she had previously known to be true and to confabulate "facts" which filled in the gaps in, and distorted, her memory, such that she may honestly have believed her own testimony at trial. However, that testimony was utterly unreliable, false and misleading. The admissions she attributed to petitioner were in large part never made by him and to the extent that they were, those statements did not indicate guilty knowledge, but instead showed only that petitioner himself had received

information regarding the killings from Reilly.

At petitioner's trial, the only other evidence presented which remotely connected petitioner to the killings was as follows: various witnesses testified that, both before and after the killings, petitioner was frequently in the company of codefendant Reilly. Various witnesses testified that petitioner's behavior was, in general, odd. Joseph Dempsey and Mike Mitchell testified that, before the killings, Reilly had indicated that he believed petitioner would be the one who would commit the crime. Mr. Jonas elicited from Mr. Dempsey that Reilly had told him petitioner and a "black guy" had agreed to commit the killings, but that there had been a dispute over the use of a gun and the "black guy" had declined to participate. In fact, Mr. Dempsey had indicated that Reilly told him it was petitioner who had declined to participate, but Mr. Jonas succeeded in subverting the evidence in this regard.

Mr. Demby conducted minimal investigation into petitioner's life and family history and consulted no mental health experts. Had Mr. Demby conducted reasonable investigation and consultation with experts, he would have determined that petitioner's odd behavior could have been explained in a manner that was consistent with, and in fact, indicative of his innocence. Petitioner's association with Reilly could similarly have been explained by evidence that, at the time of the killings, his social functioning was at an all-time low, but that his behavior in this regard nevertheless did not indicate that he had committed the killings. Reasonable investigation and consultation would have revealed that, given petitioner's character and psychological condition, his behavior after the killings was in fact inconsistent with the theory that he had been the killer.

Mr. Demby also utterly failed to investigate or consult any experts

regarding the critical issue of time of death of Nancy and Mitchell Morgan. The prosecution presented evidence that the killings had occurred some time between 3:30 and 5:30 a.m. on May 21, 1981, during the time when Ms. Mitchell claimed that she was unable to account for petitioner's whereabouts. Had Mr. Demby only conducted reasonable investigation and consultation, he would have determined that credible evidence was available that the killings in fact had occurred at approximately 12:30 a.m. on May 21, 1981, and not later than 2:00 a.m. on that date, when petitioner's whereabouts had been firmly established.

In sum, the evidence of petitioner's guilt was by no means strong and, to the extent that there was any such evidence, competent counsel could have shown that such evidence was false and/or misleading, was the product of state misconduct, and was the result of law enforcement's desire to secure a conviction at all costs. Reasonably competent counsel could have established that petitioner was not the killer and that the real killer was the prosecution's own witness, Calvin Boyd.

The evidence presented at the reference hearing also showed that, had petitioner been represented by competent counsel, he would not have been sentenced to death. A vast quantity of compelling mitigation was available, but Mr. Demby simply failed to conduct an adequate investigation thereof. The jury that decided whether petitioner should live or die knew virtually nothing about who petitioner was, the many hardships he had endured in his life, his history of good deeds and good character, the many people (including his own children) who cared deeply for him, the mitigating explanation for his sole prior conviction (the prosecution's only aggravating evidence other than the circumstances of the capital crime) and the fact that his sometimes odd behavior was symptomatic of mental illness

but in no way indicative of a propensity for violence.

Petitioner's conviction and sentence of death cannot stand. The reasons therefor are set forth below in detail. As the instant supplemental allegations show, petitioner's trial and its outcome represent a shameful example of the fact that the criminal justice system too frequently fails to ferret out the truth. Although the crime of which petitioner stands convicted is not one in which DNA evidence is available to vindicate petitioner's claim of innocence, like those so prevalent in recent news reports, the evidence shows that petitioner is nevertheless an innocent man who has now spent nearly 20 years of his life in prison and under sentence of death because of an unscrupulous prosecutor and incompetent defense counsel.

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II

PRELIMINARY ALLEGATIONS

1. Petitioner is unlawfully confined and restrained of his liberty at San Quentin State Prison, San Quentin, California, by Cal Terhune, Director of the California Department of Corrections, and by Jeanne Woodford, Acting Warden of San Quentin State Prison.

2. Petitioner's imprisonment and death sentence are the result of a fundamentally unfair trial. A combination of factors including, inter alia, state misconduct, trial court error, the application of unconstitutional rules, policies and statutes, and the ineffective assistance of counsel, denied petitioner his state and federal constitutional rights. As a result, petitioner's conviction and sentence were arrived without consideration of compelling exculpatory and mitigating evidence which should have been presented, and were tainted by false, misleading and unreliable evidence which may not lawfully form the basis for a capital conviction or sentence of death. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 1, 7, 15, 16, 17; Pen. Code § 1473 et seq.)

3. Petitioner James Edward Hardy is confined under sentence of death pursuant to the judgment of the Superior Court of California in and for the County of Los Angeles, Superior Court Criminal Case No. A148767, which was rendered on February 1, 1984. (CT 717.)[2]

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[2] "CT" and "RT" refer to the Clerk's Transcript and Reporter's Transcript in *People v. James Edward. Hardy*, No. S004607, Crim. No. 23533, petitioner's automatic appeal before this Court. "HT" refers to the Reporter's Transcript of the reference hearing held pursuant to this Court's order to show cause of April 23, 1992, and amended reference order of July 20, 1994. "HCT" refers to the clerk's-type transcript, which contains selected pleadings and orders filed in the referee's court and which

(continued...)

4. Petitioner's conviction and sentence were the subject of the automatic appeal in the matter of *People v. James Edward Hardy and Mark Anthony Reilly* (1992) 2 Cal.4th 86 (No. S004607/Crim. No. 23533). The record on appeal in that matter was filed in this Court on or about June 17, 1988. Petitioner's opening brief was filed on November 2, 1988. The respondent's brief was filed on or about July 9, 1990. Petitioner's reply brief was filed on April 26, 1991. Petitioner's supplemental opening brief was filed on September 12, 1991. Petitioner requests that this Court take judicial notice of the record on appeal. (Evid. Code, §§ 452, subd. (d), 453.)

5. On or about August 9, 1991, the California Appellate Project filed a brief as amicus curiae in support of the automatic appeal of petitioner's codefendant, Mark Reilly. On September 12, 1991, petitioner filed a supplemental opening brief, joining in the majority of claims raised by the California Appellate Project in its brief as amicus curiae. On November 25, 1991, the Attorney General filed a response to the amicus curiae's brief and petitioner's supplemental opening brief. On December 31, 1991, petitioner filed a supplemental reply brief.

6. On March 12, 1992, this Court filed its opinion in petitioner's automatic appeal, vacating one of the multiple-murder special circumstance findings as to petitioner and his codefendant, Mark Reilly, and affirming the

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[2](...continued)
petitioner and respondent are filing jointly for this Court's ease of reference in reviewing the instant pleading and the parties' respective briefing on the merits and exceptions to the referee's report. "H.Exh." refers to exhibits presented in proceedings held pursuant to the aforementioned reference order. "Report" refers to the Referee's Findings of Fact and Conclusions, filed September 16, 1999.

judgment in all other respects. (*People v. Hardy*, *supra*, 2 Cal.4th 86.) On March 27, 1992, petitioner filed a petition for rehearing, which was denied on May 14, 1992. On September 10, 1992, petitioner filed a petition for writ of certiorari in the United States Supreme Court; on November 16, 1982, that petition was denied.

7. On July 26, 1991, petitioner filed a timely petition for writ of habeas corpus in this Court. That petition, with respect to which this Court issued an Order to Show Cause and ordered a reference hearing (see paragraphs 11, 15, *infra*), is currently pending before this Court. It is that petition which petitioner now supplements with the allegations contained herein.

8. On December 30, 1991, petitioner filed supplemental allegations and exhibits in support of the petition for writ of habeas corpus of July 26, 1991. On December 31, 1991, this Court asked the Attorney General, respondent herein, to file an informal response to petitioner's petition and supplemental allegations. On January 24, 1992, petitioner filed an additional supplemental allegation in support of the petition for writ of habeas corpus. On March 2, 1992, respondent filed its informal opposition to the petition. On March 27, 1992, petitioner filed a reply to respondent's informal opposition.

9. On April 23, 1992, this Court issued the following order:

> "The petition for writ of habeas corpus, filed July 26, 1991, as supplemented by the additional allegations filed December 30, 1991, and February 24, 1992 [sic], has been read and considered. The Director of Corrections is ordered to show cause before this court at its courtroom, when the proceeding is ordered on calendar, why petitioner is not entitled to reversal of the penalty judgment because his trial attorney rendered constitutionally ineffective assistance of counsel by failing to call, at the penalty phase of the trial,

available witnesses who would have presented evidence of mitigating circumstances." (HCT 1.)

10. On July 1, 1992, respondent filed a return to the petition for writ of habeas corpus. On August 17, 1992, petitioner filed a traverse to respondent's return. On December 7, 1992, petitioner filed a supplemental allegation and supplemental exhibit in support of the petition.

11. On April 28, 1993, this Court issued the following order:

> "Respondent is ordered to file a supplemental return to the order to show cause, responding to the following:
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> "1. Trial counsel Michael Demby provided ineffective assistance of counsel by failing to present, at the penalty phase of the trial, available mitigating evidence related to petitioner's participation in the Outward Bound Program, including the views of Charles Behrensmeyer.
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> "2. Trial counsel Michael Demby provided ineffective assistance of counsel by failing to present, at the penalty phase of the trial, available mitigating evidence related to petitioner's diminished capacity, including the views of Dr. David Smith and the evidence of petitioner's prior commitment in Camarillo State Hospital." (HCT 2.)

12. Also on April 28, 1993, this Court issued the following additional order:

> "Based on the record in this matter and good cause appearing, it is ordered:
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> "The Honorable Robert M. Mallano, Presiding Judge of the Los Angeles County Superior Court, shall select a Judge of the Los Angeles County Superior Court to sit as a referee in this proceeding and shall promptly notify this court of the referee selected. After appointment by this court, the referee shall take evidence and make findings of fact on the following questions regarding the case of People v. James Edward Hardy (Los Angeles County Sup. Ct. No. A148767; Judge Robert Fratinne):
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> "1. Did petitioner Hardy engage in an act of heroism

while employed as a driver for the Southern California Rapid Transit District?

"2. Was defense counsel Michael Demby made aware of the facts surrounding the incident?

"3. What were Mr. Demby's reasons why he did not present evidence of the incident?

"4. Were those reasons supportable?

"It is further ordered that the referee prepare and submit to this court a report of the proceedings conducted pursuant to this appointment, of the evidence adduced, and the findings of fact made." (HCT 3-4.)

13. On May 19, 1993, this Court appointed the Honorable Paul G. Flynn, Judge of the Los Angeles County Superior Court, to sit as a referee in the instant case. The Court ordered Judge Flynn to take evidence and make findings of fact on the questions set forth in the order of April 28, 1983. The Court further ordered Judge Flynn to submit a report of the evidence adduced and findings of fact made. (HCT 5.)

14. On June 28, 1993, respondent filed a supplemental return to the order to show cause. On August 16, 1993, petitioner filed a supplemental traverse to respondent's supplemental return. On June 30, 1994, at the request of Judge Flynn, petitioner wrote a letter to this Court requesting clarification of this Court's reference order of May 19, 1992. (HCT 6-7.) On July 12, 1994, respondent wrote to this Court and offered its views concerning this matter.

15. On July 20, 1994, this Court issued the following order, amending the questions to be answered by Judge Flynn:

"The four questions set forth in the order of this court filed in this case on April 28, 1993, are amended to read as follows:

> “1. Did petitioner Hardy engage in an act of heroism while employed as a driver for the Southern California Rapid Transit District?
>
> “2. Was defense counsel Michael Demby made aware of the facts surrounding the incident?
>
> “3. What were Mr. Demby’s reasons why he did not present evidence of this incident, or the uncontradicted evidence of other available witnesses who would have provided mitigating evidence at the penalty phase of the trial?
>
> “4. Were Mr. Demby’s reasons supportable?” (HCT 13.)

16. On July 1, 1994, petitioner filed supplemental exhibits in support of the petition for writ of habeas corpus. On July 14, 1994, respondent filed a motion to strike petitioner’s supplemental exhibits. On August 24, 1994, this Court granted respondent’s motion “without prejudice to petitioner’s right to seek admission of the evidence at the evidentiary hearing in this case, to the extent the alleged facts contained in the aforesaid exhibits are deemed relevant by the referee to the issues to be decided under the terms of the amended reference order.”

17. Evidence was presented before Judge Flynn on June 10, 11, 12, 13 and 14, July 29, 30 and 31, and August 1 and 2, 1996, and on February 24, 25, 26, 27 and 28, and March 3, 4, 5, 6 and 7, 1997.

18. On April 30, 1997, pursuant to a stipulation of the parties, Judge Flynn ordered extensive corrections of the reporter’s transcript of the reference hearing. Additional corrections of the reporter’s transcript were ordered on August 18 and again on August 19, 1997. On approximately June 22, 1998, counsel for petitioner received the corrected reporter’s transcript of the evidentiary hearing.

19. On September 17 and 18, 1998, respectively, respondent and

petitioner filed proposed findings of fact before Judge Flynn. On October 27, 1998, petitioner filed a reply to respondent's proposed findings of fact. On November 19, 1998, respondent filed a motion to strike petitioner's reply to its proposed findings of fact. On September 16, 1999, Judge Flynn filed his Findings of Fact and Conclusions of Law. These supplemental allegations are being filed together with the Brief on the Merits and Exceptions to the Referee's Report.

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III

TIMELINESS

20. The habeas corpus petition which petitioner hereby supplements was timely filed on the ninetieth day after the deadline for petitioner's reply brief on automatic appeal. (Standard 1-1.1, Policies Regarding Cases Arising From Judgments of Death.) That petition is pending, as is this Court's order to show cause, which was granted on the claim that petitioner was denied the effective assistance of counsel by virtue of his trial attorney's failure to present available mitigating evidence at the penalty phase of his trial. At the reference hearing, the parties presented evidence relevant to the claim at issue in the order to show cause. Predictably, the evidence which was presented at the reference hearing significantly expanded upon the facts which counsel had originally pled as the basis for the claim. Moreover, as is also reasonably foreseeable, the reference hearing evidence established a basis for a number of violations of petitioner's constitutional and statutory rights beyond those originally claimed. In the instant supplemental allegations, counsel for petitioner seeks to articulate and present those other legal claims in the manner of a pleading conforming the allegations to the proof. With few exceptions, the supporting facts for the allegations herein are contained in the record of the proceedings held pursuant to this Court's order to show cause. Copies of particular documents presented at the reference hearing are provided as appendices for the sake of this Court's convenience.

21. Given that the Referee's Findings of Fact and Conclusions, filed in September, 1999, was largely favorable to petitioner, that report provided important support for the instant allegations. Prior to the receipt of that document, counsel for petitioner expected that additional claims, or

additional support for existing claims, would be provided by the referee's findings, whether favorable or not. Moreover, counsel reasonably concluded that attempting to file and litigate his supplemental allegations prior to this Court's receipt of the corrected record of the reference hearing, which this Court was to obtain in conjunction with the referee's report, would result in significant confusion. Counsel would have had to attempt to provide the Court with a copy of the record of the reference hearing, which includes approximately 3,000 pages of reporter's transcript, approximately 1,000 pages of pleadings, and approximately 151 exhibits, some of which are thousands of pages in length and one of which is petitioner's trial counsel's file, which consists of three large boxes of documentary material and 39 cassette tapes.

22. Many of the supplemental allegations herein could not have been made earlier because petitioner did not have access to court ordered discovery and subpoena power. (See, e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260-1261.)

23. The reference order did not encompass the question of prejudice flowing from trial counsel's ineffectiveness: this Court reserved the question of prejudice for its own determination. Knowing that the evidence underlying the claim at issue in the reference order would change through the course of the hearing as witnesses testified and were cross-examined, counsel for petitioner conducted juror interviews after the close of the reference hearing, so that the jurors' views of the evidence presented at the hearing could be ascertained and presented to this Court in support of petitioner's contention that his trial counsel's deficient performance was prejudicial.

24. These supplemental allegations are being filed without

substantial delay. If they are deemed filed with substantial delay, any such delay is justified by good cause. Good cause is established by virtue of the requirement that all allegations be presented in a single pleading, and good cause for substantial delay may be established if the petitioner can demonstrate that, because he or she was conducting an ongoing investigation into at least one potentially meritorious allegation, petitioner delayed presentation of one or more other known allegations in order to avoid the piecemeal presentation of his allegations. (See, e.g., *In re Clark* (1993) 5 Cal.4th 750, 767-769; *McCleskey v. Zant* (1991) 499 U.S. 467.)

25. If this Court finds any of the allegations alleged herein to be filed with substantial delay and not justified by good cause, petitioner is entitled to, and hereby requests, a hearing at which he may present evidence justifying the perceived unjustified delay. To address in this pleading the origin of every fact would be impracticable.

26. The allegations contained in this pleading should be considered on their merits. Any unjustified failure to file this pleading sooner was the responsibility of habeas counsel, not petitioner. Petitioner is an indigent, incarcerated layperson and suffers from mental impairments which make him even less able than most laypersons to organize and prepare the instant supplemental allegations. He was entirely dependent upon counsel to handle his case in a competent manner. As this Court has noted, a petitioner who is represented by habeas counsel "has a right to assume that counsel is competent." (*In re Clark*, *supra*, 5 Cal.4th at p. 780.) If habeas counsel has unjustifiably delayed some facet of petitioner's case, then petitioner's counsel has "failed to afford [petitioner] adequate representation" within the meaning of *In re Clark* and, accordingly, any procedural bar should be excused. (*Ibid*.)

27. If this Court finds any allegation in this pleading to be procedurally barred as untimely, or waived, or barred because it was previously raised and rejected on appeal, or that any allegation should have been raised on appeal, or was pleaded defectively in petitioner's initial petition or on appeal, present counsel had no tactical reason for not raising such allegation adequately in these proceedings. Any delay in raising any issue in this pleading should not be ascribed to petitioner; all decisions in the instant proceeding have been made by present counsel, including the time of filing, the conduct of the investigation, and the manner in which issues have been presented. The prejudice resulting from any unjustified delay is manifest in the numerous constitutional issues presented herein. For this reason, the instant pleading must be regarded as timely.

28. Should this Court reject any allegation raised or sought to be raised in petitioner's supplemental allegations on grounds other than the merits of thereof, petitioner alleges that he is deprived by such action of his rights to life, liberty, due process on appeal, equal protection, reliability in the determination of guilt and imposition of the death penalty, and effective counsel on appeal and on habeas corpus, all in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, sections 1, 7, 15, 16, and 17 of the California Constitution, and the provisions of Penal Code section 1473.

29. This Court's recent decisions in *In re Robbins* (1998) 18 Cal.4th 770 and *In re Gallego* (1998) 18 Cal.4th 825 regarding timeliness should not be applied retroactively to pending cases, such as petitioner's. In *Robbins* and *Gallego*, this Court purported to clarify this Court's rules concerning timeliness, as those rules were announced in this Court's Policies Regarding Cases Arising From the Judgments of Death and its

decision in *In re Clark*, *supra*. However, this Court's decisions in *Robbins* and *Gallego* went far beyond a clarification of existing rules and law, and instead imposed substantial new rules and additional burdens that were not articulated in, and could not be discerned from, the *Clark* opinion, and of which reasonable capital post-conviction attorneys therefore had no notice.[3] Although the *Robbins* majority summarily asserted that the rules and pleading burdens announced in that case do not amount to a "new requirement imposed for the first time in this opinion" (*In re Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 10), this Court does not point to any language in *Clark* or elsewhere that would have apprised reasonably competent counsel in capital post-conviction cases of the rules this Court has now imposed, including but not limited to these very specific and burdensome pleading requirements. Moreover, this Court would have no reason to issue orders to show cause and opinions in *Robbins* and *Gallego* unless members of this Court perceived a lack of clarity in its previous pronouncements concerning timeliness. Indeed, neither counsel for

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[3]Justice Kennard noted in her concurring and dissenting opinion in Robbins that this Court's

> "earlier decisions have never expressly required that the petitioner provide this explanation [explaining delay and fully disclosing the reasons for delay] separately *as to each subclaim* in a multiclaim petition, that the petition allege with specificity a *legal theory* of good cause for delay as to each subclaim, or that good cause for delayed presentation of developed claims will invariably require an *ongoing bona fide investigation* of undeveloped claims. Death penalty habeas corpus petitioners, and the counsel who represent them, had no notice of these previously unarticulated requirements." (*In re Robbins*, *supra*, 18 Cal.4th at p. 819 (conc. and dis. opn of Kennard, J.), emphasis in original.)

Robbins or *Gallego* initially provided this degree of specificity in their petitions. Since the opinions in *Robbins* and *Gallego* announce significant new rules concerning timeliness, and new pleading requirements to justify the filing of claims later than 90 days after the due date of the reply brief – including, but not limited to, requirements that a petition supply as to each claim and subclaim the dates on which information was obtained, that the legal theories justifying delay as to each claim and subclaim be pleaded in the petition, and that "bona fide ongoing investigation" be demonstrated in order to justify delayed presentation of claims – they should not be applied retroactively to pending cases, such as petitioner's. Counsel in such cases (including petitioner's) simply had no notice that this Court would require such detailed information and pleading.

30. This Court's decision in *In re Robbins*, *supra*, 18 Cal.4th 770, also requires that counsel seeking to establish the absence of delay must demonstrate with specificity facts showing when information offered in support of the claim was obtained, and that the information was neither known, nor reasonably should have been known, at any earlier time. (*In re Robbins*, *supra*, 18 Cal.4th at p. 787.) This new requirement clearly impinges upon the attorney-client privilege and the attorney work-product rule by requiring habeas counsel to disclose confidential information. It is an ill-conceived requirement that should not be applied to petitioner's case.

31. In *In re Clark*, *supra*, this Court held that pleadings otherwise barred by procedural rules regarding timeliness will be entertained on their merits when they are found "to allege facts which, if proven, would establish that a *fundamental miscarriage* of justice occurred as a result of the proceedings leading to conviction and/or sentence." (*In re Clark*, *supra*, 5 Cal.4th at p. 797.) Such a miscarriage of justice will be found

"in any proceeding in which it can be demonstrated (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which [he] was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [or] (4) that the petitioner was convicted or sentenced under an invalid statute." (*In re Clark*, *supra*, 5 Cal.4th at pp. 797-798 [footnotes omitted].)

32. Such a fundamental miscarriage of justice occurred in petitioner's case in that: (1) but for counsel's ineffective assistance, no reasonable judge or jury would have found petitioner guilty or found the special circumstances true; (2) petitioner is actually innocent of the crimes charged; (3) either individually or in any combination thereof, trial counsel's failure to investigate and present evidence pertaining to the crime and to petitioner's social history and mental state, together with the state misconduct and the presentation of false, misleading and unreliable evidence not properly considered in determining whether the death penalty should be imposed, the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner that, absent these errors and omissions, no reasonable judge or jury would have imposed a sentence of death; and (4) the statute under which petitioner was convicted and sentenced is unconstitutional as applied. (See *In re Clark*, *supra*, 5 Cal.4th at p. 797-798.)

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IV

INCORPORATION OF EXHIBITS AND REQUEST FOR JUDICIAL NOTICE

33. Petitioner hereby incorporates by reference, as if fully set forth herein, the certified record on appeal and all other documents filed in this Court in the case of *People v. James Edward Hardy* (Los Angeles County Sup. Ct. No. A148767; Supreme Court No. S004607), as well as the record of all proceedings held in the instant matter, including all prior habeas corpus petitions, allegations, exhibits, appendices, pleadings, motions, testimony and argument, and including any pleadings, evidence or other materials proffered but stricken or excluded by the referee.

34. Petitioner hereby incorporates by reference all the appendices to these supplemental allegations, as if fully set forth herein. Each and every allegation made herein is based on each and every document contained in the appendices as well as the entire record of proceedings held in the trial court, on direct appeal and in the instant habeas corpus proceedings. Petitioner requests this Court to take judicial notice of all records, documents, exhibits, and pleadings in *People v. James Edward Hardy and Mark Anthony Reilly*, Case No. S004607, and *In re James Edward Hardy on Habeas Corpus*, S022153.

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V

GENERAL ALLEGATIONS

35. Petitioner makes the following general allegations with respect to each claim and allegation made herein:

36. To the extent that the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, petitioner was deprived of the effective assistance of counsel. To the extent that trial counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were based upon state and/or prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts and therefore were not reasonable, rational or informed.

37. To the extent that the facts set forth below could not reasonably have been uncovered by trial counsel, those facts constitute newly discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings and undermine the prosecution's case against petitioner such that his rights to due process and a fair trial have been violated and collateral relief is appropriate.

38. If respondent disputes any of the facts alleged below, petitioner requests an evidentiary hearing so that the factual disputes may be resolved.

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VI

THE PROSECUTION PROCURED PETITIONER'S CONVICTION AND SENTENCE BY PRESENTING FALSE AND MISLEADING EVIDENCE, IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

39. Petitioner's conviction, judgment and confinement are unlawful, unconstitutional and void, in that they were obtained in violation of his rights to due process and a fair trial, to present a defense, to an unbiased jury, to conviction on proof beyond a reasonable doubt, to the effective assistance of counsel, to confrontation and cross-examination, to reliable and accurate guilt and penalty verdicts and against cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, sections 1, 7, 13, 14, 15 and 17 of the California Constitution, and Penal Code section 1473, in that the prosecution presented false, misleading and unreliable testimony in the proceedings leading to petitioner's conviction and sentence of death and/or presented false, misleading and unreliable testimony which it subsequently determined was false and failed to correct its falsity. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *United States v. Bagley* (1985) 473 U.S. 667, 678-680; *Zant v. Stevens* (1982) 462 U.S. 862, 865; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Giglio v. United States* (1972) 405 U.S. 150; *Miller v. Pate* (1967) 386 U.S. 1, 7; *Napue v. Illinois* (1959) 360 U.S. 264, 269; *Alcorta v. Texas* (1957) 355 U.S. 28, 31; *Pyle v. Kansas* (1942) 317 U.S. 213, 216; *Berger v. United States* (1935) 295 U.S. 78, 87; *Mooney v. Holohan* (1935) 294 U.S. 103, 112 (per curiam).)

40. The prosecution has a duty to disclose that a witness has testified falsely, even if it finds out of the falsity after the testimony has

already been given. (*Napue v. Illinois, supra,* 360 U.S. 264; *Alcorta v. Texas* (1957) 355 U.S. 28; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011.) Where the prosecution has knowingly used perjured testimony, or failed to correct testimony which it subsequently learned was false, the falsehood is deemed to be material and reversal is required if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. (*United States v. Bagley*, *supra*, 473 U.S. at p. 679, fn. 9; *United States v. Agurs* (1976) 427 U.S. 97, 103; accord *Giglio v. United States*, *supra*, 405 U.S. at p. 154; *Napue v. Illinois*, *supra*, 360 U.S. at p. 271.)

41. Due process is violated when the prosecution calls a witness who testifies falsely, even if the prosecution is unaware at the time the testimony is given that it is false. (*United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1203-1204; *Sanders v. Sullivan* (I) (2nd Cir 1988) 863 F.2d 218, 222; *Sanders v. Sullivan* (II) (2nd Cir. 1990) 900 F.2d 601.) Where the prosecution has unwittingly presented false evidence, reversal is required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (See *United States v. Bagley*, *supra*, 473 U.S. at p. 682; *United States v. Young*, *supra*, 17 F.3d at pp. 1203-1204; *United States v. Alzate* (11th Cir. 1995) 47 F.3d 1103, 1109.)

42. Due process is also violated when the prosecution has used improper suggestive and manipulative techniques in order to attain sought-after witness testimony. (See *Foster v. California* (1969) 394 U.S. 440; *Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Shirley* (1982) 31 Cal.3d 18.)

43. Reversal is required for the presentation of material false evidence not only under federal and state constitutional authority, but under

state statutory authority as well. The California Penal Code provides that a writ of habeas corpus may be prosecuted on the ground that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code, § 1473(b)(1).)

44. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. The facts underlying this claim are contained in the record of the reference hearing. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

45. In the event that this Court finds that reasonably competent trial counsel would have been aware of the facts underlying this claim and would have presented those facts as well as the instant argument at petitioner's trial, petitioner has been deprived of the effective assistance of counsel at trial.

46. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

47. In the event that this Court finds that the instant claim should

have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

48. To the extent that the facts set forth below were not known to the prosecution and could not have been reasonably discovered by petitioner's trial counsel, they constitute newly-discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings, undermining confidence in the outcome and violating petitioner's rights to due process, a fair trial, and reliable guilt and penalty determinations. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 358)

49. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and in post-conviction proceedings, additional facts in support of this claim would be available to petitioner. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

A. Calvin Boyd

50. Calvin Boyd (a.k.a. Washington Kelvin Boyd, Calvin McKay, Calvin Love, Robert Jackson) testified for the prosecution at petitioner's preliminary hearing, at an in limine hearing held pursuant to Evidence Code section 402, and in the presence of the jury at the guilt phase of petitioner's trial. Boyd also testified for respondent at the reference hearing held in this habeas corpus proceeding. Those of Boyd's out-of-court statements which were in the possession of petitioner's trial counsel, Michael Demby, at the time of petitioner trial are contained in Exhibit 85, Mr. Demby's trial files from petitioner's case, entered into evidence at the reference hearing. (H.Exh. 85.) The record of the reference hearing, together with the record

on appeal, demonstrates that each and every material statement made by Boyd at petitioner's trial was false. The state, including but not limited to Deputy District Attorney Jonas, knew or should have known of the falsity. Even if the state was unaware of the falsity, petitioner is entitled to relief under the foregoing authorities.

51. Boyd's material false testimony at petitioner's trial includes, but is not limited to, the following:

52. Boyd lied when he testified at trial that he had not been promised immunity in exchange for his cooperation with the prosecution in petitioner's case. (RT 8051, 8278, 8365.) The evidence presented at the reference hearing shows that, after Boyd's testimony at petitioner's preliminary hearing and prior to his testimony at petitioner's trial, Mr. Jonas promised him immunity from prosecution for perjury committed at the preliminary hearing. (Report at pp.17-18; HT 2020, 2027.) The evidence presented at the reference hearing also shows that, on August 3, 1981, the prosecutor promised Boyd that, as long as law enforcement believed that he did not plan or commit the Morgan killings, he would not be prosecuted in connection therewith.[4] Close to the end of that interview, Mr. Jonas told

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[4]A police chronology contained in Mr. Demby's files indicates that on July 31, 1981, Boyd told detectives, who had interviewed him at least three time prior to that date, that he no longer was willing to take a polygraph examination and instead that he wanted "to talk to the DA." (Appendix 11). The chronology also indicates that, on August 3, 1981, Boyd presented himself at the police station in the morning, but Mr. Jonas was unavailable until the afternoon. (Appendix 11.) Boyd came back later that day, at which time he met with Mr. Jonas. That interview was tape-recorded and a copy of the tape was provided to petitioner's counsel prior to trial. The tape recorder was apparently started shortly after Boyd had asked for a guarantee of immunity from prosecution. The tape commences with

(continued...)

Boyd: "You're gonna probably have to come back in and sign the immunity papers once I get them prepared." (Appendix 2.) Although formal immunity papers may not have been signed, Boyd was promised immunity from prosecution for the Morgan murders.

53. Boyd lied when he testified at petitioner's trial that he received no favors in exchange for his cooperation in petitioner's case and that there had been no discussions with authorities in Santa Clara County, where Boyd had criminal charges pending at the time petitioner was awaiting trial, about Boyd's cooperation with law enforcement in petitioner's case. (RT 8079-8080, 8365.) At the reference hearing held herein, Boyd admitted that, when he was being interviewed for the preparation of a pre-sentence report, he told the Santa Clara County probation department about his involvement in petitioner's prosecution. (HT 1979.) The court file from Boyd's Santa Clara County case confirms this fact. (H.Exh. 78.) Moreover, Detective Jamieson, the lead investigating officer in petitioner's case, admitted at the reference hearing that, when Boyd's own charges were still pending, he (Jamieson) had numerous contacts with the Santa Clara County District Attorney's office regarding Boyd and the fact that he was testifying for the prosecution in petitioner's case. (HT 2601.) Documentary evidence confirms this fact as well. (Appendix 6.) Petitioner hereby incorporates by reference as if fully set forth herein paragraph 247, *infra*. The sentence which Boyd received in

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[4](...continued)
the following statement by Mr. Jonas: "about the time of the preliminary hearing in October. Understand? It's a formal piece of paper. . . If what you're telling us is the truth, that will guarantee to you that we will not prosecute you in the case. Okay, but again, understanding that we have to believe you. Okay?" (Appendix 2.)

his Santa Clara County case was the lowest term available, despite the fact that Boyd had absconded for over a year between the entry of his guilty plea and sentencing. This indicates that Boyd expected to, attempted to, and did in fact receive leniency in his own case as a result of the fact that he assisted in petitioner's prosecution. The evidence presented at the reference hearing also shows that, in exchange for his cooperation with the prosecution in petitioner's case, Boyd expected to receive other future assistance from law enforcement in his own contacts with the criminal justice system. (See, e.g., HT 1945-1946, 1991-1992, 2007.)

54. Boyd lied when he testified at petitioner's trial that, on the morning of May 21, 1981, he walked through Steve Rice's apartment with his wife, Arzetta Harvey, and her son, Arzel Foreman, and saw petitioner, Reilly, Colette Mitchell and Rice himself inside the apartment. (RT 8107, 8162, 8197, 8409-8410.) Boyd also testified falsely when he stated that he walked through Steve Rice's apartment with his wife "mostly every day" (RT 8250), and that it was a short-cut to the fence. (RT 8162.) At the reference hearing, Boyd admitted that he never used anyone else's apartment to get to the fence because he could get to the fence just as easily without going through anyone's apartment. (HT 1981-1983; Report at p. 17.) Other evidence in the record of the hearing and in the record on appeal supports the proposition that Boyd's trial testimony in this regard was false. (See, e.g., HT 146, 281; H.Exhs. F, 85.) In one of his first statements to the police, Boyd said he did not know whether it was the day after or two days after the killings that he had walked through Rice's apartment and seen petitioner and Reilly sleeping. (Appendix 7.) At trial, Boyd testified that, on the morning of May 21, 1981, the door to Steve Rice's apartment was open. (RT 8162.) On August 3, 1981, Boyd said Colette Mitchell opened

the door for him. (Appendix 2.)

55. Boyd lied at trial when he testified that he first learned about the murders when he saw a news report of the crime on television. (RT 8086, 8105.) The evidence presented at the hearing shows that Boyd participated in the killings themselves. Petitioner hereby incorporates by reference as if fully set forth herein Claims XIII, XVIII, *infra*. Moreover, Boyd's testimony that he learned about the murders from the television news had been suggested to Boyd by Detective Bobbitt, one of the investigating officers in petitioner's case. During the interview of August 3, 1981, Boyd said that Cliff Morgan was supposed to leave town "the night before it happened"; Detective Bobbitt asked Boyd whether he meant the night before he heard about it on the news; Boyd followed Detective Bobbitt's lead and agreed that he meant to say the night before he heard it on the news. (Appendix 2.)

56. Boyd lied when he testified at trial that he had seen petitioner's boots in Steve Rice's apartment on the morning of the killings and they "had red on them." (RT 8198-8200.) In the interview of August 3, 1981, Boyd first came up with purported information regarding petitioner's boots. At that time, he stated that, when he purportedly saw petitioner's boots, they had something on them that could have been water stains: that is, the purported stain was not red. (Appendix 2.) At trial, Boyd testified that the boots in evidence at the preliminary hearing were the same boots and were in the same condition as when he claimed to have seen them on May 21, 1981. (RT 8198-8200.) The boots that were entered into evidence at the preliminary hearing had been subjected to testing by law enforcement and were found not to have blood on them. (Appendix 50.)

57. Boyd lied when he testified at trial that, on the night of the

killings, he was drinking and using cocaine with his friends Marcus, Selena, Ollie and Jeff; that he suddenly began to feel as if he was going to pass out; that he thought Marcus had drugged him; that Ollie and Marcus helped him back to his apartment; that he had his pajamas on under his pants because he had never taken them off that morning; that his wife and neighbor Sandy undressed him and put him to bed; that he slept from 11:00 p.m. on May 20, 1981 until 7:00 a.m. on May 21, 1981; and that slept so soundly that he did not wake up when his wife came to bed that night. (RT 8106-8107, 8150, 8167-8161, 8214-8117.) The evidence presented at the reference hearing showed that Boyd in fact committed the killings that night and that his alibi for the night of the killings was false. The evidence showed that, at around 8:00 or 9:00 p.m. on the night of May 21, 1981, Boyd and Marcus were seen standing outside the apartment complex talking to some other residents of the building. Boyd did not appear to be under the influence of alcohol or drugs at that time. Boyd and Marcus were asking around for a ride. (Report at p. 14; HT 151-152; H.Exh. G.) In the "late evening," Boyd and Marcus asked Rick Ginsburg if they could borrow his car or get a ride; Ginsburg declined their requests. (Report at p. 14; HT 87, 116; H.Exh. D.) At around 10:00 or 11:00 p.m., Marcus and Boyd left the apartment complex on Marcus' motorcycle, with Marcus driving and Boyd riding on the back. (Report at pp. 14-15; Frank, HT 152; H.Exh. G.) The evidence showed that, after the killings, Boyd pressured his neighbor, Sandy Moss, his step-son, Arzel Foreman, and his wife, Arzetta Harvey, to tell police that the night Ms. Harvey bought a bedroom set from Ms. Moss and Boyd came home drunk as described above was the night of the killings, when in fact it was not. Petitioner hereby incorporates by reference as if fully set forth herein Claim XIII, *infra*. The hearing evidence showed that Ms. Moss

never helped undress Boyd or watched Arzetta Harvey do so, and that the night that Ms. Moss sold Ms. Harvey the bedroom set, Boyd had came home and passed out on the bed during a period of time when Sandy was not present. (HT 1153.) Boyd's wife's testimony at the preliminary hearing contradicted his claim that he had pajamas on under his clothes on the night in question. (CT 851-852.) Moreover, the reference hearing evidence included a tape of the interview of August 3, 1981, in which Boyd admitted that he knew petitioner, Reilly, Rice and Colette Mitchell were going back and forth between Reilly's and Rice's apartments on the night of the crime, when he claimed to have been so drunk that he did not notice when his wife came to bed. (Appendix 2.) The hearing evidence also included a tape-recording of Colette Mitchell's statement to law enforcement that when she, petitioner, Reilly and Rice were in Reilly's apartment, on the night of May 20, 1981, they saw Boyd walk by Reilly's window. (Appendix 13.)

58. Boyd testified falsely at trial that, the day of the killings, when he heard about the murders on the news, he immediately gathered about 10 people from the Vose St. Apartment and several others who did not live in the apartments, took them to Reilly's car, had them write down the license plate number, and told them that if he (Boyd) came up missing, Reilly was responsible. (RT 8107-8109, 8285.) On August 3, 1981, Boyd told police that, when he heard the news, he told Sandy to get Reilly's license plate and to hold him responsible if anything happened to Boyd. Boyd also said the he got in his car and went to Reilly's car to write down the license plate number. (Appendix 2.) At the preliminary hearing, Boyd had admitted that he did not have a car. (CT 2641.)

59. Boyd testified falsely at trial that, when he saw the news on the evening of May 21, 1981, he went downstairs to Reilly's apartment to

confront Reilly and he found Reilly, Debbie Sportsman, petitioner and Colette in Reilly's apartment. (RT 8108-8110.) At the preliminary hearing, Boyd said that when he saw the news, he went downstairs to Reilly's apartment and found Reilly, Mike Mitchell, Debbie Sportsman, and "this other blond-headed girl"; petitioner was not there. (CT 807-808.)

60. Boyd lied when he testified at trial (and at the preliminary hearing) that, about a week after the killings,[5] Reilly told him in the "wash-house" that he and petitioner had committed the crime. (RT 8110, 8111, 8113.) The evidence presented at the reference hearing shows that Boyd was interviewed by law enforcement at least five times[6] prior to the preliminary hearing and was asked directly if Reilly had ever admitted committing the killings; Boyd never mentioned in any of the those interviews any conversation with Reilly in the "wash-house," and consistently denied that Reilly had ever said who committed the killings. (Appendices 2, 7, 11, 30.) In the tape-recorded interview of August 3, 1981, Boyd stated that "Buck didn't tell me about Jim." (Appendix 2.) At the preliminary hearing itself, Boyd testified that, after the killings, he asked Reilly about them and Reilly answered that he did not want to talk about it. (CT 2644-2645.) However, at the preliminary hearing, after Reilly's defense counsel stated during his cross-examination of Boyd that he believed Boyd's alibi was "phony" (CT 2726) and pressed Boyd regarding

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[5]The killings occurred on the night of May 20 or early morning of May 21, 1981. Police chronological records contained in Mr. Demby's trial files show that Reilly was arrested on May 26, 1981, and released May 29, 1981, then re-arrested in July 15, 1981. (Appendix 11.)

[6]Police reports and chronologies contained in Mr. Demby's files indicate that Boyd was interviewed by law enforcement on July 2, 15, 30, 1981, and twice on August 3, 1981. (Appendices 2, 7, 11, 30.)

the extent of his knowledge of details of the crime, Boyd suddenly, on redirect examination, made a variety of statements for the first time. Included in these new purported revelations was the conversation he claimed to have had with Reilly in the "wash-house." This was a complete fabrication, likely designed only to distract attention away from the fact that Boyd knew many details about the killings that only the killer could have known. By the time of the reference hearing, Boyd could not remember what lies he had told at the time of petitioner's trial. At the hearing, he testified that he did not recall having ever spoken to Reilly after the murders occurred. (HT 1876.) If Reilly had truly confessed to Boyd, Boyd surely would have remembered it. However, it is clear that Boyd fabricated the entire conversation and, in fact, Reilly never told Boyd that he himself or petitioner committed the murders.

61. Boyd testified falsely at trial when he claimed that he waited until redirect examination at the preliminary hearing to reveal Reilly's purported admission in the "wash-house" because it was only then that Boyd believed Reilly had broken his promise not to tell anyone about Boyd's fugitive status. (RT 8124-8125, 8128, 8260, 8274.) The evidence presented at the reference hearing shows that, on August 3, 1981, well before the preliminary hearing, Boyd himself revealed to law enforcement his name, his true date of birth, and the fact that he had a burglary case in the San Francisco area. (Appendix 8.) The reason for which detectives investigating petitioner's case had not served Boyd with the warrant from Santa Clara County was not that they were unaware of it, but was that they wanted to secure his testimony in the prosecution against petitioner and his codefendants. Los Angeles authorities' claim that they were unaware of the warrant is not credible since "Calvin Boyd" had long been one of Mr.

Boyd's known aliases and the prosecution admitted that they had run Mr. Boyd's criminal history under the names "Boyd" and "McKay." (CT 2726.) The reason Boyd did not reveal Reilly's purported "wash-house statement" until redirect examination at the preliminary hearing was not that Boyd thought Reilly had broken some agreement; the reason was that Reilly never in fact made the "wash-house statement." Boyd concocted the evidence in response to cross-examination by Reilly's attorney at the preliminary hearing. Reilly's counsel stated in Boyd's presence that he believed Boyd's alibi was false and, through cross-examination, accused Boyd of lying and of being more involved in the killings than he claimed to be.

62. Boyd lied at trial when he denied that Reilly approached him about doing the murders and when he claimed that he and Reilly discussed committing only a burglary, not a murder. (RT 8260-8261, 8332, 8404.) On numerous occasions both in and outside of the courtroom, Boyd admitted that Reilly talked to him about committing the killing. (RT 8111, 8115, 8179; CT 2787; Appendix 2.) Moreover, the evidence presented at the reference hearing, which shows that Boyd in fact committed the killings, indicates that Boyd not only discussed committing the murders, but agreed to do so. Petitioner hereby incorporates by reference as if fully set forth herein Claim XIII, *infra*.

63. Boyd testified falsely at trial that, after the killings and after his purported conversation with Reilly in the "wash-house," petitioner told Boyd that he had been asking too many questions (RT 8113, 8195, 8238, 8390-8392) and asked if Reilly had told Boyd that he (petitioner) had participated in the killings. (RT 8391-8392.) Like Boyd's testimony regarding Reilly's purported admission in the "wash-house," this testimony was false. In all of the statements and testimony which Body made prior to

redirect examination at the preliminary hearing, he had consistently denied that petitioner had made any statement to him after the killings. In the tape-recorded interview of August 3, 1981, Boyd made no mention of petitioner ever saying he had been asking too many questions, but stated that petitioner had told him before the killings that he (petitioner) did not want to have anything to do with the crime; Boyd also said that, before the killings, Reilly had told him not to say anything about the killings to petitioner. (Appendix 2.) At the preliminary hearing, prior to redirect examination, Boyd testified that petitioner never said anything to him about the killings or about not talking to Buck and that petitioner had always said he did not know anything about the murders. (CT 826, 2810-2811.) Boyd testified at the preliminary hearing that Ron Leahy, but not petitioner or Reilly, had told him that he had been asking too many questions. (CT 2647-2648.)

64. At trial, Boyd falsely denied ever having said that Reilly told him that he and Mike Mitchell had committed the killings. (RT 8227-8230, 8302-8303.) In one of his earliest interviews with police, Boyd stated that "Buck told me that they, he and Mitchell, got involved in a murder." (Appendix 7.) At the preliminary hearing, Boyd testified that this statement had been true. (CT 825-826.) At trial, however, he falsely denied the statement and, when confronted with his testimony on the subject from the preliminary hearing, falsely claimed that he had misunderstood the question posed at that prior proceeding. (RT 8302-8303, 8406.) In fact, his prior statement regarding Mike Mitchell revealed the falsity of his testimony as a whole and showed that, throughout the process, Boyd was simply attempting to provide any statements and testimony he could that were consistent with what he believed the prosecution's theory to be, regardless

of whether such statements and testimony were true.

65. Boyd lied at trial when he testified that, two weeks before the killings, Reilly showed him some orange bolt cutters and said that he was going to use them to gain entry into the Morgan house. (RT 8134-8135, 8209, 8300, 8324.) Boyd's statement during the interview of August 3, 1981, shows that Boyd concocted this testimony: in that interview, Mr. Jonas asked Boyd: "Did he [Reilly] say anything about bolt cutters?" Boyd answered: "Oh, he's brought up some bolt cutters. He said that you could take some bolt cutters and, uh, clip the screen and you know go through the window, you know." (Appendix 2.) Other indications that Boyd's testimony in this regard was false include the fact that the prosecution's own theory was, inter alia, that two weeks prior to the killings, Reilly still believed that Marc Costello was arranging to have the killing done by a hit man. Accordingly, there would have been no reason for Reilly to obtain bolt cutters at that juncture. Moreover, other evidence presented at trial indicated that Reilly did not obtain bolt cutters until May 20, 1981, less than 24 hours prior to the killings. (RT 7311.)

66. At trial, Boyd claimed falsely that, as of two weeks before the killings occurred, he and Marcus were no longer discussing the killing with Reilly. (RT 8116-8119, 8172.) Although he admitted that one night Marcus and Reilly came to his door, ready to go commit the killings, he claimed that this occurred two or three weeks prior to the killings, that he refused to go along and that this was the end of his participation in the planning. (RT 8116, 8219.) However, in the interview of August 3, 1981, Boyd first stated that "they [Reilly and Morgan] asked us [Marcus and Boyd] would we go through with this on Tuesday, a week before this thing happened." He said that it was then that Marcus and Reilly showed up at

his door in the middle of the night and that Marcus wanted to go "do it" right then. (Appendix 2.) Boyd also stated in that interview that, even after Cliff Morgan left town, "he [Reilly] was still kinda, you know, talking to me about it, you know."[7] (*Ibid.*) Also, until he was "corrected" by Detective Bobbitt, Boyd indicated that he knew in advance when the killings were going to occur. (*Ibid.*) At the preliminary hearing, Boyd testified that the incident where Marcus came to his door in the middle of the night occurred a week before the murders. (CT 795.)

67. Boyd lied when he testified at trial that he was never shown a sketch or diagram of the Morgan house (RT 8137, 8225-8227), and that he was never in Buck's house with Marcus when Debbie Sportsman came in and Buck told her to leave. (RT 8272.) Other testimony at trial showed that Boyd's denials were lies. (RT 7553-7554.)

68. Boyd lied when he testified at trial that, a couple of weeks before the killings, Buck told him Morgan had given him a key to the house. (RT 8137, 8340, 8383.) Evidence presented at the reference hearing shows that, in his August 3, 1981, interview with law enforcement, Boyd stated that Reilly never said anything about a key. (Appendix 2.) Other evidence presented at trial also indicated that, if Reilly received a key, he received it on May 16, 1981, less than a week before the killings. (RT 7297-7302.) Boyd also contradicted himself repeatedly regarding when Reilly purportedly told him about the key and what Reilly said. For example, at the preliminary hearing, Boyd testified that, about a week before the killing, Reilly told him that Morgan had said the key was under

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[7]The evidence presented at trial indicated that Morgan left Los Angeles and went to Carson City on May 17, 1981, just four days before the killings. (RT 5084-5085, 10629, 11382-11383.)

something at the Morgan house and that Morgan would call a lady across the street to have her come by the house the morning after the killing, pick up the key, go in the house, see that the people were dead and call the police. (CT 784-785.) Boyd testified both at the preliminary hearing and at trial that Reilly told him after the killings, not before, that Morgan had in fact called a lady across the street on the morning after the killings and that she had gotten the key from the front yard, went inside, found the victims dead and called the police. (RT 8386, 8423-8425; CT 811) Boyd also testified that Reilly told him about the key in the "wash-house," at the same time Reilly purportedly told Boyd that he and petitioner had committed the killings. (RT 8386, 8388.) Again, Boyd's purported knowledge about a key was a fabrication which he arrived at only upon suggestive questioning by law enforcement.

69. Boyd lied when he testified at trial that Colette Mitchell and Ron Leahy approached him after the killings and that Ms. Mitchell was "cussing and shit" and said, "'Buck told me to tell you to keep you mother-fucking mouth shut'" (RT 8142), and "'we got a mother-fucker for you, you punk mother-fucker.'" (RT 8143-8145.) At the preliminary hearing, Boyd testified that Ms. Mitchell said only that she wanted to talk to him (CT 2650-2651, 2661-2667) and "didn't get a chance, really, to get up in [his] face." (CT 2664.)

70. Boyd testified falsely at petitioner's trial that he had been convicted of only two felonies. (RT 8078.) On direct examination, he claimed he had gone to prison once for burglary and once for receiving stolen property. (RT 8082.) On cross-examination, he testified that he had two burglary convictions, but claimed that, in both instances, he was only driving a car into which stolen property had been brought by someone else

and he pled guilty to avoid having to testify against his crime partner. (RT 8241-8244, 8342, 8346, 8356.) In fact, he had been convicted of at least three felonies, including two convictions for burglary and one for grand theft. (H.Exh. 78; Appendices 9 and 10.) Only one of his two burglary convictions was the result of a guilty plea (H.Exh. 78); the other was entered after a jury trial at which Boyd himself testified that he had been invited into the victim's house by the victim's estranged daughter and that the daughter had instructed him to take a number of items, which police later found in his car. (Appendix 9.) His third felony conviction stemmed from an incident in which Boyd stole from an undercover police officer posing as a homeless panhandler. (Appendix 10.)

71. Boyd testified falsely at trial that he never smoked "sherms" or used PCP or "angel dust." (RT 8363.) The evidence presented at the reference hearing shows that, at the time of the killings, Boyd was an habitual user of heroin, marijuana, cocaine, PCP and alcohol. (HT 131, 374, 766-767, 1109, 1147-1148, 2107-2109, 2125; H.Exhs. F, V, RR, 1, 2; Report at p. 16.)

72. Boyd testified falsely at trial that Reilly had made a statement about using Mike Mitchell's car on the night of the killings. (RT 8395.) The hearing evidence shows that, in his many interviews with law enforcement prior to the preliminary hearing, Boyd never made any reference to suspecting or believing that Reilly intended to drive, or in fact drove, Mike Mitchell's car on the night of the killings. Again, it was only after cross-examination at the preliminary hearing that Boyd concocted this additional lie. At the preliminary hearing, Boyd testified that before the killings, Reilly had said he intended to use Mike Mitchell's car because his own car had been seen around the Morgan house too many times. (CT

806.) Boyd said this statement was made before the killings, not in the conversation at the "wash-house." (CT 807.) By the time of trial, Boyd had forgotten what lies he had told at the preliminary hearing. Only after Mr. Jonas read to Boyd his preliminary hearing testimony on the subject did Boyd testify that Reilly had said he would use Mike Mitchell's car. The falsity of Boyd's testimony is further indicated by the fact that Boyd then testified that he was sure Reilly made this statement after the killings, during their purported conversation in the "wash-house." (RT 8395, 8403.)

73. Boyd testified falsely at trial when he stated that Steve Rice was going to tell petitioner that he could not stay with him any more, "talking about he didn't pay him no money and he just bring bitches over there and fuck them all day." (RT 8119.) The evidence presented at the reference hearing showed that Mr. Rice never made such a statement and did not use such profane language. (HT 272.) In fact, Boyd concocted this evidence to assist Mr. Jonas' efforts to paint petitioner as a person of bad character who did not work and was sexually promiscuous. Similarly, Boyd testified falsely at trial that Reilly made the following statement regarding Cliff and Nancy Morgan: "'Man, they don't fuck no more. They don't do a goddamn thing. They're just best friends. He can do better without the bitch, the bitch being in the pad and he ain't fucking the bitch no more.'" (RT 8093.) Boyd concocted this purported quotation, like the one he attributed to Rice, in order to assist Mr. Jonas' character assassination of petitioner, Reilly and their friends by falsely portraying them as people who used extremely profane and offensive language. In fact, these words were Boyd's own. The falsity of this quote is belied by Boyd's own testimony at the preliminary hearing, when he testified that, rather than the foregoing profane statement, Reilly had stated: "'Him [i.e. Morgan] and his old lady

don’t get along that good. They have separate rooms.’” (CT 797.)

74. Boyd lied when he testified at trial that Arzetta Harvey was his “common law wife.” (RT 8081.) In fact, the two had been married since 1977. (H.Exh. 41; HT 1864.)

75. Evidence proffered at the reference hearing showed that Boyd lacked credibility. At the hearing, Boyd denied, inter alia, that he had killed Nancy and Mitchell Morgan, that he was abusive to women, that he hit women, that he had ever told anyone he killed a child, that he had ever said he knifed a women, that he had ever threatened the life of Linda Lennon, and that he had used PCP, cocaine or heroin when living at the Vose Street apartments. (HT of Boyd.) The proffered evidence shows that Linda Lennon met Boyd when they both were in a drug treatment program; Boyd told her he had entered the program only to avoid going to jail; Boyd broke the rules of the facility regularly; Boyd told her he had used drugs throughout the 1980s; Boyd told her he had once “knifed a woman;” she became pregnant with Boyd’s child and, during her pregnancy, Boyd assaulted her physically; and she left him because he was abusive and threatened to kill her. (H.Exh. 73; HT 2616.) Connie Rogan witnessed Boyd’s assault of Linda Lennon; Boyd was selling drugs in 1990; and she saw Marcus in Boyd’s company sometime in 1990. (H.Exh. 74; HT 2616.) Contrary to Boyd’s testimony at the reference hearing, Seth Chazin and T.J. Hicks, both working with petitioner’s habeas counsel at the time, together interviewed Boyd at his home once only and this was the only interview of Boyd conducted by either Chazin or Hicks; neither Chazin nor Hicks badgered Boyd or attempted to plant ideas in his head. (HT 2684.) Hicks had a subsequent contact with Boyd, when he coincidentally ran into Boyd in the San Diego airport. Hicks said hello to Boyd but did not discuss

petitioner's case at that time. Hicks was traveling alone. (HT 2685.)

76. Boyd's false testimony at petitioner's trial was intentionally and knowingly elicited by Mr. Jonas. Mr. Jonas knew that the testimony was false and/or misleading and did nothing to correct the falsity. Indeed, in his closing argument, he argued that Boyd was not promised anything in exchange for his testimony (RT 13679) and vouched for Boyd's credibility (RT 12735).

77. Boyd also testified falsely at petitioner's preliminary hearing. Boyd's false testimony at the preliminary hearing included most of the lies which he told later at trial, as well as others not elicited from him at trial. For example, at the preliminary hearing, Boyd testified falsely that he did not carry a knife and had never threatened anyone with a knife. (CT 819-820, 2668.) The evidence presented at the reference hearing showed that both of these things were blatantly false. (See HT 75, 129, 375, 661, 683, 772, 784, 796, 1129-1130, 1138-1139, 1209, 2104, 2129, 2612-2613; H.Exhs. F, V, RR, 2, 28, 72; Report at p. 13.) At the preliminary hearing, Boyd testified that he came to Los Angeles from Canada, Mississippi. (CT 2707.) At trial, he admitted that this was not true and that he was in fact born in San Francisco. (RT 8126.) At the preliminary hearing, Boyd testified that he had never been convicted of a felony and had never been to prison. (CT 2707, 805; RT 8246.) At trial, he testified that he had been to prison twice and had been convicted of two felonies. (RT 8078.) The evidence presented at the reference hearing showed that, outside the courtroom at the time of the preliminary hearing, Boyd told petitioner's mother that he was not able to tell the truth on the stand because he had to protect himself. (HT 659-660.)

B. Arzetta Harvey

78. At the time of petitioner's preliminary hearing and trial, Calvin Boyd was married to Arzetta Harvey. (H.Exh. 41.) Ms. Harvey testified for the prosecution at petitioner's preliminary hearing, providing Mr. Boyd with what appeared to be an alibi for the night of the murders. The evidence presented at the reference hearing held in the instant habeas corpus proceeding shows that Ms. Harvey's testimony at the preliminary hearing was materially false. Her false testimony at that proceeding includes but is not limited to the following:

79. Ms. Harvey testified that, on the morning of May 21, 1981, at about 10:30 or 10:45 a.m., she walked through Steve Rice's apartment and saw Steve Rice, petitioner, Reilly and some other people she did not know. (CT 834.) She testified that petitioner and Reilly were asleep. (CT 835.) The evidence presented at the reference hearing shows that Ms. Harvey did not in fact walk through Mr. Rice's apartment on the morning of May 21, 1981. The hearing evidence also showed that Boyd routinely beat Ms. Harvey and otherwise abused her physically, that she was terrified of Boyd and would do anything for him, that her memory of the relevant time period was extremely poor and that her trial testimony was unreliable. (Report at p. 16.)

80. Ms. Harvey testified that, on the night of May 20, 1981, she bought a bedroom set from her neighbor Sandy Harris and that, after she had moved the bedroom set into her apartment, Boyd came in drunk and passed out on the bed. (CT 836-837.) Ms. Harvey testified that she then removed Boyd's clothes. (CT 837.) The evidence presented at the hearing shows that the night Ms. Harvey described was not in fact the night of May 20, 1981. Petitioner hereby incorporates by reference as if fully set forth

herein Claim XIII, *infra*. The hearing evidence showed that Boyd told Ms. Harvey and others to tell the police that he was home on the night of the killings. (HT 132; H.Exh. F; Report at p. 15.) The evidence also showed that Boyd routinely beat and intimidated Ms. Harvey, that he engaged in controlling behavior and kept her cooped up in the apartment, that she was afraid of him and would do anything for him and that she was therefore lacking in credibility regarding Boyd's purported alibi. (HT 75-76, 150, 770-771, 2105, 2130-2131; H.Exhs. D, G, RR, 2; Report at p. 16.)

81. Ms. Harvey testified that she was Boyd's girlfriend . (CT 830.) In fact, the two had been married since 1977. (H.Exh. 41.)

82. Ms. Harvey denied that Boyd had ever told her he was coming into a large sum of money. (CT 857.) The evidence presented at the hearing showed that, around the time of the killings, Ms. Harvey told Sandra Moss (nee Harris) that she and Boyd expected to be coming into some insurance money. (HT 1161; Report at p. 12.)

C. Colette Mitchell

83. Colette Mitchell, petitioner's girlfriend at the time of the Morgan killings, was a key witness for the prosecution at the guilt phase of petitioner's trial. She testified at trial in June of 1983. She also had testified in November, 1981, at petitioner's preliminary hearing, and in January, 1983, at the in limine hearing to determine the scope and duration of the alleged conspiracy. The evidence introduced at the reference hearing demonstrates that Ms. Mitchell's trial testimony was false and unreliable. The contents of Mr. Demby's files, together with the information in the appellate record, indicate that, between the time of the killings and the time of Ms. Mitchell's testimony before the jury, she had extrajudicial contact

with representatives of law enforcement on at least 20 occasions.[8] Those

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[8]The contacts which were revealed to Mr Demby in one form or another include the following: Ms. Mitchell was interviewed by detectives on May 27, 1981. (Appendix 15.) She talked to them by phone on June 10, 1981. (Appendix 11.) She was reinterviewed by detectives on June 24, 1981. (Appendix 16.) In July, 1981, the police came to her door, accused her of dealing drugs and asked to search her apartment. (RT 1180.) On July 15, 1981, in the course of petitioner's arrest, the police held Ms. Mitchell at gunpoint, manhandled her and searched her car. (RT 1178, 1180.) On August 6, 1981, the police spoke to Ms. Mitchell by phone. (Appendix 11.) On October 22, 1981, Ms. Mitchell was interviewed at the district attorney's office. (Appendix 17; RT 10206.) At some time prior to October 26, 1981, law enforcement told Ms. Mitchell she would receive full immunity if she testified for the prosecution. (Appendix 13.) At some time prior to October 26, 1981, Mr. Jonas accused her going to the bank where Debbie Sportsman worked and asking for her. (*Ibid*.) At some point prior to October 26, 1981, Ms. Mitchell was taken before a judge to discuss law enforcement's accusation that she had attempted to intimidate Debbie Sportsman. (*Ibid*.) On October 26, 1981, Ms. Mitchell was interrogated twice by Bradley Kuhns, a polygrapher working for law enforcement. (Appendices 13 and 14.) During a break between the two interrogations by Kuhns, Ms. Mitchell was again interviewed by detectives. (Appendices 13 and 14.) Immediately after the second polygraph interrogation, Ms. Mitchell met with detectives again. (RT 10301.) On October 29, 1981, Ms. Mitchell met with Mr. Jonas and wrote down six things that she had previously said which, at the time of the writing, she believed were false. (CT 591-592, 632; Appendix 20; RT 10017). On another occasion prior to her testimony at the preliminary hearing on November 3, 1981, Ms. Mitchell had a discussion about the case at the district attorney's office during the lunch hour. (RT 10205-10206.) On another occasion, Ms. Mitchell met with Mr. Jonas in the library in the courthouse. (RT 10267.) On November 2, 1981, Ms. Mitchell spoke with Mr. Jonas by phone. (CT 604.) On November 3, 1981, immediately prior to her testimony at the preliminary hearing, Ms. Mitchell met with Mr. Jonas for the signing of her immunity papers. (Appendix 22.) At some time after her preliminary hearing testimony in November of 1981 and prior to her testimony at the 403 hearing on January 23, 1983, Ms. Mitchell had a telephone

(continued...)

contacts included repeated interrogations in which law enforcement posed questions in a manner designed to obtain particular responses and utilized techniques which caused Ms. Mitchell to provide false and/or misleading statements and testimony. Between her initial statement to police a few days after the killings and her testimony at the 403 hearing in January of 1981, Ms. Mitchell's version of events changed dramatically.

84. Only two of Ms. Mitchell's 20 or more contacts with law enforcement were both tape-recorded and disclosed to petitioner's counsel: i.e., those conducted in conjunction with the polygraph examinations administered to Ms. Mitchell in the morning and afternoon of October 26, 1981. Neither petitioner nor his counsel ever received tape-recordings of any of the other contacts between Ms. Mitchell and law enforcement and neither petitioner nor his counsel can ascertain whether such recordings were made. The statements made to and by Ms. Mitchell in the undisclosed interviews and interrogations constitute material evidence favorable to petitioner because they include additional evidence of the falsity and unreliability of Ms. Mitchell's trial testimony. The prosecution's failure to disclose the statements made by and to Ms. Mitchell impaired counsel's effectiveness at trial and in post-judgment proceedings. Petitioner hereby incorporates by reference as if fully set forth herein Claim IX, *infra*.

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[8](...continued)
conversation with a representative of the prosecution. (RT 10306.) On January 23, 1983, upon her arrival in Los Angeles from Chicago, Ms. Mitchell met with her attorney and detectives, and then with Mr. Jonas. (RT 1028, 1123, 10307.) Ms. Mitchell met with Mr. Jonas and detectives again on January 24, 1983. (RT 1026-1027, 1120-1122.) Undoubtedly, there were even more contacts between Ms. Mitchell and representatives of law enforcement which were not reduced to writing, mentioned in testimony or otherwise revealed to petitioner's trial counsel.

85. In spite of the prosecution's violation of *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny, the information which the prosecution did disclose to petitioner's counsel (which was introduced into evidence at the reference hearing), together with the testimony elicited from Ms. Mitchell at the various proceedings herein show that material aspects of Ms. Mitchell's testimony before petitioner's jury were false. As a result of the manner in which Ms. Mitchell was interrogated and examined in and outside of the courtroom, in combination with her own vulnerability to suggestion and coercion and the confusion which resulted from the many individuals (including law enforcement) who were providing her with information, Ms. Mitchell's memory was corrupted, she was unable to distinguish what information was provided or suggested to her by others from that which was the product of her own subjective memory, she was unable to distinguish what she had perceived from that which was the product of her own confabulation and false memory, her will was overborne and she was pressured into giving statements which she knew were false or misleading and/or statements which she believed were true but were in fact false or misleading. By the time that Ms. Mitchell testified in front of petitioner's jury, she had received so much information and disinformation from so many sources over such a long period of time, had been repeatedly threatened with prosecution and otherwise intimidated, had been manipulated and psychologically coerced and had been encouraged to question the accuracy of her own memory to such an extent that her testimony was not the product of her own recollection. She was unable to recall what had been told to her by whom. Through the use of coercive, threatening, deceptive, suggestive and manipulative questioning, Mr. Jonas and other law enforcement agents convinced Ms. Mitchell to hold the false

belief that she had fallen asleep on the night of the killings and that, while she was asleep, petitioner had left her side and participated in the killings of Nancy and Mitchell Morgan. As a result, consciously or otherwise, Ms. Mitchell revised material aspects of her version of events and confabulated extensively, so that her testimony would fit Mr. Jonas' theory of the crime.

86. As stated above, the version of events which Ms. Mitchell provided at the 403 hearing in January of 1983 diverged dramatically from the various statements and testimony she had given prior to that time. One of the more significant changes was that, before January of 1983, Ms. Mitchell had consistently maintained she was with petitioner all night on the night of May 20, 1981, when the killings occurred, that they spent the night at the Vose Street Apartments partying, and that even if she might have slept part of the night, she was sure that she would have woken up and noticed if petitioner had left her side. At the hearing in January, 1983, at the 403 hearing, she indicated for the first time that she could not account for petitioner's whereabouts on May 21, 1981, between around 2:00 or 3:00 a.m. and 11:00 a.m., when she woke up. In January of 1983, she claimed that she had previously lied in this and various other respects. For the first time, she attributed to petitioner various statements suggesting that he had been at the Morgan house on the night of the killings, that he had taken something from the house to make it appear that there had been a robbery, and he had been paid by Morgan to do so. A comparison of Ms. Mitchell's testimony in January of 1983 with that from June of 1983 reveals that, by June of 1983, she appears to have forgotten a significant amount of information which she seemed to have no difficulty remembering five months earlier. This strains credulity. The suggestion that she would remember significantly more information one year and seven months after

the killings than she did two years after the killings strains credulity and suggests what is otherwise indicated by the evidence set forth below: i.e., that the version of events she provided in January of 1983 was materially false; was the product of police pressure, coercion and suggestion; and that, by June of 1983, she could not remember what false testimony she had in fact given six months earlier.

87. Ms. Mitchell's testimony before the jury consisted of a jumble of untruths and suppositions, provided to her by others. Whether or not she herself was aware of it, each and every statement which she made at trial relevant to petitioner's alleged involvement in the Morgan killings or the alleged conspiracy was false and/or misleading, and the prosecution knew or should have known as much. The factors which induced her to make false statements include but are not limited to the following:

88. Law enforcement managed to convince Ms. Mitchell that petitioner had participated in the killings. At trial, Ms. Mitchell testified that, at the time of petitioner's arrest, she felt there was "no way" that petitioner had committed that murders. (RT 10134.) However, her testimony also clearly indicated that, since that time, her opinion had changed: Mr. Jonas interrupted Mr. Demby's cross-examination of Ms. Mitchell to ask, in the presence of the jury, whether the court would allow him to ask what her feelings were then, at the time of trial. (RT 10134.) Although an objection to the question was sustained, the implication was clear: Mr. Jonas knew that, by the time of her trial testimony, Ms. Mitchell had been convinced that petitioner had participated in the killings. (RT 10135-10136.) This shows that, between the time of petitioner's arrest and the time of trial, Mr. Jonas had managed to convince Ms. Mitchell that petitioner was guilty.

89. Law enforcement provided Ms. Mitchell with information both overtly and through the use of suggestive questions. Rather than simply gathering information from her, law enforcement, including Mr. Jonas, gradually persuaded her that her own subjective memory and inferences drawn therefrom were unreliable and that she should adopt their version of events instead. Through repeated interrogations in which they provided her with information and asked suggestive questions, they inched her toward their view that petitioner was involved in the killing, such that she tailored her memory and testimony to fit that theory of the crime. The evidence presented at the reference hearing and the record on appeal provide various examples of this practice, including, but not limited to, the following:

A. Until Mr. Jonas told her otherwise, Ms. Mitchell believed Marc Costello was the one who had committed the crime or had found someone else to commit the crime. (RT 10275.) Prior to the preliminary hearing, Mr. Jonas told her that Costello was not the killer and that Costello had "pulled a scam" on Reilly and Morgan. (CT 578; RT 1070, 10274.) Mr. Jonas read Costello's statement to her and told her the foregoing information about Costello, "to help [her] get [her] story straight," because she was saying something "incorrect." (CT 578, RT 10268, 10273.)

B. Prior to Ms. Mitchell's preliminary hearing testimony, Ms. Mitchell heard for the first time that Reilly had gone to Tip's restaurant in Valencia and received money from Morgan; this information was communicated to her by Mr. Jonas, through the use of suggestive questioning. (CT 609; RT 10236.)

C. Ms. Mitchell did not know Debbie Sportsman's last

name until the detectives told her what it was. (Appendix 13.)

D. The detectives told Ms. Mitchell that Reilly had asked Boyd and Marcus to commit the murders. (*Ibid.*)

E. Ms. Mitchell did not think petitioner was involved in the killings until the detectives told her otherwise. (*Ibid.*)

F. Police polygrapher Bradley Kuhns told Ms. Mitchell that the murders happened at the time she had said she was making love with petitioner. (Appendix 14.)

G. The detectives told Ms. Mitchell that the killings were committed by two men. (*Ibid.*)

H. Mr. Kuhns told Ms. Mitchell that scientific evidence indicated that Reilly and someone else committed the killings. (*Ibid.*)

I. At the preliminary hearing and the polygraph interrogations, Ms. Mitchell indicated that, until Mr. Jonas told her so, she did not know that her driving route to and from her workplace took her by the Morgan house. At the 403 hearing, Jonas asked her what her route home was, then asked: "That route takes you right by the home of the victims, you know?" Ms. Mitchell answered: "Yes, I know that." (RT 1060) The clear implication was that she knew where the murder house was and that she was driving by it at the time and thereby implied that she had more knowledge regarding the killings than she in fact had.

J. Prior to the polygraph interrogation, detectives communicated to Ms. Mitchell that the killings occurred after midnight on May 21, 1981. (Appendix 13.)

K. Mr. Kuhns told Ms. Mitchell that the police believed the killings occurred between 11:30 p.m. on May 20, and 11:00 a.m. on May 21, 1981, and that law enforcement suspected that petitioner and Reilly

left the Vose Street apartments and came back again within that period of time. (Appendix 14.)

J. Mr. Kuhns told Ms. Mitchell that a knife had been taken from the Morgan house on the night of the killings. (Appendix 13.)

K. At the time of the polygraph interrogation, Ms. Mitchell recognized that the information which law enforcement was providing and/or suggesting to her was "putting ideas in [her] mind . . . ." (Appendix 14.)

L. Detectives told Ms. Mitchell that they knew Reilly was at the Morgan house on the night of the killings. Ms. Mitchell accepted that representation as true because "they [i.e., Detectives Bobbitt and Jamieson] would know more . . . than anybody else would . . . ." (Appendix 14.)

M. Mr. Kuhns told Ms. Mitchell that the amount of money at issue in the killings was a million dollars. (Appendix 14.)

N. Detectives told Ms. Mitchell that Sharon Morgan was in Mike Mitchell's bedroom on the night of the killings. (CT 1404.)

O. Ms. Mitchell testified at trial that, on the night of the killings petitioner told her that he "needed her" that night. Mr. Jonas convinced Ms. Mitchell that this statement was more than simply a statement of how much petitioner wanted to make love to her that night, but that it evinced a sinister intent on petitioner's part: that is, that he needed her to be his alibi. (RT 9946-9947.)

P. Through repeated suggestive questioning, law enforcement encouraged Ms. Mitchell to confuse what petitioner had told her with what Reilly had told her, so that, by the time of trial, she was unable to separate one from the other and testified repeatedly that statements she had previously attributed to Reilly only were made by

petitioner. Petitioner hereby incorporates by reference as if fully set forth herein paragraphs 202-207, *infra*.

Q. Mr. Kuhns let Ms. Mitchell know that Nancy Morgan had been stabbed 40 times. (Appendix 14.)

R. Law enforcement told Ms. Mitchell that the killer kissed Mitchell Morgan on the forehead before killing him. (RT 9996.)

S. Although Ms. Mitchell started out with no reason to believe petitioner was involved in the killings, representatives of law enforcement effectively informed her and convinced her that he was. (See Appendix 1.)

90. Law enforcement, including Mr. Jonas, narrowed the scope of questions posed of Ms. Mitchell, omitting questions that would bring to the attention of Ms. Mitchell and others (including petitioner's counsel, the judge and the jury) inconsistencies in her testimony or information she had previously provided that was inconsistent with the prosecution's theory of the crime. By the time of the 403 hearing, when Ms. Mitchell's version of events changed so dramatically in the prosecution's favor, Ms. Mitchell had been convinced that petitioner had gone to the Morgan house on the night of the killings. As a result, perhaps unconsciously, she revised and recharacterized each of the facts that she had previously known in order to reconcile them with that theory. Mr. Jonas knew that several of her underlying assumptions were false and that she had forgotten a variety of information which would have caused her (and the jury) to question the accuracy of her new version of events. However, he simply avoided questions that would point out the flaws in her reasoning and the falsity of her testimony. Examples of this practice include, but are not limited to, the following:

A. At the 403 hearing, Ms. Mitchell testified for the first time that petitioner had told her he was at the house on the night of the murders, that he said he had been trying to make it look like a robbery and that he said that he took something from the house for that purpose. (RT 1029, 1037.) She also testified that she knew what things had been taken from the Morgan house (RT 1037) and that those things were a gun, some coins and some jewelry. (RT 1047, 1176.) She stated that she first learned that these were the items taken when she read a search warrant for Reilly's apartment, but that later either Reilly or petitioner confirmed that these items had been taken to make it look like a robbery. (RT 1048.) When Ms. Mitchell testified before the jury at the guilt phase, Mr. Jonas elicited essentially the same testimony, although not without some difficulty, as Ms. Mitchell had apparently forgotten in the interim some key aspects of her testimony at the 403 hearing. (See, e.g., RT 9964 [petitioner never said he was at the Morgan house on any particular night]; RT 10030 [Ms. Mitchell did not remember if petitioner had told her he had taken something from the Morgan house on the night of the murders].) However, she again testified that a gun, some jewelry and some coins were taken to make it look like a robbery, that she had first learned that those items were involved when she saw the search warrant for Reilly's apartment, and that either petitioner or Reilly had later confirmed that these were the things that were taken to make it look like a robbery. (RT 9998, 10126.) Thus, at the time of the 403 hearing and at the time of trial, she believed that the gun, the jewelry and the rifle had been taken on the night of the killings and that this confirmed somehow that petitioner and Reilly had been at the Morgan house that night. However, the evidence showed that the gun, the coins and the jewelry had not been taken on the night of the killings. Moreover, at the

time of the polygraph interrogation, in October of 1981, Ms. Mitchell herself knew the coins, gun and jewelry had been taken before the killings and had been given to Costello as advance payment for arranging the killings. (Appendix 14.) Both at the 403 hearing and before the jury, Mr. Jonas refrained from asking her any questions that would bring to her or the jury's attention her previous statement or would point out that this key assumption in her version of events was false.

B. Similarly, as noted above, Ms. Mitchell testified at trial that, although petitioner said that he was at the Morgan house at some time, he never said what night he was there. (RT 9964.) Mr. Jonas ignored this qualifying statement and ploughed forward, asking Ms. Mitchell questions which essentially pushed her to testify that petitioner had in fact told her he was at the Morgan house on the night of the killings. (See, e.g., RT 9964, 9992,10031.)

C. At trial, Mr. Jonas elicited from Ms. Mitchell her version of the events of the night of the killing in detail. He elicited from her that petitioner, Reilly and Rice came to her workplace, the 94th Aero Squadron that night, waited for her for approximately one hour, and then drove back to the Vose Street Apartments in two separate cars. However, Mr. Jonas conveniently omitted questions which would have elicited Ms. Mitchell's prior testimony that, while at the 94th Aero Squadron that night, Reilly took a shine to one of Ms. Mitchell's coworkers, Norma; that Reilly asked Ms. Mitchell to invite Norma to join them at the Vose Street Apartments later that night; that Ms. Mitchell did so, and Norma indicated that she might join them later. Testimony indicating that Reilly had invited another person to join in the party that night certainly seemed inconsistent with Mr. Jonas' theory that Reilly and petitioner planned to, and in fact did,

commit the killing that night. Indeed, Ms. Mitchell herself had previously noted that it seemed "kind of stupid . . . to invite [Norma] over if [Reilly] was going to go kill somebody . . . ." (Appendix 14.) Therefore, Mr. Jonas simply omitted any reference to this information in his examination of Ms. Mitchell.

D. Ms. Mitchell consistently stated, before and during trial, that, when she finished work on the night of the killings, she drove back to the Vose Street Apartments with Steve Rice and she and Rice went to Rice's apartment to snort some cocaine before joining petitioner and Reilly in Reilly's apartment. In the polygraph interrogation on the morning of October 26, 1981, she stated that Rice told her he wanted to give her some cocaine "before the animals got it." (Appendix 13.) At the preliminary hearing, Mr. Jonas asked Ms. Mitchell if she recalled making this statement and if she knew why Steve Rice used the word "animals" in reference to petitioner and Reilly. (CT 1442.) At first, Ms. Mitchell did not even remember having made the statement herself, but, after prompting, recalled that she used the word "animals" not because Rice had used that term, but simply because "it was a word off the top of [her] head," which she had used to indicate that petitioner and Reilly liked cocaine quite a bit. (CT 1442.) At the 403 hearing and at trial, Mr. Jonas again elicited from Ms. Mitchell that Rice had said he wanted her to get some cocaine before the "animals" got it. (RT 1060, 9953.) On those occasions, however, Mr. Jonas omitted the follow-up question he had asked at the preliminary hearing as to whether this was Ms. Mitchell's or Rice's choice of words. Accordingly, the jury was left with the false impression that Rice had used the term "animals" in reference to petitioner and Reilly, when in fact Ms. Mitchell had chosen that word on the spur of the moment when speaking to

Mr. Kuhns. (CT 1442.)

E. At the 403 hearing, Ms. Mitchell testified that, sometime after the killings, petitioner told her that he received some money for his participation in the conspiracy. (RT 1029.) She claimed that he showed her some money, which she believed to be $1,000, and he put it in a brown cedar box that she had in her apartment. (RT 1031.) Mr. Jonas asked Ms. Mitchell: "Do you ever remember – in relation to seeing that $1,000 – loaning your car to anybody?" (RT 1035.) Mitchell then answered in the affirmative and testified that she had loaned the car to Reilly. (RT 1035.) She testified that she did not remember being told at the time why Reilly wanted to borrow her car. (RT 1035.) However, she claimed that she later learned from Reilly that he had borrowed her car to go meet with Morgan and pick up the money, that she told petitioner what Reilly said and that petitioner had "agreed." (RT 1036.) However, when testifying before the jury, she admitted that she had no idea when, in relation to the day that she lent Reilly her car, she saw petitioner with the money. (RT 10069.) Accordingly, this provides another example of Mr. Jonas narrowing the questions in order to obtain a desired response.

F. At the preliminary hearing, Ms. Mitchell testified that, after petitioner and his codefendants had been arrested and were in jail awaiting trial, petitioner told her that he had heard Morgan say, "'while I'm in here, I'm collecting twelve and three-quarters percent interest." (CT 581.) Ms. Mitchell reaffirmed this testimony at the 403 hearing. (RT 1089-1090.) However, when Ms. Mitchell was testifying before the jury, Mr. Jonas elicited this testimony in a manner that suggested it was petitioner himself who had made this statement, omitting the fact that petitioner was in fact quoting Cliff Morgan at the time. Mr. Jonas asked Ms. Mitchell,

"Did you ever get any information about interest?" (RT 10011.) She answered that she had, from either petitioner or Reilly. (*Ibid*.) Mr. Jonas then asked what the information was and Ms. Mitchell's entire response was: "'While I'm sitting in jail, at least it's collecting interest'; something in that line." (RT 10011.) Mr. Jonas then asked her if she remembered the amount of interest and she answered, "Ten and three-quarters sticks in my mind, but I could be wrong." (RT 10011.) Mr. Jonas never elicited testimony suggesting that the statement was originally made by Morgan and was only being repeated. Thus, the jury was left with the false impression that it was petitioner or Reilly who had made this inflammatory statement obviously reflecting an expectation of insurance proceeds in connection with the deaths of Nancy and Mitchell Morgan.

91. Law enforcement made both express and implied threats and promises to induce Ms. Mitchell to provide false and/or misleading statements and testimony in furtherance of their theory of petitioner's guilt. Examples of such threats and promises and their effect include, but are not limited to, the following:

A. Shortly before petitioner was arrested on July 15, 1981, police officers came to Ms. Mitchell's apartment door, accused her of dealing in drugs and asked to search her house. She refused to let them in without a warrant. One officer pointed to a box and accused her of holding drugs in it. In the same incident, the police asked Ms. Mitchell's landlord if she was dealing in drugs. (RT 1180.) This incident clearly communicated to Ms. Mitchell that she was being watched and that the police were looking for any opportunity to arrest and prosecute her.

B. Ms. Mitchell was with petitioner when he was arrested on July 15, 1981. Police held Ms. Mitchell at gunpoint, ordered her onto

the ground, told her if she moved they would shoot her, searched her car, manhandled her and told her she was being arrested for murder. (Appendix 13; RT 1178-1180.)

C. At some time prior to the interrogation of Ms. Mitchell on October 26, 1981, Ms. Mitchell was told that there was a warrant out for her arrest for conspiracy and murder. (Appendix 14.)

D. In the polygraph interrogation conducted on the morning of October 26, 1981, Mr. Kuhns told Ms. Mitchell that her polygraph results would be admissible in court, that the polygraph would tell whether she was lying as reliably as a blood pressure cuff measures blood pressure or a thermometer measures temperature; that the polygraph would not say she was lying if she told the truth. Mr. Kuhns told Ms. Mitchell that Patty Hearst, James Earl Ray and Sirhan Sirhan flunked their polygraphs. (Appendix 13.)

E. Mr. Kuhns told Ms. Mitchell that, if she lied, she would be prosecuted for perjury and she could go to prison for as much as 14 years in prison. He told her that, in his opinion, she would not survive "up in those places." (Appendix 13.)

F. Through the use of questioning, Mr. Kuhns effectively accused Ms. Mitchell of being the stabber, participating in the stabbing, participating in the murders, and being in the Morgan house at the time of the stabbings. (Appendix 13.) He asked if she knew where the weapon was that was used to kill the people, if she had ever used a knife on anyone, wished for someone's death, considered killing anyone, hurt a family member, carried a weapon, and thought about killing her mate. (Appendix 13.)

G. Mr. Kuhns repeatedly implied that someone had said

Ms. Mitchell had driven the purported killers to the Morgan house to commit the killings. "Is there any reason why somebody should say you drove those people over there to that house?" (Appendix 13.) Mr. Kuhns told her that her "story about the coke" would make it appear that she was the driver. (*Ibid.*) And he again indicated that someone said she was the driver: "What I asked you earlier, is there any reason why anybody could say you drove a car from Vose Street down to Saticoy?" (Appendix 14.) At the 403 hearing, she said a police officer had accused her of lying and told her: "'We know you drove the car that night.'" (RT 1152.) At trial, Ms. Mitchell confirmed that law enforcement officers had told her that she was a suspect and that they believed she was the driver. (RT 10027.)

H. At the end of the polygraph interrogation on the morning of October 26, 1981, Mr. Kuhns administered the separate polygraph tests. After the third one, Mr. Kuhns told her that the polygraph tests indicated scientifically that she was lying and that she had in fact been involved in the killings. He said:

> "It's not helping you one bit my friend. This is one time I'm glad I'm not a cop. And I'm just a scientist, cop I mean. . . . As far as the participation and knowing what happened there it looks like you're involved. . . . . And it appears you haven't been completely truthful with the police, that's where we're standing. . . . Well, it shows here before it happened, you knew it was going down. . . . That's where it locks you in. That's where it locks you in. That your body prints there, nobody else's. . . . [T]hat's where it caught you." (Appendix 13.)

Ms. Mitchell understood this to mean that she about to be arrested. She said, "that's, I understand, well, I might be in jail tonight." (Appendix 13.) She further stated: "Well, you might as well turn me over to [Detectives] Jamieson and Bobbitt. I think I'm in trouble." Mr. Kuhns confirmed that

she was about to be put in jail: "Yes, I think so too. Son of a gun. . . . We'll get you out but you'll be here for a while." (Appendix 13.) At the 403 hearing, Ms. Mitchell confirmed that she was threatened with arrest, that Detectives Jamieson and Bobbitt led her to believe that she was going to be arrested and that this scared her. (RT 1151-1152.)

I. At the end of the polygraph interrogation on the morning of October 26, 1981, Mr. Kuhns did in fact turn Ms. Mitchell over to the detectives. However, she was not then arrested; instead, the detectives interrogated her further and, a few hours later, brought her back to Mr. Kuhns, for additional interrogation and further polygraph testing. Mr. Kuhns then again told her that the reason they brought her back for the afternoon was that the polygraph test results from the morning "didn't help [her] at all." (Appendix 14.) He said, "If nothing else, that's a nail in your coffin, so to speak. (*Ibid*.)

J. In the polygraph interrogation on the afternoon of October 26, 1981, Mr. Kuhns threatened Ms. Mitchell that she would be charged with conspiracy if she did not implicate someone: he told her that if she said someone had admitted to her that he was the stabber, she would save herself from a conspiracy charge. (Appendix 14.) He told her that, if she was not the first one to talk, nobody would believe anything she ever said and she would end up being implicated in the entire conspiracy:

> "I'd hate to see you drop the whole enchilada just on one person. Because when it comes right down to the line, everybody's like [inaudible], they're going to save their own ass. And the person that talks first believe it or not, is the one they're going to listen to. Because by the time they say, well, you had your chance to give your side of the story a long time

> ago, but you kept back pedaling, you kept lying, you kept contradicting yourself and then nobody wants to believe." (Appendix 14.)

He further said: "I don't want you to buy the whole enchilada on for, you know . . . some little piece of cake." (Appendix 14.) It was immediately thereafter that Ms. Mitchell stated for the first time that Reilly had told her he was supposed to make the killings look like a robbery. (*Ibid*.)

K. After three additional polygraph tests, Mr. Kuhns again told Ms. Mitchell that the results showed that she was lying when she denied personal knowledge of anyone leaving the Vose Street apartments on the night of the killings. Mr. Kuhns told her that, if he were a police officer, he would arrest her right then. He threatened that she would be prosecuted for murder and that she was like Charles Manson's women:

> "So, it kind of looks like you're getting involved in this more and more, now. That's contradictory statements constantly coming up on here. . . . I'm afraid he was going about it like the old Manson killings where they break into the house and just kill people in a room, just to kill them, man. . . . And they had a few women in that if you recall. [Inaudible] people are going to get you on this, I don't know. I can't say because I'm not going to be sitting on no jury up there. [Inaudible] because that's police officer problem. If it was up to me, knowing what I see here, I'd be throwing the cuffs on you, you know, if I was a cop. I'm no cop. I'm glad of that because I don't have to put the cuffs on you." (Appendix 14.)

Again, he led her to believe that she was about to be arrested and that he would testify against her: "But now you're involved and I have to go to court tomorrow about this. . . . Well, let me go and see what those policemen want to do with you." (*Ibid*.)

L. Even before the polygraph interrogation on the morning of October 26, 1981, law enforcement promised Ms. Mitchell

immunity if she would testify for the prosecution. (Appendix 13.) Immunity papers were ultimately drawn up and signed just prior to Ms. Mitchell's testimony at petitioner's preliminary hearing. The immunity papers prescribed the manner in which Ms. Mitchell would be required to testify in order to avoid prosecution. Those papers stated that as follows:

> "Because of [Ms. Mitchell's] condition on May 20th and 21st, 1981, she does not know of Reilly or Hardy's whereabouts between approximately 2:00-3:00 a.m. on May 20th [sic] and the time she woke up, approximately 10:00-11:00 a.m. She will explain conflicting statements she made to the police including Mr. Bradley Kuhns. She will testify that she had been in constant communication with defendant Hardy since the trial started and has received information from him regarding testimony offered in court. She will relate statements made to her by Hardy and Reilly before and after the murders, concerning all charges." (Appendix 22.)

Ms. Mitchell was told in no uncertain terms that her promise of immunity was conditioned on her saying the foregoing. Ms. Mitchell was also told repeatedly by Mr. Jonas, polygrapher Kuhns, the judge and other law enforcement agents that she would get immunity only if they believed that she was telling the truth. Mr. Kuhns told her that if she lied, she would be charged with murder. (Appendix 13.) At the 403 hearing, the trial court itself admonished her as follows: "You may have a grant of immunity from the District Attorney's Office, but if this court finds that any of your testimony is not all truthful, there will be charges brought against you." (RT 1026.) On the second day of her testimony at the 403 hearing, in Ms. Mitchell's presence, Mr. Jonas stated: "I did indicate to Mr. Wolfe [Ms. Mitchell's lawyer], as the court explained to this witness yesterday, if she is taking the oath now and is perjuring herself, that that's an entirely different matter." (RT 1129.) Later that day, the trial court again stated that she

would be prosecuted for perjury if he believed that her testimony at the 403 hearing was untruthful. (RT 1201.) When she was called to testify before the jury, she testified that, at the time she signed the immunity papers, she was told that if she testified to something untruthful, she would be prosecuted for perjury. (RT 9944) She also clearly stated that she believed the determination of whether she was testifying truthfully would be made by Mr. Jonas and the police (RT 10178) and that, if they prosecuted her for perjury, she would go to prison. (RT 10333.) She also indicated that she believed the more incriminating evidence she provided against petitioner and Reilly, the less likely it was that she would be prosecuted. She said her understanding was "that if I had anything to do with the crime, as long as I went forth and told, that I couldn't be prosecuted for it." (RT 10085.)

M. Ms. Mitchell was repeatedly told that, if she did not tell what law enforcement believed to be the truth, she would be charged with murder. For example, during the polygraph interrogation, Mr. Kuhns said to her: ". . . You've got a lot to lose here my friend. . . . You not only got perjury going against you now, you got a murder rap. A murder beef." (Appendix 13.)

N. Before her testimony at the 403 hearing in January of 1983, when her version of events dramatically changed, Ms. Mitchell was promised immunity from prosecution for perjury in exchange for testifying that she had lied in her testimony at the preliminary hearing. (RT 1129, 10085.)

O. At trial, Ms. Mitchell testified that she "might have" told her brother (Ron Leahy) she was going to change her testimony so that the police would stop pressuring her. (RT 10252-10253.)

92. Law enforcement used techniques which, by design, induced

Ms. Mitchell to experience anxiety and stress, including: forcing her to undergo lengthy and intensive interrogations, telling her forcefully and repeatedly that they knew she was lying, repeatedly mentioning that she herself would be incarcerated if she did not provide the information sought and inducing her to surmise that she was in a hopeless position. As a result, she became exhausted to the point that she could not think clearly and could not resist the pressure to provide statements in conformity with law enforcement's theory of the crime. Evidence of the use of such techniques and the effect they had on Ms. Mitchell includes, but is not limited to, the following:

A. In the end of May, 1981, Detectives Bobbitt and Jamieson came to Ms. Mitchell's workplace and spoke to her about the killings loudly enough that her coworkers could hear what they were saying. (Appendix 13; CT 574; RT 1189.) At trial, Ms. Mitchell testified that, as a result of law enforcement's conduct, her life had been ruined and she had been fired[9] from her job because the police had told her employers about the case; she stated that she was not able to go anywhere without the police asking her questions; the police had come to her home and everywhere she had gone, and she felt the police had harassed her. (RT 10012-10013.)

B. In July of 1981, Ms. Mitchell experienced severe physiological symptoms of anxiety such that she had to see doctor and obtain medication. (Appendix 13.)

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[9]At the polygraph interrogations and at the preliminary hearing, Ms. Mitchell stated that she had quit her job, not that she was fired. (Appendix 13; CT 616.) Nevertheless, whether she quit voluntarily or was fired, it was clear that she felt that she was forced to leave that place of employment by virtue of law enforcement's contacts with her coworkers.

C. After leaving her job at the 94th Aero Squadron, Ms. Mitchell took a job waitressing at a Denny's restaurant and worked there for a little over one month. As a result of the pressure she was experiencing at the hands of law enforcement, she "blew up" on the job twice. She made the following statement to the police polygrapher on October 26, 1981:

> "Well it's just like at my job, a couple of days I really lost it, I mean I, I heard they had put, they were putting out a warrant for me for conspiracy to murder. Conspiracy to commit murder. Every time I went to work it was like every time I opened the front door I looking to see who was at the front door and I was jumpy 'cause I finally had to tell my boss what was going on so he would know why I was acting the way I was acting. (Appendix 13.)

D. Ms. Mitchell quit her job at Denny's because she had decided to leave California (and all of the police pressure) in the end of October, 1981. However, she was told by law enforcement that she could not leave. (Appendix 13.)

E. The above-listed threats made to Ms. Mitchell by law enforcement also increased her anxiety and stress, which in turn added to the incentive to provide the statements they sought, simply in order to relieve the pressure.

F. As stated above, in the morning of October 26, 1981, police polygrapher Kuhns interrogated Ms. Mitchell prior to administering the actual polygraph tests. At the outset of the interrogation, Mr. Kuhns advised Ms. Mitchell of her *Miranda* rights, thereby clearly communicating to her that she was a suspect. (Appendix 13.) He repeatedly told her that the polygraph testing would reveal with scientific certainty whether or not she was lying and that, contrary to her previous understanding, the results would be admissible against her in court. Mr. Kuhns used hypothetical

facts similar to the facts of the Morgan killings purportedly to illustrate the way in which Ms. Mitchell's body would involuntarily react if she lied and would reveal that she was lying to the polygraph machine. Mr. Kuhns said:

> ". . . you walk in your house at night, nobody else home, you slam the door, and out from behind the door jumps this big guy. No way out, he's between you and the door he says, now Colette, I'm gonna chop you up and take your money. . . . Bet me, you may not have a weapon, you may not have anything, but you're not going to stand there getting chopped up like liver, he could have a knife, he could have a gun but you're going to fight to your death. That's why when some people get killed and stabbed to death they have cuts all over their arms because they're trying to protect themselves. Even though they have no way to do it they're gonna defend themselves. So this is what happens the body protects itself. . . . Or you wake up in the middle of the night and you think you hear somebody enter the room. Did you ever do that?" (Appendix 13.)

G. At the end of the morning interrogation, Mr. Kuhns administered to Ms. Mitchell three separate polygraph tests. The polygraph testing itself made Ms. Mitchell nervous. After a trial run prior to the first test, Mr. Kuhns says: ". . . you are a little nervous, I see that here." He then told her was going to start the real test and she said, "Now, I'll really get nervous now." (Appendix 13.) Between the second and third polygraph test, Ms. Mitchell indicated that the repeated testing was increasing her anxiety. She stated: "We've got to do it again? How many times do we have to do this? . . . Oh, we have to keep doing it until it comes out a certain way or something?"

H. During the repeated polygraph testing, Ms. Mitchell indicated that she was getting "the chills" each time Mr. Kuhns asked her, "'in any way did you participate in the killing of those two people on

Saticoy Street?'" (Appendix 13.) This clearly indicated that the interrogation was causing Ms. Mitchell palpable anxiety, stress and/or guilt.

I. As set forth above, at the end of the morning polygraph interrogation, Mr. Kuhns led Ms. Mitchell to believe that she was about to be arrested and that he was turning her over to the detectives for that purpose. Ms. Mitchell then met with detectives, but the nature of that meeting has never been disclosed to petitioner or his counsel. After that meeting, Ms. Mitchell was taken back to Mr. Kuhns for further interrogation and polygraph testing. The tape-recording of Mr. Kuhns' interrogation conducted in that same afternoon indicates that, between Mr. Kuhns' morning and afternoon interrogations of Ms. Mitchell, she attempted to contact her attorney but was unable to reach him. (Appendix 14.) When the interrogation resumed in the afternoon, Ms. Mitchell told Mr. Kuhns this, but Mr. Kuhns forged ahead with the interrogation in any event. (Appendix 14.)

J. Ms. Mitchell told Mr. Kuhns that she had been visiting Reilly in jail because he was all alone in the world and she wanted to give him moral support. Mr. Kuhns then asked said: "Would you care for a murderer, is that it? . . . It's like this Tate, Bianchi thing or the Manson thing, where they go into the house and just stab the person and kill them all, right?" (Appendix 14.) These "questions" clearly encouraged Ms. Mitchell to feel guilty for having kind feelings toward Reilly.

K. As stated above, in the polygraph interrogation conducted in the afternoon of October 26, 1981, Mr. Kuhns told Ms. Mitchell that they had brought her back for a second session because the first one "didn't help [her] at all," that it was "a nail in [her] coffin," that he did not want her to have to take "the whole enchilada," if all she did was

"driving or standing or looking out, rather than have – stabbing with a knife 40 times. There's a big difference." (Appendix 14.) He implied that someone had seen her car at the Morgan house on the night of the killings and threatened that police would examine her car for physical evidence showing that she had been the driver. He said, "And there are too many conflicts in the story to all of you in fact, to be honest with you. That's with Jimmy and that's with Buck and that's with you and other people I'm familiar with in this case. There's just too many conflicts." He maintained the pressure, stating, "I think somebody's going to dump it all on one person. They're going to have to take the whole enchilada." He told her that, if she did not talk first, nobody would believe her if she ultimately did tell whatever she knew. After administering three more polygraph tests, Kuhns again accused her of lying. He said, "You been havin' problems with that again. I'm telling you. . . . Personal knowledge of leaving the apartment. Lying to police." He again analogized her situation to Charles Manson's women and said that, if were up to him, he would arrest her. When she finally stated that she thought Reilly had left the apartment complex on the night of the killings, he said, ". . . and that shows you withheld information from the police again, doesn't it? Because they asked you that and you kept saying, no, no, no." (*Ibid.*) He stated that the others would say that she was fully responsible for the killings and he indicated that he would testify against her. He said: "Knowing what the other people may say, they may just dump it on you and start blaming it on you. . . . But now you're involved and I have to go to court tomorrow about this [inaudible]. . . . Well, let me go and see what those policemen want to do with you." (*Ibid.*)

L. On direct examination by Mr. Jonas at trial, Ms.

Mitchell, surmising that Mr. Jonas wanted her to downplay the effect of law enforcement's techniques, claimed that she did not feel pressured when she was talking to Mr. Kuhns, the police polygrapher. (RT 10017.) However, on cross-examination, she admitted that she was frightened during and after this interrogation. (RT 10091.) She also admitted that her contacts with police made her "concerned" because she felt that they did not believe her. (RT 10079-10080.) She stated that they "made [her] believe" that she was involved and this frightened her because she knew the police were "very powerful." (RT 10079.)

93. Law enforcement manipulated Ms. Mitchell's subjective perceptions by convincing her that she did not remember accurately what had happened and, through suggestive questioning, causing her to confabulate. Thus, she unconsciously adopted as her own memory information suggested and/or provided to her by others. Evidence that law enforcement encouraged Ms. Mitchell to forget facts which she originally knew to be true and/or to adopt their version of events even if it was inconsistent with information she once had, includes, but is not limited to, the following:

A. At the preliminary hearing, Ms. Mitchell testified that, on the night of the killings, she drove to the Vose Street Apartments from her place of work with Steve Rice rather than with petitioner and Reilly because Rice was going to give her some cocaine before sharing it with Reilly and petitioner. (CT 627.) By the time of her testimony 1983, Ms. Mitchell had forgotten why she drove with Steve Rice or even whether they had gone straight to the Vose Street Apartments from her workplace. (RT 1167, 9951.) Ms. Mitchell's failure of memory in this regard served the prosecution's goals because it suggested that petitioner and/or Reilly had

wanted to be alone so that they could discuss their purported plan to commit the killings that night..

B. Similarly, at the preliminary hearing, Ms. Mitchell testified that, on the night of the killings, she and Steve Rice went straight to the Vose Street Apartments from the 94th Aero Squadron and, after snorting cocaine, picked up the beer bong, which was then in Rice's apartment, and joined petitioner and Reilly next door in Reilly's apartment. (CT 640.) By the time of her testimony in 1983, she had forgotten where the beer bong was that night and thought it possible that she and Rice stopped at her apartment on the way to the Vose Street Apartments to pick it up. (RT 1126, 10203.) At the 403 hearing, she testified that stopping at her apartment would have added another 20 minutes onto the trip to the Vose Street Apartments from her place of work. (RT 1126.) On prompting by defense counsel, she acknowledged that she probably did not go to her own apartment on the way to the Vose Street apartments. (RT 1126.) However, the fact that Mr. Jonas chose to leave this area vague was no accident. To the extent that Mr. Jonas was able to elongate the period of time that petitioner and Reilly were out of Ms. Mitchell's presence, he would have been able to present the jury with an alternate theory of the crime: i.e., that petitioner and Reilly committed the killings at that time.

C. At the polygraph interrogation on the morning of October 26, 1981, and at the preliminary hearing, Ms. Mitchell stated that she did not recall what route she and Steve Rice took when they drove from the 94th Aero Squadron to the Vose Street apartments. (Appendix 13; CT 633.) However, at trial, she testified that she remembered the route but could not remember the street names. After Mr. Jonas asked her if she remembered Woodley, Saticoy and Sherman Way, she testified that they

drove from Woodley to Saticoy, Saticoy to Sherman Way and Sherman Way to Vose Street. (RT 9950.) This testimony was the obvious product of suggestion and was false, as Saticoy, Sherman Way and Vose Street are parallel to one another.

D. At the preliminary hearing, Ms. Mitchell testified that it took at most ten minutes for her and Steve Rice to get from the 94th Aero Squadron to Rice's apartment (CT 684) and that, after she and Rice arrived at the Vose Street Apartments, they spend five to ten minutes in Rice's apartment before joining petitioner and Reilly next door in Rice's apartment. (CT 686.) Thus, her testimony indicated that petitioner and Reilly were out of her presence for a total of 20 minutes. At the 403 hearing, she testified that petitioner was out of her presence of one-half hour. (RT 1061.) At trial, however, she testified that she and Rice were at Rice's apartment for about one-half hour before joining petitioner and Reilly (RT 10116), and that about 30-45 minutes elapsed between the time she and Rice left the 94th Aero Squadron to the time that they joined petitioner and Reilly in Reilly's apartment (RT 9955). Again, Mr. Jonas did nothing to dissuade her from this testimony, for the reason set forth above: i.e., to maximize the possibility that petitioner and Reilly committed the killing between the time that they left the 94th Aero Squadron and the time that Ms. Mitchell and Mr. Rice met up with them at Reilly's apartment.

E. At the preliminary hearing, Ms. Mitchell testified that, when she and Rice arrived at the Vose Street Apartments, petitioner and Reilly were already there; she stated that she knew this because she saw Reilly's car parked behind the building and saw the light on in Reilly's apartment. (CT 686.) At trial, she testified that she did not remember whether they were there when she and Rice arrived. (RT 9952.) Although,

on cross-examination, after being confronted with her testimony at the preliminary hearing, she testified that she believed they were there when she and Rice got there (RT 10214), again, the testimony elicited by Mr. Jonas demonstrates that it was part of his strategy to encourage Ms. Mitchell to forget events which were not helpful to his dogged quest for a conviction, even at the cost of the truth.

F. Ms. Mitchell initially told law enforcement that, at about 11:00 p.m. on the night of the killings, she and Rice left the Vose Street Apartments and went to the store to buy beer. Law enforcement told her, however, that, while she was at the store, Sharon Morgan, the girlfriend of Reilly's roommate Mike Mitchell, came into Reilly's apartment and went into Mike Mitchell's bedroom. Officers told Ms. Mitchell that because she and Sharon Morgan never saw each other that night and because Sharon Morgan remembered that the Johnny Carson show was on when she got there (and the Johnny Carson show began at 11:30 p.m.), Ms. Mitchell had to have gone to the store later. (Appendix 13.) Having consciously or otherwise accommodated the information she was provided by law enforcement, Ms. Mitchell testified at trial that she and Rice went to the store sometime between midnight and 2:00 a.m. (RT 8856, 10117.)

G. At the polygraph interrogation, Ms. Mitchell stated that she was sure she was with Reilly and petitioner until 3:00 a.m. on May 21, 1981, because she recalled wanting to buy more beer and remembered being told by petitioner or Reilly that it was too late to do so. Knowing that stores stopped selling alcohol at 2:00 a.m., she surmised that this occurred after that hour. However, Mr. Kuhns told her that she should not assume that it was after 2:00 a.m. simply because petitioner had Reilly had told her so; Mr. Kuhns suggested that they could have simply told her that falsely,

because of some ulterior motive. Ms. Mitchell then agreed that she did not know what time it truly was when this conversation occurred. At trial, she made no mention of this conversation or of wanting to make a second trip to the store to buy more beer. Again, this provides an example of law enforcement's campaign to erode Ms. Mitchell's confidence in her own memory so that she was more susceptible to their suggestion regarding what occurred on the night in question.

H. At the polygraph interrogations and at the preliminary hearing, Ms. Mitchell stated that, on the night of the killings, she and petitioner made love for approximately two to three hours, starting at approximately 3:00 a.m. (Appendix 13; CT 652.) At some time prior to the polygraph interrogation, law enforcement officers suggested to her that her recollection could not be accurate and that she must have been drunk. (Appendix 13.) Similarly, at the polygraph interrogation, Mr. Kuhns asked Ms. Mitchell the following questions: "Were you ever to the point, stretched out on coke, snorting five or six lines up, supposedly or whatever, to where you didn't know if things were happening? Were you ever to that point? . . . Because it seems like sometimes you're having problems trying to recall things and I want to know if you are. . . . Any time you were stretched on any coke or any drug, it's like waking up, you know, after you drink too much. . . . Do you ever use it to the extent, even though you don't use them much, did you ever overuse and indulge to where, man, I forgot what happened last night?" (Appendix 14.) Ms. Mitchell answered that she had felt that way after drinking too much, but not in relation to using drugs. Mr. Kuhns then asked her whether, on the night of the killings, she was drinking or was drunk. She answered: "No, I don't think so. I really don't think so. Maybe I was, but I really don't think so." (*Ibid.*) Again, law

enforcements' questions encouraged Ms. Mitchell to doubt her own memory of the night in question and provided her a convenient excuse for changing her version of events: i.e., that her original memories were inaccurate because she had been under the influence of intoxicants. By causing Ms. Mitchell to question the reliability of her own memory and "forget" what she had previously known to be true, law enforcement made it more possible for her to accept as possible and/or true "facts" which were suggested to her by others.

I. Ms. Mitchell consistently maintained that, on the night of the killings, she used cocaine in relatively large quantity. In the statements and testimony which she provided prior to her testimony in January of 1983, she consistently stated that she stayed awake all night that night and only went to sleep as the sun was coming up. (Appendices 13, 15; CT 1417.) At the polygraph interrogation, Ms. Mitchell stated that cocaine generally made her "very alert, very up, very knowing what's going on, it doesn't make me sleepy." (Appendix 13.) At the preliminary hearing, she testified that "coke keeps me awake. . . . It keeps you up and alert, gives you more energy," (CT 1399) and makes it hard to sleep. (CT 1449.) At the 403 hearing, she testified that cocaine feels "like speed." (RT 1229.) Nevertheless, at the 403 hearing and before the jury, Ms. Mitchell testified that, on the night of the killings, she fell asleep or passed out at an unspecified time between 2:00 and 3:00 a.m. (RT 9957, 10219-10220.) Although she admitted that she had used more cocaine that night than ever before in her life (RT 10001), Mr. Jonas encouraged her to disregard her own knowledge and prior experience that cocaine keeps her awake; although, on cross-examination at trial, she admitted that cocaine normally

kept her awake, she claimed that she did not know if it did that night. (RT 10149)

J. Similarly, at the polygraph interrogation, after Ms. Mitchell vociferously denied having driven to the Morgan house on the night of the killings, Mr. Kuhns asked her if there was "any reason" why someone would have said they had seen her car there that night. Ms. Mitchell answered: "You know [inaudible] there's a possibility they could have used my car." (Appendix 14.)

K. At one of the polygraph interrogations, Ms. Mitchell indicated that one of the detectives had said her: "'Colette, maybe you were involved in it and didn't know that you were being involved in it. Maybe you were being used and didn't even know you were being used.'" (Appendix 14.)

L. During the polygraph interrogation, Ms. Mitchell asked the police polygrapher why petitioner and Reilly were not being given a polygraph examination. Mr. Kuhns answered, "Maybe they don't want to take them." (Appendix 13.) This loaded comment suggested to Ms. Mitchell that petitioner and Reilly were lying to her and to the police and that her belief that petitioner had nothing to do with the killings was incorrect.

94. Law enforcement effectively took control of Ms. Mitchell's memory of the relevant events not only through the use of the foregoing techniques, but also by physically controlling the circumstances under which she was questioned. Examples include, but are not limited to, the following:

A. At the polygraph interrogation, Mr. Kuhns put her in a special chair and wired her up to the machine, such that she remarked,

"Boy, I feel like I'm getting electrocuted." (Appendix 13.) Although Ms. Mitchell said she had had nothing to eat and very little sleep before the interrogation, Mr. Kuhns proceeded with it in any event. (Appendix 13.) Indeed, in the afternoon session of the polygraph, Ms. Mitchell indicated that she was so tired that she had almost fallen asleep during one of the polygraph tests. (Appendix 14.)

B. As above noted, between the two polygraph interrogations of October 26, 1981, Ms. Mitchell attempted to contact her attorney but was unable to reach him. (Appendix 14.) At the beginning of the afternoon interrogation, she informed police polygrapher Kuhns that she had been unsuccessful in reaching her lawyer. Mr. Kuhns proceeded with the second interrogation nonetheless. (*Ibid*.)

C. As above noted, police officers appeared unannounced and questioned Ms. Mitchell at her work place, at her home and everywhere she went. (Appendix 13; CT 574; RT 1180, 1189, 10012-10013.)

95. Law enforcement subjected Ms. Mitchell to numerous "dress rehearsals" for her eventual testimony at trial, questioning her on numerous occasions without recording the interrogations. For example, detectives questioned her between and after the two tape-recorded polygraph interrogations. (Appendices 13, 14, 18.) Apart from the two tape-recorded polygraph interrogations and the reported testimony Ms. Mitchell provided at the preliminary hearing and 403 hearing, Mr. Jonas and/or police officers contacted and questioned Ms. Mitchell on at least 20 occasions prior to her testimony before the jury. (See fn. 10, *supra*.)

96. Law enforcement also lied to Ms. Mitchell. Although perhaps legally permissible, utilization of this technique in an interrogation is one of the factors which tends to indicate that Ms. Mitchell's will was overborne

by psychologically coercive conduct on the part of law enforcement. Examples of the use of this technique on Ms. Mitchell include, but are not limited to, the fact that police polygrapher Kuhns told Ms. Mitchell that polygraph testing was completely reliable and admissible in court, and that the results of the testing she was given showed that she was lying as to her knowledge regarding the killings. In fact, polygraph testing is notoriously unreliable, is generally not admissible in court, and the results of the testing to which Ms. Mitchell was subjected were inconclusive: they showed either that she was lying in response to every single question posed (which clearly was not the case), or that she was an unfit subject for polygraph testing at that time. (Appendix 23.)

97. The techniques utilized by law enforcement to secure the testimony they sought from Ms. Mitchell were particularly effective because of Ms. Mitchell subjective mental state which made her particularly vulnerable to suggestion and "brain-washing." Factors indicating her particular vulnerability include, but are not limited to, the following:

A. At the time of her polygraph interrogations, Ms. Mitchell had a cold and a slight fever. (Appendix 13.) Ms. Mitchell was a drug user and had taken drugs within three days before the polygraph interrogations. (*Ibid*.) Ms. Mitchell had gotten only four hours of sleep the night before and had eaten nothing that morning. (*Ibid.*) She was so tired that she almost fell asleep during one of the polygraph tests itself. (Appendix 14.)

B. Ms. Mitchell had a nervous stomach and a spastic colon and was under a doctor's care for those conditions. (Appendix 13.)

C. Ms. Mitchell had previously required mental health care. (*Ibid*.)

D. By her own admission, Ms. Mitchell experienced lapses of memory and, intentionally or otherwise, "blocked" memories out and forgot things. (RT 1101, 10026, 10186, 10352.) As a result, she was unable to distinguish what she had heard from whom and what she recalled of her own subjective memory. (RT 1139.)

E. By her own admission, on the night of the killings, she had snorted three or four eleven-inch lines of cocaine (see RT 9954) and three or four beer bongs (CT 646).

F. By the time of trial, Ms. Mitchell had heard many different versions of events and facts regarding the killings from law enforcement (including Mr. Jonas), her lawyer, Reilly, Ms. Mitchell's brother, Steve Rice, John Hardy and petitioner. (RT 1137, 10132-10133, 10278.) Over time, she had become unable to distinguish who told her what and from whom she had received any particular piece of information. (RT 1139, 1156, 1222.) Accordingly, she was even more likely to defer to the version of events that was provided to her by those who were in a position of authority and who, in her opinion, "would know more . . . than anybody else would." (Appendix 14.)

98. Ms. Mitchell's suggestibility was demonstrated time and time again. Examples include, but are not limited to, the following:

A. At the preliminary hearing, Ms. Mitchell testified "Well, I asked him [i.e., petitioner] a lot of times what he is involved in, if he is involved; almost, say eight out of ten times I would talk to him, I was constantly asking him because I needed in my mind to know." (CT 614.) The court then asked: "You say eight out of ten times he said it's better that you don't know?" (CT 614-615.) She answered in the affirmative. (CT 615.) However, it is clear that what she had intended to say was that she

had asked petitioner eight out of ten times she saw him whether he was involved, not that he gave her any particular answer eight out of ten times.

B. At the 403 hearing, Mr. Jonas asked her: "Recall yesterday your testimony where you said that before the date that you learned the murders happened, you heard Hardy and Reilly discussing robberies?" (RT 1186.) She had given no such testimony. He then asked her if she had heard about robberies before the date she learned the murder had happened; she answered, "I believe so." (RT 1189.) He also asked if she had testified the previous day that she had heard petitioner and Reilly talk about robberies and, despite the fact that she had given no such testimony, she answered that she had. (RT 1189.)

C. Also at the 403 hearing, Mr. Jonas asked her: "Did you have a conversation with your attorney Mr. Wolfe before you discussed anything with us in this case?" She answered in the affirmative. (RT 1022) This was not true, as she had spoken to police at least twice before June, when she retained Mr. Wolfe. (CT 1394; Appendix 11, 15.)

D. Also at the 403 hearing, Mr. Jonas asked Ms. Mitchell: "At the preliminary hearing, Colette, do you recall areas of questioning which I specifically asked you whether or not Mr. Hardy was at the house the night of the murders of if he ever told you that he was? . . . At the house where the murders were committed. Do you recall whether or not you ever asked [sic] whether or not Mr. Hardy ever made any statement to you about whether or not he was at the house the night the murders were committed? . . . . Were you asked that question at the preliminary hearing?" She answered, "I don't – I don't remember. Yes, I think so." (RT 1028.) She had not been asked at the preliminary hearing whether petitioner had told her he was at the Morgan house on the night of the killings.

99. As a result of the techniques utilized by law enforcement in questioning Ms. Mitchell both in and outside of the courtroom, as well as her own vulnerability to those techniques, Ms. Mitchell's testimony before the jury at petitioner's trial was false and/or misleading in each and every material respect. The false testimony which she provided includes but is not limited to the following:

100. Ms. Mitchell testified that neither Mr. Jonas nor Detectives Jamieson and Bobbitt ever gave her any information, that they only asked her questions. (RT 10132-10133.) Ms. Mitchell may well have been unconscious at the time of trial of particular information which law enforcement had provided her over the course of their many contacts with her and which she had incorporated into her version of events. Whether or not she intended to lie, her testimony denying that law enforcement had provided her with any information was false. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 89, *supra*. Undoubtedly, numerous other examples of information which Ms. Mitchell claimed at trial to have received from petitioner, Reilly or other alleged coconspirators in fact was provided by law enforcement. However, because of law enforcement's failure to memorialize and/or disclose what was said to and by Ms. Mitchell during their many contacts with her, petitioner and his counsel are presently unable to identify them.

101. Ms. Mitchell testified that she was granted immunity on November 3, 1981, just before she testified at the preliminary hearing. (RT 9992.) She also testified that, at the time that she spoke to police polygrapher Kuhns, who interrogated her on October 26, 1981, prior to her testimony at the preliminary hearing, she had not yet been granted immunity. (RT 10016.) In fact the prosecution had promised her full

immunity before she met with Kuhns. (Appendix 13.)

102. At trial, Ms. Mitchell testified that, with her attorney's permission, she was interviewed twice by Mr. Kuhns. (RT 10298.) She testified that, in the first interview, Mr. Kuhns told her he thought she was lying and that, before the second interview, she spoke to her attorney again and he said to go ahead with the second interview. (RT 10300.) The tape of the second polygraph interrogation indicates that, although she tried to contact her attorney between the morning and afternoon interrogations by Mr. Kuhns, she was not successful in doing so and was able only to leave her attorney a message. (Appendix 14.)

103. On direct examination by Mr. Jonas at trial, Ms. Mitchell testified that she did not feel pressured when she was talking to Mr. Kuhns. (RT 10017.) However, on cross-examination, she admitted that she was frightened during and after this interrogation. (RT 10091.) She also testified that, when she spoke to the police, she felt that they did not believe her and this caused her concern. (RT 10079.) She testified that they made her believe that she was involved, or that they thought she was involved, and that this frightened her insofar as the police are so powerful. (RT 10079.) She felt from all of her interviews that the police were accusing her of being deceptive. (RT 10080.)

104. Ms. Mitchell testified before the jury that, at an unspecified time, she agreed with petitioner that she would testify falsely (RT 9900) and that there were certain things that she "had to say." (RT 9959.) While Ms. Mitchell and petitioner may well have discussed what she would or should tell the police and what she would or should say in testimony, the implication was that petitioner had specifically instructed her to say things which she believed at the time were untrue. This testimony was misleading

and its implication was false. At the 403 hearing, she testified that she "agreed to testify incorrectly or falsely with Mr. Hardy" and with Reilly. (RT 1023.) She testified that she and petitioner discussed what they did that evening; he told her that they had made love that night and that she should tell that to the police; he told her what time they went to bed and that she should say that to the police as well. (RT 1064.) In January of 1983, in preparation for her testimony at the 403 hearing, Ms. Mitchell wrote a list of items which purportedly represented false testimony which she had given at the preliminary hearing. (See Appendix 21.) In that list, she stated that she had spoken to petitioner about "it" [i.e., the night of the murders] before and after she spoke to the police, "but Buck had told me Jimmy had nothing to do with it." (Appendix 21; RT 10205.) This statement indicates not only that Reilly assured her that petitioner was not involved, but to the extent that she and petitioner discussed what occurred on the night of the murders, nothing that petitioner said led her to believe that he had been involved. Accordingly, the implication was false that, from the start, he had asked her to say things which she knew were false and she had agreed to do so. She believed petitioner had nothing to do with the killings; she had no reason to be deceptive. Ms. Mitchell's testimony implying that she and petitioner planned to deceive the police was false and misleading and the product of suggestion, confabulation, persuasion, coercion and/or the other factors set forth above.

105. Ms. Mitchell testified before the jury that she had lied at the preliminary hearing (RT 9944, 10078), and that she did so because she was then in love with petitioner and wanted to protect him. (RT 10078, 10334.) This testimony was false and/or misleading. In fact, she was no longer in love with petitioner at the time of the preliminary hearing. She had told her

lawyer, Mr. Wolfe, that she had been having a lot of sexual relationships immediately prior to the preliminary hearing, when petitioner was in custody. (RT 10360-10368.) At the polygraph interrogation on the morning of October 26, 1981, approximately one week before she testified at the preliminary hearing, Ms. Mitchell said that she was not sure whether petitioner was still her boyfriend. She said, "I'll have to wait 'till I find out [inaudible]" (Appendix 13), undoubtedly referring to whether or not he was involved in the killings. Even more telling was her statement at that same interrogation that she had intended to leave California and go back to Chicago before the end of October, 1981, and that the only reason she had not done so was because law enforcement had told her not to. (Appendix 13.) The fact that she had planned to move without petitioner, to leave him behind in jail, and did not intend to stay by his side at the preliminary hearing and help him through the court proceedings, showed that she was in fact no longer in love with him at that time. Moreover, at the preliminary hearing itself, she testified that she was not sure whether or not she was in love with petitioner (CT 575), that she was not going to make up anything for anybody and that the only person she wanted to protect was herself. (CT 1431.)

106. Ms. Mitchell testified before the jury that, on the night of the killings, she drove home with Steve Rice because he told her that he had some cocaine that wanted to give some to her before the "animals" got a hold of it. (RT 9953.) Her testimony implying that it was Rice who used the word "animals" was false and/or misleading. In fact, "animals" was Ms. Mitchell's own choice of words, not Rice's. (CT 1442.) Her testimony gave the false impression that inflammatory and pejorative word was one that Rice had used in reference to petitioner and Reilly, when in fact Ms.

Mitchell had cavalierly used the word herself, after she had been persuaded that petitioner and Reilly might have been involved in the killings.

107. Ms. Mitchell testified at trial that, on the night of May 20, 1981, she and Steve Rice were at Rice's apartment for about one-half hour before joining petitioner and Reilly next door in Reilly's apartment. (RT 10116.) She also testified that it was about 30-45 minutes between the time she and Rice left the 94th Aero Squadron to the time they went next-door to Reilly's apartment. (RT 9955.) Both statements were misleading and/or false. At the 403 hearing, she had testified that, from the time they left the 94th Aero Squadron, petitioner was out of her presence for one-half hour (RT 1061); she testified at the 403 hearing that she and Rice arrived at Vose Street within one-half hour of leaving the 94th Aero Squadron (RT 1168); and that she and Rice spent five to ten minutes at Rice's apartment before going to Reilly's. (RT 1169, 1227.) At the preliminary hearing, she testified that it took at most ten minutes to get from 94th Aero Squadron to Rice's apartment (CT 684) and that she and Rice were in Rice's apartment for ten minutes before joining petitioner and Reilly next door. (CT 686.) She also testified that petitioner and Reilly were at the Vose Street Apartments when she and Rice arrived there, which indicated that the period of time for which she could not account for petitioner's presence was only ten minutes. On June 24, 1981, she told police officer that she and Rice were in Rice's apartment for "a few minutes" before going to Reilly's. (Appendix 16.) The change in her version of events, extending the gap in the time for which she could not account for petitioner's presence from ten minutes to somewhere between 30 and 45 minutes, was the result of suggestion, confusion, persuasion, confabulation and coercion, as set forth above.

108. Ms. Mitchell testified before the jury that, on the night of the killings, she and Steve Rice left the Vose Street Apartments and went to the store to buy beer between midnight and 2:00 a.m. on May 21, 1981, and that they bought one six-pack of beer. (RT 9956.) She also testified that she thought they went to the store close to 1:00 a.m. (RT 10117.) She testified that it took about five minutes to go to the store and back. (RT 10217.) At the 403 hearing, she had testified that she and Rice went to the liquor store right before the store quit serving alcohol. (RT 1063.) At the preliminary hearing, she testified that she and Rice made a beer run at about 11:00 p.m. and bought two six packs of beer (CT 640) and that it took about ten minutes to go and come back. (CT 688.) She also said she was telling the truth when she said it took five minutes to go and come back. (CT 643). In the polygraph interrogation, she stated that they went to the store at around 11:00 p.m., but detectives had persuaded her that it had to have been later. (Appendix 13.) Given the many inconsistent statements she had provided in this respect, her testimony at trial was false and/or misleading insofar as she claimed to remember what time she went to the store.

109. Ms. Mitchell testified before the jury that she did not see Mike Mitchell at all on the night of the killings. (RT 9956.) On cross-examination, she admitted that she remembered some occasion on which he had tried to use the beer bong and spilled beer all over himself, but she could not recall if it was the night of the killings. (RT 10297.) Finally, she admitted that she did not know if she saw Mitchell that night or not and she could have just "blanked it out." (RT 10352.) At the preliminary hearing, she testified that Mike Mitchell was in the living room with petitioner and Reilly when she came back from buying beer and he did a beer bong. (CT 1403.) At the polygraph interrogation, she stated that Mike Mitchell was

there, did a beer bong, and spilled all over himself. (Appendix 13.) On May 27, 1981, she reportedly told detectives that Mike Mitchell was at Reilly's apartment at some time that night, but she did not know if he was there when she and Rice arrived or if he had come in later. She did recall that Mike Mitchell went to bed early that night and that he had been unable to handle the beer bong very well. (Appendix 15.) On June 24, 1981, she reportedly told officers that Mike Mitchell was at Reilly's apartment when she and Rice first arrived there, that Mike Mitchell went to bed early and that she did not know until later that he had a girlfriend there with him that night. (Appendix 16.) Again, given the many inconsistent statements she had provided in this respect, her testimony at trial was false and/or misleading insofar as she claimed to remember that she did not see Mike Mitchell on the night of the killings.

110. Ms. Mitchell testified at the 403 hearing and before the jury at trial that she and petitioner had gotten into an argument on the night of May 20, 1981, at Reilly's apartment, and that they did not make love that night. (RT 1057, 1126, 9945, 10117, 10221.) At the preliminary hearing, she testified that they had made love for about two hours that night. (CT 652.) In the polygraph interrogations, she says that they made love for two to three hours that night. (Appendices 13 and 14.) Despite the fact that she had had at least 20 extrajudicial contacts with law enforcement prior to her testimony in January, 1983, the first time she ever mentioned any argument with petitioner on the night of the killings was at the 403 hearing. (RT 1057.) Ms. Mitchell's testimony at trial denying that she and petitioner had made love on the night of the killings and stating that, instead, they had an argument was false and/or misleading and was the product of coercion, persuasion, confabulation and suggestion.

111. Ms. Mitchell testified before the jury that petitioner told her on the night of the killings that he needed her that night. (RT 1058, 9946, 10120.) She also stated that, although she did not know then why he made the statement, she had later gotten an idea as to why he needed her that night. (RT 9947.) The clear implication of this testimony was that she had at some point determined that he had needed her that night to serve as his alibi. Again, despite the fact that she had been questioned by law enforcement at least 20 time prior to her testimony in January of 1983, she had never before mentioned petitioner's purported statement in this regard. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) In light of the foregoing factors, this testimony was false and/or misleading, and was the product of coercion, persuasion, confabulation and suggestion.

112. In her testimony before the jury, Ms. Mitchell stated that she fell asleep or passed out in Steve Rice's apartment but she did not remember going to bed and that she was "hazy" about what happened that night after her purported argument with petitioner. (RT 9957, 10121, 10223, 10353.) She testified that she did not know what happened after her argument with petitioner; the next thing she remembered was waking up at about 11:00 a.m. in Rice's apartment with petitioner lying next to her. (RT 9958.) In all statements and testimony that she made prior to the 403 hearing in January of 1983, she had said that she and petitioner stayed up until sunrise and that she would have known if he had left the Vose Street Apartments that night. (Appendices13, 14, 15; CT 650, 652.) She testified at trial that, on the night of the killings, she had snorted three or four eleven-inch lines of cocaine that night. (RT 9954.) At the preliminary hearing, she testified that she snorted two or three twelve-inch long lines and then three more three-inch lines of cocaine (CT 648), that it was very

difficult to go to sleep after having consumed so much cocaine and that she did not go to sleep until the sun came up. (CT 1417.) In the polygraph interrogation, she stated that she snorted about five lines of cocaine that night (Appendix 14), and that cocaine generally made her very alert, not sleepy. (Appendix 13.) Nevertheless, at the polygraph interrogation in the afternoon of October 26, 1981, after hours of interrogation, threats, and accusations, Ms. Mitchell had stated, “Jimmy could have left too. I mean, I could have been so knocked out that I didn’t know Jimmy left.” (Appendix 14.) Ms. Mitchell change of testimony at trial, like this statement at the polygraph interrogation, was the product of persuasion, coercion, and suggestion. Cocaine is a powerful stimulant. Given the amount of cocaine which Ms. Mitchell admitted having consumed, her claim that she went to sleep or passed out shortly thereafter is necessarily false. Her testimony at trial in this regard, and her claim that she did not remember anything between approximately 2:00 or 3:00 a.m. and when she woke up the next morning at 11:00 a.m. was false and/or misleading. She had arrived at this testimony, intentionally or otherwise, in order to conform her version of events to the prosecution’s theory of the crime: i.e., that at some time during the early hours of May 21, 1981, petitioner left the Vose Street apartments, went to the Morgan house and participated in the killing of Nancy and Mitchell Morgan.

113. At trial, Ms. Mitchell testified that she drove by the Morgan house every day to go to work but she did not know which house it was. (RT 10049.) At the preliminary hearing, she testified that it was Mr. Jonas who told her where the Morgan house was. (CT 633, 639.) At the polygraph interrogation on the morning of October 26, 1981, she indicated that, at the time of the killings, she did not know where the house was.

(Appendix 13) Her trial testimony in this regard was false and/or misleading in that it created the false impression that she knew at the time of the crime generally, if not specifically, where the house was.

114. At trial, she testified that Reilly told her after the killings that he had called Morgan before the killings and said he wanted out; Reilly told her that Morgan told him that the killing had to be soon because the insurance would lapse in June. (RT 10010, 10208-10211.) Mr. Jonas then asked her: "Did you ever testify that that came from Mr. Hardy?" She answered: "I might have." (RT 10011.) She had never so testified. In fact, in none of her prior statements or testimony, including her testimony at the 403 hearing, had she ever attributed this statement to anyone other than Reilly. (Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21; RT 1087; CT 594.) Accordingly, her testimony before the jury suggesting that petitioner had made this statement was false and/or misleading, and the product of suggestion, coercion, persuasion and confabulation.

115. At the guilt phase, before the jury, in the guise of a question, Mr. Jonas effectively testified that Ms. Mitchell had told the jury on the previous day that there had been a rifle in a guitar case that ended up at her house on Ben Avenue.[10] (RT 10003.) The implication of this "testimony" was that the guitar case contained a rifle that had belonged to Cliff Morgan. This "testimony" was false and/or misleading, as Ms. Mitchell admitted on cross-examination that she had never in fact seen the rifle. (RT 10248.)

116. At trial, Ms. Mitchell testified that, after petitioner's arrest, she had told petitioner's brother, John Hardy, to get rid of the aforementioned rifle because petitioner had told her to do so. (RT 10003.)

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[10]Ms. Mitchell had not so testified. (See paragraph 214, *infra*.)

She testified that she did this because she knew the rifle "had something to do with the case." (*Ibid*.) She further testified that petitioner had called her from the jail and told her to change her testimony about the rifle so that it would appear as if the only rifle she knew about was another one that belonged to petitioner or his brother. (RT 10004.) This testimony was false and/or misleading. At the 403 hearing, Ms. Mitchell had testified that petitioner had called her the night before her testimony at the preliminary hearing and told her, with regard to the rifle, only that she should get her story straight with his brother, John Hardy. (RT 1084.) She further testified at the 403 hearing that she thought it might have been John who told to change her testimony about the rifle. (RT 1082.) She recalled that someone told her to say that petitioner did not ask her to ask John to get rid of it and that she had been told this when she was "outside the courtroom" before her testimony at the preliminary hearing, (RT 1083.) Petitioner was in jail at the time, so Ms. Mitchell could not have heard this from him when she was "outside the courtroom." In testifying before the jury, she also mentioned that, just before she testified at the preliminary hearing, she ran into John in the hallway outside the courtroom. (RT 10005.) Accordingly, her testimony at trial that petitioner had instructed her to change her testimony regarding the rifle was false and/or misleading and was the product of coercion, persuasion, suggestion and/or confabulation.

117. Ms. Mitchell testified at trial that she had read in the search warrant that a rifle was one of the things that was stolen from the Morgan house; she further claimed that she had been told that the rifle was one of the items that was taken to make it look like a robbery but she did not recall who told her this and she was never told when it was taken. (RT 10248-10249.) Her testimony implied that petitioner had taken the rifle from the

Morgan house on the night of the killings. Ms. Mitchell's testimony and its implication were false and/or misleading. Petitioner had come into possession of the rifle prior to the killings. (CT 546; RT 9277.) Petitioner had borrowed the gun from Reilly because he and his brother were planning planned to go camping over the Memorial Day weekend and use the gun to go hunting in the woods; petitioner had gotten the rifle from Reilly at least a couple of weeks before his birthday (i.e., May 24), and had given the rifle to his brother to hold onto because petitioner was on probation and was therefore not allowed to possess weapons. (CT 547, 554, 565; RT 9373-9374.) Although petitioner believed that the rifle was "hot" (i.e., stolen), he did not know at that time that the rifle was connected to Morgan. (CT 547; RT 9345, 9366-9377.) Petitioner told Ms. Mitchell to dispose of the rifle because he had just found out that it had come from the Morgan house. Accordingly, Ms. Mitchell's testimony and belief that the rifle had been taken from the Morgan's house on the night of the killings was false and was the product of coercion, persuasion, suggestion and/or confabulation.

118. Ms. Mitchell testified before the jury that she knew "for a fact" that petitioner received what she thought to be $1,000 from Cliff Morgan. (RT 9967-9968; 10286.) She also stated that she helped petitioner and Reilly get the money by loaning "them" her car to obtain it. (RT 9967-9968.) She testified that she had been told by Reilly or petitioner that Reilly had borrowed her car to go to Magic Mountain to collect the money. (RT 9968, 9970.) She testified that the money was split two ways. (RT 9971.) The foregoing testimony was false and/or misleading. First, Ms. Mitchell herself admitted that it was Reilly alone who borrowed her car. (RT 9968.) At the 403 hearing, she had also testified that Reilly did not tell her at the time why he wanted to borrow her car and, although she never indicated

what specifically he said, she testified that it was Reilly, not petitioner, who later told why he had borrowed her car. (RT 1035-1036.) Second, she admitted to the jury that she did not remember seeing money change hands between Reilly and petitioner; she did not remember seeing Reilly with any money; and she did not know who told her from where the money had come. (RT 10072.) She admitted that she did not remember when she saw the money or who was present; she just remembered seeing it in her cedar box and when she saw it, she knew it was not hers so she figured it must have been petitioner's. (RT 10072-10073.) More importantly, when confronted with her preliminary hearing testimony that she was never told by petitioner or Reilly about moneys that had been collected or given for doing the job (CT 609), she admitted that it was Mr. Jonas who had told her weeks or months after the fact that, when Reilly borrowed her car, he used it to go to Tip's restaurant in Valencia and there received money from Cliff Morgan. (RT 10235-10236.) Most importantly, she admitted that she had no idea when in relation to the day that she lent Reilly her car she saw petitioner with $1,000. (RT 10069.) Moreover, at the 403 hearing, she testified that petitioner had never told her from whom the $1,000 had come and she did not know where the money had come from at the time that she saw it. She testified, "Now I know but not then." (RT 1034.) When asked for the source of her information, she testified that she "just put two and two together."[11] (RT 1034.) Whether or not Ms. Mitchell ever saw

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[11]Ms. Mitchell's statement that she put two and two together was stricken as speculative. (RT 1034.) However, the implication that she knew the money had come from Morgan was not. At trial, no objection was made to her testimony that she knew where the money had come from, although it too was arguably inadmissible as lacking in personal knowledge (continued...)

petitioner in possession of $1,000 or any other relatively large sum of money, she in fact had no personal or reliable knowledge regarding whose money it was or from where it had come, or that it had been split between Reilly and petitioner. Although petitioner may well have been in possession of a sum of money at some time, and Reilly may have borrowed Ms. Mitchell's car at some time and may even have used it to meet with Morgan and receive money for his role in the killings, it was only weeks or even months after these events, after Ms. Mitchell had been convinced by law enforcement that petitioner had participated in the conspiracy, that she "put two and two together" and concluded that whatever money it was that she saw in petitioner's possession was from Morgan, was intended for petitioner to keep and was payment for some participation in the killings. Ms. Mitchell's testimony that petitioner had received money from Morgan, as well as the implication that petitioner had received money for assisting in the conspiracy, was either the product of coercion and suggestive questioning on the part of law enforcement and/or the product of Ms. Mitchell's own confabulation and false memory, or both. In fact, the money was not petitioner's, but was Reilly's and Reilly had asked petitioner to keep it for him because Reilly did not feel it would be safe in his own apartment. The fact that Ms. Mitchell could not identify how petitioner spent this relatively large sum of money is corroborative (see RT 1111, 9972); whatever money Ms. Mitchell saw was not petitioner's.

119. At trial, Ms. Mitchell testified that, after petitioner and Reilly were in jail, Reilly asked her to go to his apartment and pick up some

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[11](...continued)
and speculation.

things, including two keys which were hidden in an encyclopedia. (RT 9988.) She testified that the two keys in the encyclopedia were car keys and that she gave them to her brother, Ron Leahy. (RT 9988) She also stated either her brother or petitioner's brother, John Hardy, was with her and that this person picked up a third key that was inside a record album. (RT 9988.) This testimony was false and/or misleading. Although she had testified at the 403 hearing that she had gone to Reilly's apartment, gotten two keys out of the encyclopedia and given them to her brother because he was taking over Reilly's car (RT 1053), the first time that she mentioned a third key was at trial. At the 403 hearing, she testified that she did not recall getting any other key (RT 1141) and that she was sure that she just remembered two keys. (RT 1219.) When questioned at trial about the third key, she testified that she did not mentioned the third key at the 403 hearing because she did not remember it then. (RT 9999.) She testified that just before her testimony before the jury, she was looking through some records and "remembered something about somebody standing by records saying – and getting another key." (RT 9999.) Again, this testimony was the product of coercion, persuasion, suggestion and/or confabulation.

120. Ms. Mitchell testified at trial that petitioner told her on more than one occasion that he went to the Morgan house. (RT 9964.) Although at first she stated that he never said what night it was that he went there (RT 9964), after additional suggestive questioning, she testified that he told her he was at the house on the night of the killings. (RT 9992.) She testified that he gave her two different versions of events: one was that "he went to the house and that the people were still alive because he heard them snoring" (RT 9965) and that "he heard somebody snoring" (RT 9992); the other was "that he went to the house and that they already [sic] been dead,

killed." (RT 9965; 9992.) The foregoing testimony was false and/or misleading. On cross-examination, she admitted that, at 403 hearing, she had stated she was unsure who made the latter statement (RT 1049-1050.) However, in testifying before the jury, she claimed that she was no longer unsure; she was sure that petitioner had made the statement. (RT 10165.) Prior to the 403 hearing in January of 1983, Ms. Mitchell had been had been questioned by law enforcement at least 20 times and had been asking over and over again whether she had reason to believe petitioner had left the Vose Street Apartments on the night of the killings. She had consistently denied that she had any such information and repeatedly stated that petitioner had told her he knew nothing about the killings. (Appendices 13, 14; CT 584.) The first time that she ever stated that petitioner made any such statement was at the 403 hearing. (RT 9992.) Ms. Mitchell's testimony that petitioner told her he was at the Morgan house on the night of the murders, that he heard snoring and that he was there after the killings was false and was the product of coercion, suggestion, persuasion and/or confabulation.

121. At trial, Ms. Mitchell testified that, in talking to petitioner, she kept referring to the killers as "'they,'" and he said, "Where to you get 'they?'" She testified that she told him she had been told there were two killers and he responded, "'No, I know for a fact it was one.'" (RT 10023.) This testimony, and its implication the this constituted an admission that he was present and/or was the killer, was false and/or misleading. At the 403 hearing, Ms. Mitchell had testified that petitioner told her, "'I know it was one,'" and that this was a direct quote. (RT 1100.) If petitioner made any such statement, it was based on information he had been provided by others. Ms. Mitchell's testimony suggesting that petitioner made the statement on

the basis of personal knowledge was the product of persuasion, suggestion, coercion and/or confabulation.

122. Ms. Mitchell testified before the jury that petitioner had told her prior to the killings that he was supposed to make something look like a robbery. (RT 9962-9963.) This testimony was false and/or misleading. On cross-examination, she admitted that she did not remember if she knew this before the murders; she further admitted that she had heard this from Reilly (not petitioner) after the killings. (RT 10261-10262.) It was only after improper and suggestive questioning at the 403 hearing, that she indicated that she had heard petitioner and Reilly discussing robberies prior to the killings. (See RT 1186.) At the preliminary hearing, she had testified that she heard only after the killings that it was supposed to look like a robbery and that she heard this from Reilly, not petitioner. (CT 583.) At the polygraph interrogation conducted on the morning of October 26, 1981, she stated that before the killings, she knew nothing about it and that, if she had been given a polygraph in May of 1981, "it would have been blank," because she knew nothing about it. (Appendix 13.) In the interrogation conducted on the afternoon of October 26, 1981, after Ms. Mitchell had been accused of lying and threatened with arrest, she stated that Reilly had told her after he was in jail that he was supposed to make it look like a robbery. (Appendix 14.) She also stated that petitioner had never said anything about the killings and that, at first, he did not know how the people were killed or what had happened to them. (Appendix 14.) She stated that she had asked him questions but he had said he did not know anything and never had answers to any of her questions. (*Ibid.*) Her testimony that, prior the killings, she heard petitioner and Reilly say that robberies were going to take place was the product of suggestion, persuasion, coercion and/or

confabulation.

123. At trial, after Mr. Jonas read to Ms. Mitchell her prior testimony from the 403 hearing stating that petitioner told that he took something to make it look like a robbery (but not indicating that he said what night he did so), she testified that petitioner told her that he took something "that night."[12] (RT 10031.) This testimony was false and/or misleading. Ms. Mitchell had previously testified that petitioner had never told her whether anything was taken when he was at the Morgan's house. (RT 9966.) She also admitted that petitioner did not tell her what he took (RT 10068), but that she believed that what was taken was a gun, some jewelry and some coins and petitioner or Reilly had told her as much. (RT 9998, 10126.) At the 403 hearing, she testified that she did not know if petitioner told her he took something from the house on the night of the murders, but that she had heard that from someone. (RT 1118.) She testified that she knew that the rifle, jewelry and coins were taken because she had read as much in a search warrant which she had seen sitting on Reilly's coffee table before petitioner was arrested. (RT 1175-1177.) However, the evidence presented at trial showed that the gun, jewelry and coins were not, in fact, taken on the night of the killings. Moreover, at the polygraph interrogation on the afternoon of October 26, 1981, Ms. Mitchell had said that she had found out that Reilly had "offered [Costello] the job to do it and then paid him with a ring, some coins and a gun. And then Mark

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[12]Mr.Jonas read Ms. Mitchell's prior testimony to her and then asked the following question: "And what I'm asking you is, do you remember Mr. Hardy telling you specifically the night he went to the house and the night he said he heard snoring and later said that they were already dead when they got there, did he tell you that he took something that night?" (RT 10031.) Ms. Mitchell answered in the affirmative.

Costello went off and sold the stuff and screwed him over and kept the money for himself and didn't do anything." (Appendix 14.) Ms. Mitchell's trial testimony in this regard provides a telling example of the way in which her false testimony came into existence: remembering what she had read in the search warrant, but forgetting that she had once known Costello received these items before the killings, she later deduced (erroneously) that a gun, jewelry and coins had been taken from the Morgan house on the night of the murders and then, in response to law enforcement's heavy-handed and coercive tactics, she attributed this information (also erroneously) to petitioner. Thus, as a result of persuasion, coercion, suggestion and confabulation, she delivered her erroneous and false opinion to the jury at petitioner's trial.

124. Ms. Mitchell testified before the jury that petitioner never gave her "an exact figure" for what he was supposed to get paid for participating in the killings, but she someone gave her the figure of forty or fifty thousand dollars; she thought it was Reilly who told her that. (RT 9967.) She testified that Reilly told her that he and petitioner would share $40 to $50,000. (RT 9967.) She testified that petitioner expressed doubts as to whether or not he would get "any part of that." (RT 9993.) This testimony was false. Despite the fact that Ms. Mitchell had been previously questioned by law enforcement at least 20 times, the first mention that she made of this purported statement on petitioner's part was at the 403 hearing. (See RT 1032 -1034; see also appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and CT 567-696, 1369-1456.) This testimony was the product of persuasion, coercion, suggestion and confabulation.

125. At trial, Ms. Mitchell testified that Reilly told her the boy was not supposed to be in bed with his mother, but that he just happened to be

sleeping with his mother. (RT 9994, 9996.) She testified that she then asked petitioner about Reilly's statement in this regard and he told her the same thing. (RT 9996.) The clear implication was that petitioner told her this of his own personal knowledge and/or that petitioner knew this at the time of the killings. These implications were false and/or misleading. If petitioner told her this, it was because he had heard the same thing from Reilly or Morgan, after the killings. Indeed, none of Ms. Mitchell's statements or testimony indicated to the contrary.

126. At trial, Ms. Mitchell testified that, after petitioner was in jail, she obtained from him a pair of his boots that she knew the police were interested in. (RT 10015.) This testimony was false and/or misleading because it implied that, at the time she received petitioner's boots, she knew that the police were interested in them, and that she obtained the boots in order to keep them from the police. She also testified that she brought him a pair of tennis shoes in exchange for the boots that he had been wearing when he was arrested and that she did so because the boots were hurting his feet. (RT 10015-10016; 10340.) Moreover, the boots she received from petitioner were entered into evidence at trial, as was the fact that they had been tested for the presence of blood and none had been found. (RT 10329; Appendix 50.) Furthermore, Ms. Mitchell's implication that, at the time she received the boots, she knew that the police were looking for them was false and was the product of suggestion, persuasion, coercion and confabulation.

127. At trial, Ms. Mitchell testified that, pursuant to petitioner's request, she had destroyed a pair of boots that were at her house because the detectives had found a footprint. (RT 10340.) She testified that these boots were not the ones that she had gotten from petitioner at the county jail. (RT

10047.) She testified that petitioner had two pairs of boots that looked the same (RT 10048), and that the boots she destroyed looked just like the ones he had in jail, but were a different color. (RT 10330, 10341.) She testified that he was not concerned about the boots he had in the jail, but only the other ones. (RT 10331.) She claimed that he said the footprint was by the house in the back. (RT 10049.) She claimed that she had gotten the boots from her apartment, put them in the trunk of her car, and threw them in a garbage can where she lived. (RT 10048.) The foregoing testimony was false. Although petitioner had owned two other pairs of boots previously, by the time of the crime, he no longer had them. Indeed, Ms. Mitchell herself had testified at the preliminary hearing that petitioner had one pair of cowboy boots which he wore ninety percent of the time. She testified that, other than his cowboy boots, the only other shoes that he had were tennis shoes. She testified that the cowboy boots were light-colored and had little circles and stitching at the top (CT 1424-1425), which described the boots that were entered into evidence at trial. Ms. Mitchell's claim that she had destroyed another pair of petitioner's boots was false and was the product of persuasion, coercion, suggestion and/or confabulation. Evidence that the boots petitioner had been wearing on the night of the killings had been tested for the presence blood and none had been found tended to undermine the prosecution's theory of the crime. Accordingly, law enforcement pressured Ms. Mitchell to provide evidence that would suggest that, on the night of the killings, petitioner was wearing some other boots that were no longer available for testing. Intentionally or otherwise, Ms. Mitchell fabricated the evidence that which the prosecution sought.

128. At trial, Ms. Mitchell testified that she had asked petitioner about Morgan's dog and he had responded that the dog did not bother him.

(RT 9967.) This testimony was false and/or misleading: the clear implication was that petitioner made this statement in reference to the night of the killings. However, petitioner was not at the Morgan house on the night of the killings. If in fact he made any statement to Ms. Mitchell regarding Morgan's dog, he was either referring to some other occasion on which he came in contact with Morgan's dog or that the dog would not have bothered him if he had gone to their house. Moreover, at the polygraph interrogation conducted on the morning of October 26, 1981, she said that Reilly had once told her he had killed the dog and the next day, Reilly said he never saw a dog. (Appendix 14.) Ms. Mitchell's trial testimony regarding the dog was the product of coercion, persuasion, suggestion and/or confabulation.

129. Ms. Mitchell testified at trial that petitioner told her, after he was in jail, that he was supposed to cut something with "wire cutters," to get in the back door of the Morgan house. (RT 9965-9966.) She also testified that she believed it was petitioner who said something about having "metal cutters" to get into the back gate (RT 10369), that petitioner had told her he had bought some "cutters" (RT 10373), that the wire cutters were bought to make it look like a robbery (RT 10032), and that petitioner had told her he had gone into the Morgan property through the back gate. (RT 10373.) This testimony was false and/or misleading. Despite her numerous previous contacts with law enforcement, the first time that Ms. Mitchell ever mentioned anything in this regard was at the 403 hearing. (RT 1119, 1037.) This testimony was the product of coercion, suggestion, persuasion and/or confabulation.

130. At trial, Ms. Mitchell testified that she had gotten some information from either petitioner or Reilly about interest. (RT 10011.)

When the prosecutor asked what that information was, she answered as follows: "'While I'm sitting in jail, at least it's collecting interest'; something in that line." (RT 10011.) Mr. Jonas then asked her if she remembered the amount of interest and she answered, "Ten and three-quarters sticks in my mind, but I could be wrong." (RT 10011.) This testimony was false and/or misleading. At the preliminary hearing, Ms. Mitchell testified that petitioner had told her that he had heard Cliff Morgan say, "'While I'm in here, I'm collecting twelve and three-quarters percent interest." (CT 581.) At the 403 hearing, she stated that her testimony on the subject at the preliminary hearing was truthful. (RT 1089.) Indeed, her written statement of October 29, 1981, indicated the same. (Appendix 20.) The implication at trial that petitioner or Reilly had made the quoted statement himself was false and/or misleading, and the product of improper and suggestive questioning on the part of Mr. Jonas.

131. At trial, Ms. Mitchell testified that petitioner had told her "the less you know, the better for you. That is why Buck is lying to you." (RT 10020, 10370.) She said that Reilly too had told her that the less she knew, the better off she would be. (RT 10370.) Mr. Jonas asked her whether petitioner had told her this "constantly," and she answered in the affirmative. (RT 10021.) The implication that petitioner had made this statement numerous times was false and/or misleading, and the product of suggestion, as Ms. Mitchell had never before indicated that he had made this statement repeatedly.

132. At trial, Mr. Jonas asked her the following question: "How many witnesses did you attempt personally on behalf of James Hardy to convince to testify untruthfully?" (RT 10037.) She testified that there were two and one of them was Joe Dempsey. (RT 10037-10038.) The

prosecutor asked her, “Do you remember anything about reading something in a document that you had received from James Hardy that he had been pointed out [by Joe Dempsey] as the person that was going to do it?” (RT 10038.) She answered in the affirmative even though she had never before stated that petitioner had ever given her any such document. Indeed, she then clarified that she believed this information about Dempsey had been told to her and she did not recall reading anything. (RT 10038.) Mr. Jonas did not ask her expressly who had asked her to contact Dempsey, but the clear implication was that it was petitioner. This testimony was false and/or misleading. At the 403 hearing, she had testified unequivocally that it was Reilly who asked her to contact Dempsey. (RT 1221.) Her testimony before the jury in this regard was the product of suggestion, persuasion, coercion and/or confabulation.

133. At trial, Ms. Mitchell testified that she received information from petitioner or Reilly that there was going to be an attempt to set up Marc Costello. (RT 10045.) She said that she recalled a telephone conversation where Costello’s name came up but she did not recall to whom she was speaking. (RT 10043.) She also testified that she heard that a note had been intercepted and that the note contained a plan to set Costello up. (RT 10231-10232.) This testimony was false and/or misleading in that she implied that she believed the note and the purported plan might be attributable to petitioner. At the 403 hearing, she had testified that, on November 2, 1981, the night before her testimony at the preliminary hearing, she had a telephone conversation with Reilly in which he told her a note had been intercepted and that the note was to set up Costello. (RT 1210.) She also testified that, on the phone the night before her preliminary hearing testimony, petitioner told her about a note being passed. (RT 1098.)

In her testimony at the preliminary hearing, she had testified that petitioner had called her the previous day and said he had been put in “the hole” (i.e., disciplinary segregation) for passing a note, but he did not know what the note had said. (CT 600-601.) She testified that Reilly had then gotten on the phone and told her that the note was to set Costello up. (CT 607.) Her trial testimony implying that petitioner had been responsible in some way for the note and/or the plan to set Costello up was the product of coercion, persuasion, suggestion and/or confabulation.

134. At trial, she testified that she was told the car was parked down the street. (RT 10027.) She testified that she did not know where she heard that or if she had read it. (RT 10247.) She also testified that she heard it from petitioner or Reilly and she thought it was petitioner. (RT 10290.) She testified that she did not know whose car it was, but that “there was talk about Mike Mitchell’s car.” (RT 10027.) She testified that she heard this while standing outside the Vose Street apartments with petitioner, Mike Mitchell and Reilly; the detectives were looking for Mr. Mitchell’s car and whoever was there said that the police were trying to make it look like the stains on the seat of Mr. Mitchell’s car were blood but they were not. (RT 10029.) She also testified, in response to a leading and suggestive question by the prosecutor, that she knew that Mr. Mitchell, Reilly and petitioner deliberately got rid of the car and that they told her where the car was hidden but she did not remember. (RT 10029.) At the 403 hearing, she testified that Reilly or petitioner said they had parked the car around the block. She thought petitioner said it, after his arrest. (RT 1213.) She also testified that, at another time, she heard about Mr. Mitchell’s car being parked in front of someone’s house, that the police saw it, and that they moved it. (RT 1214.)

135. Because of the state's failure to memorialize, record and disclose countless statements made by and to Ms. Mitchell, present counsel is able to identify the way in which Ms. Mitchell's false testimony came into being only in some instances. Nevertheless, even the small portion of such information which is presently available to counsel shows that the testimony which petitioner's jury heard from Ms. Mitchell was completely unreliable and materially false. By virtue of law enforcement's methods, including Mr. Jonas' misconduct in the courtroom, Ms. Mitchell's testimony consisted largely of false information which had been provided to her by others in one way or another and which she had perhaps unwittingly incorporated into her own memory of the relevant events. In sum, she was effectively "brainwashed," and was unable to distinguish the source or reliability of any of the information which she delivered to petitioner's jury.

D. Joe Dempsey

136. Through the use of leading and improper questions, Mr.Jonas elicited false and misleading testimony from Joe Dempsey: e.g., that Reilly told him that petitioner and a black guy were going to commit the crime and the black guy pulled out of the agreement. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 211, *infra*.

E. Detective Sandra Bobbitt

137. Detective Sandra Bobbitt testified falsely at trial that, prior to the preliminary hearing, police were unaware that there was an outstanding warrant for Calvin Boyd's arrest. She claimed that they "ran him" as Calvin McKay and Calvin Boyd and found no warrant. (RT 10415.) She admitted that they had received information indicating that he was a fugitive and had a felony warrant, but claimed that they "were never able to determine whether it was true or not." (RT 10416.) She further testified that, after the

preliminary hearing police determined that the he had felony warrant and that they then arrested him. (RT 10416.) This testimony was false and/or misleading. On August 3, 1981, if not before, Boyd provided law enforcement with his correct birth date and told them that he had a burglary conviction from the San Francisco area. (Appendix 8.) Records show that Boyd was arrested by members of Los Angeles Police Department for grand theft auto on August 4, 1981, and was identified by those officers as Kelvin W. Boyd. (Appendix 37.) The warrant was not served on him at that time. Boyd testified at the preliminary hearing in October of 1981. Los Angeles Police officers arrested Boyd again on July 3, 1983, for driving under the influence of alcohol and again identified him as Kelvin W. Boyd. (*Ibid*.) Nevertheless, Boyd was not arrested on the warrant out of Santa Clara County until August 14, 1982. (*Ibid*.) If the officers who arrested Boyd for grand theft auto and driving under the influence identified him as Kelvin W. Boyd, it simply cannot be true that Detectives Bobbitt and Jamieson had not done so, particularly given that Boyd had provided them with his true date of birth, two of his known aliases, and the fact that he had been convicted of burglary in the San Francisco area. Moreover, Bobbitt's testimony implying that Boyd was arrested immediately after his testimony at petitioner's preliminary hearing was misleading, for in fact it was over nine months later that Boyd was finally served with the warrant. The foregoing facts indicate that Detectives Bobbitt and Jamieson knew full well that Boyd had a warrant for his arrest, but chose not to serve that warrant, and instructed other officers not to serve that warrant, until it served their purposes to do so. Because of law enforcement's pervasive and persistent failure to provide discovery of contacts with witnesses in petitioner's case, counsel is unable to ascertain the reason for which they chose to serve the

warrant in August of 1982. However, it is clear from the foregoing facts, together with those set forth in paragraph 243, 245, 247, *infra*, that their failure to serve that warrant prior to August of 1982 was intentional and that, when the warrant was finally served, there was some reason for doing so, likely involving a need to exert pressure on Boyd with respect to petitioner's case. Accordingly, Detective Bobbitt's testimony to the contrary was false and misleading.

138. The facts set forth above were readily available to petitioner's trial counsel through the exercise of reasonable diligence. Reasonably competent counsel would have questioned each witness the prosecution and/or law enforcement had interviewed about threats, promises, and attempts on the part of government actors to discourage witnesses from testifying for the defense and to encourage them to provide the information that the prosecution desired. All of the evidence set forth herein was admissible to support the theory that petitioner was innocent and was the victim of a prosecution in which law enforcement engaged in a pattern of conduct likely to induce false statements and false testimony. Such evidence was admissible as impeachment of the testifying prosecution witnesses.

F. Prejudice

139. There can be no doubt that the foregoing false and misleading testimony was material and that the prosecution's presentation thereof was prejudicial to petitioner. Calvin Boyd, Joe Dempsey and Colette Mitchell were unquestionably key witnesses and essential to the prosecution's case against petitioner. Without the testimony of these witnesses, particularly Ms. Mitchell and Boyd, the prosecution could not have obtained a verdict of guilt against petitioner.

140. At least some of the jurors believed Boyd's testimony and relied on it in convicting petitioner and in sentencing him to death. (See Appendix 12.)

141. Ms. Mitchell provided the most incriminating evidence against petitioner. Other than her testimony, the prosecution's only evidence consisted of Boyd's testimony as to Reilly's purported admissions; hearsay testimony from Dempsey and Mitchell that, prior to the killings, Reilly had pointed petitioner out prior to the killings as someone whom he hoped would commit the crime; and evidence that petitioner had been fraternizing with Reilly before and after the killings.

142. Had Joe Dempsey's testimony not been subverted by Mr. Jonas, he would have provided evidence that was extremely exculpatory to petitioner.

143. Whether viewed individually or cumulatively, the foregoing false testimony was prejudicial to petitioner's ability to present a defense, deprived petitioner of due process and a fair trial, and rendered the guilt and penalty verdict unreliable.

144. The effect of the prosecution's presentation of false and misleading evidence must be viewed cumulatively. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 436.)

145. Whether the witnesses intentionally or unconsciously lied, the false testimony obstructed the fact-finding process at trial and obstructed the jury's and the court's access to the truth. To the extent that the testimony was intentionally false, the prosecution cannot prove beyond a reasonable doubt that the error did not affect the verdict. (See *United States v. Steinberg* (9th Cir. 1996) 99 F.3d 1486, 1490; *United States v. Alzate*, *supra*, 47 F.3d at p. 1109.) To the extent that the testimony was unwittingly

false, there is at least a reasonable likelihood that it affected the jury's verdict. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *United States v. Agurs*, *supra*, 427 U.S. at p. 103; *Giglio v. United States*, *supra*, 405 U.S. at p. 154; *United States v. Young*, *supra*, 17 F.3d at pp. 1203-1204.)

146. In assessing prejudice, this Court must be mindful of the principle that, even if jurors had found only some of the foregoing testimony to be false, they would have been instructed that the testimony of a witness found materially false in one respect could be found materially false in its entirety.

147. The judgment must be reversed.

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VII

THE STATE ENGAGED IN PREJUDICIAL MISCONDUCT IN INVESTIGATING AND DEVELOPING ITS CASE AGAINST PETITIONER, WHICH FATALLY CORRUPTED THE FACT-FINDING PROCESS

148. Petitioner's conviction, confinement and sentence are unlawful and were obtained in violation of his rights to due process, to a fair trial, to present a defense, to counsel, to compulsory process, to confrontation and cross-examination, to conviction upon proof beyond a reasonable doubt, and to an accurate and reliable determination of guilt and punishment, and against cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendment and Article I, section 1, 7, 13, 15, 16, and 17 of the California Constitution, in that government actors engaged in repeated and pervasive, prejudicial misconduct and/or overreaching in investigating and developing a case against petitioner. Law enforcement employed suggestive interviewing techniques, intimidated witnesses, provided witnesses with information and then attributed that information to the witnesses, made threats and promises to witnesses such that they then provided false or misleading testimony, provided counsel for petitioner with inaccurate and misleading transcripts and reports of witness statements, and failed to reduce witness statements to writing for the purpose of circumventing petitioner's right to the discovery of material and exculpatory information.

149. Individually and cumulatively, the state's investigative procedures violated petitioner's right to due process and a fair trial. (See, e.g., *Ex parte Brandley* (1989) 781 S.W.3d 886, 893.)

150. The rights to due process, a fair trial and compulsory process are violated where the prosecution uses threats of prosecution or other

coercion to secure particular false or misleading testimony or to prevent a witness from testifying truthfully to a matter helpful to the defense. (See, e.g., *Webb v. Texas* (1972) 409 U.S. 95; *In re Martin* (1987) 44 Cal.3d 1, 30.)

151. The prosecution has a duty to exercise diligence in seeking to present the case without presenting deceptive and misleading testimony and to refrain from "selective inattention" to evidence which is inconsistent with the defendant's guilt. (See, e.g., *Imbler* v. *Craven* (C.D. Cal. 1969) 298 F.Supp. 795, 808-809.)

152. Due process is violated and perjury is suborned when the police question a witness in a very suggestive manner or provide the witness with information. (See, e.g., *Foster* v. *California* (1969) 394 U.S. 440; *Dyspensa* v. *Lynaugh* (5th Cir. 1988) 847 F.2d 211, 218.)

153. Collectively, the methods employed by law enforcement in investigating the present case were outrageous, deprived petitioner of the right to present a defense, warped the fact-finding and truth-determining process, rendered petitioner's trial fundamentally unfair and resulted in a verdict that is unreliable. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rochin v. California* (1952) 342 U.S. 165, 168; *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn. 1)

154. The prosecutor's misconduct deprived petitioner of rights conferred by state statutory and constitutional provisions and therefore petitioner was denied state law entitlements in violation of the Fourteenth amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

155. Due process is also violated where the prosecution leads witnesses to believe that they will receive future benefits in exchange for false and/or misleading testimony. (See, e.g., *Singh v. Prunty* (9th Cir) 142

F.2d 1157, 1161-1164.)

156. To the extent that the facts set forth below were not known to the prosecution and could not have been reasonably discovered by petitioner's trial counsel, they constitute newly-discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings, undermining confidence in the outcome and violating petitioner's rights to due process, a fair trial, and reliable guilt and penalty determinations. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358)

157. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

158. In the event that this Court finds petitioner's trial counsel failed to object to the misconduct set forth herein, no tactical justification for that omission is conceivable and petitioner has been deprived of the effective assistance of counsel at trial.

159. In the event that this Court finds that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel and were not knowable to the prosecution at the time of trial, those facts constitute newly discovered evidence which cast fundamental doubt on the reliability of the guilt and penalty verdicts and require that petitioner

be afforded a new trial.

160. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

161. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

162. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

163. Once the investigating officers focused their suspicions on petitioner, they made concerted efforts to make every piece of evidence fit the theory that petitioner was the killer. Prior to and during petitioner's trial, law enforcement actors, including representatives of the Los Angeles Police Department and the Los Angeles County District Attorney's Office engaged in a variety of tactics designed to extract from witnesses information implicating petitioner without regard to its truth. These tactics included: express and implied threats of criminal prosecution; promises of future benefits; false statements concerning petitioner's culpability; and suggestive interviewing techniques which provided witnesses with information later attributed to them. Interview reports were written such that witnesses who contradicted themselves, expressed uncertainty as to

particular facts, or "remembered" particular facts only after suggestive questioning, were made to sound certain and clear of mind regarding circumstances which were helpful to the prosecution's theory of the crime. Law enforcement's firm desire to obtain petitioner's conviction, in spite of minuscule evidence indicating that petitioner was involved, carried the "investigation" forward with such momentum that it swept the witnesses along with it.

A. The Prosecution Used Suggestive and Improper Interrogation Techniques Which Coerced and Corrupted the Memories of Witnesses

164. State actors, specifically including Deputy District Attorney Jonas and Detectives Bobbitt and Jamieson, utilized suggestion in interviewing and provided information to witnesses which they subsequently elicited at trial such that witnesses professed to have personal knowledge of information provided to them by law enforcement. Examples include, but are not limited to, the following:

A. Prior to the preliminary hearing, Joseph Dempsey told detectives that codefendant Reilly had pointed someone out to him as the person he though might commit the killings. Detectives showed Mr. Dempsey a photograph of petitioner and asked whether he was the person whom Reilly had pointed out. The photograph was one which had been taken in 1980 (CT 1454), when petitioner's hair was longer and appeared to be lighter in color than it was in the spring of 1981, when Mr. Dempsey claimed this event had occurred. Between the beginning of May, when Reilly moved into the Vose Street apartments, and May 20, 1981, when the killings occurred, petitioner had short dark hair; his hair was never shoulder length and curly, nor was it light in color. (CT 1432-1434, 1455.) Mr. Dempsey testified at the preliminary hearing that the person whom Reilly

had pointed out as the person who might commit the killings had shoulder-length, curly blonde hair. It is self-evident that Dempsey's testimony was the product of the aforementioned identification procedure, which was improperly suggestive. Either Mr. Dempsey did not in fact recall the appearance of the person Reilly had pointed out to him and his testimony was based on the memory of the photograph shown to him by law enforcement, or Mr. Dempsey in fact remembered that Reilly had pointed out someone who in fact had shoulder-length blonde hair and that person was not petitioner. In either event, his memory had been tainted by the suggestive identification procedure and his testimony was unreliable.

B. Prior to the tape-recorded interview of Calvin Boyd on August 3, 1981, detectives showed Boyd a photograph of petitioner and a piece of paper bearing petitioner's name, thereby communicating to Boyd that they had focused their attention on proving that petitioner was one of the killers and that Boyd should attempt to assist them in proving that theory in whatever way he could, truthfully or otherwise. (Appendix 2.) As a result, Boyd was able to profess knowledge of petitioner's last name at trial (RT 8083), which added false indicia of reliability to his testimony. Other information which law enforcement provided to Boyd included: Steve Rice's last name, the fact that the prosecution believed that bolt cutters had been used in the commission of the crime, the fact that the prosecution believed Reilly had been given a key to the Morgan house and the idea that when Boyd got out of the conspiracy, petitioner got into it.

C. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 89, *supra*.

D. Police provided Sharon Morgan information by the way in which they asked her questions. (RT 12523, 12528.)

E. On August 3, 1981, Detectives Bobbitt and Jamieson and Deputy District Attorney Jonas conducted a tape-recorded interview of Calvin Boyd. In that interview, the manner in which they questioned Boyd effectively provided him with information and suggested that he should provide particular statements. Boyd stated that "the night before it [i.e., the killings] happened," Reilly told him that he had to hurry up and commit the crime before Cliff Morgan returned from Nevada. Detective Bobbitt then asked Boyd, "when you say the night before it happened, Calvin, do you mean the night before you heard it on the news?" Boyd responded, "The night before, I should say that." Bobbitt then reinforced that this was the answer Boyd should give: she said again, "it was the night before you heard it on the news." (Appendix 2.) Later in the same interview, Boyd stated that, shortly before the killings occurred, Reilly and Marcus came to his door one night and Marcus indicated that he was prepared to go commit the crime at that time. Also in the interview of August 3, 1981, Boyd indicated that, the morning after the killings, he walked through Steve Rice's apartment and saw Reilly and petitioner sleeping there. Detective Bobbitt then said to Boyd, "So you didn't know about the murder, that the murder had happened yet . . . when you went through there. Right?" Boyd answered, "No." Bobbitt then asked, "Did you find it unusual for Buck to be sleeping at Steve's house?" When Boyd answered that he did not find it unusual, Bobbitt then suggested to Boyd that this was the wrong answer. She said: "But, I mean Buck lived right next door to Steve, right? . . . And you didn't think when you walked through there that it was kind of strange for Buck to be sleeping at Steve's instead of at his own place?" Boyd answered: "Yeah, yeah, yeah. I thought it was real strange . . . ." (*Ibid*.) Also on August 3, 1981, Deputy District Attorney Jonas asked Boyd the

following suggestive question, "In other words when you got out of it, that's when Jim got into it?" Boyd answered, "Jim got into it." (*Ibid.*) Although Boyd was interviewed by law enforcement on many occasions, the only such interview in which a tape-recording was provided to petitioner's trial counsel is the one of August 3, 1981. However, the evolution of Boyd's statements and testimony as well as the consistency with which state agents utilized suggestive questioning with other witnesses indicate that similar suggestive questioning occurred every time Boyd was interviewed so that, by the time of trial, he was able to provide the prosecution with what the testimony that they sought from him.

B. Witness tampering: Threats and Promises

165. Both in and outside the courtroom, law enforcement made numerous threats and promises to Colette Mitchell in order to obtain her testimony. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 91, *supra*.

166. In exchange for his cooperation with the prosecution in petitioner's case, Calvin Boyd was promised immunity from prosecution both for the killings themselves and for perjury in connection with his testimony at petitioner's preliminary hearing. Petitioner hereby incorporates by reference as if fully set forth herein the facts set forth in paragraphs 52-53, *supra*.

167. In exchange for his cooperation with the prosecution in petitioner's case, Boyd was led to believe that law enforcement would assist him in his own present and future contacts with the criminal justice system. Whether or not Boyd received precisely what he expected, he in fact received some future benefit in exchange for his assistance in petitioner's prosecution. Petitioner hereby incorporates by reference as if fully set forth

herein the facts set forth in paragraphs 52, 53, 243, 245, 247, *infra*.

168. Like other witnesses, Boyd was promised immunity with an implied threat: i.e., that he would be prosecuted if Mr. Jonas or the police deemed his testimony to be untruthful. (See Appendix 2.)

169. Prior to trial, Steve Rice was threatened with prosecution for the killings, was treated as if he were a suspect, was shown photos of the dead victims (RT 9841) and was told that petitioner and codefendant Hardy had confessed and told police that Mr. Rice had participated in the crime. (HT 250-252; H.Exh. O.) When Mr. Rice testified at petitioner's trial, the prosecutor deliberately asked questions which were intended to, and which in fact did, confuse Mr. Rice and take advantage of his significant intellectual impairments, without apprising the jury of the fact that he was so impaired. (HT 255.) As a result, Mr. Rice's trial testimony was false and/or misleading on several material points, including, but not limited to, his testimony at trial that he did not see anyone in his apartment when he left in the morning of May 21, 1981 (RT 9827, 9831; cf. HT 245; H.Exh. O.)

170. Other witnesses who were threatened with prosecution if law enforcement deemed their testimony to be untruthful include, but are not limited to: Mike Mitchell (HT 439-442; RT 9124, 9127; H.Exh. Y [Declaration of Mike Mitchell]); Sharon Morgan (RT 12294-12296); Debbie Sportsman (RT 7387); and Joseph Dempsey (RT 8593, 8596-8597.)

C. The Prosecution Provided Defense Counsel with Inaccurate Transcripts and Reports of Witness Statements

171. The prosecution provided petitioner's trial counsel with inaccurate transcripts and reports of interviews conducted by law enforcement. By providing reports and purported transcriptions to counsel,

the prosecution implicitly represented to counsel that such reports and purported transcriptions were accurate reflections of the relevant witness' statements. However, the reports and purported transcriptions contained material inaccuracies. Petitioner's trial counsel relied to petitioner's detriment on the inaccurate reports and transcriptions and the prosecution therefore succeeded in confusing and misleading petitioner's trial counsel and obstructing his ability defend petitioner effectively against the prosecution's case.

172. To the extent that petitioner's trial counsel's reliance on this implied representation was not reasonable, petitioner was deprived of the effective assistance of trial counsel.

173. Examples of the material inaccuracies in the transcriptions and reports which the prosecution provided to petitioner's trial counsel include, but are not limited to, the following:

A. The police report of law enforcement's interview of Sue Moutes on June 9, 1981, states that Moutes said: "Later Joe [Dempsey] heard from [Mike] Mitchell that Buck [codefendant Reilly] was supposed to pay two other guys $10,000.00 each for the murders. Buck had known them a couple of weeks. They lived next door to Buck." (Appendix 24.) The tape-recording of that interview shows that Ms. Moutes in fact stated that the "two guys that did it" lived "a couple doors down from Buck" and that they were recently out of jail or one of them had just recently gotten out of jail. (Appendix 25.) The apartment where Steve Rice lived and petitioner stayed off and on was immediately next door to the apartment in which Reilly lived. (RT 1061.) However, Calvin Boyd's apartment was a few doors down. (CT 2671; HT 247.) Reilly lived in 7C; Rice lived in 6C; and Boyd lived 2C. Boyd had just been released from jail in January of

1981. (H.Exh. 78.) The police report misrepresented the statement that Moutes had made and was intended to deflect suspicions away from Boyd and discourage petitioner's trial counsel from investigating or presenting the testimony of Moutes, Dempsey and Mitchell regarding what Reilly had told them about the killer.

174. On October 26, 1981, police polygrapher Bradley Kuhns conducted two tape-recorded interrogations and polygraph examinations of Colette Mitchell: one in the morning of that date and one in the afternoon. Law enforcement provided petitioner's trial counsel with tape-recordings and purported transcripts of those interrogations. However, the purported transcripts were materially inaccurate in the extreme. (See Appendices 13, 14, 43, 44 , 45.) The contents of petitioner's trial counsel's files indicate that he listened to the tape-recording of the interrogation conducted in the afternoon of October 26, 1981, and noted many, but not all, of the inaccuracies on the face of his copy of the purported transcript that had been provided to him by law enforcement. However, virtually no corrections were made of the purported transcript he had been provided of the interrogation conducted on the morning of October 26, 1981.

A. Material omissions and inaccuracies in the purported transcript of the morning session and which petitioner's trial counsel failed to correct, include, but are not limited to, the following: Ms. Mitchell's statement that law enforcement had already promised her full immunity from prosecution; Ms. Mitchell's statement that Reilly was afraid that if he told who the killer was, he would be marked as a "snitch" and therefore would not survive in prison; Ms. Mitchell's statement that it was the detectives who told her Debbie Sportsman's last name; Ms. Mitchell's statement that it was a judge to whom she had stated that it would have

been stupid to attempt to intimidate Debbie Sportsman at the bank; Mr. Kuhns' statement that he would be taking notes during the interview; Ms. Mitchell's statement that, just before the polygraph interview, she had found out the Morgan's house was only a couple of blocks from where she was working and that this "freak[ed] [her] out"; Ms. Mitchell's statement that the detectives told her Reilly had asked Boyd and Marcus to commit the murders; Ms. Mitchell's statement that she would have "done something" if she had known that there was going to be a murder; Ms. Mitchell's statement that Detectives Jamieson and Bobbitt had made her question her belief that petitioner had nothing to do with the murders; Ms. Mitchell's statement that Reilly had hinted to her that the killer was Cliff Morgan's brother; Mr. Kuhns' statement that the polygraph examination would tell them if Ms. Mitchell was involved; Mr. Kuhns' statement to "Dick," indicating that Detective Jamieson was in the room during the polygraph, a fact otherwise undisclosed; Ms. Mitchell's statement that she would have to go talk to Detectives Jamieson and Bobbitt about the polygraph results; Mr. Kuhns' statement to Ms. Mitchell that nobody would "deal for [her]" any more, since she failed the polygraph test, that she needed to look out for herself and that she was looking at "big time" if she did not take measures to save herself; Ms. Mitchell's statement to Mr. Kuhns that he should turn her over to Detectives Jamieson and Bobbitt; and Ms. Mitchell request for a phone on which to call her lawyer. (Appendices 13, 43, 44.)

B. In addition to the foregoing material inaccuracies and omissions, review of the tapes and transcripts indicate that law enforcement tampered with the tape-recordings before providing copies to petitioner's trial counsel. For example, the police transcript includes a question on the

part of Mr. Kuhns as to the age of Ms. Mitchell's mother; however, the relevant portion of the tape recording reflects no such question. (Appendices 13, 43, 44.) This fact suggests that law enforcement had tampered with or altered the tape recording and that other more material portions of the original tape-recording had similarly been omitted from the copy provided to counsel. Further indication that the tapes were tampered with includes the fact that, on side two of tape number 87292 and on side one of tape number 87295, there are gaps in the recording. (Appendix 43.)

C. With respect to the purported transcript of the interrogation conducted in the afternoon of October 26, 1981, numerous inaccuracies and omissions were in the original, but, as noted above, many were corrected by petitioner's trial counsel. However, he failed to correct or note several material inaccuracies or omissions, including but not limited to the following: Ms. Mitchell's statement that she told Detectives Bobbitt and Jamieson that Reilly could have left the apartment and she would never have known; Mr. Kuhns' statement that the stabber may have been a woman; Ms Mitchell's statement that she had tried to reach her lawyer at the lunch break but did not succeed in doing so and instead just left him a message; Ms. Mitchell's statement regarding the circumstances of petitioner's arrest; Ms Mitchell's statement that in the morning of the killing, Reilly's car was in the same place he had left it the night before; and Ms. Mitchell's statement that she was sleepy. (Appendices 14, 43, 45.)

175. The state also provided petitioner's trial counsel with a tape of the interview of Calvin Boyd on August 3, 1981, and a purported transcription thereof. That purported transcription was materially incomplete and inaccurate and designed to mislead and/or impede petitioner's trial counsel in investigating and preparing a defense on

petitioner's behalf as well. For example, the police "transcription" contained over 4,000 inaccuracies or omissions. (Appendix 43.) Entire sentences and paragraphs were omitted. Innumerable words and phrases were purported to be "undecipherable," when in fact that was not the case. The section corresponding to Boyd's discussion of the night of the Morgan killings and his purported alibi is particularly inaccurate to the point of being incomprehensible. The following names are repeatedly omitted throughout much or all of the document, when in fact they can be clearly heard on the tape: "Jim," "Ollie," "Sandy," "Marcus," "Ricky," and "Colette." The document omits Boyd's statement that petitioner told him he did not want to have anything to do with the killings. As a whole, the document is misleading insofar as it purports to be an accurate transcription but is not. (See Appendices 2, 3, 43.) Petitioner's trial counsel had the tape of the interview re-transcribed. However, his purported transcription, although an improvement over the state's version, was materially inaccurate as well. (See paragraph 425, *infra.*

176. The state provided petitioner's counsel with a report of a law enforcement interview of Sandra Moss (nee Harris) conducted July 29, 1981. Although law enforcement never provided petitioner's trial counsel with the tape-recording of this interview (see paragraph 249, *infra*), the evidence presented at the reference hearing shows that this report was materially inaccurate. (HT 1163-1164.) The material inaccuracies in the report include, but are not limited to, the following:

A. The police report indicates that Ms. Moss told officers she first learned about the killings the day after the killings, when she and Boyd saw coverage of it on the TV news. (H.Exh. 600.) This was not true. Ms. Moss first learned of the killings when Arzetta Harvey told her that

Reilly had been arrested. (HT 1154-1155.)

B. The report indicates that Ms. Moss stated she saw Calvin Boyd on the night of the killings at about 10:30 p.m. and that he was at his home, in bed, drunk. (See H.Exh. 600.) In fact, although officers asked her about the night that she had made these observations of Boyd, they never asked her if the night that she saw Boyd in that condition was the night of the killings and she never said that it was. (HT 1189.)

C. The report indicates that Ms. Moss said Boyd had told her she "could" tell police that she saw him drunk and helped undress him; in fact, Ms. Moss told officers that Boyd told her that she *should* say that. (HT 1181-1182.)

D. The report states that Ms. Moss told police she had seen Reilly, Boyd and petitioner meeting with Cliff Morgan by the swimming pool about a week before the killings. (See H.Exh. 600.) In fact, she told them she saw Reilly, Boyd and Cliff Morgan, but she did not tell the police that she saw petitioner meeting with them and she did not in fact see petitioner meeting with them. (HT 1178.)

E. The report states that, at the aforementioned meeting by the swimming pool, she saw Morgan give Boyd 100 dollars. (H.Exh. 600.) In fact, she did not observe money change hands and did not tell the police that she had; she told the police that Boyd had told her Morgan had given him one hundred dollars. (HT 1178-1179, 1183.)

F. The report states that Ms. Moss told the police her impression was that Boyd was supposed to go with Reilly and petitioner to commit the killing but he was too drunk. (See H.Exh. 600.) In fact, she did not say this. (HT 1179.)

G. The report does not indicate that the interview was

tape-recorded but, in fact, it was. (HT 1163.)

D. Failure to Reduce Favorable Information to Writing

177. At the reference hearing, Deputy Attorney General Roy Preminger noted that Detective Jamieson had told him that, during the police investigation of the Morgan killings, quite a few people were interviewed as to which no reports were prepared because the witnesses did not provide any information that was useful to the Police Department. (HT of 6/10/96 at p. 49.)

178. Law enforcement conducted countless interviews and interrogations of potential witnesses and testifying witnesses that were neither tape-recorded nor reduced to writing and therefore were not provided to counsel in discovery. Petitioner's trial counsel was provided with no contemporaneous notes of any witness interviews and reports that were provided were exceedingly brief and failed to indicate what questions were asked of the witness as well as many statements made by the witness. Examples of this practice include, but are not limited to, the following:

A. Colette Mitchell was questioned by law enforcement at least 20 times. (See fn. 10, *supra*.) On only two of those occasions were the interrogations tape-recorded. For the most part, the discovery provided to counsel of statements made to or by Ms. Mitchell consisted of extremely brief reports, one or two lines in the police chronological record, or no documentation at all. The contents of all contacts between law enforcement and Ms. Mitchell constitute evidence that was material and favorable to petitioner: to wit, statements made by Ms. Mitchell that were inconsistent with her testimony at trial, conduct on the part of the police which provided Ms. Mitchell with information which she previously did not have and which she subsequently attributed to petitioner; and conduct on the part of the

officers which intimidated, coerced, persuaded, threatened or otherwise caused Ms. Mitchell to give subsequent material false testimony and statements incriminating petitioner.

B. Prior to his testimony at the guilt phase of petitioner's trial, Joe Dempsey was interviewed by law enforcement at least six times: i.e., on June 9, June 11, July 16, August 4, and August 10, 1981, and on May 24, 1983. On only one of those occasions, the interview of June 9, 1981, was a tape recording made. The transcript of that taped interview is 28 pages in length and the recording occupies two sides of a cassette tape. (Appendix 27.) The police report of that interview is slightly over two pages in length and by no means contains every statement made to or by Mr. Dempsey that was material and favorable to petitioner. (Appendix 26.) On June 11, 1981, Mr. Dempsey was interviewed at his home and shown a photo lineup. Other than brief notes in the police chronology, no report was made. (Appendix 11.) The report of a "re-interview" of Mr. Dempsey on June 16, 1981, which apparently lasted over an hour is approximately one-half page in length. (See Appendices 11, 28.) Mr. Dempsey was again re-interviewed on August 10, 1981; no report was made of that interview. (See Appendix 11.) Mr. Dempsey was contacted by phone on August 4 and September 30 1981; other than brief notes in the police chronology, no report was provided of either conversation. (See Appendix 11; H.Exh. 85.)

C. Law enforcement failed to tape-record or otherwise memorialize numerous contacts with Calvin Boyd in which statements were made by and to him which were favorable to petitioner. For example, although it appears that most of the interview of Boyd on August 3, 1981, was tape-recorded, the recording begins in the middle of a critical discussion in which Boyd apparently requested immunity from prosecution.

(Appendix 2.) Other than the portion of the discussion that was captured on the tape-recording, that discussion was not documented or recorded. Moreover, on the morning of August 3, 1981, several hours prior to the tape-recorded interview with Deputy District Attorney Jonas, Boyd met with detectives, who apparently showed him photographs and documents relevant to petitioner's case and further interviewed him regarding the crime. (See Appendix 2.) Detectives did not provide petitioner's counsel with a tape-recording or any other documentation of the statements made to or by Boyd in that interview. Boyd was interviewed by law enforcement on July 2, July 15, and July 30, 1981. Very brief reports and no tape-recordings were provided of the interviews on July 2 and July 15, 1981.[13] (Appendices 29, 30.) No report or tape-recording was prepared of the interview on July 30, 1981. (Appendix 11.)

179. The facts set forth above were readily available to petitioner's trial counsel through the exercise of reasonable diligence. Reasonably competent counsel would have questioned each witness the prosecution and/or law enforcement had interviewed about threats, promises, and attempts on the part of government actors to discourage witnesses from testifying for the defense and to encourage them to provide the information that the prosecution desired. All of the evidence set forth herein was admissible to support the theory that petitioner was innocent and was the victim of a prosecution in which law enforcement engaged in a pattern of conduct likely to induce false statements and false testimony. Such evidence was admissible as impeachment of the testifying prosecution

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[13]The interview of July 15, 1981, was tape-recorded, but the tape was subsequently destroyed. (See Claim X, *infra*.)

witnesses.

180. As a result of the state's improper investigative tactics, witnesses and/or potential witnesses provided material and prejudicial false, incomplete and/or misleading statements and/or testimony to the prosecution and/or the jury.

181. Petitioner hereby incorporates by reference as if fully set forth herein all other claims of state misconduct contained in the instant pleading, including but not limited to those contained in Claims VI, VII, VIII, IX, X and XI, *infra*.

182. The investigative procedures utilized by the state in developing its case against petitioner subverted the truth-seeking process and undermine confidence in the outcome of the trial.

183. Petitioner's conviction is based entirely on circumstantial evidence. State misconduct is more likely to affect the outcome of the trial based upon circumstantial evidence than one in which there is direct evidence, untainted by state misconduct, linking a defendant to the crime. (*Ex parte Brandley*, *supra*, 781 S.W.3d at p. at 892.)

184. Had the jurors been apprised of the tactics utilized by law enforcement to secure the testimony called by the prosecution at trial, the jury would have concluded that the prosecution had procured and presented material false testimony and the jury would not have found petitioner guilty of capital murder.

185. The judgment must be reversed.

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VIII

THE PROSECUTOR'S PERVASIVE MISCONDUCT THROUGHOUT THE TRIAL VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

186. Petitioner's confinement is unlawful, unconstitutional and void in that his conviction and death sentence were unlawfully and unconstitutionally imposed in violation of his rights to due process and a fair trial, to present a defense, to trial by an unbiased and impartial jury, to the effective assistance of counsel, to confrontation and cross-examination, to heightened capital case due process, to a reliable guilt and penalty determination, to an individualized penalty determination and against cruel and unusual punishment, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Chessman v. Teets* (1957) 354 U.S. 156, 164-165; *Frank v. Mangum* (1914) 237 U.S. 309, 327-328; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Duncan v. Louisiana* (1968) 391 U.S. 147-158; *Strickland v. Washington* (1984) 466 U.S. 688, 694; *Coy v. Iowa* (1988) 487 U.S. 1012, 1015-1020; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 and fn. 13; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305; *Eddings v. Oklahoma* (1978) 455 U.S. 104, 110-112.)

187. The applicable federal and state standards regarding prosecutorial misconduct are well established: "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness

as to make the conviction a denial of due process.”’” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [citations omitted].) Conduct by a prosecutor renders a criminal trial fundamentally unfair under state law if it involves “‘“the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”’” (*Ibid*.)

188. Repeated unseemly comments by the prosecutor violate the defendant’s right to a fair trial under federal law. (*Martin v. Parker* (6th Cir. 1993) 11 F.3d 613.) Where the prosecutor asks an improper question, the question itself may insinuate that he is in possession of information to which the question refers and that the information simply is not being admitted. In this instance, even where the objection is sustained and the witness does not answer the question, the damage is done and the defendant’s right to confront and cross-examine is violated. (*Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875.)

189. Prosecutorial misconduct may “so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.” (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) To constitute a due process violation, the prosecutorial misconduct must be “‘of sufficient significance to result in the denial of the defendant's right to a fair trial.’” *United States v. Bagley* (1985) 473 U.S. 667, 676, quoting *United States v. Agurs* (1976) 427 U.S. 97, 108.) To be fundamentally unfair, the misconduct must violate “those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’” (*Dowling v. United States* (1990) 493 U.S. 342, 352, quoting *United States v. Lovasco* (1977) 431 U.S. 783, 790.).

190. Under California law, it is improper to ask questions which clearly suggest the existence of facts which would have been harmful to

defendant in the absence of a good faith belief that the questions would be answered in the affirmative, or of a belief that the facts could be proved, and a purpose to prove them, if their existence should be denied. (*People v. Perez* (1962) 58 Cal.2d 229, 241; see also *People v. Mickle* (1991) 54 Cal.3d 140, 191; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1098.)

191. The prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 87.)

192. In petitioner's case, Deputy District Attorney Jeffery Jonas' misconduct so infected the trial with unfairness that the resulting conviction denied petitioner due process and a fair trial. The evidence supporting the prosecution's theory of petitioner's guilt was weak and circumstantial. However, at both the guilt and penalty phases, Mr. Jonas succeeded in manipulating and misstating the evidence, such that even competent defense counsel could not have effectively rebutted the prosecution's case. Like the prosecuting attorney at issue in *Berger v. United States*, *supra*,

> "[the prosecutor] overstepped the bounds of that propriety and fairness which should characterize the conduct of such an

officer in the prosecution of a criminal offense . . . He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thorough indecorous and improper manner. . . . The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken. The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. . . . Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and pervasive, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded." (*Id*. at pp. 84-89.)

193. To the extent that petitioner's trial counsel failed to object to Mr. Jonas' misconduct, no reasonable justification for the omission is conceivable and petitioner has been deprived of the effective assistance of counsel. To the extent any portion of this claim should have been raised on automatic appeal, petitioner has been deprived of the effective assistance of appellate counsel. To the extent that any portion of this claim should have been previously raised in the instant habeas corpus proceedings, counsel had no tactical reason for the omission and petitioner has been deprived of

the effective assistance of habeas counsel.

194. Many of the acts of misconduct committed by Mr. Jonas at petitioner's trial were raised and briefed on automatic appeal. Petitioner hereby incorporates by reference as if fully set forth herein Argument III of the Supplemental Opening Brief and Argument I of the Supplemental Reply Brief filed on petitioner's behalf on automatic appeal. Petitioner also previously raised on habeas corpus some of the acts of misconduct to which Mr. Demby unreasonably failed to object. Petitioner hereby incorporates by reference as if fully set forth herein the facts alleged in Petitioner's Supplemental Allegation filed in the instant habeas corpus matter on or about January 24, 1992. The additional evidence now before this Court as a result of the reference hearing held herein provides new factual support for the arguments made on direct appeal and the claim previously raised on habeas corpus, such that the prosecutorial misconduct arguments and claims previously raised and implicitly or expressly rejected by this Court must be revisited and reconsidered.

195. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

196. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference

hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner.

197. The facts set forth herein are offered only as examples of the misconduct committed by Mr. Jonas at petitioner's trial. That misconduct was so pervasive that detailing every improper question posed and every act of misconduct committed would require essentially retyping the majority of the reporter's transcript of the trial. Examples of Mr. Jonas' misconduct include, but are not limited to, the following:

198. At the guilt phase, Mr. Jonas argued that codefendant Morgan's deteriorating physical appearance was evidence of his guilt. (RT 12939-12941.) This argument was improper both because it encouraged the use of a legally irrelevant factor as proof of guilt and because it was false as a factual matter. Morgan was, in fact, seriously ill with cancer, so ill that he died shortly thereafter of that illness. Prejudice is shown by the fact that the jury was unaware that Morgan was ill until after the trial, but considered his demeanor while testifying among the strongest evidence of his guilt and therefore of the conspiracy between all three defendants. (See Appendix 12.) Petitioner hereby incorporates by reference as if fully set forth herein Argument XXV of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal.

199. Mr. Jonas elicited from Ms. Mitchell that, after the preliminary hearing, petitioner told her that she had done a good job in testifying that she and petitioner had made love on the night of the killings. Mr. Jonas then asked the following question: "You sort of went into some elaborate detail about how good Mr. Hardy was, right?" (RT 9945.) Ms. Mitchell answered in the affirmative. However, at the preliminary hearing,

the only "detail" that she provided regarding the love-making was that it went on for two hours. (CT 652.) Mr. Jonas' question improperly misstated and/or mischaracterized her preliminary hearing testimony in a manner that was prejudicial to petitioner in that the prosecution's position was that Ms. Mitchell and petitioner had not in fact made love on the night of the killings and therefore Mr. Jonas' characterization of her preliminary hearing testimony implied that she not only perjured herself but did so in an intentionally theatrical manner.

200. At the guilt phase, Ms. Mitchell testified that petitioner had told her that he had been at the Morgan's house, but he never said what night he was there; she testified: "To be honest, he never said a certain night." (RT 9964.) Nevertheless, Mr. Jonas then asked the following question, clearly referring to the night of the killings: "Did he give you different statements about what happened, what he observed? What he heard? What he did on that particular night?" (RT 9964.) Mr. Jonas later asked: "Did Mr. Hardy ever tell you, when he was there the night of the murders, that he took some property?" (RT 10030.) Ms. Mitchell answered that she did not know whether petitioner told her that or not. (*Ibid*.) Shortly thereafter, Mr. Jonas asked: "And what I'm asking you is, do you remember Mr. Hardy telling you specifically the night he went to the house and the night he said he heard snoring and later said that they were already dead when they got there, did he tell you that he took something that night?" (RT 10031.) Ms. Mitchell answered in the affirmative. This question was not only compound and assumed facts not in evidence – i.e., that petitioner made three statements which all referred to the same night – but also elicited false and/or misleading testimony by effectively requiring Ms. Mitchell to reconcile three purported statements of petitioner which

were inconsistent with one another. Through use of compound and repeated questioning, Mr. Jonas finally succeeded in securing evidence, without regard to its truth, that petitioner had said he was at the Morgan’s house on the night of the killings.

201. At the guilt phase, Mr. Jonas asked Ms. Mitchell, “Did Mr. Hardy ever tell you that he knew for a fact how many people did the killing?” (RT 10023.) She answered in the affirmative. This question was leading and lacking in a good faith basis. Ms. Mitchell had testified at the preliminary hearing that petitioner had told her on the telephone: “‘No, it wasn't two people, it was one.’” (CT 603-604.) At the in limine hearing held pursuant to Evidence Code section 403, Ms. Mitchell testified that petitioner said: “‘I know it was one,’” and that this was a direct quote. (RT 1100.) Nevertheless, at trial, Mr. Jonas asked Ms. Mitchell if petitioner’s exact words were, “‘I know for a fact that it was one.’” She answered in the affirmative. (RT 10023.) Other than the testimony cited above, Ms. Mitchell had never before stated that these were petitioner’s words. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

202. Mr. Jonas made repeated efforts to elicit testimony which falsely attributed to petitioner many statements and actions that witnesses had previously attributed only to codefendant Reilly. For example, at the guilt phase, Mr. Jonas asked Ms. Mitchell whether she had told Bradley Kuhns (the police polygrapher) that she knew Reilly had left the Vose Street Apartments apartment on the night of the killings. When she answered that she had, he asked her, “was that made of your own personal knowledge, Colette, or was that made because of a statement that was made to you by either Mr. Hardy or Reilly.” (RT 10291.) She answered, “Yes, it was a statement made by either Mr. Reilly or Mr. Hardy.” (RT 10292.) Mr.

Jonas lacked a good faith basis for the question. On October 26, 1981, when Ms. Mitchell was interrogated by Mr. Kuhns, Ms. Mitchell stated clearly that Reilly had told her he had left the apartment complex on the night of the killings. (Appendix 14.) Indeed, on all prior occasions, she had stated unequivocally that she had heard this from Reilly, in a telephone conversation with him after he was in jail; she had never indicated that petitioner told her Reilly left the apartment that night. (CT 653, 1413, 1452; RT 1206, 1233; Appendices 13, 15, 16, 17, 18, 19, 20, 21, 22.)

203. In questioning Ms. Mitchell about her contact with Marc Costello, Mr. Jonas stated: "In fact, you went to him originally to try to assist – have him assist – get some advice with regard to helping Reilly and Hardy; is that true or not true?" (RT 10040.) This was leading, assumed facts not in evidence and lacked a good faith basis: i.e., that Ms. Mitchell had gone to Costello to help petitioner as well as Reilly. In fact, she had testified previously that it was Reilly who had sent her to Costello. (RT 1183; 9975; CT 616.) She had never said in any previous statement that petitioner had anything to do with her contact with Costello. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

204. Mr. Jonas elicited from Ms. Mitchell that Reilly had told her the killing had to be done by June, because, after that time, the insurance would no longer be good. (RT 10010.) Mr. Jonas then asked: "Did you ever testify that that came from Mr. Hardy?" (RT 10011.) Ms. Mitchell answered, "I might have." (RT 10011.) In fact, she had never so testified nor had she ever made such a statement outside the courtroom. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

205. On another occasion, Mr. Jonas asked Ms. Mitchell: "Do you ever remember having any conversation with Mr. Hardy about it had to

have been a relative that did it or somebody that knew the boy?" Ms. Mitchell answered: "I heard that statement somewhere." (RT 9997.) This question was leading, lacking in a good faith basis and assumed facts not in evidence: Ms. Mitchell had never before attributed such a statement to petitioner. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) Mr. Jonas subsequently asked, "Do you remember if it was at a time when there was a phone conversation between yourself, Mr. Hardy, Mr. Reilly and Ron Leahy?" (RT 9997.) Ms. Mitchell answered that she did not remember. This question also was lacking in a good faith basis, was leading and assumed facts not in evidence: i.e., that there had been a telephone conversation between Ms. Mitchell, Mr. Reilly, petitioner and Ron Leahy. Despite the fact that Ms. Mitchell did not recall, Mr. Jonas thus effectively testified that petitioner had made the statement at issue to Ms. Mitchell in a phone call.

206. In an effort to attribute everything possible to petitioner, even when he knew the source of the information was someone else, Mr. Jonas asked Ms. Mitchell, "Did you ever get any information about interest?" (RT 10011.) When she answered in the affirmative, he asked, "from whom?" (*Ibid.*) She answered, "Oh, I don't know. Either Jimmy or Buck." (*Ibid.*) Mr. Jonas then asked, "What was the information that you received about interest?" Ms. Mitchell answered, "'While I'm sitting in jail, at least it's collecting interest'; something in that line." (*Ibid.*) Mr. Jonas then asked her if she remembered the amount of interest and she answered, "Ten and three-quarters sticks in my mind, but I could be wrong." (*Ibid.*) The manner in which the testimony was elicited implied that petitioner or Reilly had made the statement Ms. Mitchell quoted. However, at the preliminary hearing, Ms. Mitchell testified unequivocally that petitioner had told her

that he had heard *Cliff Morgan* say, "'while I'm in here, I'm collecting twelve and three-quarters percent interest." (CT 581.) At the 403 hearing, she stated that her testimony on the subject at the preliminary hearing was truthful. (RT 1089.) Mr. Jonas knew that the testimony Ms. Mitchell gave on the subject at trial was false and/or misleading, but he failed to clarify or correct the falsity.

207. In another example, Mr. Jonas asked Ms. Mitchell what she remembered petitioner telling her about Mike Mitchell's car. She answered that she did not remember whether she had heard about Mitchell's car from petitioner or someone else. She testified that she recalled a conversation in which someone told her that the police were looking for the car because they incorrectly assumed that the stains on the seat were blood, but the stains on the seat were old and were not blood. (RT 10029.) Mr. Jonas then asked: "What I'm asking, Colette, did you know of a deliberate attempt by Mr. Mitchell, Mr. Reilly and Mr. Hardy to in some way prevent the police from locating that car when it became of interest to them again?" (RT 10029.) This question assumed facts not in evidence, i.e., that the car had "become of interest to [the police] again," and that petitioner and the others were aware that the police were interested in the car. Ms. Mitchell answered, "yes. I know they deliberately got rid of the car." (*Ibid*.) In fact, the evidence indicated to the contrary, and that Mike Mitchell had in fact given the car to a friend to sell when he left the Los Angeles area, several weeks before the police began looking for it. (RT 9096, 9128-9129, 9151.)[14]

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[14]The police began looking for Mike Mitchell's car only after Debbie Sportsman statement of June 29, 1981. (See H.Exh. 85; Appendix 11.)

208. At the Evidence Code section 403 hearing, Mr. Jonas asked Ms. Mitchell the following question: "The statement that you attribute to Mr. Hardy, that quote, 'I'll say one thing. We were at the house,' did you ever ask him specifically what he got paid for when he was at the house?" (RT 1047.) Ms. Mitchell had not testified that day or ever before that petitioner had made such a statement. Mr. Jonas therefore simply testified for Ms. Mitchell, to avoid the risk that, if he asked her a proper question, she might not answer in precisely the fashion that he desired. Moreover, the question improperly implied not only that she had quoted petitioner as stated, but also that petitioner had told her he had gotten paid "at the house." Ms. Mitchell never made such a statement, before or after this question was asked. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

209. Also at the section 403 hearing, Mr. Jonas asked Ms. Mitchell: "Recall yesterday your testimony where you said that before the date that you learned the murders happened, you heard Hardy and Reilly discussing robberies?" (RT 1186.) Again, she had given no such testimony. Nevertheless, she answered in the affirmative. (RT 1186, see also RT 1191.) Accordingly, Mr. Jonas again succeeded in effectively testifying for the witness and putting words in her mouth that had never before been there.

210. At the guilt phase, Mr. Jonas inquired of Ms. Mitchell whether she had developed relationships with some deputy sheriffs at the jail. (RT 10015.) After she answered in the affirmative, Mr. Jonas asked, "As a result of that, were you able to obtain a piece of item [sic] that you knew that the police were interested in from one of the deputies?" (RT 10015.) Mr. Jonas then elicited testimony indicating that the item to which he was referring was a pair of boots belonging to petitioner. (RT 10015.)

The question assumed facts that were not in evidence: i.e., that the police were interested in petitioner's boots at the time Ms. Mitchell received them and that Ms. Mitchell was aware that the police were interested in the boots at that time. The question also implied that petitioner and Ms. Mitchell had somehow circumvented the rules of the county jail when she received the boots. The manner in which the testimony was elicited left the jury with the following false impressions: that the boots were somehow incriminating, that petitioner intentionally disposed of them because he suspected that they were incriminating; and that Ms. Mitchell had intentionally cultivated a relationship with the guards at the jail in order to obtain favors otherwise not available. Ms. Mitchell later testified that petitioner had in fact asked her to dispose of a pair of boots, but that the boots petitioner asked her to throw out were not the boots that she had received from him at the county jail. (RT 10047.) She also testified that petitioner had wanted to trade the boots he had in the jail for tennis shoes only because the boots hurt his feet. (RT 10175, 10340.) Nevertheless, Mr. Jonas' original question and its innuendo left the jury with the false impression that Ms. Mitchell's receipt of the boots which petitioner had in jail was somehow sinister and indicative of his guilt. This question was lacking in any good faith basis, as Ms. Mitchell had never indicated that petitioner had given her his boots for any reason other than to exchange them for his more comfortable tennis shoes. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

211. Mr. Jonas intentionally misstated witnesses' prior statements and testimony in questions, such that the jury was left with false impressions as to what witnesses had previously said. For example, during Joseph Dempsey's testimony at the guilt phase, Mr. Jonas stated out of the jury's presence that Mr. Dempsey had just informed him for the first time

that Reilly had told him (Dempsey) that petitioner and a “black guy” were supposed to commit the killings, but that petitioner had gotten upset with the “black guy” and had backed out of the plan. (RT 8451.) In addition to the fact that Mr. Jonas failed to provide timely discovery of this purported statement, he also then subverted the evidence and misled the witness and the jury as to the nature of the statement that Mr. Dempsey claimed to have heard. Although, on direct examination, Mr. Dempsey testified that, “Mr. Hardy had discovered a gun that a black man had with him and got all upset about it and said he didn’t want anything to do with them and an argument took place,” (RT 8491) on redirect examination, Mr. Jonas asked Mr. Dempsey the following two “questions” completely altering the meaning of the witness’ testimony:

> “So you were withholding what you told me yesterday and you are withholding something you gave me or some information which we won’t go into right now, and then you mentioned about Hardy, about a black man and Reilly and a fight and as a result *the black man was out*?” (RT 8589 [emphasis added].)

And

> “All I’m asking is: why did you – what was that information withheld with regard to the fact that Hardy and this black guy got in a fight about the gun and *the black guy wasn’t going to do it*? Why did you withhold that?” (RT 8592 [emphasis added].)

These questions were not only compound and assumed facts not in evidence, but also were blatantly designed to elicit false and/or misleading testimony: i.e., that the “black guy,” not petitioner, had declined to participate in the killings. Mr. Dempsey answered the questions by providing a reason for having withheld information from Mr. Jonas. However, neither Mr. Dempsey nor Mr. Jonas corrected the misstatement

regarding the nature of the information that he had purportedly withheld. Accordingly, the jury was left with the false impression that it was the "black guy" who declined to participate in the killings, rather than petitioner, as Dempsey had previously indicated.

212. Mr. Jonas asked Ms. Mitchell, "Did you ever attempt to deceive the police as to where Mr. Reilly was during the period of time over the Memorial Day weekend when the police were looking for Mr. Reilly?" (RT 10032-10033.) This question assumed facts not in evidence: i.e., that the police were looking for Reilly over Memorial Day weekend and that Ms. Mitchell knew the police were looking for Mr. Reilly over Memorial Day Weekend. Moreover, when she answered by saying she did not remember, he asked: "Do you ever remember testifying that you did so and the reason you did so was to protect them so that they would know where they were? That's your answer, and I'm assuming you are referring to the police looking for somebody. . . . That's on page 1196 of volume 8." (RT 10033.) She responded that she still did not remember this incident. (RT 10033.) Despite Ms. Mitchell's lack of memory and the vagueness of her prior testimony in any event, Mr. Jonas effectively testified for her and thereby cleared up the ambiguity in her prior testimony in the manner which served his purposes.

213. At the guilt phase, Mr. Jonas asked Ms. Mitchell if, on the night of the killings, petitioner made a statement to her about making love that night. (RT 9946.) She answered: "Yes. He said that he needed me that night." (*Ibid*.) Mr. Jonas then asked, "Did he tell you why he needed you?" (*Ibid*.) She answered, "Not that I can remember." (*Ibid*.) Mr. Jonas then asked, "As a result of his making this statement to you, did you have an idea in your mind what that was for? I just want a yes or not answer."

(RT 9946-9947.) She answered, "yes." (RT 9947.) He then asked, "Later on, as you went to visit him at the jail, did that become more and more meaningful to you?" (*Ibid.*) The latter three questions were asked without a good faith basis, as Ms. Mitchell had never before stated that she had re-interpreted the significance of petitioner's purported statement on the night of the killings. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) Moreover, the question called for an improper and irrelevant opinion as to petitioner's reasons for making the alleged statement and compounded the prejudicial effect on the jury of the coercion, suggestion and persuasion which Mr. Jonas had applied to Ms. Mitchell in order to convince her to hold the false belief that petitioner had participated in the killings and to revise and recharacterize her version of events.

214. On Ms. Mitchell's second day of testimony at petitioner's trial, Mr. Jonas asked, "Colette, what do you know about an M-1 rifle other than what you have told us yesterday about it being in a guitar case and ultimately ending up at your house on Ben Street? Do you know anything more about that?" (RT 10003.) Ms. Mitchell answered, "No, not really." (*Ibid.*) However, Ms. Mitchell had not testified to anything about a rifle or a guitar case on the previous day or previously on the same day. Mr. Jonas thus testified for her and asked a question which assumed facts not in evidence. Moreover, Mr. Jonas effectively testified to facts that were not even within Ms. Mitchell's personal knowledge, as she had never seen the rifle at issue and did not know what an "M-1" looked like in any event. (RT 10004, 10127.) Ms. Mitchell had never before stated that she knew anything about the rifle. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

215. Mr. Jonas asked Ms. Mitchell, "Was there ever any discussion

between yourself, John Hardy and Mrs. Hardy that you would try in some way to get into the courtroom to listen to what the testimony was so you could prepare your testimony? . . . Was there ever any attempt by yourself, by John Hardy, by Mrs. Hardy together to try to learn ahead of time what the testimony was so you could then try to modify your testimony to meet whatever needs arose?" (RT 10008.) Ms. Mitchell answered in the negative. The question was leading, assumed facts not in evidence, called for hearsay and was asked without a good faith basis, as Ms. Mitchell had never before stated that she had discussed anything with Mrs. Hardy, nor had she ever indicated that she had made any such agreement with John Hardy. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) Neither John Hardy nor Mrs. Hardy had ever so indicated either. (See H.Exh. 85.)

216. Mr. Jonas asked Ms. Mitchell, "Did Mr. Hardy constantly tell you that the less you knew, the better off you would be?" (RT 10021) This question was leading, assumed facts not in evidence and was without a good faith basis: Ms. Mitchell had not previously testified before the jury that petitioner had made any such statement; she also had never before stated in or outside of the courtroom that petitioner had made this statement more than once, let alone "constantly." (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) Nevertheless, she answered Mr. Jonas' question in the affirmative. Thus, Mr. Jonas again succeeded in mischaracterizing the witness' testimony before it was even given.

217. Mr. Jonas asked Ms. Mitchell: "How many witnesses did you attempt personally on behalf of James Hardy to convince to testify untruthfully?" (RT 10037.) Ms. Mitchell answered that there were two "for sure": John Hardy and Joe Dempsey. (RT 10037-10038.) Mr. Jonas' question improperly implied that petitioner had asked Ms. Mitchell to

pressure witnesses to testify falsely. In fact, Ms. Mitchell has previously testified that she was "not sure" petitioner had asked her to contact anyone other than his brother, John Hardy. (RT 1203.) Ms. Mitchell also previously testified that it was Reilly who asked her to contact Joe Dempsey. (RT 1221.) Ms. Mitchell had never before made any statement indicating that petitioner had asked her to get anyone to change their testimony (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

218. Ms. Mitchell testified that she vaguely recalled contacting Joe Dempsey and asking him to change his testimony. (RT 10038.) Mr. Jonas then asked her: "Do you remember anything about reading something in a document that you had received from James Hardy that he had been pointed out as the person that was going to do it?" (RT 10038.) She answered in the affirmative, and then added that this had been told to her, not shown to her in writing. (*Ibid*.) However, the impression remained that it was petitioner who had informed her of Dempsey's statement and that Mr. Dempsey had said petitioner had been pointed out as the "person who was going to do it." Ms. Mitchell had previously testified that it was Reilly who asked her to contact Joe Dempsey. (RT 1221.) Moreover, in none of her pretrial statements or testimony had she ever indicated that petitioner had asked her to contact Dempsey or had shown her any documents of any kind. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.) Mr. Jonas' question was not only compound and assumed facts not in evidence, but also was asked in bad faith.

219. Mr. Jonas asked Ms. Mitchell: "Did you ever discuss with Mr. Leahy what you would testify to [at the preliminary hearing] that was not going to be true?" (RT 10036.) This question was improperly vague and suggestive because it did not make clear whether Mr. Jonas was asking

Ms. Mitchell if she had simply told her brother how she would testify and she purportedly believed this testimony would be false or whether she had told him that she intended to testify falsely. Mr. Jonas then asked, "Did Mr. Leahy know from you that you were going to commit perjury to protect him?" (RT 10037.) Ms. Mitchell answered, "I would say yes." (*Ibid*.) The question called for speculation. Indeed, when Mr. Jonas then asked, "Did Steve Rice know that you were going to commit perjury to protect Jimmy Hardy," counsel for Reilly objected and the objection was sustained. (*Ibid*.) However, Ms. Mitchell answered in the affirmative nonetheless and no request was made to strike it. Thus, Mr. Jonas, questions elicited testimony improperly suggesting that Ms. Mitchell had expressly told her brother and Steve Rice that she intended to lie at the preliminary hearing. This improperly bolstered Mr. Jonas' contention that Ms. Mitchell's trial testimony was true, whereas her preliminary hearing testimony was knowingly and intentionally false. This proposition and testimony was false and/or misleading. Ms. Mitchell's testimony at the preliminary hearing was generally consistent with the other statements which she had given in her many extrajudicial contacts with law enforcement. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 22.) The true state of affairs was that, at the time of her preliminary hearing testimony, Ms. Mitchell believed that she was testifying truthfully and it was only later that she became convinced that her testimony at that proceeding must have been false.

220. Mr. Jonas asked Ms. Mitchell: "do you remember a phone conversation in which you participated with Mr. Leahy where both Mr. Hardy and Reilly talked at different times concerning some notes that had been passed or received or confiscated?" (RT 10042.) She answered that she did not remember. (*Ibid*.) Mr. Jonas then read Ms. Mitchell her

testimony from the 403 hearing, in which she stated that it was a telephone conversation with Reilly in which she heard that a note had been intercepted and that the note was to set up Marc Costello. (RT 10045.) Mr. Jonas then asked, "Did you ever receive any information then from Mr. Reilly or Hardy that there was going to be an attempt to set up Marc Costello; yes or no?" (RT 10045.) She answered in the affirmative. (*Ibid*.) Mr. Jonas' questions implying that petitioner could have been the source of this information were misleading, assumed facts not in evidence and were asked without a good faith basis: in her prior testimony, Ms. Mitchell had unequivocally stated that it was Reilly who told her about the note. (RT 1209-1210.) None of her out of court statements indicated that petitioner was a party to the conversation to which Mr. Jonas was referring. (See Appendices 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.)

221. Mr. Jonas made a practice of reading into the record in the jury's presence his own witnesses' prior consistent and inconsistent statements and testimony, before any impeachment or cross-examination of the witness had been undertaken by the defense. In the guise of refreshing witnesses' recollections, Mr. Jonas effectively introduced extensive inadmissible hearsay. The improper use of prior statements was prejudicial because it protected them against impeachment by the defense and improperly bolstered their credibility. For example, Mr. Jonas asked Ms. Mitchell: "You had given us some information about that interest and how much interest was supposed to be collected prior to the preliminary hearing; had you not?" (RT 10012.) Ms. Mitchell answered, "I believe so." Mr. Jonas had not asked any question in this regard before, and Ms. Mitchell had not testified inconsistently with this at trial. Thus, her prior statement was not admissible as a prior consistent statement since there had been no

impeachment at that juncture. The only purpose of the use of the prior statement was to lead the witness and to bolster her credibility in front of the jury by making it appear that she had been saying the same thing all along.

222. Mr. Jonas' direct examination of Calvin Boyd provides another example of his practice of improperly introducing evidence of prior statements and testimony. Asking Boyd only if his prior statements had been truthful and accurate, Mr. Jonas read into the record large portions of Calvin Boyd's extra-judicial statement of August 3, 1981. (See, e.g., RT 8181-8184, 8186, 8187-8188, 8193-8194.) By using Boyd's prior statement in this fashion, Mr. Jonas gave Boyd a false air of credibility and reliability and minimized the very real risk that Boyd would forget what false statements he had previously made, would contradict his prior statements and then would be impeached. Therefore, Mr. Jonas read Boyd's prior statement into the record without asking substantive questions directly, thereby improperly but effectively protecting his witness from being impeached and shown to be utterly lacking in credibility, as he in fact was.

223. Mr. Jonas argued at the guilt phase that Boyd had not been promised anything in exchange for testimony (RT 13679), when in fact this was not the case. Petitioner hereby incorporates by reference paragraphs 52, 53, 243, 245, 246, *infra*. Mr. Jonas also committed misconduct in argument by and vouching for Boyd's credibility. (RT 12735)

224. Mr. Jonas argued at the penalty phase that petitioner had no history of psychological or mental health problems. He stated:

> "You recall the lifestyles of the individuals, and it was a day-to-day proposition for both of them, being supported by their girlfriends, enjoying it. What did they live for? That was for the immediate pleasures of life. There was nothing put out in

> the future. It was the, if you will, the physical. For lack of anything else, I guess you all go up and go home sometime and look up the definition of hedonism. That's what it is, pure and simply, and that affects how one lives and how one responds to that type of enticement, and they so responded. It wasn't because of some mental immaturity or mental problem or psychological difficulty. And if any of that had existed, you would have heard about it." (RT 14048.)

This argument indicated not only that there had been no evidence presented to indicate that petitioner had psychological problems, but also that no such evidence existed. However, Mr. Jonas knew that this was not the case, as he had previously (and unlawfully) obtained petitioner's records from Camarillo State Hospital showing that, in 1978, petitioner had been committed to that facility (a mental hospital), where he was diagnosed with Chronic Undifferentiated Schizophrenia and that, upon his release, he was prescribed antipsychotic medication. (H.Exh. 9.) Mr. Jonas' argument in this regard was improper and unethical.

225. Mr. Jonas' argument at the penalty phase improperly argued petitioner's lifestyle as an improper non-statutory factor in aggravation. Petitioner hereby incorporates by reference as if fully set forth herein Argument XXIX of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. Contrary to this Court's finding on automatic appeal (*People* v. *Hardy*, *supra*, 2 Cal.4th at p. 211), prejudice is shown by the evidence now presented that the jury in fact considered petitioner's lifestyle as an aggravating circumstance. (See Appendices 12 and 46.)

226. Mr. Jonas' willingness to engage in tactics designed to mislead defense counsel and the jury is further evinced by the letter he wrote on February 26, 1997, prior to Calvin Boyd's reference hearing

testimony, granting Boyd complete immunity from prosecution for any crime in connection with this case and stating that Calvin Boyd "never was, or has been considered a suspect in this case." (Appendix 1.) Petitioner had at that time presented evidence which strongly indicated that Boyd was very much involved in the killing of Nancy and Mitchell Morgan. Mr. Jonas' willingness to grant Boyd full immunity despite such evidence demonstrates that he has a personal interest in protecting the judgment in this case at all costs, including at the cost of the truth. Moreover, the statement in Mr. Jonas' immunity letter that Boyd was never a suspect was patently false: Boyd was arrested on charges of murder in connection with this case (RT 8145-8146,10414) and was named as a coconspirator in all of the charging documents filed in this case. (CT 1-9, 11-17, 55-73.) This falsity, together with the fact that Mr. Jonas failed to disclose to counsel for petitioner the immunity letter, demonstrate Mr. Jonas' loss of objectivity and desire to protect the judgment from attack at the expense of the truth.

227. Mr. Jonas' improper tactics were also part of a larger pattern on the part of his office, the Los Angeles County District Attorney's Office, to condone and/or passively tolerate similar misconduct on the part of its deputies. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800.) In the absence of the referee's improper denial of petitioner's request for discovery, additional facts would be available to counsel in support of this claim. (See Claim XXII, *infra*.)

228. Petitioner hereby incorporates by reference as if fully set forth herein Claims VI, VII, IX, X, and XI, *infra*.

229. As a result of Mr. Jonas' pervasive misconduct, the truth was obscured, the jury was misled and petitioner's trial was fundamentally unfair. Contrary to this Court's finding on direct appeal, Mr. Jonas'

misconduct was prejudicial. The evidence of petitioner's guilt was not overwhelming; only the force of Mr. Jonas' misleading statements and questions, improper argument and innuendo were. Through the use of highly improper and inflammatory questioning and argument, Mr. Jonas effectively testified on behalf witnesses in the manner that most fit his theory of the crime. Mr. Jonas' misconduct was so pervasive that the jury was unable to separate what evidence was properly presented by the witnesses and what was improperly furnished by Mr. Jonas. Cumulatively, Mr. Jonas, innumerable acts of misconduct require a new trial.

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IX

THE STATE FAILED TO DISCLOSE TO THE DEFENSE FAVORABLE AND MATERIAL EVIDENCE

230. Petitioner's conviction and sentence of death were obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the California Constitution, Article I, sections 7, 15, 16, 17, and Penal Code section 1473, insofar as the state withheld, concealed and/or destroyed evidence favorable to the defense and material to the guilt and penalty determinations, as well as evidence material to petitioner's ability to demonstrate his entitlement to post-judgment collateral relief. The violations of petitioner's constitutional rights include but are not limited to deprivations of the right to due process and a fair trial; the right to present a defense; the right to the effective assistance of counsel; the right to confront and cross-examine witnesses; the right to compulsory process; the right to an accurate and reliable determination of guilt, death eligibility and penalty; and the prohibition against cruel and unusual punishment. (See *Kyles v. Whitley* (1995) 514 U.S. 419; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 61-65 (conc. opn. of Blackman, J.); *id*. at pp. 62-72 (dis. opn. of Brennan, J.); *Holbrook v. Flynn* (1986) 475 U.S. 560; *Zant v. Stephens* (1983) 462 U.S. 862, 462; *United States v. Bagley* (1985) 473 U.S. 667; *Estelle v. Williams* (1976) 425 U.S. 501, 505; *Brady v. Maryland* (1963) 373 U.S. 83.)

231. Individually and cumulatively, the violations of these constitutional rights resulted in a prejudicial distortion of the evidence admitted at petitioner's trial and adversely affected every factual and legal determination made by petitioner's trial counsel.

232. The state's duty to disclose material evidence favorable to the defense is an essential element of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 7 and 15 of the California Constitution. Evidence is deemed "material" if:

> ". . . there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley, supra*, at p. 682 (plur. opn.); see also, *id*., at p. 685 (conc. opn. of White, J.).)

233. In determining materiality, a court must consider the cumulative effect of all of the suppressed evidence, rather than considering each item individually. (*Kyles v. Whitley*, *supra*, 514 U.S. at 436-437.) Once the reviewing court has found materiality, there is no need for further harmless-error review. (*Kyles v. Whitley*, *supra*, 514 U.S. at 435.)

234. The "duty [to disclose] exists regardless of whether there has been a request for such evidence, and irrespective of whether the suppression was intentional or inadvertent." (*People v. Morris* (1988) 46 Cal.3d 1, 30 (citations omitted), overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.)

235. The duty to disclose extends to evidence which can be used to impeach a prosecution witness. (*United States v. Bagley*, *supra*, 473 U.S. at p. 676, citing *Giglio v. United States* (1972) 405 U.S. 150, 154, and *Napue v. Illinois* (1959) 360 U.S. 264, 269.) Among the most important evidence in this category is evidence of promises, inducements or benefits which the prosecution has offered to its witnesses. (See *People v. Morris*, *supra*, 46 Cal.3d at p. 30; *People v. Phillips* (1985) 41 Cal.3d 29, 46; see also *Bagley*

v. Lumpkin (9th Cir. 1986) 798 F.2d 1297.)

236. The duty to disclose also extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to others acting on the government's behalf in the case." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 437.) "As a concomitant of this duty, any favorable evidence known to others acting on the government's behalf is imputed to the prosecution." (*In re Brown* (1998) 17 Cal.4th 873, 879; see *United States v. Payne* (2nd Cir. 1995) 63 F.3d 1200, 1208.) In addition, the prosecution has an on-going post-conviction duty to disclose information casting doubt on the correctness of a defendant's convictions and judgment of death. (*Imbler v. Pachtman* (1976) 424 U.S. 409, 472, fn. 25; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; see also *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750.)

237. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

238. To the extent that the non-disclosure of favorable information was due to petitioner's trial counsel's own action or inaction (e.g., the failure to investigate or the failure to request discovery), petitioner was deprived of the effective assistance of counsel, in violation of the Sixth and

Fourteenth Amendments.

239. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

240. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

241. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

242. Petitioner hereby incorporates by reference, as if fully set forth herein, the facts and legal authorities set forth in Claim X, *infra*.

243. Prior to his testimony at petitioner's trial, Calvin Boyd was told by law enforcement that he would not be prosecuted for perjury for any false testimony which he had given at petitioner's preliminary hearing. (HT 2019, 2021.) The prosecution never disclosed this fact to petitioner's counsel at trial or after; it was disclosed to petitioner only by Boyd himself, on cross-examination during his testimony at the reference hearing held herein. (*Ibid*.)

244. The prosecution failed to provide petitioner or his counsel with material statements made by and to Calvin Boyd prior to petitioner's trial. Boyd discussed matters relevant to petitioner's case with law

enforcement on numerous occasions, including July 2, 15, 30 and 31, 1981, and August 3 and 12, 1981. To date, petitioner has been provided with brief reports of Boyd's statements on July 2 and 15, 1981, and a tape-recording of an interview occurring in the afternoon of August 3, 1981. Otherwise, the only discovery provided to petitioner or his counsel relevant to Boyd's many contacts with law enforcement consists of one or two-line entries in the police chronological records for the foregoing dates. A tape-recording of the interview of Boyd conducted on July 15, 1981, was destroyed by law enforcement and never provided to petitioner or his counsel. (See Claim X, *infra*.) Petitioner never received any report, notes or tape-recording of the "re-interview" of Boyd conducted on July 30, 1981. Similarly, no notes, reports or tapes were ever provided of the statements made by or to Boyd on July 31, 1981, on the morning of August 3, 1981, or on August 12, 1981. (See Appendix 11.) The statements made to and by Boyd on those dates were material and favorable to petitioner.[15] The brief reports of the statements made by Boyd on July 2 and 15, 1981, do not reflect all of the material statements made by or to Boyd that were favorable to petitioner. Statements attributed to Boyd in the interview report of July 15, 1981, differ dramatically from the statements which he made in the tape-recorded interview of August 3, 1981. Similarly, Boyd's testimony at the preliminary hearing differed dramatically from the statements he made on August 3, 1981. The undisclosed statements made by and to Boyd

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[15]For example, it is clear from the tape of the interview on August 3, 1981, that Boyd had made a statement before that time about some yellow boots as well as something to the effect that Morgan was supposed to call from Las Vegas. (Appendix 2.) Petitioner was provided no discovery of any such prior statements.

would reveal the reasons for which Boyd's version of events changed so dramatically over time. Those reasons as well as all statements made by or to Boyd constitute impeachment evidence to which petitioner was and is constitutionally entitled. Petitioner is and was also entitled to disclosure of the photograph of petitioner and the document bearing petitioner's name which detectives showed to Boyd on the morning of August 3, 1981. (See Appendix 2.) These items were never disclosed to petitioner or his counsel.

245. Prior to Boyd's testimony at the reference hearing herein, Deputy District Attorney Jeffrey Jonas discussed immunity with Boyd and then wrote a letter promising Boyd complete immunity from prosecution for any criminal charges relating to the instant case. (HT 1948-1967; Appendix 1.) The prosecution failed to disclose to petitioner's counsel the discussion(s) between Jonas and Boyd, the fact that immunity was granted and the immunity letter itself; disclosure occurred only when Boyd himself revealed these facts and the letter during his cross-examination by petitioner's counsel at the reference hearing herein. (Boyd, HT 1949-1950.) The egregiousness of the nondisclosure is particularly severe given the repeated efforts on the part of habeas counsel to obtain any letters written by law enforcement on behalf of Boyd (and others). (HT 37, 318-329, 1069-1075; HCT 233-277, 358-361, 379-390, 396-401.)

246. The prosecution failed to disclose to the defense prior to or after the entry of judgment Steve Rice's statement to law enforcement prior to trial that he had seen cuts on Boyd's hand or hands around the time that the Morgans were killed. (HT 282.)

247. Prior to petitioner's trial, law enforcement investigating petitioner's case had numerous contacts with Santa Clara County authorities regarding Boyd and his involvement in the prosecution of petitioner and his

codefendants. These contacts inured to Boyd's benefit. Boyd had entered a plea of guilty to burglary in Santa Clara County on January 2, 1981, had failed to appear for sentencing on January 30, 1981, and was a fugitive from Santa Clara County authorities at the time of the Morgan killings (i.e., May, 1981). (HT 1978; H.Exh. 78.) Prior to petitioner's trial, Boyd had numerous contacts with the officers investigating the Morgan murders and with Deputy District Attorney Jonas; on July 15, 1981, Boyd was arrested for the murders of Nancy and Mitchell Morgan and informed officers of his true name and date of birth on that date. (Appendices 2, 7, 8, 11, 29, 30, 34.) Accordingly, they must have been aware shortly thereafter of his criminal history and of the warrant for his arrest from Santa Clara County. In October, 1981, Boyd testified for the prosecution at petitioner's preliminary hearing. (RT 10416) It was not until August of 1982, that Los Angeles authorities served Boyd with the warrant out of Santa Clara County and returned him to that jurisdiction. (H.Exh. 78.) On September 2, 1982, Boyd posted bail and was released from Santa Clara County's custody. (*Ibid*.) September 17, 1982, was the date set for Boyd's sentencing on the Santa Clara County burglary charges; on that date, Boyd again failed to appear. (*Ibid*.) Later that day, Detective Jamieson called the Santa Clara District Attorney's office and indicated that Boyd had gotten on a bus in Los Angeles that morning, headed for Santa Clara County; based on this information, a bench warrant was stayed. (Appendix 6.) Boyd did not appear in Santa Clara County that day or the following court day, and a bench warrant was issued. (*Ibid*.) On September 28, 1982, the Santa Clara County District Attorney's office spoke again to Detective Jamieson, who said that Boyd was still needed to testify in petitioner's case and that he was expected to return to Los Angeles within a day or so. On September 30,

1982, Detective Jamieson called Santa Clara County District Attorney's office and stated that Boyd had told him he was appearing in Santa Clara County that day, to reinstate bail and reset sentencing. Boyd did in fact appear in Santa Clara County on September 30, 1982; bail was exonerated and the matter was again set for sentencing. Boyd was referred to the Santa Clara County Probation Department for a pre-sentence report. During Boyd's subsequent interview with a probation officer, he stated that he had been assisting the prosecution in petitioner's case; the probation officer noted this in his report to Boyd's sentencing judge. (HT 1979-1980; H.Exh. 78.) Boyd was finally sentenced in Santa Clara County on October 22, 1982. Despite having failed to appear at sentencing the first time, having been a fugitive for over a year, having been arrested on new charges and having failed to appear for sentencing a second time, Boyd was given the lowest possible sentence for the crime, his bail was exonerated and he was not charged with failure to appear. In short, he was treated in an extremely favorable fashion, due at least in part to communications between Detective Jamieson and Santa Clara County authorities. Moreover, even if the leniency given Boyd in his own burglary case was not in fact attributable to the contacts between government actors in the two jurisdictions, petitioner was nevertheless constitutionally entitled to disclosure of the fact that such contacts had occurred and to their content.

248. The prosecution was aware of and failed to disclose to the defense information indicating that prior to the entry of judgment in the present case, Boyd engaged in intimidating and threatening behavior with respect to other witnesses and potential witnesses who had information regarding his involvement in the Morgan killings, in an apparent attempt to prevent them from providing information damaging to Boyd himself and/or

to force them to provide information damaging to other parties including petitioner. (See, e.g., HT 282; H.Exh. O.)

249. Prior to trial, law enforcement failed to disclose to petitioner or his counsel certain tape-recorded interviews of potential witnesses, including, but not limited to that of the interview of Sandra Moss (nee Harris) on July 29, 1981. (HT 1163; H.Exh. 600.) Detective Richard Jamieson testified at the reference hearing that this interview was not tape-recorded and that he knew this because no tape number was written on the report of that interview. (See H.Exh. 600.) Detective Jamieson's testimony was false and was based on a false premise: i.e., that the report of every tape-recorded interview reflected the number of the tape on which it was recorded. This was not in fact true. For example, a "police chronology" indicates that law enforcement tape-recorded their interview of Calvin Boyd on July 15, 1981, on tape number 86041. (Appendix 11.) However, the report of that interview does not reflect that number or any suggestion that the interview was tape-recorded. (Appendix 7.) Moreover, tape number 86041 was subsequently intentionally destroyed by law enforcement (Appendix 11; see Claim X, *infra*), indicating that law enforcement's failure to indicate on the face of a report that the interview was tape-recorded was not accidental, but was intentional and undertaken in bad faith so that the tape could subsequently be suppressed. The tape-recording of the interview of Ms. Moss was favorable and material evidence and was destroyed intentionally and in bad faith. It would have shown that the police report of her interview was inaccurate and that Ms. Moss' statements to officers were far more favorable to petitioner than the report indicated, including, but not limited to, the fact that she did not provide law enforcement with a firm alibi for Boyd on the night of the killings. (See HT 1142-1191.)

250. During the course of the trial in petitioner's case, Deputy District Attorney Jonas, without notice to petitioner or his counsel, obtained from Camarillo State Hospital a copy of various confidential and privileged mental health records pertaining to petitioner. Petitioner hereby incorporates by reference as if fully set forth herein Claim XI, *infra*. Although petitioner's trial counsel had obtained from Camarillo a set of records pertaining to petitioner, the set of records obtained by Mr. Jonas was significantly more complete than the records which had been provided to petitioner's trial counsel. (Compare H.Exh.8 with H.Exh.9; HT 1703-1705.) The prosecution failed to disclose the records themselves, or the fact that they had been obtained, to petitioner or his trial counsel. (H.Exh. 9.)

251. The prosecution failed to disclose to petitioner or his counsel the content of numerous witness interviews conducted by law enforcement, including but not limited to the following.

252. On July 30, 1981, law enforcement interviewed Calvin Boyd (Appendix 11.) To date, no information regarding the content of this interview has ever been provided to petitioner or his counsel. Such information was favorable to petitioner insofar it included statements on the part of Boyd that were inconsistent with his testimony at trial and conduct on the part of the 1officers which effectively provided Boyd with information and encouraged Boyd to give subsequent material false testimony and statements incriminating petitioner.

253. On the morning and afternoon of August 3, 1981, law enforcement interviewed Calvin Boyd. (Appendices 2, 11.) No discovery was provided prior to trial of the content of that interview, nor has such discovery been provided to date. Such information was favorable to petitioner insofar it included statements on the part of Boyd that were

inconsistent with his testimony at trial and conduct on the part of the officers which effectively provided Boyd with information and encouraged Boyd to give subsequent material false testimony and statements incriminating petitioner.

254. Prior to petitioner's trial, Colette Mitchell told law enforcement that Boyd was harassing, threatening and attempting to intimidate her and that he had gotten into a physical altercation with her brother, Ron Leahy, in which Ms. Mitchell and Boyd's wife became involved. (See RT 10036) This information was never disclosed to petitioner or his counsel prior to trial and was revealed only by Ms. Mitchell herself during her testimony in front of the jury at petitioner's trial. Such information was favorable to petitioner insofar as it showed Boyd's consciousness of guilt and further suggested that he was directly involved in the Morgan killings.

255. The evidence presented at the reference hearing shows that Ms. Mitchell had numerous contacts with law enforcement in which statements were made to and by her which were favorable to petitioner and which were never disclosed to petitioner or his counsel. All such information was favorable to petitioner insofar it included statements on the part of Ms. Mitchell that were inconsistent with her testimony at trial and reflected conduct on the part of the officers which effectively provided Ms. Mitchell with information and intimidated, coerced, persuaded, threatened and otherwise caused Ms. Mitchell to give subsequent material false testimony and statements incriminating petitioner. The undisclosed information includes, but is not limited to the following:

A. Ms. Mitchell was interviewed by law enforcement on May 27, 1981. The prosecution disclosed to petitioner a very brief report of

that interview (Appendix 15), but no tape-recording, nor was there any reference to this interview in the police chronology.

B. On June 10, Ms. Mitchell spoke to detectives by phone. The only information provided to counsel in this regard was a brief entry in the police chronological record. (Appendix 11.)

C. On June 24, 1981, Ms. Mitchell was reinterviewed by detectives Bobbitt and Jamieson at her home. The prosecution disclosed a two-page report of the interview (Appendix 16), but no tape-recording was provided to counsel, nor was there any reference to this interview in the police chronology. (See Appendix 11.)

D. In July, 1981, the police came to Ms. Mitchell's apartment, accused her of dealing in drugs and asked to search her apartment. She declined to consent to a search without a warrant. One officer saw a box in Ms. Mitchell's apartment and said it looked as if it contained drugs. Ms. Mitchell threw the box, which contained pictures, at the officer. The officers asked Ms. Mitchell's landlord questions about Ms. Mitchell, including whether or not she was dealing in drugs. (RT 1180.) This information was not disclosed to counsel until Ms. Mitchell herself revealed it on the witness stand at an in limine hearing in January of 1983.

E. On July 15, 1981, as Ms. Mitchell, petitioner, "Gary" and Rick Ginsburg (a.k.a. Sanders), were parking at the apartment complex where Ms. Mitchell and petitioner's mother lived, police pulled up behind them. (HT 90; Appendix 14.) With guns drawn, the police ordered Ms. Mitchell and the others to lie down on the ground. One officer pushed Ms. Mitchell and another grabbed her. Officers searched Ms. Mitchell's car, including a tool box in her trunk, but did not seize anything; officers arrested petitioner. (RT 1178, 1180) The prosecution did not disclose the

fact that the officers manhandled Ms. Mitchell, searched her car and did not find anything until Ms. Mitchell herself disclosed it on the witness stand at an in limine hearing in January of 1983.

F. On August 6, 1981, the police spoke to Ms. Mitchell by phone. The only information provided to counsel from this conversation was a brief entry in the police chronological record. (Appendix 11.)

G. On October 22, 1981, Ms. Mitchell was interviewed at the district attorney's office. (Appendix 17; RT 10206.) The only information provided to counsel regarding this interview was a one-page handwritten statement written by Ms. Mitchell. (Appendix 17.)

H. At some time prior to October 26, 1981, Ms. Mitchell met with Deputy District Attorney Jonas and was taken before a judge. The only discovery provided to petitioner or his counsel in this regard was Ms. Mitchell's own oblique reference to it in the tape-recording of the polygraph interrogation conducted in the morning of October 26, 1981. (Appendix 13.)

I. On October 26, 1981, during a break between her two tape-recorded polygraph interviews, Ms. Mitchell met with Detectives Jamieson and Bobbitt. (Appendices 13, 14, 18.) After the second polygraph interview, Ms. Mitchell met with detectives again. (RT 10301.) The prosecution never disclosed what was said to or by Ms. Mitchell in these two meetings with the detectives.

J. During Ms. Mitchell's polygraph interrogation on the morning of October 26, 1981 she stated that law enforcement had told her they would give her full immunity before calling her as a witness. (Appendix 13.) This statement was not included in the transcript provided by law enforcement to petitioner's counsel. Although the prosecution

provided petitioner's counsel with a tape recording of the interview, the omission of this critical statement from the purported transcript of that tape recording was tantamount to suppression of the statement. The prosecution disclosed to counsel that Ms. Mitchell was granted immunity prior to her preliminary hearing testimony in November of 1981, but did not indicate that immunity had been promised even before her interview and polygraph in October of 1981.

K. The prosecution failed to disclose to petitioner or his counsel tape number 87293. The Polygraph Test Information Card for the polygraph interview and examination given to Ms. Mitchell on the afternoon of October 26, 1981, lists tape number 87293 as the tape number for that session. (Appendix 18.) However, no tape bearing that number was provided to petitioner or his counsel prior to trial, nor has such tape been provided to petitioner or his counsel to date. Tape number 87295, which was provided to petitioner's counsel prior to trial, appears to contain at least part of the polygraph interview and examination given to Ms. Mitchell on the afternoon of October 26, 1981. However, tape number 87293 appears to have contained additional portions of the polygraph interview and examination of Ms. Mitchell, and may also have included the interview of Ms. Mitchell by detectives Bobbitt and Jamieson on October 26, 1981, between the morning and afternoon polygraph interviews conducted by Bradley Kuhns.

L. At some point after the polygraph interviews on October 26, 1981, and prior to October, 29, 1981, Ms. Mitchell and her attorney met with Deputy District Attorney Jonas. (CT 591.) Mr. Jonas told her to write down what she remembered talking to petitioner and Reilly about. (CT 591-592.) On October 29, 1981, Ms. Mitchell made a list of six

statements which she had not previously disclosed. (CT 591-592, 632; RT 10017-10021; Appendix 20.) Other than the document which Ms. Mitchell wrote and which was entered into evidence at the preliminary hearing, no information was provided to petitioner regarding what was said to Ms. Mitchell by Mr. Jonas or by Ms. Mitchell to Mr. Jonas on or before October 29, 1981.

M. At some time prior to November 3, 1981, Ms. Mitchell had a discussion about the case at the District Attorney's office during the lunch hour. (RT 10205-10206.) On another occasion, Ms. Mitchell met with Mr. Jonas in the library in the courthouse. (RT 10267.) Petitioner never received any information regarding what was said to or by Ms. Mitchell on these two occasions. Indeed, the fact that these contacts occurred was not revealed until Ms. Mitchell herself did so in her testimony at the guilt phase of petitioner's trial.

N. On November 2, 1981, Ms. Mitchell spoke with Mr. Jonas by phone. (CT 604.) The only information which petitioner received regarding this conversation was Ms. Mitchell's testimony at the preliminary hearing that it had occurred.

O. Ms. Mitchell testified at petitioner's preliminary hearing on November 3 and 4, 1981. On November 3, 1981, prior to her testimony she met with the prosecutor for the signing of her immunity papers. (Appendix 22.) The only information which petitioner's counsel received of that meeting was the immunity papers themselves; petitioner was never informed as to what was said to or by Ms. Mitchell at that time.

P. At some point after her testimony at petitioner's preliminary hearing in November of 1981, Ms. Mitchell moved to Illinois. (RT 10083.) She returned to California to testify on January 24 and 15,

1983, at a hearing pursuant to Evidence Code section 403 regarding the scope and duration of the alleged conspiracy. Before her return to California, Ms. Mitchell was contacted by law enforcement on one or more occasions. To date, the prosecution has never provided petitioner or his counsel with any information regarding what statements were made to or by Ms. Mitchell during any such contacts.

Q. On January 23, 1983, Ms. Mitchell arrived in Los Angeles and met with her attorney, the detectives investigating petitioner's case, and with Mr. Jonas. (RT 1123, 10307.) On January 24, 1983, prior to her testimony, she met with Mr. Jonas and detectives again. (RT 1026-1027, 1120-1122, 10083.) Apart from a handwritten list which Ms. Mitchell herself made in preparation for her testimony on January 24, 1983 (Appendix 21), and which she herself disclosed to petitioner's counsel during her testimony on that date, the prosecution has never provided petitioner or his counsel with any information regarding what extra-judicial statements were made to or by Ms. Mitchell between her arrival in Los Angeles on January 23, 1983, and her return to Chicago after testifying at on January 25, 1983.

R. In June of 1983, Ms. Mitchell testified before petitioner's jury at the guilt phase. After her testimony at the in limine hearing in January of 1983, and before her testimony at the guilt phase, she had contact with law enforcement on one or more occasions. To date, the prosecution has never provided petitioner or his counsel with any information regarding what statements were made to or by Ms. Mitchell during any such contacts.

256. Ms. Mitchell was under the care of a mental health professional. (Appendix 13.) Petitioner is informed and believes that the

prosecution obtained her records from that mental health professional. The prosecution did not divulge that information to the defense. That information was material and favorable to petitioner in that it would have provided additional support for the contention that Ms. Mitchell's testimony at trial was false and/or misleading and that she was particularly susceptible to coercion, persuasion, suggestion and confabulation because of her psychological state.

257. Prior to trial, Steve Rice told law enforcement that Calvin Boyd had threatened him and that he had seen the cuts on Boyd's hands after the murders. (HT 282; H.Exh. O.) To date, the prosecution has never provided petitioner or his counsel any information regarding what statements were made to or by Mr. Rice to that effect. That information was material in that it constituted evidence that Boyd had committed the killings and that, after the killings, his behavior was indicative of consciousness of guilt.

258. The prosecution failed to disclose to petitioner and his counsel Joe Dempsey's statement that petitioner's codefendant Buck Reilly had told him (Dempsey) that petitioner and a "black guy" had agreed to do the killing, but that petitioner got angry and refused to participate because the "black guy" had a gun. (RT 8451, 8460.) Mr. Jonas disclosed this information after Mr. Dempsey was on the witness stand and his direct examination had begun, and then only after Mr. Dempsey had testified that he had given Mr. Jonas some "new information" earlier that day, at which point Mr. Stone, counsel for codefendant Morgan, requested a recess for Mr. Jonas to divulge the "new information" out of the jury's presence. (RT 8450.) Mr. Jonas then divulged the new information. (RT 8460.) Assuming arguendo that Mr. Jonas had in fact only received the information

earlier that day, petitioner was nevertheless entitled to disclosure of the information immediately thereafter. Mr. Jonas' failure to disclose the information until the witness was on the stand effectively prevented counsel from cross-examining Boyd on the subject. Boyd had testified immediately prior to Mr. Dempsey and was still being cross-examined at the time that Mr. Dempsey purportedly divulged the information about a "black guy" to Mr. Jonas. Both Boyd and his friend Marcus were African-American. Had Mr. Jonas disclosed Mr. Dempsey's statement in a timely fashion, defense counsel could have cross-examined Boyd in that regard and would have more effectively undermined Boyd's credibility and cast suspicion on Boyd as the actual killer.

259. The prosecution failed to disclose to petitioner or his counsel the fact that, prior to trial in the present case, a civil suit for declaratory relief had been filed to determine who if anyone should receive the life insurance proceeds for the deaths of Nancy and Mitchell Morgan and that law enforcement had been in contact with Equitable Life Insurance Company and instructed them not to pay anything to Clifford Morgan, as they were one hundred percent sure that he had arranged for the death of his wife and child. (Appendix 41.) These facts, had they been disclosed to defense counsel, could have been used to show that there was no possibility that Morgan would receive the insurance proceeds, even if he were acquitted, and that therefore, the purported goal of the conspiracy had been frustrated. These documents tend to support the contention that the conspiracy was not ongoing at the time of trial, as the prosecution contended.

260. Prior to trial in the present case, representatives of law enforcement interviewed Anna Olsen approximately three times. To date,

the prosecution has disclosed neither the fact nor the content of the interviews to petitioner or his counsel. This information was material insofar as Calvin Boyd had told Mrs. Olsen that he was at the Morgans' house when the killings occurred (H.Exh. 15), and her statement to the police undoubtedly revealed that fact. Such evidence would have constituted or led to evidence that Boyd, not petitioner, committed the charged murders.

261. Prior to trial in the present case, representatives of law enforcement interviewed Michael Mitchell in Texas, where he was living at the time of his testimony at petitioner's trial, threatened him with prosecution and compelled him to come to California and testify at petitioner's trial. To date, the prosecution has never revealed to counsel for petitioner the fact or nature of this contact with Mr. Mitchell. (HT 15.) The content of that interview was favorable to petitioner insofar as it included statements on the part of Mr. Mitchell that were inconsistent with his testimony at trial and conduct on the part of the officers which effectively provided Mr. Mitchell with information and intimidated, coerced, persuaded, threatened and otherwise caused him to give subsequent material false or misleading testimony at petitioner's.

262. As indicated herein, the majority of the prosecution's failures to disclose have yet to be remedied. The prosecution has an ongoing duty to disclose evidence favorable to petitioner after judgment is entered. (See, e.g., *United States v. Agurs* (1976) 427 U.S. 97, 106-107; *Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) The continued nondisclosure violates petitioner's rights under *Brady* and its progeny. At the proceedings held pursuant to this Court's order to show cause, respondent refused to identify or disclose any evidence or information other than that which was in the

personal possession of Deputy Attorney General Preminger. (HT of 5/3/96 at pp. 8-9; HT 3, 6-8, 18.) This view is clearly contrary to law. (See *Kyles v. Whitley*, *supra*, 514 U.S. at p. 437.) In spite of the fact that respondent made very clear that it was proceeding according to this erroneous view of its disclosure obligation, the referee erroneously found that respondent had provided petitioner with adequate discovery. (See HT 24-44, 1075.) The prosecution's violation of petitioner's constitutional rights to disclosure of favorable and material evidence thus continues.

263. The prosecution's failures to disclose must be viewed cumulatively. (*Kyles v. Whitley*, *supra*, 514 U.S. at 436-437.) Therefore, all of the failures to disclose set forth above, as well as those which appeared on the face of the appellate record, must be considered together. Petitioner hereby incorporates by reference Argument V of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal.

264. The combined *Brady* violations undermine confidence in the outcome of petitioner's guilt and penalty phases. Some or all members of the jury found Mr. Boyd to be a credible witness. (Appendix 12.) Had the jury known that Boyd had been promised immunity from prosecution for perjury and that he had been assisted in his own criminal case in exchange for his cooperation in petitioner's case, at least some of those jurors would have had a different opinion of his credibility and would have disbelieved his testimony. The jury would have questioned the integrity of the entire prosecution case and would not have sentenced petitioner to death or convicted him of capital murder.

265. Had the foregoing evidence been disclosed to petitioner's trial counsel, petitioner would not have been convicted of capital murder and

petitioner would not have been sentenced to death.

266. As a result of the prosecution's continuing violations of its disclosure obligation, petitioner has been denied a full and fair hearing in the instant proceeding. Petitioner hereby incorporates by reference as if fully set forth herein Claim XXII, *infra*. The prosecution's failure to disclose all favorable and material evidence continues to prejudice petitioner by impairing his ability to establish entitlement to relief on habeas corpus.

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THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY FAILING TO PRESERVE MATERIAL EXCULPATORY EVIDENCE

267. Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, sections 1, 7, 15, 16, and 17 of the California Constitution and Penal Code section 1473, in that state authorities failed to preserve evidence favorable to petitioner both as to guilt and as to the appropriateness of the death penalty. The rights violated include, but are not limited to: the right to due process and a fair trial; the right to the effective assistance of counsel; the right to confront and cross-examine witnesses; the right to present a defense; the right to a trial free from the influence of false evidence; right to an accurate and reliable determination of guilt, death eligibility and penalty; and the right to be free from cruel and unusual punishment. Individually and cumulatively, the violations of these rights have prejudicially affected and distorted the investigation, discovery, presentation and consideration of evidence as well as the factual and legal determinations made by trial counsel, the courts and the jurors at all stages of the proceedings through the present time. (*California v. Trombetta* (1984) 467 U.S. 47; *Strickland v. Washington*, *supra*, 466 U.S. 668; *Beck v. Alabama* (1980) 447 U.S. 625*; United States v. Agurs*, *supra*, 427 U.S. at p. 112; *Giglio v. United States*, *supra*, 405 U.S. 150; *Napue v. Illinois, supra*, 360 U.S. at pp. 269-272; *Mooney v. Holohan* (1935) 294 U.S. 103; *Brady v. Maryland*, *supra*, 373 U.S. at p. 87.)

268. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the

reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

269. To the extent that this Court determined that the destruction of evidence here at issue was due to defense counsel's failure to investigate and/or litigate petitioner's right to discovery, petitioner has been deprived of the effective assistance of counsel.

270. To the extent that the facts set forth below could not reasonably have been known by the state or by trial counsel at the time of trial, they constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings and undermining the prosecution's case against petitioner such that collateral relief is appropriate.

271. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

272. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

273. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial

and post-conviction, additional facts in support of this claim would be available to petitioner. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

274. The prosecution failed to preserve, and took affirmative steps to destroy, tape-recordings of interviews of petitioner, his codefendants, witnesses and potential witnesses. The tapes which were destroyed include, but are not limited to,[16] the following:

A. On July 15, 1981, the date of petitioner's arrest in the present case, law enforcement tape-recorded interviews of Calvin Boyd, petitioner, and his codefendants Cliff Morgan and Mark Reilly. (Appendix 11.) All four interviews were recorded on a tape numbered 86041. (*Ibid.*) On July 20, 1981, an employee of the Los Angeles Police Department by the name of Norman ordered that tape number 86041 be erased. (Appendix 11 [see entry dated 8/24/81].) The recordings on tape number 86041 included evidence favorable to petitioner, including, but not limited to, statements made by and to Boyd which were inconsistent with his testimony at the preliminary hearing and trial. The exculpatory value of the tape recording was necessarily apparent to the officer at the time he ordered it destroyed; indeed, there is no conceivable reason for destroying this evidence unless it was helpful to petitioner and his codefendants. The erasure was intentional and undertaken in bad faith, as it was affirmatively ordered by an officer in the Los Angeles Police Department. Petitioner had

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[16]During the course of their investigation, detectives tape-recorded interviews surreptitiously, without informing the witness being interviewed that the interview was being tape-recorded or asking the witness for permission to do so. (See, e.g., CT 2234, 1761.) Accordingly, petitioner has no way of ascertaining what additional tape recordings were made and destroyed by law enforcement.

access to no comparable evidence, since no civilian witnesses were present for any of the interviews reflected on the tape.

B. On July 29, 1981, detectives interviewed Sandra Moss (nee Harris) and tape-recorded the interview. (HT 1163; H.Exh. 600.) No tape-recording of that interview has ever been provided to petitioner or his counsel. At the reference hearing, detective Richard Jamieson denied that such a tape-recording ever existed. Detective Jamieson's testimony was based on a false premise: i.e., that the written report of any law enforcement interview which was tape-recorded reflects the number of the tape on which it was recorded. Because no tape number appears on the report of the interview of Sandra Moss on July 29, 1981, Detective Jamieson concluded that the interview was not tape-recorded. However, other evidence presented at the reference hearing shows that not every report of every interview that was tape-recorded reflects as much. For example, a "police chronology" indicates that law enforcement tape-recorded their interview of Calvin Boyd on July 15, 1981, on tape number 86041. (Appendix 11.) The report of that interview does not reflect any such number, nor does it suggest in any way that the interview was tape-recorded. (Appendix 7.) Moreover, tape number 86041 was subsequently destroyed by law enforcement (Appendix 11), indicating that law enforcement's failure to indicate on the face of a report that the interview was tape-recorded was not accidental, but was intentional and undertaken in bad faith so that the tape could subsequently be suppressed. The tape-recording of the interview of Ms. Moss (nee Harris) was favorable and material evidence and was destroyed intentionally and in bad faith. It would have proven that the police report of her interview was inaccurate and that Ms. Moss' statements to officers were far more favorable to

petitioner than the report indicated. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 176, *supra*. The exculpatory value of Ms. Moss' statement was apparent to the officers at the time of the tape's destruction: they knew that Boyd was a suspect and that any evidence tending to incriminate him would be helpful to petitioner; moreover, they knew that the tape would prove that Ms. Moss had not implicated petitioner as their report falsely asserted. No comparable evidence was available to petitioner, since there were no witnesses to the interview.

275. The prosecution failed to preserve physical evidence from the bodies of Nancy and Mitchell Morgan. Documents entered into evidence at the reference hearing show that law enforcement failed to preserve fingernail scrapings or cuttings from the body of Nancy Morgan. It was clear from the condition of the bodies that a struggle had preceded the deaths. (HT 2253.) Nancy Morgan had long, painted fingernails at the time of her death. (People's Exh. 57 [at trial].) Both because of the length and strength of her fingernails and because of her adult stature, common sense dictates that she would have been much more likely to have scratched the assailant in the struggle immediately preceding her death. However, law enforcement failed to gather fingernail scrapings from her body. (Appendix 31.) Item 31 of the property gathered contains only the fingernail scrapings from the body of Mitchell Morgan and not from the body of Nancy Morgan. (Appendix 31.) Had law enforcement preserved fingernail scrapings from the body of Nancy Morgan, skin cells of the assailant would have been contained therein, reasonably competent counsel would have obtained a sample of those skin cells and subjected that sample to ABO- and enzyme-typing and petitioner would have been excluded as the assailant. Petitioner

would then not have been found guilty of capital murder or sentenced to death. Moreover, the fingernail scrapings from the body of Mitchell Morgan were not preserved properly: that is, the specimen was refrigerated, not frozen. Had that specimen been frozen, it could now be subjected to conventional ABO- and enzyme-testing to establish that petitioner was not the assailant and that counsel was ineffective for failing to conduct such testing prior to trial. However, since the specimen was not properly preserved, such testing is now impossible. The specimens are and were stored at the scientific investigative division of the Los Angeles Police Department. In 1981, employees of that division were well aware of the availability of ABO- and enzyme- testing on specimens containing a suspect's skin, blood or semen. Indeed, they themselves conducted such analysis of other specimens taken from the body of Nancy Morgan. Accordingly, they were aware of the exculpatory value of such evidence at the time they failed to preserve it. Moreover, the fact that they gathered fingernail scrapings from the child's body but not the adult's shows that the failure to gather the specimen from Mrs. Morgan's body was intentional and undertaken in bad faith. Similarly, crime lab employees were certainly aware that freezing is necessary to preserve samples of blood and tissue for future testing and that refrigeration results in degradation and contamination of the specimen. Accordingly, the failure to freeze the sample was also undertaken intentionally and in bad faith, with knowledge of its exculpatory value. No comparable evidence was then or now available to petitioner, as law enforcement took exclusive control of the bodies, and they were shipped to family members in New Jersey for burial. Thus, by the time of petitioner's arrest, nearly two months after the bodies were discovered, the opportunity to compel preservation of the evidence had long passed.

276. Individually and cumulatively, the failure by the prosecution to preserve and disclose exculpatory evidence prejudicially affected and distorted the guilt phase, special circumstance, and penalty phase determinations in this case, including the investigation, discovery, presentation, and consideration of evidence as well as each and every factual and legal determination made by defense counsel, the trial court and the jurors. Therefore, the judgment must be reversed in its entirety.

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XI

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY UNLAWFULLY OBTAINING PETITIONER'S CONFIDENTIAL PSYCHIATRIC RECORDS AND THEN ARGUING THAT THERE WAS NO EVIDENCE PETITIONER WAS MENTALLY ILL

277. Petitioner's judgment and sentence of death were obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, in that the prosecutor committed gross misconduct violating petitioner's right to due process and a fair trial; his right to confrontation and cross-examination; his right to counsel and to present a defense; his right to a reliable and accurate penalty verdict and sentence; and his right to be free from cruel and unusual punishment: prior to petitioner's penalty phase, the prosecutor illegally obtained petitioner's psychiatric records; at the penalty phase, the prosecutor knowingly argued to the jury that petitioner had never suffered from mental illness.

278. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

279. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to

this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

280. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

281. Although a prosecutor may vigorously present facts favorable to his side, that argument ". . . does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343, disapproved in part on other grounds in *People v. Morse* (1964) 60 Cal.2d 631.) This misconduct, combined with the many other instances of misconduct by the prosecutor and law enforcement, resulted in a miscarriage of justice. (See *People v. Hill* (1998) 17 Cal.4th 800; *People* v. *Bell* (1989) 49 Cal.3d 502, 533.) Under the circumstances, the absence of an objection to the misconduct during closing argument does not waive the error. (See *People v. Green* (1980) 27 Cal.3d 1, 34, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 831.) In the event that this Court finds that Mr. Demby waived the error by failing to object, no reasonable justification for that omission is conceivable and petitioner was deprived of the effective assistance of counsel by Mr. Demby's omission..

282. This claim is based on the following facts:

283. Between the jury's verdict at the guilt phase and the commencement of the penalty phase of petitioner's trial, Deputy District Attorney Jeffery Jonas unlawfully obtained a copy of petitioner's confidential and privileged mental health records from Camarillo State Hospital. Mr. Jonas, an experienced capital prosecutor, knew or should have known that petitioner's Camarillo State Hospital records were

confidential and protected from disclosure by Welfare and Institutions Code section 5328[17] and the psychotherapist-patient privilege (Evid. Code, § 1014), which operates independently of the Welfare and Institutions Code privilege. (*People v. Pack* (1988) 201 Cal.App.3d 679, 684-685; *People v. Gardner* (1984) 151 Cal.App.3d 134, 140 [Welfare and Institutions Code section 5328 does not permit disclosure of information to a probation officer preparing a presentence or probation report]; 53 Ops.Cal.Atty.Gen. 151, 156 (1970) [same].) Mr. Jonas also knew or should have known that the only way that he could lawfully obtain such confidential records was to first obtain petitioner's consent for the release of such confidential information. Moreover, he was required by law to provide written notice to petitioner and his trial counsel prior to obtaining a copy of petitioner's Camarillo State Hospital records. (See Code of Civ. Proc., §§ 1985, 1985.3.) Mr. Jonas did not do this (see HT 1704); instead, he contacted the trial judge ex parte and prevailed upon him to direct Camarillo State Hospital to provide the District Attorney's Office with a copy of petitioner's records from that facility. (See H.Exh.9.)

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[17]Welfare and Institutions Code section 5328 provides in pertinent part as follows:

> "All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential. Information and records obtained in the course of providing similar services to either voluntary or involuntary recipients prior to 1969 shall also be confidential."

284. Knowing the facts and circumstances of petitioner's hospitalization at Camarillo State Hospital, Mr. Jonas falsely implied to petitioner's jury at the penalty phase that petitioner had "walked away from" Camarillo State Hospital (RT 13954), and argued that petitioner had no mental or psychological problems, stating that, if he did, the jury would have "heard about it." (RT 14049.) Mr. Jonas's representations to petitioner's jury were knowingly false and constitute prosecutorial misconduct.[18]

285. Mr. Jonas' misconduct in this regard was prejudicial. The records which Mr. Jonas unlawfully obtained from Camarillo State Hospital showed that petitioner was discharged from Camarillo State Hospital and did not "walk away" against doctor's advice or without permission to do so. Physicians at Camarillo State Hospital released petitioner with a diagnosis of Chronic Undifferentiated Schizophrenia. At the time of his discharge, physicians at Camarillo believed that he was still suffering from the symptoms of that illness: they recommended that he seek outpatient mental health care, released him with a supply of Stelazine, a psychoactive medication, and recommended that he continue to take such medication on a regular basis. Mr. Jonas' argument falsely conveyed to the jury that

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[18] *People v. Contreras* (1998) 66 Cal.App.4th 842 [misconduct for prosecution to argue that there was no evidence that defendant had any kind of problems before, after court had excluded evidence of childhood trauma and PTSD. "While the statement that there was no evidence before the jury of prior problems is an accurate one, it implies that no such evidence exists, and the prosecutor knew that to be untrue."], citing *People v. Purvis*, *supra*, 60 Cal.2d at p. 343, disapproved in part on other grounds in *People v. Morse*, *supra*, 60 Cal.2d 631, for the proposition that vigorous presentation of facts "does not excuse either deliberate or mistaken misstatements of fact."

petitioner was not mental, that his behavior was completely within his control and that he was dangerous. Had the jury known the truth, they would have seen petitioner as a person deserving of sympathy, a person with mental illness outside of his control, but a person who nevertheless obeyed institutional rules and would not pose a threat to security and safety in an institutional setting. Had petitioner's jury known that petitioner had been diagnosed as mentally ill and that he had not escaped from Camarillo State Hospital, petitioner would not have been sentenced to death.

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XII

THE TRIAL JUDGE COMMITTED MISCONDUCT BY ENTERTAINING AN EX PARTE COMMUNICATION WITH THE PROSECUTOR AND BY ORDERING CAMARILLO STATE HOSPITAL TO PROVIDE HIM WITH PETITIONER'S CONFIDENTIAL PSYCHIATRIC RECORDS

286. Petitioner's sentence and judgment of death were obtained in violation of his rights to due process, counsel, effective assistance of counsel, confrontation, fundamental fairness, objective and reliable jury determination of penalty, and a fair and objective judicial determination pursuant to Penal Code section 190.4(e), under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, in that the trial judge engaged in improper ex parte communications with Mr. Jonas and, without notice to petitioner or Mr. Demby, and unlawfully ordered Camarillo State Hospital to release to Mr. Jonas records that were privileged and confidential to petitioner.

287. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

288. The following facts, which were proven at the reference hearing held in the present case, establish the basis for this claim. These

facts were discovered shortly before beginning of the reference hearing herein, when the prosecution provided counsel for petitioner certain documents in discovery. Said discovery included a large packet of medical and psychiatric records from Camarillo State Hospital pertaining to petitioner. Attached to that packet of records was a cover letter, detailing the manner in which the records had been provided to Mr. Jonas. (H.Exh. 9.)

289. In 1978, petitioner was hospitalized at Camarillo State Hospital and diagnosed with, inter alia, Chronic Undifferentiated Schizophrenia.

290. Petitioner's jury returned its verdicts at the guilt phase on August 31, 1983. The penalty phase of petitioner's trial began on September 20, 1983.

291. At some time after the jury returned its verdict at the guilt phase and prior to the start of petitioner's penalty phase, Mr. Jonas communicated with the trial judge ex parte and, without notice to petitioner or Mr. Demby, asked the judge to assist him in obtaining petitioner's medical and psychiatric records from Camarillo State Hospital.

292. Still without giving notice to petitioner or Mr. Demby, the trial judge contacted staff counsel for Camarillo State Hospital and instructed that petitioner's mental health records be released to an investigator for the District Attorney's Office. (H.Exh. 9.) The records were in fact subsequently released to the District Attorney's Office.

293. Mr. Demby did not learn of this ex parte communication until the time of his testimony at the reference hearing held herein. At that time, he was shown the records obtained by Mr. Jonas, with the cover letter indicating that they had been released pursuant to the trial court's directive.

Until that time, Mr. Demby had been unaware that the records had been disclosed to Mr. Jonas. (HT 1704.)

294. The trial judge, in doing what he did, acted as an advocate for the government and committed prejudicial misconduct. The trial judge's actions violated petitioner's right to due process of law (see, e.g., *McKenzie v. McCormick* (1988) 488 U.S. 901) and constitute a gross breach of the appearance of justice (see, e.g., *United States v. Wolfson* (9th Cir. 1980) 634 F.3d 12170).

295. The trial judge's misconduct in this case also exposed him to information pertaining to petitioner as to which Mr. Demby had no notice or opportunity to explain or rebut. The trial judge, aware of this secretly obtained information, was later called upon to rule on the question of whether the jury's death verdict should be modified. (Pen. Code, § 190.4, subd. (e).) The trial judge's misconduct prejudicially tainted that determination and, at the very least, petitioner's sentence of death must be reversed. (See, e.g., *United States v. Perri* (9th Cir. 1975) 513 F.2d 572, 575 ["Fairness to the defendant in this case requires that he be apprised in detail of the nature of the adverse information on which the court relied in passing sentence."].)

296. It is also apparent from the manner in which Mr. Jonas circumvented the law and obtained a copy of petitioner's confidential Camarillo State Hospital records through ex parte contacts with the trial judge that Mr. Jonas enjoyed a special relationship with the trial judge. Further evidence of this special relationship is provided by the fact that, when Mr. Jonas was later arrested in July of 1986 and charged with petty theft, the trial judge testified as one of three character witnesses at Mr.

Jonas' trial. (See Appendices 32, 33.)[19] At the time of the trial judge's testimony in Mr. Jonas' case, the appellate record in petitioner's case had not yet been certified by this Court and was still before the trial judge on petitioner's motion to correct and settle the record on appeal. The trial judge's involvement in Mr. Jonas' case was never disclosed to petitioner's appellate counsel.[20]

297. Had the trial judge's bias in favor of Mr. Jonas been disclosed to Mr. Demby at the time the trial judge was assigned to try petitioner's case, petitioner would have moved to challenge the trial judge for cause. (See Code of Civ. Proc., §§ 170.5, 170.6.)

298. The trial judge's undisclosed bias in favor of Mr. Jonas so infected all of the proceedings that reversal of the entire judgment is warranted.

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[19]The theft case against Mr. Jonas was ultimately dismissed because the jury could not agree on a verdict (the jury was deadlocked six to six). (Appendix 33.) According to several of the jurors who were interviewed after the case was dismissed, the jurors who voted against guilt were heavily influenced by Mr. Jonas' three character witnesses. (*Ibid*.) In a post-trial interview, one juror stated that Mr. Jonas' character witnesses "would not be likely to put their career and reputation on the line for someone they didn't have a great deal of respect for." (*Ibid*.)

[20]The appellate record in petitioner's case was filed by this Court on June 17, 1988.

XIII

PETITIONER'S TRIAL ATTORNEY UNREASONABLY AND PREJUDICIALLY FAILED TO INVESTIGATE AND PRESENT EVIDENCE UNDERMINING THE PROSECUTION'S THEORY OF PETITIONER'S GUILT

299. Petitioner's conviction, death sentence and confinement were obtained in violation of the petitioner's right to the effective assistance of counsel, to due process and a fair trial, to confrontation of witnesses, to a jury trial, to present a defense, to a fair, individualized, reliable and/or nonarbitrary guilt and penalty determination and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16 of the California Constitution, in that the Los Angeles County Public Defender's Office unreasonably and prejudicially failed to investigate and present evidence in petitioner's defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68; *Strickland v. Washington* (1984) 466 U.S. 668; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Horton v. Zant* (11th Cir. 1991) 942 F.2d 1449, 1462; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

300. A criminal defendant has the right to the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (See, e.g., *Strickland v. Washington*, *supra*, 466 U.S. 668, 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *In re Cordero* (1988) 46 Cal.3d 161, 179-180; *People v. Pope*, *supra*, 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective*

assistance. Specifically, it entitles him to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 215, quoting *United States v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202, emphasis in original, citations omitted; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 686; *In re Cordero*, *supra*, 46 Cal.3d at p. 180; *People v. Pope*, *supra*, 23 Cal.3d at pp. 423-424.) The defendant can reasonably expect that, before counsel undertakes to act or not to act, he or she will make a rational and informed strategic and tactical decision founded on adequate investigation and preparation. (See, e.g., *In re Fields* (1990) 51 Cal.3d 1063, 1069; *In re Hall*, *supra*, 30 Cal.3d 408, 426; *People v. Frierson*, *supra*, 25 Cal.3d 142, 166; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.) If counsel fails to make such an informed decision, his action – no matter how unobjectionable in the abstract – is professionally deficient. (See, e.g., *In re Hall*, *supra*, 30 Cal.3d at p. 426 [emphasizing that the exercise of counsel's professional discretion must be reasonable and informed and founded on reasonable investigation and preparation]; *People v. Frierson*, *supra*, 25 Cal.3d at p. 166 [same]; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.)

301. To the extent that trial counsel's failure to investigate or to present evidence was purportedly based on strategic considerations, those considerations do not withstand constitutional scrutiny. Before an attorney can make a reasonable strategic choice not to pursue a certain line of investigation, the attorney must obtain the facts needed to make the decision; an attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

(*Strickland v. Washington*, *supra*, 466 U.S. 668, 690-691; see also *Griffin v. Warden, Maryland Correctional Adjustment Center* (4th Cir. 1992) 970 F.2d 1355, 1358; *Horton v. Zant* (11th Cir. 1991) 941 F.2d 1449, 1462.)

302. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's right to due process, a fair trial and a reliable guilt and penalty determination have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358.)

303. This claim conforms the pleadings to the evidence presented at the reference hearing held herein. The evidence presented at that hearing established petitioner's right to relief on the claim of ineffective assistance at the penalty phase, the claim on which this Court issued the order to show cause. However, the evidence which proved petitioner's right to relief on that claim simultaneously proved petitioner's right to relief on the present one. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

304. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the

instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

305. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and in post-conviction proceedings, additional facts in support of this claim would be available to petitioner.

306. Petitioner offers the following evidence in support of this claim, virtually all of which was presented at the reference hearing:

307. Before, during and after trial, petitioner steadfastly maintained his innocence. No physical or other direct evidence links petitioner to the crime. Until Colette Mitchell's change of testimony in January of 1983, petitioner's whereabouts on the night of the killings were accounted for. Petitioner had virtually no history of violent or criminal behavior. Mr. Demby's own preliminary investigation suggested that Calvin Boyd was a much more likely suspect: several witnesses told Mr. Demby's investigator that they were afraid of Boyd, that he was assaultive and that he had threatened one woman with a knife; one woman stated that Boyd had admitted being the killer. (H.Exh. 15.) Mr. Demby knew that the prosecution would call Boyd as a witness at the guilt phase of the trial. Mr. Demby knew that the prosecution would put on evidence that the killings occurred on the morning of May 21, 1981, when Colette Mitchell's memory of petitioner's whereabouts was the foggiest. Mr. Demby knew that the prosecution would put on evidence that petitioner and codefendant Reilly were friends, that Reilly was in charge of hiring a hit man to kill the victims and that Reilly and petitioner were together on the night of the killings. Mr. Demby recognized that investigating other suspects including Boyd was

extremely important. He failed to recognize that police reports were not a reliable indication of whether a witness would reveal anything favorable to the defense. Although Mr. Demby requested that his investigator interview some of the relevant witnesses, including those whom he called the "Boyd connection," most of the interviews he requested were never done. The few interviews that were undertaken were done incompetently. Mr. Demby consulted no experts regarding the forensic evidence. He consulted no experts regarding petitioner's mental state. He delegated the investigation of petitioner's life history, including his activities leading up to the crime, to a first-year law student who worked on the case part-time for approximately one month.

A. Failure to Investigate Evidence of Third Party Culpability

308. At the guilt phase of trial, one of the prosecution's key witnesses against petitioner was Calvin Boyd, also known as Washington Kelvin Boyd, Calvin Love, Calvin McKay and Kelvin Boyd. Boyd testified, inter alia, that petitioner's codefendant, Mark Reilly, told him (Boyd) that he (Reilly) and petitioner had committed the killings; Reilly purportedly asked Boyd not to tell petitioner of this statement; Boyd testified that petitioner later confronted him (Boyd) and said he had been asking too many questions. (RT 8111, 8113.) Boyd had testified at petitioner's preliminary hearing and had been named as a member of the conspiracy in each of the charging instruments filed against petitioner. (CT 1-9, 11-17, 55-73.) Mr. Demby knew that Boyd claimed to have been asleep at his home at the time the killings occurred and that his purported alibi witnesses were his wife, Arzetta Harvey, and her friend, Sandra Moss

(nee Harris).[21]

309. Mr. Demby was on notice that Boyd's alibi was potentially false: in addition to the fact that Boyd's only alibi witnesses were his wife and her friend, Mr. Demby was provided a taped interview of Colette Mitchell in which she stated that she saw Boyd walk by Reilly's apartment late on the night of the killings, when he claimed to have been too drunk to walk on his own and at home in bed. (H.Exh. 85; Appendix 13.) Indeed, at petitioner's preliminary hearing, Reilly's then-attorney, Mr. LeBell, stated on the record that he had reason to believe Boyd's alibi was "phony." (CT 2726.)

310. In preparing petitioner's case for trial, Mr. Demby recognized that Calvin Boyd may well have been the killer of Nancy and Mitchell Morgan and that investigating Boyd and his relationship to the crime was of great importance to petitioner's defense. (Report at p. 18.) Indeed, Mr. Demby argued to the jury at both guilt and penalty phases of petitioner's trial that Boyd and Marcus may have been the killers. However, Mr. Demby's investigation of Boyd and Marcus and their relationship to the charged killings was inadequate and fell below professional norms prevailing at the time of petitioner's trial. (Report at pp. 68-71.)

311. The Los Angeles County Public Defender's Office

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[21]At the preliminary hearing and trial, Boyd testified that, on the night of the killings, he spent the evening at the Vose Street Apartments drinking and using drugs with friends (i.e., Marcus, Ollie Epps, Marcia Sanders and Jeff). (RT 8106-8107, 8158, 8214; CT 2640, 2684-2685, 2688.) He claimed that, at around 10:30 or 11:00 p.m., he felt as if he were going to lose consciousness and had to be taken to his apartment, whereupon his wife, Arzetta Harvey, and her friend, Sandra Moss (nee Harris), undressed him and he immediately fell asleep. (RT 8106-8107, 8157; CT 2640, 2696.)

unreasonably delayed investigating petitioner's case. Petitioner was arrested in July of 1981 and the Public Defender's Office was appointed to represent him shortly thereafter. Nevertheless, the Public Defender's Office did not begin its investigation in petitioner's case until the latter part of January of 1982. This delay was not reasonable, and fell below the standard of care for attorneys trying death penalty cases in Los Angeles County at that period of time. (HT 2396-2397; Report at, p. 69.)

312. Mr. Demby was assigned to petitioner's case in January of 1982. Shortly thereafter, he entrusted Public Defender Investigator Ralph Cano with investigating what he dubbed "the Boyd connection." (Report at pp. 3, 20.) Mr. Demby asked Mr. Cano to go to the Vose Street apartments, interview some of the residents, and follow up on any leads that he obtained. (HT 1720-1721, 1748; H.Exh. 21; Report at p. 19.)

313. In February and March of 1982, Mr. Cano interviewed four residents of the Vose Street Apartment, who provided information indicating, inter alia, that they thought Calvin Boyd was violent and dangerous; that he had threatened, assaulted and/or intimidated residents of the Vose Street Apartments; that he had been known to wield a knife; that he was regarded as untrustworthy; that he was a heroin user; that he had tried to shift suspicious for the Morgan killings onto another Vose Street resident; that he abused his wife and she was afraid of him; and that he had admitted to someone his participation in the killings. (Report at p. 19; H.Exh. 15.) Police reports in Mr. Demby's files indicated that Debbie Sportsman told police on July 13, 1981, that a few days earlier, Boyd blocked her car and insisted on talking to her as she was trying to leave the Vose Street Apartments. (Appendix 11.) Mr. Demby himself interviewed Steve Rice, who repeatedly told Mr. Demby that, after the killings, Boyd

had physically attacked him and ordered him not to mention his (Boyd's) name to the police. (HT 1849; Appendix 35.) Boyd himself admitted in his testimony at petitioner's preliminary hearing he "jammed [Steve] up" for talking about the case. (CT 2667.) Also at the preliminary hearing, Reilly's attorney, Mr. LeBell, made a statement on the record indicating he had reason to believe that people around the Vose Street apartments were afraid of Boyd, that Boyd had been threatening people, and that Boyd had threatened Reilly with a knife and demanded money. (CT 2729.) Mr. Demby therefore had reason to believe that Boyd was violent, that he had admitted committing the killings, that many people around the Vose Street apartments were afraid of him and that he had intimidated and threatened potential witnesses who might have had knowledge of his involvement in the Morgan killings.

314. In early September of 1982, approximately five months before jury selection began in petitioner's case, Mr. Demby asked Mr. Cano to interview and/or re-interview the following individuals with regard to the Boyd connection: Calvin Boyd, Arzetta Harvey, Arzel "Flicky" Foreman, Marcia Sanders (King), Marcus, Selena, Rick Sanders (a.k.a. Ginsburg), Annette Blodgett, Patti Hendricks, Anna Olsen, Wesley Frank, and Kenton and Cynthia Catlett. (Report at pp. 21-27; H.Exh. 15.)

315. Later in September of 1982, Mr. Demby recognized that Mr. Cano's work was substandard and asked his supervisor for additional investigators. (HT 1745.) New investigators were assigned and, at the end of September, 1982, Mr. Cano was relieved of his duties on petitioner's case. (HT 1746-1747; H.Exh. 31.) Despite his misgivings about the quality of Mr. Cano's work, Mr. Demby did not have any of the new investigators take over, or redo, any of the critical areas, including the "Boyd

Connection," that had been previously assigned to Mr. Cano. (HT 1747.) Neither Mr. Cano nor any other person working on behalf of petitioner prior to trial ever interviewed or even attempted to interview Calvin Boyd, Arzetta Harvey, Arzel "Flicky" Foreman, Anna Olsen, Marcia Sanders (King), Marcus, Ollie Epps,[22] Selena, Rick Sanders (a.k.a. Ginsburg), or re-interviewed Annette Blodgett, Patti Hendricks, Wesley Frank, and Kenton and Cynthia Catlett, as requested by Mr. Demby in his investigation request. In fact, Mr. Demby and his office unreasonably stopped investigating Calvin Boyd and the "Boyd Connection" approximately a year before petitioner's guilt trial began.[23] Mr. Demby's failure to ensure that the investigative tasks he had identified as necessary were in fact completed and his failure to supervise adequately the investigators assigned to assist him constitute deficient performance. (Report at p. 69.)

316. In addition to the fact that Mr. Demby failed to make sure that the interviews he had requested were in fact conducted, he also unreasonably failed to identify the need to interview a number of key potential witnesses. For example, Mr. Demby unreasonably failed to request that investigators interview Sandra Moss (nee Harris), who had purportedly provided police with an alibi for Boyd on the night of the murders. Mr. Demby unreasonably failed to request that investigators

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[22]Ollie Epps was the boyfriend of Marcia Sanders (King) and, at the time of the killings, lived with Marcia Sanders, Rick Ginsburg and Rick Ginsburg's brother at the Vose Street Apartments. (HT 62-63.) Mr. Epps died on May 17, 1989. (HT 100; H.Exh. 87.)

[23]Most of the investigation of Calvin Boyd and the "Boyd Connection" was conducted during the months of January, February and March of 1982 (see Exh. 15); the guilt phase trial commenced in February of 1983.

interview James Moss, Sandra Moss's live-in boyfriend, who was named on the face of the police report of the interview of Sandra Moss. Mr. Demby also unreasonably failed to request that his investigators interview Ollie Epps, who was Boyd's close friend and one of the people he claimed he was with on the evening of the killings. (H.Exh. 15; HT 2414-2415.)

317. Mr. Demby's investigation was deficient insofar as he relied on the contents of police reports to decide whether several key witnesses had information helpful to petitioner's defense. (Report at p. 70.) At the reference hearing, Mr. Demby attempted to justify his failure to interview Rick Ginsburg (Sanders), Sandy Moss (Harris), James Moss and Marcia King (Sanders) by stating that he had seen nothing in the police reports indicating that these witnesses had anything useful to say. (HT 2052-2055.) Mr. Demby was not competent in simply relying on the information in the police reports to decide which individuals had information useful to the defense. (HT 2402-2403; Report at p. 70); he "was under an independent obligation to determine the usefulness of the dozens of witnesses located by police investigation, most of whom were friends and acquaintances of petitioner." (*In re Hall*, *supra*, 30 Cal.3d at 426; see also *In re Neely* (1993) 6 Cal.4th 901, 919; *Ferguson v. State* (Miss. 1987) 507 So.2d 94, 96 ["It appears to us that trial counsel made little or no effort to conduct an independent investigation; rather, he seems to have relied almost exclusively on material furnished to him by the state during discovery."]; *Schlup v. Bowersox* (E.D. Mo. 1996) ___ F.Supp. ___, 1996, U.S.Dist. LEXIS 8887.)

318. Whether due to his failure to supervise and ensure that the individuals he named in investigation reports were interviewed and interviewed competently or to his failure to recognize the need to interview

witnesses named in particular police reports, Mr. Demby's failure to contact and interview Arzel Foreman, Arzetta Harvey, Rick Ginsburg (Sanders), Anna Olsen, Marcia Sanders (King), Marcus, Ollie Epps, Selena, Sandra Moss (Harris), James Moss, Michael Mitchell, and Calvin Boyd himself, all of whom were available at the time of petitioner's trial, constitutes deficient performance. (Report at pp. 69-71.)

319. As to those Vose Street residents who were interviewed by Mr. Demby or his investigators, Mr. Demby unreasonably failed to make sure that all relevant questions, including those pertaining to Boyd, were posed. Reasonably competent counsel would have made sure that he or his investigator asked anyone likely to have information regarding Boyd questions designed to explore Boyd's involvement in the crime and his credibility (or lack thereof) as a witness. Reasonably competent counsel would have inquired of any such witness: whether Boyd had made any admissions regarding his involvement in the Morgan killings; whether Boyd had made any admissions regarding the truth or falsity of his testimony against petitioner; whether Boyd carried a knife and the appearance of any such knife; whether Boyd had ever committed an act of violence with a knife; whether Boyd had ever said that he had committed an act of violence with a knife; whether Boyd had a reputation for violence or a history of violent, threatening or intimidating behavior; whether Boyd's behavior or appearance changed after the killings; whether Boyd had a motive to commit the killings; whether Boyd exhibited any evidence of consciousness of guilt, including whether or not he had made false statements to law enforcement regarding the killings or his alibi, whether he had pressured others to provide police with false and/or misleading information regarding his whereabouts on the night of the murders, and whether he had made

statements exhibiting an attempt to shift suspicion to persons other than himself; whether Boyd had a reputation for dishonesty; and whether he had ever lied in order to protect himself or his own interests. Reasonably competent counsel would have investigated the truth or falsity of Boyd's testimony at the preliminary hearing, including: whether he in fact had never been to prison and had no felony convictions (CT 2707); whether he was married to Arzetta Harvey, whom he claimed was his "common law wife" (CT 2640); whether Boyd walked through Steve Rice's apartment "mostly every day" (CT 2641, 2690, 2692); whether Boyd, Harvey and Harvey's son, Arzel Foreman, walked through Rice's apartment on the morning of May 21, 1981, and saw petitioner, Reilly, Steve Rice and Colette Mitchell (CT 2642); and whether Boyd ever used PCP ("angel dust"). (CT 2820-2821.)

320. Examples of Mr. Demby's failure to ask relevant questions of those few witnesses who were interviewed include the following:

A. Mr. Demby himself interviewed Steve Rice but failed to ask Rice about his knowledge in any of the foregoing categories. Mr. Rice in fact told Mr. Demby in that interview that Boyd had assaulted and threatened him but Mr. Demby failed to inquire further and ignored Mr. Rice's statements suggesting that inquiry into his knowledge of Boyd would be potentially fruitful. (H.Exh. 85; Appendix 35.)

B. Mr. Demby asked the investigative division of his office to interview Mike Mitchell, who had been Reilly's roommate at the Vose Street apartment; Mr. Demby listed Mitchell as a witness who should be interviewed regarding "the Reilly Connection," but failed to note that Mitchell potentially also had information relevant to Boyd. (H.Exh. 20.) In any event, neither Mr. Demby nor his investigators ever interviewed

Mitchell on any subject. (HT 442.)

C. Mr. Demby himself spoke to petitioner's mother, who attended the preliminary hearing, including during the testimony of Calvin Boyd at that proceeding. Mr. Demby failed to inquire of Mrs. Hardy as to whether she had observed anything unusual about Boyd (or any other prosecution witnesses) outside the courtroom or whether she had ever spoken to Boyd.

D. Wesley Frank was a resident of the Vose Street Apartments and reportedly told police that he had seen petitioner's codefendant, Reilly, leaving the apartment complex alone in the early hours of May 21, 1981, the night of the killings. (H.Exh. 26; HT 1731-1732; Appendix 11.) Having been provided this information in discovery, Mr. Demby asked Mr. Cano to interview Frank. Mr. Cano later reported that he had interviewed Mr. Frank and Frank did "not know much about the incident other than what he read in the papers." (H.Exh. 27.) The report, which consists of five lines of text, fails to address whether Mr. Frank saw Reilly leave alone on the night of the killings and what he told the police in this regard. The report indicates that Mr. Cano failed to ask Mr. Frank the most obvious questions, including what he knew about Boyd's behavior before, on and after the night in question.[24] (H.Exh. 27.) Mr. Demby's failure to ensure that Mr. Frank and other witnesses were asked all relevant questions, including those concerning Boyd, constitutes deficient

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[24]Mr. Cano reported to Mr. Demby that he contacted Mr. Frank on March 14, 1981. (H.Exhs. 15, 27.) Mr. Frank testified at the hearing that he did not recall ever being contacted by anyone working on petitioner's behalf. (HT 157.) Mr. Cano did not testify at the hearing. It is clear that, if Mr. Cano in fact interviewed Mr. Frank, he did not do so competently.

performance.

321. Particularly given his admitted dissatisfaction with the quality of Mr. Cano's investigation, Mr. Demby's reliance on Mr. Cano's brief reports to decide which individuals, if any, had anything to contribute to petitioner's defense was unreasonable. (HT 2405; see *Eldridge v. Atkins* (8th Cir. 1981) 665 F.2d 228, 235-236; Report at pp. 70-71.) In particular, Mr. Demby was not justified in relying on Mr. Cano's report of his contact with Wesley Frank in deciding whether to call Mr. Frank as a witness. (Report at pp. 70-71.)

322. Mr. Demby unreasonably failed to make sure that contact was maintained with the one witness who had told his investigator that Boyd had previously been known to commit knife assaults. Mr. Cano reportedly interviewed Annette Blodgett in March of 1982. At that time, Ms. Blodgett told Cano that Boyd had assaulted her with a knife; she also told him that she was in the process of moving. (Report at pp. 24-25; H.Exh. 72.) By the time petitioner's case came to trial, one year later, neither Mr. Cano nor anyone else working on petitioner's behalf was aware of Ms. Blodgett's location. As a result, the Public Defender's office was unable to locate her, the one witness whom Mr. Demby wanted to call at petitioner's penalty trial. (See RT 13899FF-13899HH.) Reasonably competent counsel would have ensured that contact was maintained throughout the proceedings with any witness known to have information regarding Boyd that was favorable to petitioner. Mr. Demby's failure to ensure that contact with Ms. Blodgett was maintained and/or that her whereabouts were determined at the time of trial was unreasonable and fell below prevailing professional norms. (Report at p. 71.)

323. Mr. Demby also failed to supervise the way in which the

investigators assigned to petitioner's case approached potentially hostile witnesses. Reasonably competent counsel would have required that, whenever an investigator attempted to interview a witness likely to be hostile or uncooperative, the investigator's first contact with the witness was in person and without advance notice to the witness. Mr. Demby failed to require this approach. As a result, investigators working on petitioner's case frequently made initial contact with witnesses they sought to interview by writing letters and asking the witnesses to call back and volunteer to be interviewed. This method of investigation fell below prevailing professional norms and cannot be supported by any reasonable tactical justification. As a result of this methodology, numerous potential defense witnesses were never interviewed and Mr. Demby never came into possession of important evidence which could have been presented on petitioner's behalf at the guilt phase. For example, Mr. Demby assigned to investigator Quentin King the task of interviewing Joe Dempsey and his then-girlfriend, Sue Moutes. Dempsey and Moutes lived together at the relevant time period and Dempsey had been a long-time friend of petitioner's codefendant, Mark Reilly. Dempsey and Moutes had been interviewed by law enforcement and had provided extensive information as to incriminating statements Reilly had purportedly made prior to the killings. (Appendices 24, 25, 26, 27, 28.) Reasonably competent counsel would have made sure that investigators initially contacted Dempsey and Moutes separately, in person. Public Defender investigator Quentin King, who had been assigned the task of interviewing Moutes and Dempsey on petitioner's behalf, made his initial contact with those two witnesses by writing them a letter and asking them to call him. They did not respond. He then telephoned their home and spoke to Moutes, who stated that she

and Dempsey declined to be interviewed. (H.Exh. 15.) Mr. King made no further attempt to contact either Moutes or Dempsey. Had this occurred, it is reasonably likely that either or both witnesses would have cooperated and provided information favorable to petitioner, including but not limited to the fact that Reilly had told Dempsey that petitioner had initially talked about participating in the crime with a "black guy," whom the prosecution apparently thought was Marcus (See RT 8459), but that petitioner had pulled out because the "black guy" had a gun. (See RT 8451) Mr. King never made contact with Dempsey personally. Had Mr. King contacted Dempsey and Moutes in person and not in the presence of each other, they would have cooperated and provided Mr. King with information such that Mr. Demby would have been aware prior to trial of Reilly's statement to Dempsey that petitioner had declined to participate in the crime. Instead, Mr. Demby was unaware of that information until Mr. Dempsey was actually on the witness stand at the guilt phase and the prosecutor finally disclosed it. (RT 8451, 8460.) Reasonably competent counsel would have supervised his investigators competently. Mr. Demby's failure to do so was prejudicial in that he came into the guilt phase of trial completely unprepared and lacking in a wide variety of available evidence which could have been presented in petitioner's defense.

324. Reasonable investigation into what Boyd had said to others regarding the killings would have revealed facts including, but not limited to, the following:

A. Shortly before the killings, Raynall Burney overheard Boyd say that he was looking for a hit man; Boyd later told Burney that he should say nothing about the conversation about the hit man. (HT of Burney; H.Exh. V; Report at p. 11.)

B. A few days before the killings, Boyd and Marcus tried to recruit Ollie Epps, another one of Boyd's friends, to help with the killings. (HT of Ginsburg; H.Exh. D; Report at p. 11.)

C. Shortly after the killings, James Moss had a conversation with Boyd, Marcus and another unidentified man, during which Boyd stated that he was angry at petitioner because he had not shown up to "do what he was supposed to do" and that Boyd had ended up having to go in his place. Mr. Moss heard Boyd say that he (Boyd) "went into the house and did what he had to do." In the same conversation, Mr. Moss heard Marcus say that he (Marcus) had been forced to drive the getaway car because petitioner had not shown up to do so. Shortly thereafter, Boyd and Marcus both told Mr. Moss to forget that this conversation had occurred. (HT of J. Moss; H.Exh. 1; Report at pp. 11-12.)

D. After the killings, Rick Ginsburg overheard Boyd say to Ollie Epps that he (Boyd) had "tripped upon the kid and grabbed a pillow and put it over his face and stabbed him." (HT of Ginsburg; H.Exh. D; Report at p. 12.) On another occasion, Boyd, referring to the killings, told Epps "that he did it." (HT of Small; Report at p. 12.)

E. At some point after the killings, Boyd told Michael Small, "I've taken out one young kid. I can do the same again." Small questioned Boyd about this statement, and Boyd said, "I took the pillow and I put it over him and I just stabbed him." Boyd told Small that he expected to receive a large sum of money. (HT of Small; H.Exh. RR; Report at p. 12.) Boyd's statement that he put a pillow over the boy's head and stabbed him shows guilty knowledge. A pillow found at the scene had knife holes in it. (RT 7219.) Boyd could not have known that the boy was knifed through a pillow unless he had been present when the boy was killed.

F. Boyd told Small that he expected to receive a large sum of money. Around the time of the killings, Boyd's wife, Arzetta Harvey, told her friend, Sandra Moss (then Sandra Harris), that she and Boyd expected to be coming into some insurance money soon. (HT of S. Moss; HT of Small; Report at p. 12.) Boyd also apparently told someone else that he was going to be coming into a lot of money. (Appendix 2.)

G. Shortly after the killings, Boyd threatened petitioner's codefendant, Mark Reilly, and demanded to be paid for his role in the killings. (H.Exh. Y; HT 430-431.)

H. At some point after the killings, Boyd came into Steve Rice's apartment while he was asleep and began hitting Rice, telling him he "better not mention his name [to the police] or he was going to kill [his] white ass." (HT of Rice; H.Exh. O; Report at p. 12.)

I. In a threatening manner, Boyd also told Rick Ginsburg he should tell the police that he knew nothing about the killings. (HT of Ginsburg; H.Exh. D; Report at p. 12.)

325. Reasonable investigation into whether or not Boyd carried a knife and whether he had previously committed acts of violence with a knife would have revealed facts including, but not limited to, the following:

A. At the time of the killings, Boyd was known to carry a knife that was approximately six inches long and one-half inch wide, the dimensions of the weapon with which Nancy and Mitchell Morgan were killed. (H.Exhs. D, G, J, V, Y, 1, 2; HT 75, 157-158, 376, 429, 1109, 1152 2473, 2611; RT 6817-6818, 6835; see also *People v. Hardy*, *supra*, 2 Cal.4th at 118.)

B. On numerous occasions, Boyd had threatened his wife, Arzetta Harvey, with a knife: once, he put a knife to her throat and

threatened to kill her; another time, he chased her with a knife and threw it at her; on another occasion, he threatened both Ms. Harvey and her son, Arzel Foreman, with a knife and then threw the knife at Harvey; on yet another occasion, during a dispute between Boyd and Harvey, Boyd pointed a knife at Harvey's side. (HT of Harvey, Foreman, Burney; H.Exhs. F, V; Report at p. 13.)

C. Boyd had brandished a knife at others as well, including Michael Small, Raynall Burney, Annette Blodgett and a group of people gathered at the swimming pool at the Vose Street Apartments. (HT of Small; H.Exhs. RR, 28, 72; HT 2613; Report at p. 13.)

D. Boyd had admitted to various people that, when he was in prison, he had used a knife to "slit some throats" and/or stab people. (HT of Ginsburg, Small, J. Moss; H.Exhs. D, RR, 2; p. 13.)

326. Reasonable investigation into Boyd's reputation for violence and his history of violent, threatening and/or intimidating behavior would have produced facts including, but not limited to, the following:

A. Boyd physically abused his step-son, Arzel Foreman (HT of Foreman, Harvey, Ginsburg; H.Exhs. D, F), and routinely beat his wife, Arzetta Harvey. (HT of Small, S. Moss, Frank, Ginsburg, Harvey; H.Exhs. D, G, RR, 2; Report at p. 14.)

B. Boyd had physically threatened and/or assaulted several other residents of the Vose Street Apartment. (HT of Ginsburg, Mitchell, Rice, J. Moss, S. Moss, Small, Harvey, Foreman; H.Exhs. D, F, Y, O, RR, 1, 2, 28, 72, 73; HT 2615; Report at p. 14.)

C. Boyd had a reputation for violence and a habit of threatening and intimidating others. (Report at pp. 13-14.)

327. Reasonable investigation of whether Boyd's behavior or

appearance changed after the killings would have revealed facts including, but not limited to, the following:

A. Just after the Morgan murders, Boyd was seen to have cuts on his hands. Around the time of trial, Steve Rice told petitioner's sister, Linda Barter (nee Thompson), that he knew who the killer was because he had seen cuts on his hands. (HT of Barter; H.Exh. BBB; Report at p. 14.)

B. Boyd told Sandra Moss (nee Harris) that he had cut his hands while working on his car but in fact Boyd did not have a car and never worked on cars. (HT of Boyd, S. Moss; H.Exh. 2; Report at p. 14.)

328. Reasonable investigation of Boyd's purported alibi would have revealed facts including, but not limited to, the following:

A. At the time she spoke to police, Sandra Moss did not in fact know whether the night that she had sold Arzetta Harvey some furniture and the two women found Boyd at home in a drunken stupor was the night of May 20, 1981. (HT of S. Moss; H.Exh. 2; Report at p. 15.)

B. At around 8:00 or 9:00 p.m. on the night of the murders, Boyd was seen standing outside the Vose Street Apartments talking to some other residents and did not then appear to be under the influence of alcohol or drugs. (Report at p. 14.)

C. Late on the night of the killings, Boyd and Marcus were asking around for a ride and asked Rick Ginsburg (a.k.a. Sanders) if they could borrow his car. (Report at p. 14.)

D. At around 10:00 or 11:00 p.m., Marcus and Boyd were seen leaving the apartment complex on Marcus' motorcycle. (HT of Frank, Ginsburg; H.Exhs. D, G; Report at pp. 14-15.)

E. At sometime after 11:00 p.m. on May 20, 1981, Colette

Mitchell saw Boyd walk by Reilly's apartment window. (See Appendix 13; Report at p. 15.)

F. Boyd told his step-son, Arzel Foreman, and his wife, Arzetta Harvey, to tell the police that he (Boyd) was home on the night of the killings. Boyd also told Foreman to tell the police that petitioner and Reilly were involved in the murders and that he had heard about the murders from someone at school. Foreman told the police what Boyd had told him to say, even though it was not true. (HT of Foreman; Report at p. 15.)

329. Reasonable investigation of whether Boyd had a motive to commit the crimes would have revealed facts including, but not limited to, the following:

A. At the time of the killings, Boyd habitually used alcohol, heroin, marijuana, cocaine and/or PCP. (HT 131, 374, 766-767, 1109, 1147-1148, 2107-2109, 2125; H.Exhs. F, V, RR, 1, 2; Report at p. 16.)

B. At the time of the killings, Boyd was unemployed and always needed money. (HT of Foreman, Burney, Harvey, Small, Ginsburg, Rice, J. Moss, S. Moss; H.Exhs. E, F, RR, V, 1, 2; Report at p. 16.)

330. Reasonable investigation of whether, after the killings, Boyd exhibited evidence of consciousness of guilt would have revealed facts including, but not limited to, the following:

A. Boyd testified falsely at petitioner's preliminary hearing and trial. Petitioner hereby incorporates by reference as if fully set forth herein the facts contained in paragraphs 50-77, *supra*.

B. Boyd made false statements to law enforcement regarding the killings, including providing a false alibi. Petitioner hereby

incorporates by reference paragraph 328, *supra*.

C. Boyd pressured others to provide police with false and/or misleading information regarding his whereabouts on the night of the murders. He instructed his wife, Arzetta Harvey, and step-son, Arzel Foreman, and family friend Sandra Moss (nee Harris) to tell the police that he was home on the night in question, when in fact this was not true. (HT of S. Moss, Harvey, Foreman, Ginsburg; H.Exhs. 1, 2, F.)

D. Boyd spread, and urged others to spread, disinformation tending to shift suspicion to persons other than himself. He instructed his step-son, Arzel Foreman, to tell the police that he had heard that petitioner and codefendant Reilly were involved in the murders. (HT of Foreman, Ginsburg; H.Exh. F.) He told Cynthia Catlett, another resident of the Vose Street Apartments, that Annette Blodgett's husband, Franchet Baker, had committed the murders. (H.Exhs. 24 and 25.)

E. After the killings, Boyd's demeanor changed: he appeared nervous and stopped carrying his knife. (HT of Rice, J. Moss, Foreman, Ginsburg and Frank; H.Exhs. D, O, F, 1.)

331. Mr. Demby unreasonably failed to investigate Boyd's criminal history. Prior to petitioner's trial, Mr. Demby was provided with a copy of Boyd's "rap sheet," which put him on notice that Boyd had several prior felony convictions and an arrest for burglary that was still pending at the time of the killings. (H.Exh. 85.) Reasonably competent counsel would have obtained records pertaining to all of Boyd's prior arrests, particularly those for felonies, in search of impeachment information, including: prior felony convictions; convictions for providing false information to the police; evidence that Boyd expected to obtain benefits for providing statements and testimony against petitioner; evidence that Boyd had

received lenient treatment in his own criminal case(s) as a result of his assistance to law enforcement in petitioner's case; evidence that Los Angeles law enforcement authorities had contacted other law enforcement authorities on Boyd's behalf. Mr. Demby's files contain no information regarding Boyd's criminal history other than that which had been provided by the prosecution. (H.Exh. 85.) Mr. Demby's failed even to obtain the Superior Court file from the Santa Clara County criminal case in which Boyd was sentenced while petitioner's case was pending. (See H.Exh. 78.) Mr. Demby's failure to investigate Boyd's criminal history was unreasonable and constitutes deficient performance.

332. Mr. Boyd was in custody at the time of petitioner's trial. At the guilt phase, Boyd testified that he had been convicted of a felony and been to prison twice (RT 8078): once for receiving stolen property and once for the burglary conviction on which he was still serving time. (RT 8082.) He testified that he pled guilty to the burglary because he did not want to have to testify against his codefendant. He claimed that he did not break into any place, but that his codefendant had gotten into his (Boyd's) car carrying a bag containing stolen pistols and that they were then stopped by the police. (RT 8342-8357.) He testified that his other felony conviction was also the result of a guilty plea and was based on an incident in which he had been transporting some goods that another man had stolen. (RT 8346, 8357-8359.) During cross-examination, the trial judge invited counsel to produce the transcript of proceedings in which Boyd had been a defendant. (RT 8349-8350.) Neither Mr. Demby nor counsel for either of petitioner's codefendants produced any records of Boyd's prior convictions.

333. Reasonable investigation of Boyd's criminal history would have revealed facts including, but not limited to, the following:

A. Boyd in fact had three felony convictions at the time of trial: one for grand theft (Appendix 10); and two for burglary. (Appendix 9; H.Exh. 78.)

B. Boyd had also been convicted of providing false information to a police officer (HT 1984; Appendix 38), a misdemeanor conviction which was admissible for impeachment purposes at the time of petitioner's trial. (See Cal. Const., art. I, § 28, subd. (f) [Prop. 8, effective June, 1982]; *People v. Davis* (1995) 10 Cal.4th 463; *People v. Wheeler* (1992) 4 Cal.4th 284, 296.)

C. Boyd's testimony regarding the facts underlying the older of the two convictions he admitted having was false. Neither his first nor his second felony conviction involved the scenario he related. Boyd's first felony conviction was for grand theft. Boyd pled guilty in that case, but the arresting officer testified at the preliminary hearing that he had been working plain clothes, posing as a disabled person in a wheelchair on the street, when Boyd took from him a wallet which was in a purse on the officer's lap. (Appendix 10.) Boyd's second felony conviction was entered after a jury trial, at which the victim testified that she came home to find a window broken and items missing, including a television, some costume jewelry and a checkbook. Shortly thereafter, police stopped the car that Boyd was driving. Another man, Mr. Hamel, was in the car with Boyd, as were the stolen goods. Boyd testified at the trial and stated that, prior to the alleged burglary, he had become acquainted with the victim's daughter; the victim had kicked her daughter out of the house several months earlier. Boyd claimed that the daughter had asked for his help in transporting some items and the daughter was with Boyd in the victim's house at the time Boyd received the items in question. Boyd claimed the daughter handed

him the items, which he then put in his car (where they were found by police). A police officer then testified that Boyd told him shortly after his arrest that he had lent his car to Mr. Hamel, that Mr. Hamel had picked Boyd up, that Boyd took the driver's seat and then noticed that there was a television in the car which had not been there before he lent the car to Mr. Hamel. (Appendix 9.)

334. In addition to the foregoing information regarding Boyd's felony convictions, reasonable investigation of Boyd's credibility as a witness would have revealed facts including, but not limited to, the following:

A. Boyd had a reputation for dishonesty among his neighbors and family and often lied to protect himself or his own interests. (HT 1107, 2138-2139.)

B. Boyd expected to obtain benefits in one form or another for the statements and testimony he provided against petitioner. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 243, 245, 257, *supra*. In the early 1980s, in Los Angeles County's criminal justice circles, criminal defendants or potential criminal defendants, willing to testify (truthfully or otherwise) against other criminal defendants expected to, and in fact did, receive significant benefits in exchange for their testimony from the government, including the Los Angeles District Attorney's Office, the Los Angeles County Sheriff's Department and/or Los Angeles Police Department. (Appendix 39.) Informants and other testifying criminal defendants expected such benefits regardless of whether any law enforcement representative ever expressly offered or promised any such benefits: although promises were rarely made expressly, it was understood that an individual who testified against another

criminal defendant could expect some form of benefit to be conferred by government actors at some future time. (*Ibid*.) Calvin Boyd was familiar with the criminal justice system in Los Angeles County, had spent time in State Prison and in the Los Angeles County jail, and expected to obtain future benefits as a result of his cooperation with the prosecution in petitioner's case. (See, e.g., HT 1991-1992, 2007.)[25]

C. As a result of the assistance he provided to the prosecution in petitioner's case, Boyd not only expected future benefits, but in fact received them. For example, he received the most lenient treatment possible in his own criminal case in Santa Clara County. (H.Exh. 78.) At the time of the Morgan killings, Boyd was a fugitive: he had pled guilty to burglary in Santa Clara County, but had absconded prior to sentencing. After testifying at petitioner's preliminary hearing in October of 1981, Boyd was arrested and returned to Santa Clara County. Boyd discussed with the Santa Clara County Probation Department the fact that he had been cooperating with the prosecution in petitioner's case. Detective Jamieson had a number of conversations regarding Boyd with the Santa Clara County District Attorney's office prior to the disposition of Boyd's Santa Clara County case. (HT 2599.) In spite of the fact that he had absconded prior to sentencing, Boyd received the lowest possible sentence for his crime.

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[25]At the reference hearing, Boyd admitted that, on several occasions prior and subsequent to petitioner's trial, he had contacted Detective Richard Jamieson to assist him in various matters. On one occasion, Boyd requested that Detective Jamieson recover Boyd's car, after it had been seized by other police officers investigating a different case. (HT 1991-1992.) Boyd's testimony at the reference hearing indicated that he expected Detective Jamieson to help him and felt that he had been wronged when Detective Jamieson declined to do so. (HT 2007.)

D. In exchange for his assistance in petitioner's prosecution, Boyd was given immunity from prosecution for perjury in connection with his own false testimony at petitioner's preliminary hearing. (Boyd, HT 2019, 2021.)

E. Petitioner's mother, Carol Hardy, attended petitioner's preliminary hearing and, in the hallway outside the courtroom, had a conversation with Calvin Boyd prior to his testimony at that proceeding. When Mrs. Hardy commented that he should simply tell the truth, Boyd remarked: "'Sometimes you can't be honest. You have to protect yourself.'" (HT 660; H.Exh. KK.)

F. Boyd testified at petitioner's preliminary hearing and trial that Harvey was his "common law wife." (RT 8081, CT 2640.) In fact, Boyd and Harvey were married on December 1, 1977. (H.Exh. 41.)

G. At petitioner's preliminary hearing and trial, Boyd testified that he and his wife, Arzetta Harvey, walked through Steve Rice's apartment "mostly every day." (RT 8250; CT 2641, 2690, 2692.) He further testified that, on the morning of May 21, 1981, he walked through Steve Rice's apartment with both Harvey and her son, Arzel Foreman, and that in the apartment that morning he saw petitioner, Reilly, Steve Rice and Colette Mitchell. (RT 8162, 8107; CT 2642.) Reasonable investigation would have revealed that this testimony was false. (See HT 281; H.Exhs. F, O; HT 1981-1982.) Petitioner hereby incorporates by reference as if fully set forth herein the facts contained in paragraph 54 *supra*.

H. At the preliminary hearing and at trial, Boyd testified that he never used PCP ("angel dust"). (RT 8363; CT 2820-2821.) Reasonable investigation would have revealed that this was false. (HT 766.)

I. At trial, Boyd testified that he always gave the money his parents sent to his wife. (RT 8106, 8157.) Reasonable investigation would have revealed that this was false and that Boyd took almost all of that money for himself. (HT 2128.)

335. All of the evidence regarding Calvin Boyd that was presented at the reference hearing was available at the time of trial and the reason for which Mr. Demby was unaware of its existence was that his investigation was deficient. (Report at p. 18.) That evidence included the testimony of Wesley Frank, Rick Ginsburg (Sanders), Raynall Burney, Carolyn Hardy, James Moss, Sandra Moss (Sandra Harris), Steve Rice, Mike Mitchell, Arzel Foreman, Michael Small, Annette Blodgett,[26] Calvin Boyd, Arzetta Harvey, Marcia King (Sanders),[27] and Linda Barter (formerly Linda Thompson).[28] Petitioner also established that Ollie Epps, who has since died, would have been available at the time of trial. (H.Exh. 87; HT 80-88, 95, 792-793.) Petitioner hereby incorporates by reference the testimony as if fully set forth herein the entire record of the reference hearing, which includes the testimony and declarations of the above-listed individuals.

336. Mr. Demby failed to interview (or have his agents interview)

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[26]At the reference hearing, Annette Blodgett was deemed to have been called, sworn and testified as reflected in the Public Defender interview report of March 15, 1982. (HT 2613; H.Exhs. 28, 72.)

[27]At the reference hearing, Marcia King (Sanders) was also deemed to have testified. (HT 2610-2611.)

[28]At the reference hearing, Linda Barter's declaration was admitted for the purposes of showing what information was available to Mr. Demby. (H.Exh. BBB; HT 2643.) Petitioner attempted to elicit testimony from Ms. Barter regarding what Rice had told her, but that testimony was improperly excluded. (HT 948-950.)

any of the foregoing witnesses, with the exception of Carol Hardy, Wesley Frank, Annette Blodgett and Steve Rice. Mr. Demby's law clerk, Patty Mulligan interviewed Carol Hardy, but failed to interview her on the subject of her knowledge of, or contact with, Boyd. (HT of Demby; H.Exhs. 33.) Ralph Cano interviewed Annette Blodgett in March of 1982, but, by the time petitioner's case came to trial, one year later, neither Mr. Cano nor anyone else working on petitioner's behalf was aware of Ms. Blodgett's location. Mr. Demby interviewed Steve Rice, who told him that Mr. Boyd had threatened him and assaulted him physically, but Mr. Demby failed to ask any follow-up questions of Mr. Rice on this subject, nor did he ask any other questions about Mr. Boyd. Mr. Cano reportedly interviewed Wesley Frank, but failed to inquire of his knowledge regarding Boyd.

337. Nine of the witnesses who testified (or were deemed to have testified) at the reference hearing were named in Mr. Demby's investigation requests: Wesley Frank, Rick Ginsburg (a.k.a. Sanders), Arzel Foreman, Annette Blodgett, Arzetta Harvey, Marcia King (a.k.a. Sanders), Calvin Boyd, Steve Rice and Mike Mitchell.[29] Had the interviews identified by Mr. Demby been conducted, the information gathered in those interviews would have produced additional investigative leads which, if followed, would have led Mr. Demby to the remainder of the evidence presented by petitioner at the hearing.[30]

338. Had Mr. Demby conducted a reasonably competent interview

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[29]Although three of those witnesses testified for respondent, the information provided in their testimony failed to rebut, and in some respects supported, petitioner's case on this point.

[30]In October of 1982, Boyd was arrested and sentenced to prison, thereby eliminating any ability her had to intimidate witnesses.

of Mike Mitchell, he would have been prepared for Mike Mitchell's testimony at trial that he heard the shower running in the early morning hours of May 21, 1981, and saw a wet towel in the bathroom when he got up. Mr. Demby would have known that this testimony was misleading, because Mitchell was in fact unable to distinguish the sound of the shower in his apartment from the sound of his neighbors showering and because the towel could have been used by his girlfriend, who had gotten up and showered before he did. (HT of M. Mitchell.)

339. If Mr. Demby had been aware of the evidence of third party culpability which was presented at the reference hearing, he would have presented it at the guilt phase of petitioner's trial. (HT 2181; Report at p. 68.) Such evidence, including direct or circumstantial evidence that Boyd was the actual killer and evidence that Boyd lacked credibility, would have been consistent with the arguments that Mr. Demby in fact made at the guilt and penalty phases of petitioner's trial, which included arguing that Calvin Boyd and Marcus, not petitioner, had committed the killings. (HT 1713-1714, 1720; RT 13085-13088, 13094-13096, 13099, 13103-13110, 13151-13152, 14059-14060; Report at p. 27.) He had no strategic or tactical reason for not presenting the evidence. (Report at p. 27.)

340. Had he conducted a reasonably adequate investigation, Mr. Demby could and would have presented evidence that Boyd had made statements to numerous individuals indicating that he had killed the Morgans, that petitioner had not accompanied him and that Marcus had driven the getaway car. He would have shown that Boyd was known to carry a knife that matched the murder weapon, that Boyd had committed knife assaults in the past, that Boyd had pressured witnesses to provide him a false alibi and had threatened to harm others if they said anything to the

police that would incriminate him, that Boyd had cuts on his hands after the killings, that Boyd had a motive to commit the killings, that Boyd had exhibited signs of consciousness of guilt after the killings and that Boyd had a reputation for violence. He would have shown that Boyd's statements and testimony incriminating petitioner and Reilly were lacking in credibility. Such evidence, regardless of when it was presented, would have provided powerful support for petitioner's defense.

341. Had Mr. Demby presented the foregoing evidence at the guilt phase of petitioner's trial, at least some members of the jury would have found that there was at least a reasonable doubt as to whether petitioner committed the killings and would not have convicted petitioner of capital murder.

B. Failure to Consult An Expert in Forensic Pathology

342. At the guilt phase of petitioner's trial, Dr. Fremont Davis, the prosecution's forensic pathologist, testified that, in his opinion, Nancy and Mitchell Morgan died between 3:30 and 5:30 a.m. on May 21, 1981. (RT 6845, 6858.) The testimony of Colette Mitchell and Steve Rice accounted for petitioner's whereabouts until sometime between 2:00 and 3:00 a.m. on May 21, 1981. (See RT 10219; *People v. Hardy*, *supra*, 2 Cal.4th at p. 123.) The prosecution proceeded on a theory that at some time between 3:30 and 5:30 a.m., petitioner and codefendant Reilly left the Vose Street Apartments, went to the Morgan's home and killed Nancy and Mitchell Morgan. The prosecution argued that petitioner committed the stabbing and that Reilly either assisted or waited outside while the deed was completed.

343. Mr. Demby was aware prior to trial that the time of death of Nancy and Mitchell Morgan was critical to petitioner's defense and particularly the degree to which he could establish an alibi on petitioner's

behalf. (HT 1720.) Nevertheless Mr. Demby did not retain an expert in forensic pathology. (Report at p. 31; HT 2171-2172.) At the reference hearing, Mr. Demby testified that he does not know much about forensic pathology and that, at the time of petitioner's trial he lacked any expertise in calculating time of death. (HT 2173-2174.) In his closing argument at the guilt phase of petitioner's trial, Mr. Demby also stated that he did not "know much" about scientific testimony regarding time of death. (RT 13120-13121.)

344. Mr. Demby did not retain or meaningfully consult any forensic pathologist prior to petitioner's trial. (HT of Demby.)

345. Reasonably competent counsel would have hired an independent expert in forensic pathology and would have provided that expert with all of the available information relevant to the question of time of death. Had Mr. Demby undertaken such reasonable investigation and consultation, he would have been apprised that reasonable and credible expert opinion testimony was available to the effect that: Nancy and Mitchell Morgan died between 10:00 p.m. on May 20, 1981, and 1:00 a.m. on May 21, 1981; midnight was the most likely time within that range that the deaths occurred; it was possible that the deaths occurred at 2:00 a.m. on May 21; but it was not possible that they occurred as late as 3:00 a.m. on that date. (HT 2237, 2267, 2299-2300; H.Exh. 50; Report at pp. 27-28.) A qualified expert would have based that opinion of the following facts and scientifically sound opinions:

A Forensic pathology has long recognized three physiochemical parameters which must be considered in estimating time of death: algor mortis, livor mortis and rigor mortis. (HT 2223, 2314, 2354; H.Exh. 50; Report at p. 28.)

B. Dr. Davis, the prosecution's time of death expert at trial, failed to take into account the rigor mortis and livor mortis evidence in reaching his opinion in this case. (HT 2298, 2352; H.Exh. 50; Report at p. 28.) At petitioner's trial, Dr. Davis testified that the evidence of rigor mortis had no significance in this case; he did not mention the evidence of livor mortis in this case and instead relied exclusively on the parameter of algor mortis. (RT 6809.)

C. Photographs taken by law enforcement investigators at the scene of the crime and during the autopsies showed the presence of fixed livor mortis in the body of Mitchell Morgan at the time of the crime scene examination, thereby indicating a time of death of approximately midnight on May 20, 1981, or 1:00 a.m. on May 21, 1981. (HT 2227, 2248-2249, 22465-22487, 2333; H.Exh. 50.) A qualified expert could reach a reasonable and credible opinion that those photographs also showed that the livor was fixed at the time of the crime scene examination, indicating a time of death of approximately midnight or 1:00 a.m. on May 21, 1981.[31]

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[31]At the reference hearing, the prosecution's expert, Dr. Sathyavagiswaran, declined to conclude that the livor at issue was fixed because there was no contemporaneous finding by the crime scene investigator to that effect. (HT 2233-2241.) Dr. Sathyavagiswaran conceded that the crime scene investigator failed to note the presence of the livor mortis evidence that appeared in the photographs and that, a fortiori, the crime scene investigator did not test that livor to determine whether or not it was fixed. Nevertheless, Dr. Sathyavagiswaran declined to find evidence of fixed livor mortis because of the lack of a contemporaneous finding that it was fixed. Therefore, he opined that the livor mortis evidence pointed to a time of death of 12:30 a.m. to 8:30 a.m. on May 21, 1981. (HT 2332.) In light of the conceded deficiency in the crime scene investigation, Dr. Sathyavagiswaran's opinion, reached in reliance on the absence of findings made by the crime scene investigator, does not

(continued...)

(H.Exh. 50; Report at pp. 28-29.)

D. Livor mortis evidence in both bodies indicates that, sometime between 11:30 p.m. on May 20, 1981, and 7:30 a.m. on May 21, 1981, the bodies were moved. (HT 2244, 2250, 2286-2287; H.Exh. 50; Report at p. 29.)

E. The rigor mortis evidence – including the crime scene investigator's observation that, when he lifted Nancy Morgan's hand prior to 1:00 p.m. (and probably between 11:30 a.m. and 12:30 p.m. on May 21), he found it "rather loose and limp" – pointed to a time of death prior to 1:00 a.m. on May 21, 1981. (HT 2252-2254; H.Exh. 50; Report at p. 29.)

F. At the time the bodies' liver temperatures were taken, there was a difference in temperature of approximately 25 degrees between the bedroom (where the bodies were found) and the outside air, as shown by weather data from the date in question. (HT 2257; H.Exh. 50.) This indicated that the air temperature in the room where the bodies were found was regulated either by heating or insulation and remained more or less constant and relatively warm between the time of death and the time that the bodies' liver temperatures were recorded. Accordingly, the bodies cooled more slowly than average. The evidence further indicated that Nancy and Mitchell Morgan struggled immediately preceding their deaths and, therefore, their respective body temperatures were higher than normal at the time of death. Under normal circumstances, body temperature rises immediately after death and remains stable for an average of three hours, then cools at an average rate of 2.5 degrees per hour for three hours, and

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[31](...continued)
undermine the reasonableness of Dr. Comparini's opinion regarding the evidence of fixed livor mortis.

then subsequently cools at an average rate of 1.5 degrees per hour until reaching environmental temperature.[32] (H.Exh. 50.) A qualified expert could have reached a reasonable and credible opinion that, based on the foregoing factors, the algor mortis evidence in the present case pointed to a time of death of 12:30 a.m. on May 21, 1981, approximately twelve hours prior to the time the liver temperatures were taken. (H.Exh. 50; Report at p. 29.)

G. A qualified expert could have reached a reasonable and credible opinion that, taking into account all three parameters, Nancy and Mitchell Morgan died some time between 10:00 p.m. on May 20, 1981, and 1:00 a.m. on May 21, 1981, and midnight is the most likely time within that range that the deaths occurred. (HT 2237, 2267; H.Exh. 50; Report at pp.

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[32]Dr. Sathyavagiswaran agreed that controls causing room temperature to remain static between the time of death and the time a body's temperature is measured affect the assessment of the time of death calculation. However, in spite of the evidence that the room temperature was 25 degrees warmer than the outside temperature at the time the bodies were found, he declined to deduce that the temperature was controlled in this case. (HT 2327.) Dr. Sathyavagiswaran conceded that, in this case, there was evidence of a struggle prior to death and that there could be an elevation in body temperature when there is such a struggle. (HT 2346.) He also conceded that, according to a leading text by Spitz and Fisher, there is a plateau phase when the body cools more slowly immediately after death. (HT 2345.) Dr. Sathyavagiswaran based his algor mortis calculation on the "nomogram" in a text by Hensskge, which charts time of death based on rectal temperature; Dr. Sathyavagiswaran conceded that only liver temperature was measured in this case and the nomogram "really cannot be applied to liver temperatures." (HT 2328, 2346-2348.) Nevertheless using the "nomogram" for rectal temperature, Dr. Sathyavagiswaran calculated that the algor mortis parameter in this case indicated a time of death of 12:30 to 6:30 a.m., with a median of 3:30 a.m. on May 21, 1981. (HT 2314, 2348.)

27-28, 30.) Such an expert would also have opined that it was possible that the deaths occurred as late 2:00 a.m. on May 21. However, the deaths could not have occurred as late as 3:00 a.m. on that date. (HT 2299-2300; H.Exh. 50; Report at p. 28.)

H. Petitioner hereby incorporates by reference as if fully set forth herein the entire record of the reference hearing herein, including specifically the testimony and declaration of Sylvia Comparini and the exhibits to which she referred therein.

346. Mr. Demby unreasonably failed to undertake any meaningful consultation of a forensic pathologist and therefore was unaware of the availability of such evidence.

347. Counsel for codefendant Reilly retained a forensic pathologist, Dr. Salem Rabson. Mr. Demby testified at the reference hearing that, on one occasion, he spoke to Dr. Rabson. (HT 2096, 2171-2172.) Mr. Demby did not retain an expert in forensic pathology. His only contact with any forensic pathologist in this case was a brief and insignificant contact with Dr. Salem Rabson, who had been retained by counsel for petitioner's codefendant Reilly. Mr. Demby did not retain Dr. Rabson, did not consult with him independently, provided him with no materials, and took no notes of their purported conversation. (HT 2170-2171.) Accordingly, any "consultation" between Mr. Demby and Dr. Rabson was not meaningful. At most, Mr. Demby was a passive participant in Mr. Lasting's consultation with Dr. Rabson. Moreover, even if Mr. Demby had consulted with Dr. Rabson, it would have been unreasonable for him to rely on Dr. Rabson's opinion. Reasonably competent counsel would not have relied on the opinions of a forensic pathologist hired by a codefendant who had possible antagonistic defenses and was therefore

laboring under a conflict of interest.[33] (HT 2424; see also *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1159.) Reasonably competent counsel would have perceived a need to explore whether there was any basis for concluding that the deaths occurred at a time when Reilly could have been the killer but petitioner could not; Dr. Rabson could not have provided such an opinion, since he had been retained by Reilly. Moreover, Dr. Rabson's opinion was not reliable for the additional reason that Mr. Lasting had not provided him with all of the factual data needed to render a competent and reliable opinion as to time of death.[34] Reasonably competent counsel would not have relied upon codefendant's counsel to provide the expert with all necessary factual information. Mr. Demby did not provide

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[33]Dr. Rabson testified at the guilt phase of petitioner's trial that, in his opinion, the time of death could have been any time within the 18-hour period ending at 6:00 a.m. on May 21, 1981. (RT 12161.) Codefendant Reilly's defense was that codefendant Morgan traveled to Los Angeles from Carson City, Nevada, committed the murders, and then returned to Carson City. A broad time of death range, such as the one provided by Dr. Rabson was helpful to Reilly's defense theory. However, Dr. Rabson's time of death calculation provided little direct benefit to petitioner's defense. Mr. Demby was aware that a time of death before 2:00 a.m. on May 21, 1981, when petitioner had a firm alibi and Reilly had been seen leaving the apartment complex alone, would have been far more beneficial to petitioner's defense. (HT 2171-2172.)

[34]Dr. Rabson testified that the prosecution's time of death calculation based on algor mortis was unreliable also because it did not take into account the day and night environmental temperatures, the manner of death, the clothing worn by the victims, or the size of the bodies; Dr. Rabson did not consider himself qualified to render an opinion as to algor mortis because he did not have this and other information. (RT 12154-12155, 12158.) This testimony indicates that Dr. Rabson was not provided with the weather data, the crime scene and autopsy photographs and other information which was available at the time of trial and would have permitted a competent analysis of the livor and algor mortis parameters.

Dr. Rabson with any materials to review. (HT 2173.) Because Dr. Rabson had not been provided with the available factual information which would have permitted a competent analysis of the livor and algor mortis parameters, his opinion was based solely on analysis of the rigor mortis parameter, with no calculation of the significance of the livor mortis or algor mortis parameters, and was therefore unreliable. (RT 12160-12161; H.Exh. 50.) Also, given Mr. Demby's admitted lack of knowledge in the area, and his recognition that evidence of the victims' time of death would be presented at trial and would be critical to the viability of petitioner's alibi defense, reasonably competent counsel would have retained his own expert in forensic pathology, both to determine whether affirmative evidence supportive of petitioner's defense at guilt and/or penalty was available and to enable him to cross-examine competently the experts testifying on behalf of other parties. (H.Exh. 50; HT 2213-2311, 2424.) Mr. Demby's failure to retain such an expert and to provide him or her with all of the factual information needed to render a competent opinion, was an omission which fell below prevailing professional norms.

348. Had Mr. Demby conducted a minimally adequate consultation with an independent forensic pathologist, he would have learned that the foregoing expert testimony was available to show that the killings occurred at a time when petitioner could not have been the killer. He would have learned that the prosecution expert's opinion regarding time of death was flawed. He would have presented expert testimony similar to that presented at the reference hearing through the testimony and declaration of Dr. Sylvia Comparini. He would have cross-examined the prosecution's expert such that the jury would have found that the prosecution failed to show beyond a reasonable doubt that the killings occurred during the hours the prosecution

claimed. Had Mr. Demby conducted an adequate consultation and investigation in this regard, the jury would have found at least a reasonable doubt that petitioner was the killer, would not have convicted him of capital murder and would not have found the death penalty to be appropriate.

349. Had Mr. Demby consulted a forensic pathologist, he would have been advised to obtain the specimen of fingernail scrapings which had been gathered from the body of Mitchell Morgan and subject that specimen for ABO and enzyme testing. The specimen contained skin cells belonging to the assailant. Had Mr. Demby undertaken this testing, the results would have shown that petitioner was not the killer.

350. Had Mr. Demby consulted a forensic pathologist, he would have been advised that, given the circumstances, law enforcement's failure to gather fingernail scrapings from the body of Nancy Morgan was undertaken intentionally and in bad faith, and that the exculpatory value of such evidence was necessarily known to law enforcement at the time they failed to preserve it. Reasonably competent counsel would then have made a successful motion for sanctions pursuant to *People* v. *Hitch* (1974) 12 Cal.3d 641, the governing authority on the subject at the time of petitioner's trial. Petitioner hereby incorporates by reference as if fully set forth herein Claim X, *supra*.

C. Failure to Investigate Evidence of Petitioner's Pending Insurance Claims

351. Prior to trial, Mr. Demby was aware that petitioner had been a bus driver for the city of Los Angeles and that, on August 24, 1978, petitioner attempted to thwart a robbery on his bus and was injured in the ensuing scuffle. (H.Exh. 18; Report at p. 8.) Mr. Demby knew that petitioner had filed a worker's compensation claim based on this incident

and his claim was still pending at the time of the Morgan killings and at trial. (H.Exh. 60; HT 1675; Report at p. 8.) Mr. Demby was also aware that petitioner had been involved in several other auto accidents shortly before the killings and had made insurance claims in connection therewith. (HT 1675.)

352. At trial, Steve Rice testified that petitioner owed him $200 to $300 and said that he was going to collect some insurance money and buy Rice a motorcycle. (RT 9343-9344.) A detective also testified to a prior statement attributed to Rice that, the day before the killings, petitioner and codefendant Reilly mentioned that they were going to be getting some insurance money soon. (RT 10518.)

353. Mr. Demby stated at the reference hearing that he wanted to present to petitioner's jury evidence that petitioner was expecting insurance money from a then-pending Worker's Compensation case, as well as insurance payments from several car accidents he was involved in, to show the jury that if the jury found that petitioner stated that he was expecting to receive insurance money, he was not referring to the life insurance proceeds potentially flowing from the victims' deaths.[35] (HT 1673-1674, 1807, 2169;

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[35]At trial, Mr. Demby efforts to present evidence of petitioner's pending Worker's Compensation case and of his other insurance claims made in connection with his car accidents consisted of the following: in cross-examining Colette Mitchell, Mr. Demby asked whether petitioner ever mentioned that he had a Worker's Compensation case pending against R.T.D., to which she answered in the affirmative (RT 10174); Mr. Demby then asked Ms. Mitchell whether she knew the name of petitioner's Worker's Compensation attorney, to which she answered that she did not (RT 10174); in his cross-examination of Steve Rice, Mr. Demby elicited testimony that petitioner had worked for R.T.D., that he had broken his legs, and that he had "some claim arising out of that" (RT 9867); in his closing (continued...)

Report at pp. 32-33.) However, he decided not to present evidence regarding petitioner's Worker's Compensation claim because he believed the jury would find that petitioner was attempting to recover Worker's Compensation insurance fraudulently for injuries which he actually received when he jumped off a cliff after his brother's suicide. (HT 2167-2168.) This rationale was uninformed, unfounded and unsupportable for the following reasons:

A. Mr. Demby did not investigate what the possible recovery might be regard and was therefore unaware that it could be as large as 80 percent of petitioner's salary for up to two years. (HT 2166.)

B. Both the evidence in Mr. Demby's possession and the evidence available to him through additional investigation showed that petitioner's claim was not fraudulent and that any such implication could have been dispelled. The details of petitioner's Worker's Compensation claim, including the nature of his injuries and the way in which they were incurred, were well-documented in petitioner's R.T.D. personnel records, which Mr. Demby had at the time of trial. (H.Exh. 18.) The claim for Worker's Compensation was made in connection with the incident in which petitioner attempted to thwart a robbery on his bus, which occurred on August 24, 1979. Both the basis for the claim and petitioner's injuries were documented immediately following that incident, approximately three months before the incident in which petitioner jumped off of a cliff and broke his legs (which occurred on October 29, 1979). (H.Exh. 3-C.)

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[35](...continued)
argument at the conclusion of the guilt phase, Mr. Demby stated that "[w]e know [petitioner] worked for R.T.D., that he had a Workman's Compensation [case] against them." (RT 2168.)

Nowhere in the documents pertaining to the Worker's Compensation claim was there any mention of the injuries incurred in the latter incident, which included broken legs and a severe back injury. Petitioner's Worker's Compensation claim concerned only the injuries he suffered in connection with the robbery on the bus.

C. Mr. Demby did not even try to obtain records from the police department or fire department, which would have confirmed that the incident occurred and provided details corroborating the version of events petitioner had given immediately after the incident. (H.Exhs. 18, 35; Report at p. 74.)

D. Mr. Demby did not identify or locate Esther Meisel, the victim of the robbery, who would have corroborated material portions of petitioner's version of events. (Report at p. 74.)

E. Mr. Demby did not contact anyone from R.T.D. (petitioner's employer), such as Gus Lopez, petitioner's supervisor at the time of the incident, whose name was listed on the R.T.D. records in Mr. Demby's files, and who would have both corroborated petitioner's statements at the time of the incident and would have informed counsel as to petitioner's potential monetary recovery from the incident. (H.Exhs. 18, 60; Report at p. 74)

F. Although Mr. Demby interviewed Steve Rice himself, he failed to ask Rice when petitioner had first said anything about expecting an insurance recovery and to what he was referring. (Appendix 35.)

G. Mr. Demby failed to speak personally to Lawrence Silver, petitioner's Worker's Compensation attorney, who would have informed him that the claim was not fraudulent and that petitioner had made no attempt to add to the claim anything about his subsequent injury

sustained after his brother's suicide.

H. Mr. Demby did not ask to see Mr. Silver's file, nor did he review the incident reports and medical records filed with the Worker's Compensation Appeals Board. (Report at p. 74.)

I. Mr. Demby failed to consult any mental health expert and in so doing failed to determine whether there was any psychiatric explanation for petitioner alleged statements regarding insurance proceeds. (See paragraphs 364-379, *infra*.)

354. Upon reasonable investigation, Mr. Demby would have been aware of the availability of evidence showing facts including, but not limited to, the following:

A. Petitioner could reasonable have expected to recover as much as eighty percent of his salary as a bus driver for up to two years in connection with his worker's compensation claim. (H.Exh. 60; HT 2360; Report at pp. 31-32.)

B. Petitioner first began talking of receiving insurance proceeds long before the Morgan murders, in reference to money he was expecting from a Worker's Compensation case and damages he expected to receive as a result of a car accident. (HT of Rice; Report at p. 32.)

C. Petitioner suffered from psychiatric symptoms which may well have caused him to overvalue or exaggerate the likely recovery. (Report at pp. 31-32; Jackman, HT 1514; Report at p. 32)

D. Petitioner's worker's compensation claim was not fraudulent, but was legitimately based on the incident which occurred on August 29, 1979, in which he attempted to thwart a robbery on his bus. Petitioner's version of that incident could have been corroborated by the victim of the robbery, doctors' reports of petitioner's injuries written shortly

after the incident, the fire department's records of the incident and additional documents no longer available including the police report of the incident. Petitioner had never attempted to include in the claim the injuries which he received subsequently, when he jumped off a cliff after his brother's suicide.

355. Had Mr. Demby conducted the foregoing investigation, he would have realized that his fears that the jury would think petitioner's claim was fraudulent were unfounded and he would have presented the foregoing evidence at the guilt phase. Such evidence would have provided the jury with an innocent explanation for the evidence that, around the time of the killings, petitioner had stated he was expecting to receive insurance proceeds. The foregoing evidence would have undermined the reasonableness of the prosecution's argument that the statements which petitioner was alleged to have made regarding his expectation of an insurance recovery were not made in reference to the life insurance proceeds from the killing of the Morgans. (Report at p. 32.) Such evidence would also have undermined the prosecution's argument that the only possible source for money petitioner got to repair his car was payment for participation in the murders.

D. Failure to Investigate and Interview Colette Mitchell

356. At the hearing pursuant to Evidence Code section 403 in January of 1983 and at the guilt phase of petitioner's trial in June of 1983, Colette Mitchell testified that her testimony at the preliminary hearing in November of 1981 was false; she claimed that she had lied at the preliminary hearing because she was then in love with petitioner. She claimed that she had fallen out of love with petitioner after the preliminary hearing and that this was the reason for her change of testimony at the 403

hearing and at trial. (RT 1022-1023, 10078, 10086-10087, 10193, 10334, 10347.) Mr. Demby unreasonably failed to investigate evidence that Ms. Mitchell was not in fact in love with petitioner at the time of the preliminary hearing. Reasonably competent counsel would have interviewed individuals who were likely to have had contact with Ms. Mitchell between the time of petitioner's arrest and the preliminary hearing and would have asked them questions regarding what Ms. Mitchell had told them about her feelings about petitioner at that time. Mr. Demby failed to do so.

357. As stated above, Mr. Demby himself interviewed Steve Rice, who was a close friend of petitioner's and also knew Colette Mitchell. Mr. Demby unreasonably failed to ask Mr. Rice any questions regarding his contacts with Colette Mitchell after petitioner's arrest in July of 1981. (Appendix 35.) Reasonably competent counsel would have inquired of Mr. Rice as to whether he had been in touch with Ms. Mitchell and whether she had said anything to him about her feelings for petitioner at the time of the preliminary hearing. Reasonably competent counsel would have asked Mr. Rice questions designed to explore his knowledge of the status of petitioner's relationship with Ms. Mitchell at the time of the preliminary hearing, and her state of mind regarding that relationship at that time.

358. Upon reasonable investigation, Mr. Demby would have learned that, following petitioner's arrest, Colette Mitchell became angry with petitioner because she felt that he owed her money. She asked Mr. Rice repeatedly to give her the keys to petitioner's car so that she could sell the car and keep the proceeds of the sale. (Rice, HT 257.) Mr. Rice ultimately gave her the keys to petitioner's car and she sold it. Indeed, at her interview by Bradley Kuhns in the afternoon of October 26, 1981, she said she forged petitioner's signature on the papers so that she could sell the

car. (Appendix 14.) This evidence would have shown that, at the time of Ms. Mitchell's statements to the police and testimony at the preliminary hearing, she was angry with petitioner and not biased in petitioner's favor. Evidence that she was angry with him at that time undermined the credibility of her claim, and the prosecutor's argument, that, because she was blinded by love for petitioner, she lied at the preliminary hearing and in previous statements to law enforcement. The evidence would have therefore undermined the assertion that her early statements, which supported petitioner's alibi defense, were false.

359. Mr. Demby unreasonably failed to interview Bruce Wolfe, Colette Mitchell's lawyer. At the guilt phase of trial, Ms. Mitchell waived the attorney-client privilege with respect to all confidential communications with Wolfe. (RT 10316.) Reasonably competent counsel would have interviewed Mr. Wolfe and inquired, inter alia, as to what Ms. Mitchell had told him. At some point, she had told Mr. Wolfe that she had been having sexual relations "a lot" right before her testimony at the preliminary hearing. (See RT 10368.) Given that petitioner was in jail at the time of the preliminary hearing and had been for several months, Ms. Mitchell's statement in this regard indicated that she had been having sexual relations with others. Reasonably competent counsel would have presented this evidence by way of proof that, at the time of her testimony at the preliminary hearing, she was no longer in love with petitioner. The evidence would have supported a contention that her testimony at the preliminary hearing was not false, as she claimed at trial.

360. Mr. Demby unreasonably failed to investigate evidence that Colette Mitchell had a reputation for dishonesty. Reasonably competent counsel would have interviewed acquaintances, friends and former friends

of Ms. Mitchell regarding her reputation for truthfulness. Mr. Demby failed to contact such individuals and failed to ask those who were contacted any questions regarding Ms. Mitchell's reputation. For example, Mr. Demby's law clerk, Patty Mulligan, interviewed petitioner's sister, AnaMaria Kosciolek (nee Hardy) and petitioner's mother, Carol Hardy; Mr. Demby himself spoke to AnaMaria on at least one occasion. Petitioner's family and Ms. Mitchell lived in the same apartment complex on Ben Avenue. (RT 740.) Neither Ms. Mulligan nor Mr. Demby asked AnaMaria, petitioner's mother or anyone else about Colette Mitchell's reputation. Had the question been posed, Mr. Demby would have been informed that, according to AnaMaria, Carol Hardy, and others, Ms. Mitchell was reputed to be a liar. Upon reasonable investigation, Mr. Demby would have been aware that Ms. Mitchell had a reputation for dishonesty. (HT 741.)

361. Mr. Demby was aware that law enforcement had applied great pressure to Colette Mitchell, accused her of lying and threatened her with prosecution in order to encourage her to provide them with evidence against petitioner. Mr. Demby was also aware that Ms. Mitchell's statements and testimony changed dramatically between the time of the killings and the time of her testimony at the guilt phase. Reasonably competent counsel, aware of these facts, would have consulted an expert in false memory and/or coercive police tactics. Mr. Demby unreasonably failed to do so. Upon reasonable investigation and consultation, Mr. Demby would have been aware of extensive evidence showing that Ms. Mitchell's testimony at the 403 hearing and at the guilt phase was false and that expert testimony was available to support that proposition.

362. Mr. Demby failed to interview Colette Mitchell prior to trial. Mr. Demby was aware that, after the preliminary hearing, Ms. Mitchell left

the state of California and moved to Illinois. He was in possession of information regarding the names of Ms. Mitchell's parents, who lived in Illinois. (Appendix 13.) Reasonably competent counsel would have located and interviewed Ms. Mitchell. Mr. Demby failed to do so. Such reasonable investigation would have revealed additional support for a contention that her testimony at the 403 hearing in January, 1981, and her testimony at the guilt phase of petitioner's trial, in June of 1981, were false, that her will had been overborne by the coercive conduct of law enforcement representatives and that she was particularly vulnerable to coercive interrogation tactics because of her own subjective medical and psychological condition.

363. Mr. Demby was aware that Ms. Mitchell had been in the care of one or more mental health experts and physicians before and after the killings and before her testimony at trial. Reasonably competent counsel would have requested a court order for disclosure of records of all contacts between Ms. Mitchell and medical and mental health personnel. Upon such a request, the records would have been disclosed and Mr. Demby would have learned that Ms. Mitchell was particularly vulnerable to police pressure and coercive tactics, that her condition at the time of her polygraph was such that the test results were not reliable, and that her testimony in general was unreliable and potentially false.

E. Failure to Consult Any Mental Health Experts

364. Mr. Demby consulted no mental health experts in preparing for trial. (HT of Demby; Report at p. 5.) Mr. Demby's failure to consult or retain any mental health expert was not the product of financial constraints. Prior to trial, Mr. Demby was aware that petitioner had been previously

committed to Camarillo State Hospital, a mental institution, for an episode of psychosis, was diagnosed schizophrenic and that, upon his release, had been referred for out-patient mental health care. (Report at p. 89; H.Exh. 8.) Mr. Demby knew that conditions of probation imposed upon petitioner in 1980 included seeking mental health counseling. (H.Exh. 85; Appendix 40.) Mr. Demby knew that petitioner had jumped off of a cliff in an apparent suicide attempt in 1979. (HT of Demby; Report at p. 89.) Mr. Demby knew that, in 1979, petitioner suffered three significant losses: i.e., the death of his girlfriend, Tina Shanks; the death of his grandmother, and the suicide of his brother Bob. (HT 1669; Report at p. 89.) Mr. Demby knew of petitioner's ensuing depression and suicidality. (HT 1670; H.Exh. 33; Report at p. 89.) Mr. Demby knew that petitioner's father had been diagnosed paranoid schizophrenic and that his older brother had committed suicide. (H.Exh. 33.) One witness reportedly told Ms. Mulligan, Mr. Demby's law clerk, that petitioner was "not entirely sane." (H.Exh. 33; HT 1782; Report at p. 89.) Mr. Demby knew the prosecution would proceed at penalty phase on a theory that petitioner had a propensity for violence and that he had personality characteristics which indicated as much. He knew that, at the penalty phase, the prosecution would introduce evidence of the August 6, 1980, incident, and argue that this incident indicated that petitioner had a propensity for violence. (Report at p. 88.) Mr. Demby was in possession of the arrest report from that incident, which indicated that petitioner was suicidal and unresponsive on the date in question. (*Ibid*.) Mr. Demby himself labeled petitioner's behavior on that date as "bizarre." (RT 14065-14066.) Mr. Demby had interpersonal conflicts with petitioner before and during trial and knew prior to trial that petitioner's demeanor in the courtroom was likely to be a "problem." (HT 2090; see also RT A-11-

A-12, A-18-A-21, A-68, 1764-1766, 1788-1791, 3032-3033, 3053-3054, 3818-3819, 4524-4525, 4527-4529, 13899-13899HH; CT 279-287, 811-821.) Mr. Demby's approach to the problem of petitioner's demeanor was to instruct petitioner to alter his behavior. Mr. Demby was aware, prior to trial, that petitioner had a lengthy history of drug abuse[36] and that the prosecution was likely to present evidence of petitioner's drug use, particularly with respect to the night of the murders.[37] (HT 1819; Report at p. 90.) Mr. Demby knew that the prosecution's case-in-chief at the guilt phase would include evidence that petitioner had been spending a great deal

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[36]Ms. Mulligan reported to Mr. Demby that Pat Stevens had said that she felt petitioner's "biggest problem" was drugs and she remembered that he had overdosed on angel dust, was taken to a hospital and was then sent to Camarillo State Hospital, where the treatment he received was insufficient. (H.Exh. 33; HT 1780.) Ms. Mulligan also reported that Gail Reuben said that she could not remember a time when petitioner was not on drugs. (H.Exh. 33; HT 1774.)

[37]At petitioner's preliminary hearing, the prosecution elicited testimony of petitioner's drug use on the night of the crime. (See, e.g., CT Volumes II-III.) Moreover, numerous police reports included similar information. At the guilt phase of trial, Debbie Sportsman testified that every time she saw petitioner at the Vose Street apartments, he was drinking or getting high. (RT 7318.) Calvin Boyd testified that petitioner often joined the others who gathered on a regular basis at the Vose Street apartments to drink alcohol and smoke marijuana. (RT 8090-8091.) Steve Rice testified that, on the night of the killings, he got petitioner high on cocaine and that, also on that night, petitioner smoked marijuana and drank beer. (RT 9813, 9816, 9826, 9864-9865, 9871-9872.) Similar testimony about petitioner's use of drugs and alcohol on the night of the killings was provided by his then-girlfriend, Colette Mitchell. (RT 9949, 10116, 10350.) Mike Mitchell also testified that, on the night of the killings, he saw petitioner "beer bonging" and smoking what appeared to be marijuana; also in the room with petitioner and the other people was a mirror and a razor blade, which Mitchell testified were associated with the use of cocaine. (RT 9143-9144.)

of time with codefendant Reilly and other admitted coconspirators in the days or weeks leading up to the crime, and that the prosecution would also introduce evidence that petitioner was unemployed at the time of the crimes, did not have his own residence and had been staying with his girlfriend, Colette Mitchell, and his friend Steve Rice. That is, Mr. Demby was on notice that the evidence would show petitioner was not functioning well in the weeks leading up to the crime.

365. Particularly in light of the foregoing circumstances, Mr. Demby's failure to consult with any mental health expert was completely unjustifiable. (Report at p. 90.) Reasonably competent counsel in Mr. Demby's position would have, prior to the commencement of the guilt phase, consulted one or more mental health professionals on a host of questions relevant both to guilt and to penalty, including, but not limited to, the following: whether petitioner's behavior after the crimes was significant in any way to the question of his guilt or innocence; whether petitioner's psychiatric profile suggested a propensity for violence of the nature at issue in the charged crimes; whether petitioner's demeanor in the courtroom was subject to petitioner's conscious control and, if not, whether a sympathetic explanation could be provided to the jury; whether there was evidence available to explain petitioner's drug use in a way that supported his claim of innocence and to undermine the prosecution's theory that petitioner took drugs on the night of the crime in order to embolden himself; the significance of petitioner's prior psychiatric hospitalization and of the losses he had suffered in 1979; the significance to petitioner's mental state at any time of the records counsel had gathered pertaining to petitioner's social history; and whether there was some way in which to

secure petitioner's trust and confidence.[38] (HT 1545-1547, 2427, 2467-2468, 2488.)

366. At the reference hearing, Mr. Demby attempted to justify his failure to have petitioner examined by a psychiatrist by stating that petitioner consistently maintained that he did not commit the murders and Mr. Demby believed that any evidence an expert could offer would suggest to the jury that petitioner actually committed the murders in this case. (HT 2037-2038; Report at p. 90.) Mr. Demby testified that, if petitioner had stated that he had committed the murders or that he had been at the murder house, Mr. Demby would have had him examined by a psychiatrist. (HT 2037.) This purported justification for Mr. Demby's failure to investigate was also unreasonable. (Report at p. 91.) Reasonably competent counsel would have known that some mental health expert testimony is not inconsistent with a claim of innocence but can in fact bolster it. (HT of Earley; Report at pp. 91-92.) The fact that petitioner denied participation in the crime in no way eliminated the potential relevance of the advice and/or testimony of a mental health expert. (Report at p. 90.) Accordingly, Mr. Demby's stated reasoning does not justify his failure to have petitioner examined by a mental health expert and to conduct a complete and thorough investigation of possible mental defenses. (Report at p. 91; see also *People v. Ledesma* (1987) 43 Cal. 3d 171, 222; *People v. Mozingo* (1983) 34 Cal.3d 926, 934.)

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[38]"[T]he attorney-client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 561.)

367. Mr. Demby attempted to justify his failure to consult any mental health expert regarding the significance of petitioner's Camarillo hospitalization on the ground that he believed petitioner's hospitalization was due to a drug-induced psychosis and that it was therefore not favorable. (H.Exh. 44.) However, records in Mr. Demby's files reflected that, although petitioner was admitted to Camarillo with a diagnosis of Drug Induced Psychosis, he was released from Camarillo with a diagnosis of Undifferentiated Schizophrenia. (H.Exh. 8.) Given the change in diagnosis, Mr. Demby's assumption that petitioner's hospitalization signified nothing other than a drug-induced psychosis was unreasonable, as was his failure to consult a mental health expert before making any decision regarding the value of those records and the information they contained.[39] (Report at p. 91.) In any event, his decision was made on the basis of an incomplete set of records from Camarillo State Hospital and therefore was based on insufficient investigation. (Report at p. 91.)

368. Mr. Demby claimed that his decision not to pursue any explanation for petitioner's drug use or any evidence suggesting that petitioner suffered from symptoms of mental illness was based on his assumption that jurors do not like drug users or the insane and his fear that the jury would view evidence of petitioner's symptoms of mental illness as evidence of guilt. (HT 1819, 1852; Report at p. 93.) Mr. Demby acknowledged that he told respondent prior to the hearing that "if jurors feel defendants are truly insane and dangerous, they want to convict them and

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[39]See *Thomas v. Lockhart* (8th Cir. 1984) 738 F.2d 304, 308 [counsel's reliance on medical reports and interviews with defendant only was an inadequate investigation.]; *Beavers v. Balkcom* (5th Cir. 1981) 636 F.2d 114.

give them the death penalty in order to keep them off of the street." (HT 1792; Report at p. 93.) Mr. Demby made this assumption without ever before having tried a death penalty case. (RT 1658.) Assuming, for purposes of argument, that Mr. Demby in fact believed prior to trial that all jurors took such a negative view of drug users and the mentally ill, it was even more imperative that he determine whether petitioner's behavior and drug use could be explained in a manner that was consistent with, or indicative of, his innocence. (Report at p. 93.) Mr. Demby knew that the jury was likely to hear evidence of petitioner's drug use and mental health problems from prosecution witnesses at the guilt phase. Nevertheless, Mr. Demby never consulted any expert in this or any other regard. Mr. Demby's failure to consult constitutes deficient performance. (Report at p. 94.) Moreover, Mr. Demby's claim that he made an affirmative decision not to pursue an explanation for petitioner's drug use rings hollow. Mr. Demby knew long before trial that evidence of petitioner's drug use and symptoms of mental illness was likely to be presented by the prosecution at the guilt phase. Had he entertained the reasoning he has claimed, one would expect that he would have asked questions of prospective jurors on voir dire regarding their views on mental illness or drug users; he did not do so. (HT 1793; Report at p. 93.) If Mr. Demby were in fact concerned about the jury's negative views toward drug users, one would reasonably expect that he would have made efforts to obtain an order excluding or limiting the evidence of petitioner's drug use at the guilt phase, a request to which he may well have been entitled.[40] This he did not do. Accordingly, it is more

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[40]See *People v. Cardenas* (1982) 31 Cal.3d 897, 906 ["The rule applicable here is that evidence of an accused's narcotics addiction is

(continued...)

likely that Mr. Demby simply did not understand how he could have diffused any negative implications of petitioner's drug use: he assumed that the only relevance of expert testimony regarding drug use was to support a claim of diminished capacity (see, e.g., HT 1791) and he arrived at the claimed justification after trial, in response to the allegation of ineffectiveness. In any event, his failure to investigate and consult in this area constitutes deficient performance.[41]

369. To the extent that Mr. Demby's decision not to investigate or present mental health expert evidence was based on his fear that evidence offered to explain petitioner's drug use or to show that petitioner was mentally ill would be used by the jury against petitioner, his reasoning was also unsupportable. (Report at p. 94.) The prosecutor used evidence of petitioner's drug use and odd behavior as evidence of his guilt. Accordingly, there was nothing to be lost by attempting to rebut the prosecutor's argument and show the jury that petitioner's behavior was not, in fact, indicative of his guilt but rather was consistent with, and indicative of, his innocence. In any event, Mr. Demby's failure to undertake reasonable and minimally competent consultation and investigation constitutes deficient performance. (HT 2482.)

370. The evidence presented at the reference hearing shows, and

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[40](...continued)
inadmissible where it 'tends only remotely or to an insignificant degree to prove a material fact in the case . . . .'"]

[41]Mr. Earley testified that it was imperative in this case to voir dire petitioner's jury about drugs. "I believe in this case it would have been imperative because you knew drugs were going to come in, your client's drug use." (HT 2496; see also HT 2490, 2497; see also *Lankford v. Foster* (W.D. Va. 1982) 546 F.Supp. 241, 248.)

the referee found, that mental health experts such as Drs. Conte and Jackman, who testified at the reference hearing, as well as the information on which they relied in reaching their opinions, was available at the time of trial. (HT 1217, 1246, 1459-1460, 1478; Report at p. 64.) Even the few social history documents in Mr. Demby's possession prior to trial contained numerous indicators that petitioner suffered from symptoms of mental illness and had been subject to numerous assaults on his psychological development. The data which a qualified mental health expert would have needed to perform a social history analysis was readily available in this case. The supply of social history data available at the time of trial was extensive. Evidence of the events and circumstances of petitioner's life was available from many sources. Numerous friends, acquaintances and family members were able and willing to tell what they knew about petitioner and his family.[42] Numerous documents, generated over the years as petitioner and his family-members came in contact with various institutions, were available upon request at the time of petitioner's trial. (See H.Exhs. 3-B through 3-I.) Additional documents, since destroyed, would have been available at the time of trial. (HT 2429, 2432-2434.)

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[42]At the reference hearing, 11 witnesses testified on petitioner's behalf regarding petitioner's childhood. Nine additional witnesses were available to testify via video conference. Twenty witnesses testified regarding petitioner's adulthood. Twenty-four witnesses testified to aspects of petitioner's family history. Approximately thirty-four witnesses provided statements under penalty of perjury to petitioner's current counsel and would have cooperated similarly with trial counsel had they been asked to do so. (See H.Exhs. 3-A, 3-I.) A number of petitioner's family members had died over the previous ten years (e.g., Betty Ladd Downer, Burton Downer, William Steiner, Bill Hardy, Sr.). Accordingly, more, rather than less, information was available to trial counsel at the time of trial than was available at the time of the reference hearing.

371. In the early 1980s, when Mr. Demby was preparing for trial, it was commonly recognized that a psychiatrist could not render a valid, professionally sound and accurate opinion regarding an individual's mental state without considering a social assessment or social history of the individual, including a multi-generational history of family members' psychiatric symptoms and behavior patterns. (HT 1476-1478.) Evidence that petitioner's commitment to Camarillo State Hospital indicated the presence of a psychotic disorder rather than simply a drug-induced psychosis was available to Mr. Demby in 1981: had he consulted with a physician with expertise and experience both in mental health treatment and in substance abuse, he would have been advised that this was the case. (HT 1536.)

372. If Mr. Demby had at first conducted no additional investigation into petitioner's background, but had simply presented the little information which he had in that regard to a qualified expert, that expert would have advised him that a more thorough investigation was needed to render a competent mental health assessment. (HT 1374-1375.) Mr. Demby would then have conducted a reasonable and adequate investigation into petitioner's social history to enable an expert to provide a competent opinion regarding petitioner's mental state at the relevant times and to advise counsel regarding possible approaches to his defense.

373. At the guilt phase of petitioner's trial, the jury heard a substantial amount of evidence indicating that petitioner was a drug user and was using drugs prior to and after the time of the killings.[43] This

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[43]Debbie Sportsman testified that every time she saw petitioner at the Vose Street apartments, he was drinking or getting high. (RT 7318.)

(continued...)

evidence came in without objection from Mr. Demby. The prosecutor argued at the guilt phase that petitioner's use of drugs mesmerized him "to the point where they could stand it, where they could actually participate and pull it off." (RT 12869.)

374. Reasonable investigation of petitioner's social history, including his own and his family's use of substances, and consultation with a qualified expert, would have revealed facts and opinions including, but not limited to, the following:

A. Petitioner had a significant history of drug use, primarily dating from the time at which he and his former wife separated. (HT 1352, 1518; H.Exh. EEE.);

B. Petitioner's family had an extensive history of alcohol and substance abuse, which predisposed petitioner to substance abuse disorders. (HT 175-178, 180, 300, 338-339, 553-554, 618, 739-740, 920, 939, 941, 943, 944, 1255, 1265, 1267, 1268, 1272, 1274, 1281-1282, 1519-1521; H.Exhs. BB, KK, YY, 3-A [Declarations of Godfrey, J. Davis, Moore], 3-C [Jewish Family Services records], 3-D [Autopsy report for

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[43](...continued)
Calvin Boyd testified that petitioner often joined the others who gathered on a regular basis at the Vose Street apartments to drink alcohol and smoke marijuana. (RT 8090-8091.) Steve Rice testified that, on the night of the killings, he got petitioner high on cocaine and that, also on that night, petitioner smoked marijuana and drank beer. (RT 9813, 9816, 9826, 9864-9865, 9871-9872.) Similar testimony about petitioner's use of drugs and alcohol on the night of the killings was provided by Colette Mitchell. (RT 9949, 10116, 10350.) Mike Mitchell also testified that, on the night of the killings, he saw petitioner "beer bonging" and smoking what appeared to be marijuana; also in the room with petitioner and the other people was a mirror and a razor blade, which Mitchell testified were associated with the use of cocaine. (RT 9143-9144.)

George Herbert Hardy, Jr.; New York City court records, FBI Criminal history; Connecticut police records], 4.)

C. Throughout petitioner's childhood, many, if not all, of the adults with whom he had the most contact were alcoholics and/or drug abusers. (HT 597, 600, 647-648; 699 837, 915, 1328, 1519; H.Exhs. AAA, QQ; XX, 3-A [Declaration of M. Thompson], 3-B, 3-D [Death certificate of George Herbert Hardy, Jr.; Autopsy report of George Herbert Hardy, Jr.], 3-C [Jewish Family Services records], 4.) Witnessing significant care-givers, parent and parent figures, whether or not they are blood relations, abuse drugs is known to be correlated with a child's later development of substance abuse problems. (HT 1328.)

D. Taking into account petitioner's family history, his life experiences and his own symptomatology, a qualified expert would have opined that petitioner used drugs for purposes of self-medication: to relieve the psychic pain that he experienced as a result of his childhood maltreatment and hardship and as a result of the losses he experienced as an adult. (HT 1520.) Through drugs, petitioner unconsciously sought to alter his mood and achieve more readily the dissociation and withdrawal that, without benefit of drugs, was his natural response to psychic pain or trauma. (HT 1521.) The frequency and quantity of drugs petitioner used correlated to the severity of the distress that he was experiencing. (HT 1521.) Petitioner's drug use was very much related to his dissociative disorder. (HT 1505.) Drug use, and use of PCP especially, allowed petitioner to attain that dissociative state effortlessly. (HT 1361, 1505-1506; H.Exh. 4.)

E. Although petitioner had used drugs extensively, he had never done so in order to embolden himself and historically drugs had never had such an effect on him. A qualified expert would have opined that it

was highly unlikely that, on the night of the killings, petitioner used drugs in order to enhance his aggressiveness or violence. (HT 1551.)

F. Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in paragraphs 603-608, *infra*.

375. At the guilt phase, prosecution witnesses gave testimony indicating that petitioner had exhibited odd behavior and characteristics, and that he was fraternizing with codefendant Reilly and other alleged coconspirators around the time of the killings. In closing argument, the prosecutor pointed to this testimony as evidence of petitioner's guilt.[44]

376. Upon reasonable investigation of petitioner's social history and consultation with one or more qualified experts, Mr. Demby would have been aware that credible expert testimony was available to show that the guilt phase evidence of petitioner's odd behavior could be explained in a manner that was consistent with his innocence and that would have undercut the prosecutor's argument that his oddness indicated that he was the killer. A qualified expert would have arrived at opinions including, but not limited to, the following:

A. Petitioner was genetically predisposed to mental illness and had exhibited symptoms of mental illness even as a child. In the spring of 1981, the period of time on which the prosecution witnesses' testimony focused, petitioner exhibited symptoms including those indicative of an affective disorder, Post-Traumatic Stress Disorder, an anxiety disorder, a thought disorder and a dissociative disorder. Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in

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[44]See footnote 47, *infra*.

paragraphs 587-602, *infra*.

B. In the spring of 1981, petitioner was significantly "regressed" and his mental state had deteriorated. (HT 1373.) In 1979 and 1980, petitioner had suffered an overwhelming series of profound and significant losses in rapid succession. Because of these losses, petitioner experienced an increase in the magnitude of his already existing symptomatology: he was more depressed, distractible, hypersexual, and self-destructive; he experienced rapidly shifting moods; his substance abuse increased; his cognitive impairments became more severe. (H.Exh. 4.) Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in paragraphs 609-610, *infra*.

C. Petitioner lacked a propensity for violence. As a child, petitioner was subjected to abuse, violence, aggression, chaos and instability, and consistently reacted to these experiences by withdrawing and becoming passive rather than acting out aggressively. (H.Exh. 4.) As a child, his response to psychic and physical trauma was to withdraw and to retreat into fantasy. (HT 1330; H.Exh. 4.) He was passive, withdrawn and introverted. (HT 611-612, 1318, 1336; H.Exhs. 3-A [Declarations of J. Davis and Godfrey], 3-C [Jewish Family Services records], 4.) A qualified expert would have opined that this is not an unusual response to trauma and reflects a basic character type known as the "introverter." (HT 1319; H.Exh. 4.) As an adult, petitioner's tendency toward passivity and withdrawal continued. In reaction to personal tragedy, petitioner withdrew both emotionally and physically. (H.Exh. 4.) When extremely distraught, petitioner sometimes became suicidal, but did not become violent toward others. (H.Exh. 4.) Even in spring of 1981, when petitioner had deteriorated psychologically and was using drugs heavily, he was never

seen to be physically aggressive or violent, even when angered. (H.Exh. 4; HT 70, 97, 424, 1373.) To the extent that any aggressive behavior was attributed to petitioner, it was exclusively in the context of highly charged familial disputes and was not indicative of a propensity for violence outside such a situation. Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in paragraphs 611-612, *infra*.

D. Petitioner's behavior after the killings supported his claim of innocence. Throughout his life, petitioner had become distraught in response to traumatic experiences and his distress was visible to others in the form of depression, crying and withdrawal. Participating in the killings would have been a traumatic experience for petitioner. Evidence that petitioner's behavior did not change after the killings would have been inconsistent with his participation in the killings. Petitioner's behavior between the time of the crime and the date of his arrest was inconsistent with his participation in the crime and supported his claim of innocence, insofar as petitioner exhibited no suspiciousness, evasiveness, guardedness and no attempt to flee or hide; he did not appear to be anxious, troubled or worried; he did not act as if he feared being watched or followed. (HT 90, 110, 1552-1554.) Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in paragraphs 618-619, *infra*.

E. Petitioner's symptomatology -- in particular his grandiosity, a psychiatric symptom whereby the individual overvalues and exaggerates -- provided an innocent and reasonable explanation for any statements which the jury found he made regarding an expectation of insurance proceeds. (HT 1514-1515.)

377. True to Mr. Demby's fears, during the trial, petitioner often had a fixed stare and a stoney facial expression. (HT 2038; Appendix 12.)

The prosecutor argued repeatedly that petitioner was cold, uncaring, disrespectful, dangerous and generally unsympathetic in the extreme.[45] Although the prosecutor did not explicitly refer to petitioner's demeanor in the courtroom, his argument focused the jury on petitioner's observable behavior and, by implication, condemned that behavior as indicative of guilt. Because of the absence of any evidence to explain or interpret petitioner's appearance, some, if not all, of the jurors concluded that petitioner was generally an angry person, that he was angry enough to kill, that his anger supported the prosecution's theory that he committed the charged killings and that his motivation for committing the murders was to vent his anger. (Appendix 12.)

378. Upon reasonable investigation of petitioner's social history and consultation with one or more qualified experts, Mr. Demby would have been aware that credible expert testimony was available to show that there were explanations consistent with petitioner's innocence for petitioner's behavior in the courtroom, including, but not limited to, the following:

A. Petitioner's behavior in the courtroom, although inappropriate, was an expected reaction, given his psychiatric and social history, to the fact that he was in an environment over which he had no

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[45]In closing argument at guilt phase, the prosecutor made repeated reference to petitioner's "personality," and "attitude" (RT 12704, 13039, 13042) and argued that petitioner was "weird," (RT 12704, 12808, 13646) "creepy," (RT 12704, 13039), "crazy," (RT 12704, 12808, 13039, 13051, 13645, 13646) "odd," (RT 12704) "scary" (RT 12704), "procurable for a price," (12727), someone who "just [doesn't] give a damn," (RT 12740), "cool" (13039, 13044), "tough" (13039, 13051, 13645), "a wild man" (RT 13041, 13053, 13646) who was able to kill as easily as "eating an apple" (13053).

control and in which he had no power. (HT 1545.) Petitioner, on trial for his life, had lost all trust in Mr. Demby. (HT 1546.) Given the circumstances attendant to the trial, petitioner was unable to express in any more decorous manner his feelings of frustration and dissatisfaction and his fear that he was not being adequately represented. (HT 1545-1546.) Petitioner's behavior in the courtroom did not indicate that he was cold-hearted or uncaring or that he intended to intimidate. (HT 1626-1627.)

B. Petitioner's demeanor was likely not within conscious control. (HT 1548.) Directly ordering petitioner to change his appearance was not a sound strategy for mitigating petitioner's courtroom demeanor.

C. Petitioner hereby incorporates by reference as if fully set forth herein the facts and opinions set forth in paragraphs 614-616, *infra*.

379. Reasonably competent counsel would have consulted with one or more mental health experts and would have been informed of the foregoing opinions and analyses. Upon receiving such information, counsel would then have invested more effort into building a trusting relationship with petitioner, and petitioner's demeanor in the courtroom would than not have been such a problem. Reasonably competent counsel would then have presented at least some of the foregoing expert opinions and testimony at the guilt phase of petitioner's trial, in order to rebut the prosecution's argument that petitioner's behavior around the time the crimes was evidence of his guilt. The prosecution's case against petitioner relied very heavily on his association with Reilly and other alleged coconspirators and suspicions arising from petitioner's personal characteristics and behavior as evidence of petitioner's guilt. Accordingly, had Mr. Demby presented expert testimony which provided reasonable opinions that such behaviors

were consistent with or indicative petitioner's innocence, the jury would have found at least a reasonable doubt that petitioner was not the killer and would not have found him guilty of capital murder.

F. Failure to Investigate Adequately Petitioner's Social History

380. Mr. Demby conducted minimal investigation into petitioner's life and family history. What little investigation he undertook was conducted by a first-year law student who lacked sufficient experience and training to interview witnesses competently or to perceive the need to gather records regarding petitioner and his family. Mr. Demby failed to supervise Ms. Mulligan adequately and failed to follow up on the information which she gathered. Petitioner hereby incorporates by reference as if fully set forth herein paragraphs 490 through 506, *infra*.

381. On the whole, Mr. Demby began the trial knowing precious little about petitioner, his character and background, or his mental state at any given time. His investigation of petitioner's life and social history was wholly inadequate, not only for purposes of the penalty phase, but also for the guilt phase. Although reasonably competent counsel would undoubtedly have waited until the penalty phase to present some of the life and social history evidence, reasonably competent counsel would nevertheless have investigated petitioner's life and family history prior to the commencement of the guilt phase. Such investigation was critical for reasons including, but not limited to, the following:

A. Investigation of petitioner's life and family history was essential to counsel's ability to conduct adequate and competent voir dire of potential jurors. Reasonably competent counsel would have questioned potential jurors regarding their views on the type of evidence that he

reasonably anticipated the jury would hear at the guilt and penalty phases. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 413, *infra*. Having failed to undertake an adequate investigation of potential guilt and penalty phase evidence prior to voir dire, Mr. Demby's decisions regarding what questions to ask during jury selection were uninformed and his performance at that critical phase of trial was deficient.

B. Investigation of the petitioner's life and family history was essential to Mr. Demby's ability to consult meaningfully with mental health experts. A full social history would have been required for a mental health expert to render a competent opinion regarding petitioner's mental state at any given time. As set forth above, reasonably competent counsel would have consulted with one or more qualified mental health experts prior to the guilt phase on a variety of questions. A fortiori, reasonably competent counsel would have conducted a complete social history investigation prior to the guilt phase as well.

C. Investigation of petitioner's life and family history was essential to Mr. Demby's ability to make well-reasoned and informed decisions regarding what social history evidence to present at the guilt phase. Reasonably competent counsel would have presented at the guilt phase at least some evidence of petitioner's life history, particularly the events which had occurred in the months and years preceding the crime. Such evidence would have rebutted or forestalled the prosecutor's argument at the guilt phase that petitioner was cold, uncaring, violent and essentially evil, and that the evidence of his behavior around the time of the killings indicated that he was the killer. Evidence of at least some of petitioner's life history would have made the jury see petitioner as a sympathetic human

being who was not cold and uncaring, but troubled. Moreover, reasonably competent counsel would have arrived at a strategy for the guilt phase that would set the stage for his expected penalty phase defense. That is, reasonably competent counsel would have presented evidence at the guilt phase that was consistent with and preparatory for the penalty phase.

D. Reasonably competent counsel would have conducted a full investigation of petitioner's life and social history prior to the guilt phase in order to simply be prepared for the penalty phase. Knowing that, if there is to be a penalty phase, it normally commences very shortly after the jury's verdict at the guilt phase, reasonably competent counsel would have recognized that he or she would not have time to conduct a full social history investigation between the end of the guilt phase and the beginning of the penalty phase. By the same token, without a complete social history investigation, counsel would not be able to perform adequately at a penalty phase. Accordingly, reasonably competent counsel would have conducted the vast majority of the investigation needed for the penalty phase prior to the guilt phase.

382. Mr. Demby failed to conduct an adequate social history investigation at any time, and so entered both the guilt phase and the penalty phase unprepared. His strategic decisions at the guilt phase were therefore uninformed and his performance deficient.

383. Had Mr. Demby conducted a reasonable and adequate social history investigation prior the commencement of trial, he would have conducted competent voir dire and would have eliminated from the jury those jurors who would be unable to consider evidence of petitioner's life history as sympathetic, exculpatory and/or mitigating; he would have seen the need to consult with mental health experts in order to assess the

significance of the information he had gathered and to advise him regarding his relationship with petitioner and the availability of mental health expert testimony at the guilt and penalty phases; he would have made informed and well-reasoned decisions regarding what evidence of petitioner's life history to present at the guilt phase; he would have presented at least some of that evidence in order, inter alia, to counter the prosecutor's mischaracterization of petitioner's personality and character and in order to humanize petitioner before the judge and jury; and he would have been prepared for the penalty phase. Because of the insufficiency of his investigation of petitioner's social history, he did none of these things and his performance at the guilt phase was deficient.

G. Failure to Investigate Litigation on the Part of Victims' Family Members Regarding The Life Insurance Proceeds

384. Handwritten notes provided to counsel for petitioner in discovery prior to the reference hearing herein indicate that law enforcement had informed the insurance company not to make any payment to Clifford Morgan, as they believed he was responsible for the death of his wife and son. At the time of trial, relatives of Nancy and Mitchell Morgan had initiated litigation and were requesting declaratory relief with regard to the distribution of the life insurance proceeds. The pleadings filed in that litigation were a matter of public record and at least one such pleading was in the possession of law enforcement.

385. Reasonably competent counsel would have determined whether any litigation had been initiated regarding the life insurance proceeds, as it was relevant to the question of whether the conspiracy had been frustrated by the time of trial.

386. At the 403 hearing regarding the scope and duration of the

conspiracy, reasonably competent counsel would have presented evidence of the litigation and communication between law enforcement and the insurance company to show that the conspiracy was not ongoing at that time and that its alleged goal had been frustrated at the time of Clifford Morgan's arrest.

H. Unreasonable Reliance on Inaccurate Transcripts and Reports

387. Prior to trial, the prosecution provided Mr. Demby with approximately 39 audio cassette tapes, most of which contained recordings of witness interviews by law enforcement.[46] (H.Exh. 85.) The prosecution also provided Mr. Demby with purported transcripts of several of the tape-recorded witness interviews. (*Ibid*.) Mr. Demby also had several of the tapes transcribed himself. (Appendix 42.)

388. The purported transcriptions that the prosecution provided Mr. Demby contained innumerable inaccuracies and omissions. Petitioner hereby incorporates by reference as if fully set forth herein paragraphs 171-176, *supra*.

389. Handwritten changes made on Mr. Demby's copy of some of the transcriptions indicate that Mr. Demby listened to enough of the tapes provided by the prosecution to observe that the prosecution's transcriptions were materially inaccurate. Nevertheless, Mr. Demby failed to listen to all of the tapes provided by the prosecution and/or failed to correct all of the material inaccuracies in the purported transcriptions. Even as to those purported transcriptions which reflect some handwritten corrections, many inaccuracies were not noted. Moreover, as to those tapes which Mr. Demby

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[46]Other tapes consisted primarily of electronic surveillance, including recordings of phone calls and conversations inside the county jail.

had transcribed anew, those purported transcriptions, although an improvement on the ones provided by the prosecution, nevertheless also contain material inaccuracies. Mr. Demby's failure to note all material inaccuracies in all of the purported transcriptions constitutes deficient performance.

390. As a result of his unreasonable reliance on and failure to correct inaccurate transcripts and summaries of witness statements, Mr. Demby's decision-making at petitioner's trial was skewed: his assessment of how and whether to cross-examine and/or impeach particular witnesses with prior statements was based on inaccurate information as to what those prior statements were.

391. Mr. Demby's failure to correct the inaccurate transcripts also resulted in ineffective pre-trial investigation. Had he corrected all inaccuracies in the transcripts and summaries provided by law enforcement, he would have perceived a pattern of state misconduct and would have moved for sanctions in the form of greater time to investigate, exclusion of prosecution evidence and/or even dismissal of the charges. He would also have had even more reason to question the reliability of other documentation provided in discovery by the prosecution and to re-interview individuals interviewed by law enforcement. He would have questioned witnesses regarding what law enforcement had asked and told them and what they had told law enforcement. He would have then uncovered and litigated additional violations of petitioner's right to discovery and disclosure of favorable evidence under *Brady* v. *Maryland*, *supra*, and its progeny, insofar as the prosecution had failed to disclose witness statements that were favorable to petitioner and law enforcement conduct and statements that constituted misconduct.

392. For example, one of the tape-recordings provided by the prosecution to Mr. Demby was that of an interview of Calvin Boyd on August 3, 1981, by Deputy District Attorney Jonas and Detectives Jamieson and Bobbitt. (H.Exh. 85.) The prosecution also provided Mr. Demby with a purported transcription of that interview. (Appendix 2.) However, the purported transcription was materially inaccurate and contained numerous omissions. (Appendix 43.) Mr. Demby had the tape transcribed anew. However, his purported transcription also contains many inaccuracies and omissions. For example, the transcription Mr. Demby had prepared does not include the beginning of the tape-recording, when Deputy District Attorney Jonas says to Boyd: ". . . about the time of the preliminary hearing in October. Understand? It's a formal piece of paper. . . If what you're telling us is the truth, that will guarantee to you that we will not prosecute you in the case. Okay, but again, understanding that we have to believe you. Okay?" (Appendix 4.) It clear from this portion of the tape that, before the tape-recorder had been turned on, Boyd had asked Deputy District Attorney Jonas for some guarantee of immunity from prosecution. This inference is supported by a police chronology in Mr. Demby's files indicating that, a few days before this, Boyd had declined to submit to a police polygraph and told detectives that, instead, he wanted "to talk to the DA." (Appendix 11.) Another police chronology, also in Mr. Demby's files, shows that on August 3, 1981, Boyd first presented himself at the police station in the morning. Deputy District Attorney Jonas was unavailable at that time, so Boyd came back in the afternoon when he was available. Boyd clearly wanted something from the prosecutor that the detectives could not provide: e.g., immunity from prosecution in exchange for his cooperation. The tape shows that he received what he desired.

However, Mr. Demby did not have this portion of the tape transcribed and, in reliance on his inaccurate transcript, failed to cross-examine Boyd on the subject at trial. Mr. Demby's version of the transcript omits each reference Boyd made to the name "Ollie." In interview, Boyd indicated that Ollie was his closest friend. (Appendix 4.) Reasonably competent counsel would have corrected the purported transcript and then would have interviewed Ollie, which would have revealed numerous indicators that Boyd was in fact the killer of the Morgans. (See Claim XIII, *supra*.**)**

393. Mr. Demby was also provided with tapes and purported transcriptions of the polygraph interrogations of Colette Mitchell on October 26, 1981. Mr. Demby's copies of the transcripts of Ms. Mitchell's polygraph interview on October 26, 1981, indicate that he listened to the tape recording of the afternoon session and corrected the transcript by hand, noting the majority of inaccuracies. However, he failed to correct or note a number of material omissions, including but not limited to the following: Ms. Mitchell's statement that Steve Rice had gotten "all that coke" for Ms. Mitchell, petitioner and Reilly (Appendices 14 and 45); Ms. Mitchell's statement that she told detectives Bobbitt and Jamieson that Reilly could have left the apartment and she would never have known (Appendices 14 and 45); Kuhns' statement to Ms. Mitchell that the stabber may have been a women and that, if anyone had mentioned that to her, she would be liable for conspiracy (Appendices 14 and 45); Ms Mitchell's statement that she had tried to reach her lawyer at the lunch break but did not succeed in doing so and instead just left him a message (Appendices 14 and 45); compare with RT 10300); Ms. Mitchell's statement regarding the circumstances of petitioner's arrest (Appendices 14 and 45); Ms Mitchell's statement that Reilly's car was in the same place he had left it (Appendices 14 and 45);

Ms. Mitchell's statement that she was sleepy because she had to go see her ex-husband that night (Appendices 14 and 45).

394. Mr. Demby unreasonably failed to make any corrections of law enforcement's version of the transcript of Ms. Mitchell's polygraph interrogation on the morning of October 26, 1981. (Appendices 13 and 44.) Petitioner hereby incorporates by reference as if fully set forth herein paragraph 174, *supra*.

395. As a result of Mr. Demby's failure to correct the inaccurate purported transcriptions, his cross-examination of witnesses at trial was deficient and he failed to uncover additional evidence undermining the prosecution's theory of petitioner's guilt.

I. Prejudice

396. Had Mr. Demby undertaken a reasonably adequate investigation, he would have been aware of, and would have presented, the evidence set forth above and presented at the reference hearing.

397. Had Mr. Demby undertaken a reasonably adequate investigation, he would have been aware of, and would have presented, additional and more compelling evidence and argument to the trial court in support his requests for a severance. He would have been able to demonstrate that petitioner's defense to the charges was mutually exclusive to the defenses of codefendants Morgan and Reilly, and that petitioner would suffer from prejudicial association with his codefendants if he were jointly tried with them. (See *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1081-1083.) Mr. Demby would have laid out petitioner's defense and the defenses of codefendants Morgan and Reilly in sufficient detail so that the trial court could make an informed decision. Mr. Demby would have informed the trial court that petitioner's defense to the charges

was that codefendant Morgan was the mastermind of the conspiracy, that Boyd was the hired killer, that Marcus was Boyd's driver, and that codefendant Reilly, but not petitioner, was present at the scene of the killings. Codefendant Reilly's defense was that he had withdrawn from the conspiracy and that codefendant Morgan committed the killings himself. Codefendant Morgan's defense was that "Reilly and some other unknown person who [Reilly] got committed the murder of [Morgan's] wife and child for the purpose of obtaining some coercive handle on [Morgan] to force [Morgan] to pay them money out of eventual proceeds he would get from the insurance policy which [Morgan] had mentioned to [Reilly] that he had." (RT of 2/3/83 at p. 6.) Petitioner's defense, that Reilly was directly involved in the killings, was diametrically opposed to Reilly's defense that he was not and that he (Reilly) had withdrawn from the conspiracy. For the jury to accept petitioner's defense and acquit him, it would have to reject codefendant Reilly's. Petitioner's defense, that Morgan was the person who had masterminded the murder-insurance conspiracy, was diametrically opposed to Morgan's defense that he knew nothing about the killings and that the killings had been committed by codefendant Reilly and some other unknown person (maybe petitioner). For the jury to accept petitioner's defense, it would have to reject Morgan's. Had Mr. Demby undertaken a reasonably adequate investigation in this case, he would have pointed out to the trial court that it would be fundamentally unfair to join petitioner's case with that of his two codefendants. Mr. Demby would have argued that, if petitioner's case remained joined, he would, in effect, be prosecuted by two additional prosecutors. Mr. Demby would have argued that, if petitioner's case remained joined, petitioner would not only have to deal with the prosecution's case directed against him, he would also have to deal with the

negative spillover effects of the prosecution's case against codefendants Morgan and Reilly as well. (See *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1081-1083.)

398. Had Mr. Demby undertaken a reasonably adequate investigation, he would have been aware of, and would have presented, evidence at the in limine hearing regarding the duration of the conspiracy showing that the alleged object of the alleged conspiracy had been frustrated shortly after petitioner's arrest and all statements made by any alleged coconspirator subsequent to that date were inadmissible.

399. As it was, the three were tried jointly and extensive evidence of alleged statements made by petitioner, his codefendants and other alleged conspirators were improperly and prejudicially admitted as evidence of petitioner's guilt.

400. The evidence linking petitioner to the killings was circumstantial and weak The evidence which the prosecution presented to convict petitioner consisted of the following: evidence showing that petitioner and Reilly were together at the Vose Street Apartments on the night of the killings and that they were using drugs and drinking alcohol at that time; the testimony of Colette Mitchell stating that she could not account for petitioner's whereabouts after approximately 2:00 to 3:00 a.m. on the night of the killings, and that petitioner had made a number of suspicious and/or incriminating statements to her after the killings; the testimony of Joe Dempsey and Mike Mitchell that, before the killings, Reilly had pointed petitioner out as someone who might perform the deed; the testimony of Mike Mitchell that petitioner and Reilly were together in Reilly and Mitchell's apartment on the night of the killings and, early the next morning, he heard a shower running and found a wet towel in his

bathroom; the testimony of Calvin Boyd that he had seen petitioner and Reilly sleeping in Steve Rice's apartment the morning after the killings, that Reilly had told him after the killings that he and petitioner had been the killers and that petitioner had later told Boyd he was asking too many questions; the testimony of Debbie Sportsman that petitioner and Reilly spent a great deal of time together just before and after the killings and that she did not like petitioner; and the evidence showing that, after he was in jail, petitioner told Colette Mitchell to instruct his brother, John Hardy, to dispose of a rifle which was shown to have belonged to Clifford Morgan.

401. Based on this testimony and a tremendous amount of improper argument, innuendo and improper questioning of witnesses, the prosecutor managed to convince the jury that petitioner was the killer. (Appendix 12.) The jury found that the strongest evidence against petitioner was that of his association with Mark Reilly before and after the crime. (Appendix 12.) At least some members of petitioner's jury did not understand the testimony presented by counsel for codefendant Reilly regarding the time of death. (Appendix 12.) Although Mr. Demby suggested in his closing argument at the guilt phase that someone other than petitioner was the killer, the jury found that there was no evidence to support that argument and therefore, they discounted it. (Appendix 12.)

402. Had Mr. Demby conducted reasonable investigation, he would have presented evidence to support his theory and the jury would not have found petitioner guilty of capital murder.

403. Had Mr. Demby conducted reasonable investigation and presented the products of such investigation, the jury would have found that the prosecution had not proven its theory of petitioner's guilt beyond a reasonable doubt. The evidence he could have presented includes, but is

not limited to: evidence that the killings occurred at a time when petitioner could not have been the killer; evidence indicating that Boyd was the killer and Marcus was the driver; evidence indicating that petitioner declined to go along; evidence undermining Boyd's credibility as witness; evidence undermining Colette Mitchell's credibility as a witness; evidence showing that Reilly left the Vose Street Apartments alone on the night of the killings; evidence showing that petitioner's alleged statements regarding his expectation of insurance money did not reflect an expectation that he would be receiving insurance money flowing from the killings; evidence that Mike Mitchell could not tell the difference between the sound of the shower in his apartment and the sound of the shower in neighboring apartments and that his girlfriend showered in his bathroom before he got up on the morning after the killings; evidence that petitioner's sometimes odd behavior, his association with Reilly and other alleged coconspirators and his use of drugs on the night of the killings did not indicate that he was the killer; and evidence that petitioner's behavior after the killings indicated that he did not participate in the killings. Virtually every piece of evidence presented by the prosecution against petitioner could have been proven false and/or severely undercut had Mr. Demby competently investigated and presented such evidence.

404. In the absence of counsel's omissions, the jury would not have found petitioner guilty of capital murder.

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XIV

PETITIONER'S TRIAL ATTORNEY PROVIDED INEFFECTIVE REPRESENTATION AT THE GUILT PHASE OF PETITIONER'S TRIAL

405. Petitioner's death sentence and confinement are unlawful and were obtained in violation of the his rights to the effective assistance of counsel, to due process and equal protection of the law, to confrontation of witnesses, to a jury trial, to present a defense, to a fair, individualized, reliable and/or nonarbitrary guilt and penalty determination, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, section 1, 7, 13, 15, 16 and 17 of the California Constitution in that Michael Demby's conduct at the guilt phase of petitioner's trial was prejudicially deficient. (*Strickland v. Washington* (1984) 466 U.S. 668; United States v. Cronic (1984) 466 U.S. 648; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Horton v. Zant* (11th Cir. 1991) 942 F.2d 1449, 1462; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.)

406. To the extent that Mr. Demby's conduct was purportedly based on strategic considerations, those considerations do not bear constitutional scrutiny. Before an attorney can make a reasonable strategic decision, he must obtain the facts needed to make an informed decision; an attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 690-691; see also *Griffin v. Warden, Maryland Correctional Adjustment Center* (4th Cir. 1992) 970 F.2d 1355, 1358 [deficient

performance by counsel may in fact deprive him/her of the ability to make a strategic or tactical decision]; *Horton v. Zant* (11th Cir. 1991) 941 F.2d 1449, 1462 [a "strategic" decision cannot be reasonable where the attorney has failed to investigate his options and make a reasonable choice between them].)

407. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's rights to due process, a fair trial and a reliable death judgment have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358.)

408. This claim conforms the pleadings to the documentary and testimonial evidence presented at the reference hearing. Apart from those facts which derive from the declarations of petitioner's jurors, the facts underlying this claim were presented at the reference hearing held pursuant to this Court's order to show cause. The following facts were relevant to the order to show cause and reference questions, supportive of the claim that petitioner was deprived of the effective assistance of counsel at the penalty phase and admissible at the reference hearing on that issue. However, these facts also established a factual basis for the present claim. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2

Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

409. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

410. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

411. To the extent that the facts set forth below were not known to the prosecution and could not have been reasonably discovered by petitioner's trial counsel, they constitute newly-discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings, undermining confidence in the outcome and violating petitioner's rights to due process, a fair trial, and reliable guilt and penalty determinations. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358)

412. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. To the extent that some facts underlying this claim were proffered solely by means of sworn declarations, at or before the reference hearing herein, the referee improperly prevented counsel from presenting direct testimony with respect thereto. The referee's rulings excluding such evidence denied petitioner of a full and fair hearing.

Petitioner hereby incorporates by reference as if fully set forth herein Claim XXII, *infra*. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

413. Mr. Demby unreasonably and prejudicially failed to conduct competent voir dire of prospective jurors. Petitioner's case was Mr. Demby's first capital trial. (HT 2191.) In the proceedings attendant to this habeas corpus petition, Mr. Demby claimed that his decision not to present any mitigation at petitioner's penalty phase was premised in part on his belief that jurors did not like drug abusers or the insane. (HT 1791, 1819.) A review of the record reflects that he asked none of the seated jurors for their views regarding drug and alcohol use or mental illness. To base a decision not to present mitigation on this supposition without inquiring of the actual jurors regarding their views on the subject was unreasonable and fell below professional norms prevailing at the relevant time period. (See HT 2491.) Similarly, given that his purported penalty phase defense was to argue lingering doubt as to petitioner's guilt, his performance fell below the standard of care when he failed to inquire of jurors during voir dire whether they would be receptive to the defense of lingering or residual doubt as a basis for not imposing the death penalty. (See HT 2492, 2502.) Moreover, his failure on voir dire to inquire whether prospective jurors could consider a sentence of life without parole for a person found guilty of murdering an eight-year-old child was unreasonable and fell below the standard of care. As a result of Mr. Demby's inadequate voir dire, his decisions whether to make peremptory or for-cause challenges were not sufficiently informed to be reasonable. Moreover, his purported strategic decision at the penalty phase not to present mitigation and only to argue lingering doubt was similarly uninformed and therefore unreasonable. The prejudice which

resulted is manifest. Had Mr. Demby conducted effective voir dire, the outcome would have been a sentence of less than death. As it was, the jury included individuals who were biased against petitioner at the penalty phase and unable to consider imposing a penalty of life without the possibility of parole because of the fact that one of the individuals killed was an eight-year old boy. (Appendices 12, 46.) Other jurors were biased against petitioner because he was a drug user and they considered his drug use as an aggravating circumstance weighing in favor of the death penalty.

414. Mr. Demby unreasonably and prejudicially failed to move to excuse Eusebio Hernandez and Robert Brown, both of whom had relatives who had been murdered. Reasonably competent counsel would have challenged both jurors for cause on the ground that they were actually biased and would not be able to consider the penalty of life without the possibility of parole. Predictably, at penalty phase deliberations, both jurors were unable to consider a sentence other than the death penalty. (Appendix 46.) Additional reason to exclude Mr. Hernandez was provided by the fact that he had many children and, as a result, was more likely to feel that the death penalty was warranted. Deputy District Attorney Jonas perceived this as a reason to keep Mr. Hernandez on the jury. (*Ibid.*) Reasonably competent defense counsel would have perceived that Mr. Hernandez would not be able to be fair and impartial and would have moved to excuse him for cause, or in the alternative, would have exercised a peremptory challenge against him. Mr. Demby did neither. No reasonable justification for his omission is conceivable.

415. Mr. Demby unreasonably failed to move to excuse Janice Davis from the jury panel. Ms. Davis had a son who, at the time of trial, was the same age that Mitchell Morgan was when he was killed. Just as

Mitchell Morgan was sleeping with his mother at the time they were both killed, Ms. Davis' son often came into her bed in the middle of the night and slept with her. This similarity of the circumstances of the crime to Ms. Davis' own life made her extremely sympathetic toward Nancy and Mitchell Morgan and biased against petitioner. (Appendix 12.) Reasonably competent counsel would have voir dired on the subject and would have moved to excuse Ms. Davis for cause, on the ground that she was biased and could not be fair and impartial. Alternatively, reasonably competent counsel would have exercised a peremptory challenge to have her removed from the jury. Mr. Demby did not do so. No reasonable justification for his omission is conceivable.

416. Mr. Demby unreasonably and prejudicially failed to move for sanctions for law enforcement's failure to preserve tape number 86041. Petitioner hereby incorporates by reference as if fully set forth herein claim X, *infra*. A police chronological record provided to Mr. Demby in discovery and contained in Mr. Demby's files (H.Exh. 85) indicates that, on tape number 86041, law enforcement recorded interviews conducted July 15, 1981, of petitioner's codefendants Cliff Morgan and Mark Reilly, Calvin Boyd and of petitioner himself. (Appendix 11.) A police chronological record dated August 24, 1981, also contained in Mr. Demby's files, indicated that, on July 20, 1981, officer Norman ordered that tape number 86041 be erased. (Appendix 11.) Mr. Demby's own handwritten notes refer to the erasure. (Appendix 47.) The tape had exculpatory value which was apparent at the time of its destruction: law enforcement made the tape and knew or should have known of its content; the contents of the recording included material prior inconsistent statements on the part of Calvin Boyd and evidence of state misconduct, overreaching and witness

tampering on the part of law enforcement during the interviews of Boyd, petitioner and his codefendants. Law enforcement destroyed the tape intentionally and in bad faith: the tape was not erased inadvertently; an officer affirmatively ordered that the tape be erased by the person working in the sound lab. The destruction of the tape was purposeful and no good faith reason for such purposeful destruction is conceivable. Reasonably competent counsel would have moved for sanctions such as dismissal of the charges or an instruction to the jury that law enforcement intentionally destroyed evidence favorable to the defense. Had such a motion been made, the charges would have been dismissed or other sanctions would have been imposed and petitioner would not have been convicted of capital murder or sentenced to death.

417. Mr. Demby unreasonably and prejudicially failed to move for sanctions for law enforcement's failure to preserve physical specimens from the bodies of Nancy and Mitchell Morgan, including but not limited to fingernail scrapings and/or cuttings from the body of Nancy Morgan. Petitioner hereby incorporates by reference as if fully set forth herein Claim X, *infra*. It was clear from the appearance of the crime scene and the bodies that in the events leading up to her death, Nancy Morgan struggled with her assailant. (HT 2253.) Crime scene photographs also show that, at the time of her death, Nancy Morgan had long fingernails. Calvin Boyd was seen to have cuts on his hands around the time of the killings. (HT 250, 949, 1113, 1160; H.Exhs. O, BBB, 1, 2.) Law enforcement gathered fingernail scrapings from the body of Mitchell Morgan but failed to do so with respect to the body of Nancy Morgan. Documents in Mr. Demby's files reflected law enforcement's failure to preserve that evidence. Had the evidence been preserved, it would have exonerated petitioner. The fingernail scrapings or

cuttings from the body of Nancy Morgan would have contained skin cells belonging to the assailant. Those cells could have been isolated and tested for ABO and enzyme typing. Those test results could then have been compared to a sample of petitioner's blood and the comparison would have shown that petitioner was not the assailant. Law enforcement's failure to preserve the evidence was undertaken in bad faith. At the time of the crime scene investigation, it was evident that fingernail scrapings were critical evidence which could exculpate any suspect. Reasonably competent counsel would have moved for sanctions for the failure to preserve the evidence. In the absence of Mr. Demby's omission, petitioner would have been entitled to sanctions and would not have been convicted of capital murder or sentenced to death.

418. Mr. Demby unreasonably failed to secure the appointment by the court or assignment by his office of second counsel. This omission was unreasonable and constituted deficient performance. Petitioner's case was the first capital case Mr. Demby had taken to trial. (HT 2191.) The case was unusually complex, both factually and legally. On February 2, 1981, less than a month after Mr. Demby was assigned to represent petitioner, this Court held that, in a capital case, upon a showing of genuine need, a presumption arises that a second attorney must be appointed to represent the accused. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424.) Particularly given Mr. Demby's lack of experience and the complexity of the case, reasonably competent counsel would have sought appointment by the court or assignment by the public defender's office of a second attorney to assist in petitioner's representation. Mr. Demby's failure to obtain second counsel was unreasonable under then-prevailing professional norms and no reasonable tactical justification can be advanced for his omission. Had a

request for such counsel been made, second counsel would have been appointed or assigned. With second counsel, it is reasonably likely that many of the deficiencies in the representation petitioner received would have been cured and that petitioner would not have been convicted of capital murder or sentenced to death.

419. Mr. Demby failed to object pursuant to Evidence Code section 352 to the admission of 42 hearsay statements and/or acts occurring after petitioner's and his codefendants' arrests but before trial . (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 148.)

420. Mr. Demby unreasonably and prejudicially failed to reassert the hearsay objections and arguments made at the hearing pursuant to Evidence Code 403 and at the preliminary hearing, and incorrectly assumed that they would carry over to trial. (RT 8073.)

421. Mr. Demby unreasonably failed to urge reasonable bases for the motion to sever petitioner's trial from that of his codefendants. Petitioner hereby incorporates by reference as if fully set forth herein Claim XXI, *infra*. Mr. Demby's omissions in this regard include but are not limited to the following:

A. Mr. Demby failed to argue that joint trials would result in "prejudicial association" under *People v. Massie* (1967) 66 Cal.2d 899, 917, in that the evidence of petitioner's guilt was weak, whereas the evidence against codefendants Reilly and Morgan was strong, and a joint trial would likely cause the jury to view petitioner as guilty by association. (See *People v. Champion and Ross* (1995) 9 Cal.4th 879, 904-905; see also *United States v. Tootick*, *supra*, 952 F.2d 1078.)

B. Mr. Demby failed to argue that joint trials would violate petitioner's right to confrontation and to be free from cruel and

unusual punishment under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under California Constitution, article I, sections 1, 7, 13, 15, 16 and 17. The United States Supreme Court has consistently emphasized the heightened requirement of reliability in capital fact finding procedures, both at the guilt and at the penalty phases of a capital trial. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999 [the Court "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 ["[W]e have invalidated procedural rules that tend to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."]; see also *Spaziano v. Florida* (1984) 468 U.S. 447, 455 ["The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations."]; *Schlup v. Delo* (1995) 513 U.S. 298, 324-325 [requiring special guarantees of reliability in a capital case to minimize the potential danger of executing the "actually innocent."] Reasonably competent counsel would have supported the request for a separate trial made on petitioner's behalf with the argument that a joint trial would violate petitioner's constitutional right to a fair, reliable and individualized fact finding as to guilt and/or penalty.

C. Mr. Demby failed to articulate the ways in which a failure to sever petitioner's trial from that of his codefendants would inure to petitioner's detriment at the guilt phase. (See *People v. Champion and Ross*, *supra*, 9 Cal.4th 879, 906.) Petitioner hereby incorporates by reference as if fully set forth herein Claim XXI, *infra*. Reasonably

competent counsel would have argued that at a joint trial, the jury would be much less likely to consider each defendant individually and would be likely to consider evidence showing his codefendants' guilt against petitioner. The jury would be unlikely to perceive that the evidence against petitioner was extremely weak by comparison to the evidence against his codefendants.

D. Mr. Demby failed to argue that severance of both guilt and penalty phases was required on the ground that a joint penalty trial would violate petitioner's state and federal constitutional rights to an individualized and reliable penalty determination. Reasonably competent counsel would have argued that the jury would be unable to provide petitioner with the individualized assessment of his moral culpability and would regard mitigation proffered on behalf of his codefendant as aggravation against petitioner. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 692, *infra.*

E. Mr. Demby failed to argue that severance of both guilt and penalty phases was required on the ground that petitioner was constitutionally entitled to a separate penalty trial and that, therefore, severance of the guilt phase of trial was necessary and appropriate. California statutes express a preference for the same jury to hear both guilt and penalty phase of a capital trial. (See Pen. Code, §§ 190.1, 190.3.) Moreover, granting a separate penalty trial after a joint guilt phase would be relatively inefficient, as a separate penalty phase jury would nevertheless have to be presented with the facts of the crimes charged and the defendant's defense thereto, because of the fact that consideration of such information must be made in assessing the factors and circumstances relevant to penalty. Statutory factors to be considered at sentencing include,

inter alia, the facts and circumstances of the crime (Pen. Code, § 190.3 (a)), lingering doubt as to the defendant's guilt (see, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 883; *People v. Wader* (1993) 5 Cal.4th 610, 660; *People v. Alcala* (1992) 4 Cal.4th 742, 766; *People v. Fauber* (1992) 2 Cal.4th 792, 864; *People v. Cox* (1991) 53 Cal.3d 618, 677), whether the defendant acted under the substantial domination of another (Pen. Code, § 190.3 (g)), whether or not the victim participated in the crime, and whether the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor (Pen. Code, § 190.3 (j)). Consideration of such factors, which is constitutionally and statutorily required, would necessitate presenting to the penalty jury the better part of the guilt phase evidence. (Cf. *Lockhart v. McCree* (1986) 476 U.S. 162, 181 ["it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury."].) Thus, the policy in favor of a unitary jury at both guilt and penalty phases militated in favor of granting a severance for penalty phase only.

422. Mr. Demby's failure to make the foregoing arguments in support of the motion for severance was an omission which fell below the standard of reasonable competence for attorneys at that time. Particularly in light of the fact that Mr. Demby did in fact move for a severance and his factual showing was made in camera and ex parte, no reasonable justification can be advanced for failing to argue all potential legal and factual support for that motion. (*People v. Pope*, *supra*, 23 Cal.3d at p. 425 [criminal defense attorneys have a duty to investigate carefully all defenses of fact and of law that may be available to the defendant]; *People v.*

Zimmerman (1980) 102 Cal.App.3d 647, 657-659; *People v. Farley* (1979) 90 Cal.App.3d 851.)

423. Mr. Demby's omissions in this regard were prejudicial. At the joint guilt trial of petitioner and his codefendants, antagonistic defenses were presented. Codefendant Morgan argued that petitioner and Reilly were the killers and that he had nothing to do with the crimes (RT 13408); codefendant Reilly argued that Morgan was the killer and that Reilly and petitioner had not participated in the killing. (RT 13160, 13180-13190, 13199, 13375-13377.) Therefore, acceptance of codefendant Morgan's defense tended to preclude the acquittal of petitioner and Reilly; similarly, acceptance of codefendant Reilly's defense tended to preclude the acquittal of Morgan. (See *United States v. Smith* (10th Cir. 1986) 788 F.2d 663, 668.) At least one of the dangers of joint trials was realized: i.e., the conflict between codefendants caused the jury to "unjustifiably infer from the conflict alone that [all] defendants [were] guilty." (*United States v. Esch* (10th Cir. 1987) 832 F.2d 531, 538, citing *United States v. Swingler* (10th Cir. 1985) 758 F.2d 477, 495; see also *United States v. Tootick*, *supra*, 952 F.2d at pp. 1082-1083.) Moreover, although the prosecution had precious little evidence against petitioner other than his association with codefendant Reilly, and what little evidence the prosecution presented against petitioner himself consisted of unreliable hearsay (see introduction, supra), the jury found petitioner guilty, largely because of his association with Reilly. (See Appendix 12.) The potential for unfairness which arises where codefendants are tried jointly was realized in the present case. Had the issue been properly presented at trial, petitioner would have been entitled to a separate trial and, if such motion had nevertheless been denied, to a reversal of the judgment on appeal or on federal habeas corpus.

424. Mr. Demby unreasonably and prejudicially failed to present evidence of the jailhouse conversation between petitioner's two codefendants. (Appendix 48.) On July 15, 1981, a few hours after their arrest, petitioner's codefendants Morgan and Reilly were surreptitiously tape-recorded inside the jail in Van Nuys. Prior to trial, Mr. Demby was provided with a copy of that tape recording. (H.Exh. 85, tape number 86048.) The tape recording includes conversation between Morgan and Reilly, as well as Reilly's telephone calls to various individuals, in which only Reilly's voice is recorded. The tape reflects a call apparently placed by Reilly to Ron Leahy, where Reilly makes the following statements: "Is Jimmy around? He isn't? What's that? For what? They had, they had – they took Calvin in here too." That portion of the tape was arguably supportive of petitioner's claim of innocence insofar as it indicated Reilly was surprised that petitioner had been arrested, could not guess what he might have been arrested for, and registered no similar question regarding why Boyd had been arrested. The tape recording also includes the following exchange between Reilly and Morgan:

Morgan: "There's a note on the door there that says something about ah keep Hardy, James Edward away from you and I [sic]. Who the hell is Hardy, James Edward?

Reilly: "That's Jim.

Morgan: "Huh?.

Reilly: "Collette's [sic] boyfriend. They've got him in here too.

Morgan: "Huh?

Reilly: "They've got him in here too.

Morgan: "Collette's [sic] boyfriend?

Reilly: "Yeah.

Morgan: "No." (Tape Number 86048, side 5.)

Prior to trial, Mr. Demby was in possession of the tape of this conversation and was aware of its content. (HT 2147-2148.) Although codefendant Morgan testified at trial, Mr. Demby did not cross-examine him about this statement or otherwise offer the statement into evidence. Reasonably competent counsel would have done so. To a reasonable juror, Morgan's statements indicated that he did not know petitioner, which in turn was supportive of the contention that petitioner was not the killer, particularly given that the conversation occurred almost two full months after the killings and one would reasonably expect Reilly to have told Morgan by that time who had been committed the killings.

425. During the guilt phase of petitioner's trial, Mr. Demby unreasonably and prejudicially relied upon inaccurate transcripts of witness interviews and statements. As a result, his decisions regarding whether and how to cross-examine prosecution witnesses and whether to call witnesses on petitioner's behalf were based on inaccurate, unreliable and insufficient information. The prosecution provided Mr. Demby with several purported transcripts of witness interviews, including a transcript of the August 3, 1981, interview of Calvin Boyd and transcripts of the two polygraph examinations of Colette Mitchell on October 26, 1981. Despite the fact that the prosecution provided Mr. Demby with tape recordings of the interviews reflected in the purported transcripts, Mr. Demby failed to correct material inaccuracies in the transcriptions and relied upon them at trial. (See Appendices 4, 5, 13, 14, 43, 44, 45; paragraph 425, *supra*.) Mr. Demby had his own transcriptions made of several of the tapes provided by law enforcement. Mr. Demby's transcriptions also contained numerous errors and inaccuracies. Mr. Demby failed to correct material inaccuracies in the

transcriptions and relied upon the inaccurate transcripts at trial. (See Appendices 4, 5, 13, 14, 43, 44, 45; paragraph 425, *supra*.) Mr. Demby knew or should have known that the transcripts were inaccurate. His reliance on them at trial was unreasonable. Reasonably competent counsel would have corrected the inaccurate transcripts or otherwise made sure that the transcriptions upon which he was relying during the trial were accurate. No reasonable justification can be advanced for this omission.

426. Mr. Demby unreasonably failed to object at the guilt phase of petitioner's trial to evidence of petitioner's and his codefendants' bad character, pursuant to Evidence Code sections 352, 1101, 1102 and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. Petitioner hereby incorporates by reference as if fully set forth herein Argument VI of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on direct appeal. The prosecution elicited extensive evidence of petitioner's and his codefendants' bad character, including evidence of petitioner's and his codefendants' drug use, poverty, slovenly appearance at the time of the crime, lack of employment, financial dependence on others, sexual promiscuity, bad work habits and all of the evidence specified in Argument VI of the Brief of Amicus Curiae filed by the California Appellate Project on behalf of petitioner's codefendant and coappellant Reilly on automatic appeal (which petitioner joined in his Supplemental Opening Brief). Not only did the prosecution present inadmissible bad character evidence, but petitioner's codefendants did so as well. For example, Mr. Stone, codefendant Morgan's counsel, asked Ms. Mitchell whether petitioner was having sexual relations with any other women when he was involved with her. (RT 10337.) Mr. Stone asked Ms.

Mitchell whether petitioner ever dealt in drugs. (RT 10072.) Mr. Demby failed to object to both questions. Reasonably competent counsel would have moved to exclude all negative lifestyle and bad character evidence, whether it pertained to petitioner or to his codefendants, and would have attempted to distinguish and separate petitioner from his codefendants in character as well as in deed. At a minimum, counsel would have requested a limiting instruction telling the jury that any bad character evidence admitted as to a particular defendant could be considered only against that particular defendant and not against his codefendants. Mr. Demby did not do so. No reasonable justification can be advanced for Mr. Demby's failure in this regard. Contrary to this Court's finding on automatic appeal that any error was harmless (see *People* v. *Hardy*, *supra*, 2 Cal.4th at pp. 181-182), the error was clearly prejudicial. The prosecution's case against petitioner at the guilt phase rested almost entirely on a theory of guilt by association with his more clearly guilty codefendants. The prosecution painted petitioner and codefendant Reilly as associates who lived in the same environment and with essentially the same lifestyle. Mr. Demby's omissions enabled the prosecution to convince the jury at the guilt phase that all of the evidence against Reilly was attributable to petitioner. (See Appendix 12.) At the penalty phase, the jury then also considered petitioner's lifestyle and the environment in which he and codefendant Reilly were staying at the time of the crime as evidence in aggravation. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 783, *infra*. Thus, the jury's determination of both guilt and penalty were influenced by irrelevant, inadmissible, unreliable and prejudicial considerations and the trial was unreliable, unfair and constitutionally unsound. Had Mr. Demby's objected to the extensive bad

character evidence pertaining to petitioner and his codefendants, petitioner would not have been convicted of capital murder or sentenced to death.

427. Mr. Demby unreasonably failed to object pursuant to Evidence Code section 352 and petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to evidence of the victims' good character, evidence of hearsay statements of the victims and evidence of the impact of the victims' death on others at the guilt phase. Petitioner hereby incorporates by reference Argument VI of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. Reasonably competent counsel would have objected to such evidence on the foregoing grounds. Mr. Demby failed to do so. No reasonable tactical justification can be advanced for his failure in this regard. Contrary to this Court's finding on automatic appeal (see *People* v. *Hardy*, *supra*, 2 Cal.4th at p. 182), the evidence improperly admitted was not harmless. Jurors in fact considered and were swayed by Nancy Morgan's good character in deliberations at both guilt and penalty phases. (See, e.g., Appendix 12.)

428. Mr. Demby unreasonably failed to object to the jury's visit to the Vose Street apartment complex. Reasonably competent counsel would have objected on the ground that the "evidence" the jury would receive thereby was inadmissible as more prejudicial than probative pursuant to Evidence Code section 352 and would inject the jury's guilt and penalty phase deliberations with the consideration of unreliable, arbitrary and irrelevant factors. Prejudice is shown by the fact that the jury in fact considered petitioner's lifestyle and the environment in which he was staying at the time of the crime as evidence in aggravation at the penalty phase. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 783, *infra.*

429. Mr. Demby failed to object to the tour of the Vose Street apartments on the ground that, by the time of trial, fences had been removed which, at the time of the crime, had stood outside the door of each apartment on the ground floor including Mark Reilly's. The result was that the jury's visit to the apartment complex inappropriately bolstered the credibility of Joseph Dempsey. Dempsey testified that, prior to the killings, Reilly pointed at petitioner and said he thought he could get petitioner to be the hit man. Dempsey's testimony indicated that when this conversation occurred, he and Reilly were in Reilly's apartment and petitioner was by the swimming pool, which was in the area outside Reilly's front door. With the fences torn down, as they were when the jury viewed the apartment complex, it appeared that this conversation could have occurred as Dempsey claimed. However, in reality, there was a five-foot tall solid wooden fence in front of Reilly's front door and front window, such that it was not possible to see someone by the swimming pool from the front door area. (RT 6928, RT 6937.) Accordingly, the jury's visit to the apartment complex was misleading and improperly bolstered Mr. Dempsey's credibility. Nevertheless, Mr. Demby failed to object on this basis or to argue to the jury that the previous existence of the fences indicated that Dempsey was not to be believed.

430. Mr. Demby unreasonably failed to object to the tour of the crime scene, which was unduly prejudicial. Reasonably competent counsel would have objected to the tour itself and specifically the condition in which the house was found at the time of the tour. Reasonably competent counsel would also have objected when the trial court permitted the jurors to try to open the front door of the house. Petitioner hereby incorporates by reference as if fully set forth herein the facts contained in paragraph 791,

infra.

431. Mr. Demby failed to object to Calvin Boyd's extensive use of profanity throughout his direct examination and failed to object that the prosecution had encouraged Boyd to use his "kind of talk" because it distracted the jury, made them less able to understand him and to assess his credibility and drew their attention away from the inconsistencies in his testimony. (See RT 8078, 8174.) At the preliminary hearing and on cross-examination at trial, Boyd testified without extensive use of profanity. He was clearly able to control his language when the need arose. Reasonably competent counsel would have objected and asked the trial court to admonish Mr. Boyd to control his language. Because no such objection was made, Boyd used profanity in virtually every answer he provided on direct examination. As a consequence, the jury was in fact less able to understand what he was saying and less able to assess his credibility because, in effect, he was speaking a foreign language.

432. Mr. Demby unreasonably failed to object to Boyd's numerous lengthy narrative answers to questions posed of him at trial. Often Boyd's answers were unresponsive to the question. Even when responsive, his narrative responses included a wide variety of irrelevant, inadmissible, unreliable and prejudicial information to which the jury should not have been exposed. Reasonably competent counsel would have objected and requested that the trial court admonish Boyd to answer only the question posed. Boyd was an admitted entertainer and a con man (RT 8082, 8100), whose goal was to assist the prosecution in whatever way he could. Reasonably competent counsel would have recognized early on that it was necessary to take affirmative steps to control his testimony. Mr. Demby made no such objection.

433. Mr. Demby unreasonably and prejudicially failed to object to Boyd's testimony that Reilly told him he and petitioner had committed the killings. Reasonably competent counsel would have objected on the ground that Reilly's statement was not in the furtherance of the conspiracy and was therefore inadmissible hearsay, and, even if admissible, it was more prejudicial than probative, particularly considering Boyd's lack of credibility. No legitimate tactical reason for failing to object is conceivable.

434. Mr. Demby unreasonably failed to move to exclude Colette Mitchell's testimony at trial on the ground that, as a result of coercive police interrogation techniques and her particular vulnerabilities thereto, she was incompetent to testify. (See Evid. Code, § 701.) By the time of petitioner's trial, Ms. Mitchell was unable to ascertain what was or was not true; her memory had been so corrupted that she was unable to separate what "memories" were the product of her own subjective observations and what were the product of suggestion by others and her own confabulation. Having been present for her testimony at the 403 hearing regarding the scope and duration of the conspiracy, Mr. Demby was aware that, at trial, her testimony would be dramatically different than any of the statements or testimony she had given pre-trial. Mr. Demby was also aware that law enforcement personnel had applied tremendous pressure to Ms. Mitchell, that Ms. Mitchell had received information and disinformation regarding the killings from many sources, that Ms. Mitchell had been in the care of a mental health professional, that she was a drug user and that she was physically ill. Mr. Demby was therefore on notice that her trial testimony would be false in material respects and that, at least to some degree, she may have been convinced to believe that it was not false. Petitioner hereby incorporates by reference as if fully set forth herein the allegations

contained in Claims VI and VII, *supra*. Reasonably competent counsel would have moved to exclude her testimony at trial on the ground that she was not competent to testify. (See *Foster v. California* (1969) 394 U.S. 440; *Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Shirley* (1982) 31 Cal.3d 18, 31, 64.) Mr. Demby did not do so. No reasonable tactical justification for his omission is conceivable.

435. Mr. Demby failed to seek to introduce evidence that Colette Mitchell was given two polygraph examinations by law enforcement and that, on both occasions, the police polygrapher falsely accused her of lying. (Appendices 13, 14.) Prior to trial, Mr. Demby consulted an independent polygraph expert, who examined the tape recordings and raw data from the polygraph examinations of Ms. Mitchell and informed Mr. Demby that it was his opinion that either Ms. Mitchell was an unfit subject for a polygraph or that she was the stabber of Nancy and Mitchell Morgan. (Appendix 23.) Reasonably competent counsel would have attempted to introduce this evidence and the entire transcript of the police polygraph examinations in order to demonstrate to the jury that Ms. Mitchell's testimony was the product of intense pressure and coercion placed upon her by law enforcement and was false. Petitioner hereby incorporates by reference as if fully set forth herein Claim VI, *supra*. No reasonable tactical justification for his omission is conceivable.

436. Mr. Demby unreasonably and prejudicially failed to object to numerous instances of prosecutorial misconduct. (See *People v. Hardy*, *supra*, 2 Cal.4th at pp. 171-173.) Petitioner hereby incorporates by reference as if fully set forth herein Argument III of Appellant Hardy's Supplemental Opening Brief and Argument I of Appellant Hardy's Supplemental Reply Brief, filed on petitioner's behalf on automatic appeal.

Petitioner hereby incorporates by reference Claim VIII, *supra*. No tactical advantage is conceivable for Mr. Demby's failure to object. Mr. Demby's conduct fell below the objective standard of reasonable representation.

437. Mr. Demby unreasonably failed to object to improper questions by the prosecution. As set forth above (Claims VI, VIII and XIII), the prosecutor took every opportunity both in and outside of the courtroom to shape the testimony of witnesses through the use of questions which mischaracterized or misstated witnesses' prior testimony, questions which were leading, questions which assumed facts not in evidence, questions which were compound and misleading, and questioning which provided the witnesses with information they previously did not have. Innumerable instances of improper questions of this nature passed without objection by Mr. Demby or either of the codefendant's counsel. The frequency with which this occurred is such that cataloguing the prosecutor's improper questions and Mr. Demby's failures to object thereto is impracticable and would require retyping thousands of pages of reporter's transcript. Examples include the following:

A. At the 403 hearing regarding the scope and duration of the conspiracy, Mr. Demby failed to object when the prosecutor asked Colette Mitchell whether she recalled areas of questioning at the preliminary hearing that he had never in fact asked her at that proceeding. For example, the prosecutor asked her if she recalled being asked if petitioner had ever told her whether or not he was at the Morgan house on the night of the murders. (RT 1028.) She answered in the affirmative and said that she had not been not truthful at the preliminary hearing about any statement petitioner made about whether or not he was at the Morgan's house on the night of the killings. However, at the preliminary hearing, she

was never asked whether petitioner had told her he was at the Morgans' house.

B. At the 403 hearing regarding the scope and duration of the conspiracy, the prosecutor asked Ms. Mitchell the following question: "The statement that you attribute to Mr. Hardy, that quote, 'I'll say one thing. We were at the house,' did you ever ask him specifically what he got paid for when he was at the house?" (RT 1047.) Ms. Mitchell had not testified that day or ever before that petitioner had made the quoted statement or anything resembling it. Indeed, none of the discovery provided to petitioner's counsel included any indication that Ms. Mitchell had said that petitioner told her he was at the Morgan house. The question assumed facts not in evidence: i.e., that she had made the quoted statement. No objection was made. No reasonable tactical justification for Mr. Demby's failure to object is conceivable. The prosecutor later elicited the same purported quote from Ms. Mitchell during her testimony before the jury. (RT 9992.)

C. On the second day of Ms. Mitchell's testimony at the 403 hearing, the prosecutor asked Ms. Mitchell: "Recall yesterday your testimony where you said that before the date that you learned the murders happened, you heard Hardy and Reilly discussing robberies." (RT 1186.) She had given no such testimony. However, she answered in the affirmative. (RT 1186.) Mr. Demby objected that she had given no such testimony (RT 1186.) Mr. Jonas then indicated that he would rephrase the question and the court sustained the objection as to the form of the question. (RT 1187.) Shortly thereafter, Mr. Jonas asked the question again: "Your testimony, as I understand it, you knew, based upon prior experience – I mean prior conversations between Buck and Jim – that robberies were

going to take place?" (RT 1191.) She answered in the affirmative and no objection was made. (RT 1191.) No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

D. In front of the jury, the prosecutor elicited from Ms. Mitchell that Reilly had told her the killing had to be done by June because the life insurance policy was not going to be good anymore after that time. (RT 10010.) Mr. Jonas then asked: "Did you ever testify that that came from Mr. Hardy?" (RT 10011.) Ms. Mitchell answered, "I might have." (RT 10011.) In fact, she had never so testified. In fact, Ms. Mitchell had always indicated that it was Reilly who had told her that the killing had to be completed by June 1. (RT 1087, 1089; CT 594; Appendix 17.) The question was a mischaracterization of the evidence but no objection was made. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

E. In front of the jury, the prosecutor asked Ms. Mitchell if, in her testimony at the preliminary hearing, she had gone into "elaborate detail" regarding her lovemaking with petitioner on the night that the Morgans were killed. (RT 9945.) In fact, in her preliminary hearing testimony, she had not provided any detail whatsoever in this regard, other than the length of time that they made love. (CT 652) The question therefore mischaracterized her prior testimony. It was particularly damaging because she had testified at trial that she and petitioner did not make love on the night of the killings. Therefore, the question implied that, at the preliminary hearing, she had intentionally embellished her prior testimony for dramatic effect, when in fact she had not. The question was designed to elicit the jury's condemnation for both Ms. Mitchell and petitioner. No objection was made and she answered the question in the

affirmative. (RT 9945.) No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

F. Mr. Jonas asked Ms. Mitchell: "And what I'm asking you is, do you remember Mr. Hardy telling you specifically the night he went to the house and the night he said he heard snoring and later said that they were already dead when they got there, did he tell you that he took something that night?" (RT 10031.) This question is vague, compound and misstates the testimony, insofar as it characterizes three separate statements by Ms. Mitchell as one: i.e., that petitioner said he went to the house, but he did not say that he went on a particular night; that petitioner said he went to the house but it was before the killings and he knew so because he heard snoring; that petitioner said he went to the house at a time when the Morgans were already dead. The question treats the three statements as if they are consistent and as if they all refer to the night of the killings. No objection was made. Ms. Mitchell answered the question in the affirmative. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

G. Mr. Demby failed to object to Ms. Mitchell's testimony that she knew "for a fact" that petitioner received some money from Cliff Morgan and that she helped him get the money by loaning "them" her car to obtain it.[47] (RT 9967-9968.) This testimony was objectionable as not based

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[47]The following testimony was elicited from Ms. Mitchell by the prosecutor:

"Q. What amount of money did Buck give you as an amount of money that both Hardy and Reilly would somehow share?

"A: Forty, fifty thousand. . . .

(continued...)

upon personal knowledge. Later in her trial testimony, she admitted that she did not remember seeing money change hands from Reilly to petitioner or vice versa and she did not remember ever seeing Reilly with any money; indeed, she did not know who told her from where the money had come. (RT 10072.) At the 403 hearing prior to the foregoing testimony, she had testified that she did not remember if the money passed from Reilly to petitioner or vice versa (RT 1111-1112); she did not remember seeing Reilly give petitioner the money (RT 1112) and she did not remember seeing Reilly with the money; she only remembered seeing the money in the brown box on top of her dresser. (RT 1112.) She testified that petitioner never told her from whom the money had come and she did not know at the time that she saw the money where it had come from. She said, "Now I know but not then." (RT 1034.) When asked for the source of her information, she said she "just put two and two together." (RT 1034.) Mr. Demby objected to this testimony at the 403 hearing, but when she testified

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[47](...continued)

"Q: Do you know for a fact whether or not Mr. Hardy ever received any money?

"A: Yes, he did.

"Q: How much money did Mr. Hardy receive?

"A.: I believe a thousand dollars.

"Q: And what do you know about the thousand dollars that Hardy received?

"A: Well, I know where it came from.

"Q: From whom did it come?

"A: Cliff Morgan." (RT 9967-9968.)

to the same effect at trial, neither he nor counsel for codefendants Morgan and Reilly objected. Reasonably competent counsel would have objected and this extremely damaging testimony would have been excluded at trial. Mr. Stone objected after the question was asked and answered. The objection was sustained, but the answer was not stricken and the jury was not admonished. (RT 9968.) Therefore, Mr. Demby's failure was in no way cured by Mr. Stone's belated objection. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

H. Mr. Demby unreasonably failed to object when the prosecutor interrupted Mr. Demby's cross-examination of Ms. Mitchell and asked the judge, in the jury's presence, whether he (the prosecutor) would be permitted to ask Ms. Mitchell whether she believed petitioner was guilty of murder. (RT 10134-10137.) Counsel for codefendants Stone and Lasting objected and moved for a mistrial; Mr. Demby did not join in that motion. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

I. Mr. Demby failed to object when the prosecutor asked, "Did you know of a deliberate attempt by Mr. Mitchell, Mr. Reilly, and Mr. Hardy to in some way prevent the police from locating that car [i.e. Mike Mitchell's car[48]] when it became of interest to them again?" (RT 10029.) This question was made without a good faith basis insofar as Ms. Mitchell had never before made any statement indicating that she knew anything about Mike Mitchell. The question assumed facts not in evidence: i.e., that Ms. Mitchell knew at some point that the police had become interested in

[48]The prosecution's theory was that petitioner and codefendant Reilly drove Mike Mitchell's car to the Morgan's house on the night of the killings to commit the murders.

Mike Mitchell's car. It called for testimony that was beyond Ms. Mitchell's personal knowledge and was compound. No objection was made and Ms. Mitchell responded in the affirmative. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

J. The prosecutor asked Ms. Mitchell if she had contacted Joseph Dempsey "on behalf of" petitioner and tried to convince him to testify untruthfully. (RT 10037-10038.) This question was misleading and lacked a good faith basis, as Ms. Mitchell had previously testified that it was Reilly who asked her to contact Dempsey. (RT 1221.) No objection was made and she answered the question in the affirmative. The prosecutor then asked Ms. Mitchell: "Do you remember anything about reading something in a document that you had received from James Hardy that he had been pointed out as the person that was going to do it?" (RT 10038.) This question assumed facts not in evidence: i.e., that petitioner had ever shown her a document. She had not previously given any such testimony. Moreover, the statement to which the question referred was Joe Dempsey's, to the effect that Reilly had pointed petitioner out to him as the person who might do the killing. Mr. Dempsey testified at the preliminary hearing that Ms. Mitchell had contacted him prior to his preliminary hearing testimony and asked him not to implicate petitioner. (CT 2223.) The prosecutor's question implied that it was petitioner who had asked Ms. Mitchell to contact Mr. Dempsey and ask him to change his testimony. As stated above, Ms. Mitchell had previously testified that it was Reilly who asked her to contact Dempsey. (RT 1221.) Indeed, Dempsey was Reilly's friend; petitioner did not even know him. No objection to the question was made and Ms. Mitchell answered in the affirmative. She then clarified that she believed this information about Dempsey had been told to her and she did

not recall reading anything. (RT 10038.) The false implication remained, however, that it was petitioner who told her of Dempsey's statement and asked her get him to change his testimony. Mr. Demby not only failed to object, but also failed to impeach her with her prior testimony that it was Reilly who had asked her to contact Dempsey. (RT 1221.) No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

K. Mr. Demby failed to object when the prosecutor asked Ms. Mitchell: "Colette, what do you know about an M-1 rifle other than what you have told us yesterday about it being in a guitar case and ultimately ending up at your house on Ben Street? Do you know anything more about that?" (RT 10003.) Ms. Mitchell had not testified the previous day to anything regarding a rifle. Accordingly, the question assumed facts not in evidence and misstated her testimony. No objection was made. She then testified that petitioner had told her to tell his brother to get rid of the rifle. Ms. Mitchell knew nothing about what kind of rifle it was and never actually saw any rifle other than one that petitioner and his brother had owned for a long time. (RT 10248.) It was only through the prosecutor's improper question that the jury was led to believe that the rifle was an M-1, the type of rifle that had belonged to Clifford Morgan and that the rifle was at Ms. Mitchell's apartment. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

L. Mr. Demby failed to object when the prosecutor threatened witnesses with prosecution as they were testifying. For example, Mr. Demby failed to object when the prosecutor threatened Joseph Dempsey on the witness stand. (RT 8593-8598.) No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

M. Mr. Demby failed to object when, on redirect

examination, Mr. Jonas asked Joseph Dempsey highly improper leading and misleading questions which assumed facts in evidence and mischaracterized the witness' testimony. Petitioner hereby incorporates by reference as if fully set forth herein paragraph 211, *supra*. No reasonable tactical justification for Mr. Demby's failure to object is conceivable.

438. On numerous occasions, Mr. Demby unreasonably failed to cross-examine prosecution witnesses regarding their own prior inconsistent statements and testimony. The following are but examples of Mr. Demby's omissions in this regard and are based upon prior testimony and statements contained in his files at the time of trial:

A. Joseph Dempsey testified that, at some time prior to the killings, Reilly pointed to petitioner and said to Dempsey, "'Well, that might be one of the people that I can get to do the murders for me.'" (RT 8489.) Dempsey testified that petitioner was not physically together with Reilly and Dempsey at the time of this conversation, but was by the swimming pool at Reilly's apartment. (RT 8488, 8547.) Reasonably competent counsel would have established on cross-examination that Dempsey's intended meaning was that, at the time of this conversation, he and Reilly were in Reilly's apartment, looking out the door or window at petitioner, who was by the swimming pool, which was in the area outside the front door of Reilly's apartment. Counsel would then have argued that this testimony was necessarily false: the evidence showed that, at the time of the crimes, Reilly's apartment had a five-foot tall solid wooden fence around the front door and the entire front of the apartment. (RT 6928, 6937.) Accordingly, it was impossible for Reilly and Dempsey to see or point out someone by the swimming pool from inside Reilly's apartment. Mr. Demby failed to cross-examine Dempsey on this point or to make this

argument on petitioner's behalf. No reasonable tactical justification for Mr. Demby's omission in this regard is conceivable.

B. After Joseph Dempsey took the witness stand, the prosecutor informed defense counsel outside of the jury's presence that Dempsey had just told him that Reilly had said petitioner and a "black guy" were supposed to commit the killings, but that petitioner had gotten upset with the "black guy" and had backed out of the plan. (RT 8451.) The prosecutor stated that Mr. Dempsey would testify that Reilly had said, "'Hey, we got a dispute because the black guy had a gun and Hardy is not going to do it.'" (RT 8460) On direct examination by Mr. Jonas, Mr. Dempsey then gave the following testimony: "Mr. Hardy had discovered a gun that a black man had with him and got all upset about it and said he didn't want anything to do with them and an argument took place." (RT 8491.) However, on redirect examination, the prosecutor asked Mr. Dempsey the following two questions:

> "So you were withholding what you told me yesterday and you are withholding something you gave me or some information which we won't go into right now, and then you mentioned about Hardy, about a black man and Reilly and a fight and as a result the black man was out?" (RT 8589.)

The prosecutor then asked:

> "All I'm asking is: why did you – what was that information withheld with regard to the fact that Hardy and this black guy got in a fight about the gun and the black guy wasn't going to do it? Why did you withhold that?" (RT 8592.)

Mr. Demby not only failed to object to these highly improper questions, but also failed to clarify Mr. Dempsey's testimony on re-cross-examination. Accordingly, the jury was left with the impression that it was the "black guy" who declined to participate in the killings, when in fact Dempsey's

statement was that it was petitioner who had done so. No reasonable tactical justification for Mr. Demby's omission in this regard is conceivable.

C. Calvin Boyd testified at trial that, after the killings and after Boyd's purported conversation with Reilly in the "wash-house" when Reilly allegedly admitted that he and petitioner committed the killings, petitioner told Boyd that he had been asking too many questions. (RT 8058, 8195.) Neither Mr. Demby nor codefendants' counsel cross-examined Boyd on the fact that, at the preliminary hearing, Boyd testified that it was Ron Leahy who told him he had been asking too many questions. (CT 2647.) Neither Mr. Demby nor counsel for petitioner's codefendants cross-examined Boyd with the fact that, when interviewed on August 3, 1981, Boyd never mentioned that petitioner ever said anything to him after the killings and only said that petitioner told him before the killings that he wanted nothing to do with it. (Appendix 2.)

D. Boyd testified at trial that, after petitioner and Reilly had been arrested, Colette Mitchell and Ron Leahy approached him and Ms. Mitchell said, "'Buck told me to tell you to keep your mother-fucking mouth shut,' and all that shit." (RT 8142.) Mr. Demby failed to cross-examine Boyd with his own testimony from the preliminary hearing that Ms. Mitchell said only, "I want to talk to you" (CT 2850) and that she did not get a chance to "get up in [Boyd's] face." (CT 2664.)

E. Boyd testified at trial that, the morning after the killings, he walked through Steve Rice's apartment and saw petitioner and codefendant Reilly asleep on the couch. (RT 8409-8410.) Mr. Demby failed to cross-examine Boyd with his prior statement to law enforcement on July 15, 1981, in which he said that it could have been the morning he heard about the killings on the news or it could have been the following

morning that he saw petitioner and codefendant Reilly sleeping on the couch on Steve's apartment. (Appendix 7.)

F. Boyd testified at trial that petitioner's codefendant, Reilly, told him (Boyd) that he (Reilly) had used Mike Mitchell's car to get to the Morgans' house on the night of the murders. (RT 8395.) At one point in his testimony, Boyd said that Reilly had told him this in the "wash-house," after the murders. (RT 8395.) At another point in his testimony, Boyd said that Reilly did not make this statement at the "wash-house," but that he said this before the killings. (RT 8404.) Mr. Demby failed to cross-examine Boyd with the fact that he never mentioned that he knew anything about what car was used in any of his many interviews with law enforcement prior to the preliminary hearing.

G. Mr. Demby failed to cross examine Boyd on the fact that he was interviewed by law enforcement at least five times between the date of the killings and his testimony at the preliminary hearing and that in none of those five interviews did he mention that Reilly ever admitted that he and/or petitioner committed the killings, nor did he mention that petitioner had told him after the killings that he had been asking too many questions.

H. Mike Mitchell testified at trial that, prior to the killings, Reilly pointed to petitioner and said he might commit the killings. Mr. Demby failed to elicit from Mike Mitchell that, at the time he claimed Reilly pointed out petitioner by the pool as the person who might be the killer, Mitchell knew petitioner well. Such testimony would have suggested that Mitchell's testimony was false: since he knew petitioner by name, there was no reason for Reilly to point to him rather than simply to name him.

I. Prior to petitioner's trial, Mr. Rice told Mr. Demby that

Boyd had threatened him and ordered him not to mention his (Boyd's) name to the police. (Appendix 35.) Boyd himself admitted in his testimony at the preliminary hearing that he had "jammed" Rice for talking about "the case." (CT 2667.) When Rice testified at trial, Mr. Demby unreasonably failed elicit any testimony regarding Boyd's threatening behavior. The evidence presented at the reference hearing showed that, had further inquiry been made of Mr. Rice, he would have testified that, after the killings, Boyd came into Rice's apartment when Rice was asleep, started hitting Rice in the face and told Rice that he should not mention Boyd's name or Boyd was going to kill him, and that, on a subsequent occasion, Boyd and Marcus yelled at Rice and chased him. (HT 248, H.Exh. O.) Such testimony would have been admissible to show Boyd's consciousness of guilt.

J. Boyd testified at trial that Steve Rice had told him that he was going to "put [petitioner] out," because petitioner did not pay Rice any money and that petitioner would "just bring bitches over and fuck them all day." (RT 8119.) Reasonably competent counsel would have recognized that these were not Rice's words, as Rice did not speak in such profanity. Moreover, given Boyd's apparent lack of credibility, it was doubtful that Rice ever said anything of the kind. The evidence presented at the reference hearing showed that, if Mr. Demby had asked Mr. Rice about this purported statement, Mr. Rice would have denied that he ever said any such thing and that he ever used such profane language. (HT 272.)

K. Sean Fitzgerald testified for the prosecution. On cross-examination, Mr. Demby unreasonably failed to elicit from Fitzgerald his knowledge that Reilly had been threatened with a knife by two guys in the apartment building who said they wanted some money he owed them. (Appendix 49.) This testimony would have supported the defense theory

that Calvin Boyd and Marcus had killed Nancy and Mitchell Morgan and that Reilly owed them for committing the murders. Reasonably competent counsel would have elicited this testimony and there is no reasonable justification for Mr. Demby's failure to do so.

L. At trial, Ms. Mitchell testified that she called Joe Dempsey and asked him to change his testimony because either petitioner or Reilly thought it was damaging to petitioner. (RT 10038.) At the 403 hearing, Ms. Mitchell had testified that it was Reilly who instructed her to contact Dempsey. (RT 1221.) Reasonably competent counsel would have cross-examined Ms. Mitchell to dispel the implication that it was petitioner who had told her to contact Dempsey and ask him to change his testimony. Indeed, petitioner did not know Joe Dempsey and did not have his telephone number or address. Mr. Demby unreasonably failed to cross-examine on the subject or confront Ms. Mitchell with her prior inconsistent testimony.

439. Colette Mitchell testified at the preliminary hearing, the 403 hearing regarding the scope and duration of the conspiracy and at the guilt phase of trial. She was interviewed and interrogated repeatedly by representatives of law enforcement and provided numerous statements, both oral and written. She underwent two lengthy polygraph examinations, during which the police polygrapher told her that the polygraph machine showed that she was lying. Her testimony at the 403 hearing and trial differed significantly from her previous statements and testimony. On cross-examination of Ms. Mitchell at trial, Mr. Demby sought to elicit from her evidence of the pressure that had been brought to bear upon her during the polygraph interrogations of October 26, 1981. When the trial court cut short this line of questioning, Mr. Demby argued: "I think the purpose of

the questions is to show to the jury that she might have changed her testimony because of fear she received at that test [i.e., the polygraph] or other things combined with it; that she thought she may be better off herself to testify the way she did on direct because of those – not because of the fact she lied at the preliminary hearing or lied there or told the truth. I think the fact that Mr. Kuhns [the police polygrapher] is frightening her, scaring her, can have a lot of impact on that." (RT 10099.) Mr. Demby clearly was attempting to show that Ms. Mitchell's change of testimony was the result of her own fear, which had been fanned by law enforcement's coercive conduct. However, Mr. Demby failed to cross-examine Ms. Mitchell regarding many other indications of such coercive conduct. For example, he failed to elicit testimony which Ms. Mitchell had given at the 403 hearing that, sometime prior to July 15, 1981, police officers had come to her home, accused her of dealing in drugs and asked to search her apartment. Upon seeing a box in Ms. Mitchell's apartment, one officer remarked that it looked as if it contained drugs. Ms. Mitchell threw the box, which contained pictures, at the officer. The officers also asked Ms. Mitchell's landlord questions about Ms. Mitchell, including whether or not she was dealing in drugs. (RT 1180.) Mr. Demby failed to elicit from Ms. Mitchell her prior statement and testimony that, when petitioner was arrested on July 15, 1981, officers detained her at gunpoint as well, ordered her onto the ground, grabbed her, pushed her and searched her car, including a tool box in the trunk, but did not seize anything. (Appendix 14; RT 1178-1180.) During this encounter, one officer said, "'give her to me. I'll take care of her;'" another officer "said they were arresting us for murder . . ." (RT 1178-1179.) Mr. Demby also failed to elicit that, at some time prior to the polygraph interrogation of October 26, 1981, Mr. Jonas

had taken Ms. Mitchell before a judge and accused her of going to Debbie Sportsman's bank and trying to intimidate her. (Appendix 13.) Such evidence would have provided a much stronger basis for the contention that Ms. Mitchell's testimony at trial was false and was the product of police pressure and coercion.

440. Ms. Mitchell testified at the 403 hearing and at trial that she lied at the preliminary hearing because she was in love with petitioner at that time. (RT 9944, 10078,10334; see also *People v. Hardy*, *supra*, 2 Cal.4th at p. 123.) Ms. Mitchell also testified at trial that she was fired from her job at the 94th Aero Squadron because of the police asking questions about her involvement in this case. (RT 10012-10013.) Neither Mr. Demby nor counsel for either of petitioner's codefendants confronted Ms. Mitchell with her statement on October 26, 1981, approximately one week before the preliminary hearing, that she had quit her job at the 94th Aero Squadron because she planned to leave California and move back to Chicago and that the only reason she had not done so was because law enforcement had advised her not to. (Appendix 13.) This statement not only showed that she was not fired from her job but also that she had planned to move without petitioner, to leave him behind in jail, and that she did not intend to stay by his side, protect him at the preliminary hearing and help him through the court proceedings. Reasonably competent counsel would have introduced Ms. Mitchell's prior statement to show that it was not true that she was in love with petitioner at the preliminary hearing and was trying to protect him and that she had not lied at that proceeding. Counsel could have argued that, if she had been in love with petitioner at the time of the preliminary hearing and if she intended to testify falsely at that proceeding in order to protect him, she would not have decided to move

out of state before that proceeding.

441. At trial, Ms. Mitchell testified that, prior to the preliminary hearing, she had been granted immunity from prosecution in connection with the killings. (RT 9943-9944.) Mr. Demby failed to elicit that, even prior to the polygraph interrogations of October 26, 1981, law enforcement had told Ms. Mitchell that she would receive full immunity if she testified for the prosecution. (Appendix 13.) Such evidence would have provided a basis for arguing that her statements at the polygraph interrogation were more credible because she already believed at that time that she would be immune from prosecution.

442. Ms. Mitchell testified at trial that, after she got off of work on the night of the killings, she and Steve Rice drove from the 94th Aero Squadron (where she worked) to the Vose Street Apartments (where Reilly and Steve Rice lived) along the following route: from Woodley to Saticoy, Saticoy to Sherman Way and Sherman Way to Vose Street. (RT 9950.) The prosecution's purpose in eliciting this testimony could only have been to suggest that Ms. Mitchell had knowingly driven by the Morgans' home on Saticoy on the night of the murders. This purpose is corroborated by the fact that, at the 403 hearing, Mr. Jonas stated to Ms. Mitchell: "Q: That route takes you right by the home of the victims, you know? A: Yes, I know that." (RT 1060.) Mr. Demby failed to impeach this testimony with evidence that this route was impossible, since Saticoy, Sherman Way and Vose Street are parallel to one another. He also failed to elicit from her that she had not known where the Morgans lived until after the prosecution told her where they lived.

443. Ms. Mitchell testified at trial that, upon arriving at the Vose Street Apartments on the night of the killings, she went to Steve Rice's

apartment first, before going to Reilly's, because Rice had told her he wanted her to have some cocaine "before the animals got a hold of it." (RT 9953.) She claimed that he used the term "animals" in reference to petitioner and Reilly because they very much liked cocaine. Neither Mr. Demby nor either codefendant's counsel cross-examined her with her testimony at the preliminary hearing that the term "animals" was not Rice's choice of words, but it was a word that Ms. Mitchell herself chose "off the top of her head." (CT 1442.)

444. Ms. Mitchell testified at trial that she could not remember if petitioner and Reilly were already at the Vose Street Apartments when she and Rice arrived there from the 94th Aero squadron. (RT 9952.) Although on cross-examination by counsel for codefendant Reilly, she testified that she believed petitioner and Reilly were there when she and Rice arrived (RT 10214), neither Mr. Lasting nor Mr. Demby confronted her with her prior testimony that she knew they were there already because she saw the light on in Reilly's apartment and she saw Reilly's car parked behind the building (CT 686) or her prior statement to the same effect. (Appendix 16.)

445. At trial, Ms. Mitchell testified that, after arriving at the Vose Street Apartments on the night of the killings, she spent about one-half hour at Steve Rice's apartment before going next door to join petitioner and Reilly in Reilly's apartment. (RT 10116.) On cross-examination by counsel for Reilly, she admitted that, at the 403 hearing in January, 1981, she testified that it had been ten minutes. (RT 10214-10215.) Neither Mr. Demby nor counsel for either of petitioner's codefendants impeached her with the fact that she had made several other prior statements on the subject: at the preliminary hearing, she testified that she and Rice had spent 10 minutes in Rice's apartment before joining petitioner and Reilly (CT

686), and in June, 1981, she reportedly told detectives she and Rice were in Rice's apartment for "a few minutes." (Appendix 16.)

446. At trial, Ms. Mitchell testified that about 30-45 minutes elapsed between the time she and Rice left the 94th Aero Squadron on the night of the killings until the time that they arrived at the door of Reilly's apartment, where they met up with petitioner and Reilly. (RT 9955.) Neither Mr. Demby nor either of the other defense counsel confronted her with testimony from the preliminary hearing that it took at most 10 minutes to get from 94th to Steve Rice's apartment (CT 684) and they spent ten minutes in Rice's apartment before they went next door to Reilly's apartment(CT 686), for a total of 20 minutes. Nor did anyone confront her with her testimony at the 403 hearing that, between the 94th Aero Squadron and meeting up at Reilly's apartment, petitioner was out of her presence for one-half hour. (RT 1061.)

447. Ms. Mitchell testified at trial that she picked up the beer bong on her way to Reilly's apartment on the night of the killings, but she did not remember whether she picked it up at her apartment on Ben Avenue or at Steve Rice's apartment, next-door to Reilly's apartment. (RT 10203.) Mr. Demby failed to impeach her with her prior testimony at the 403 hearing and at the preliminary hearing that she went straight home with Steve Rice and grabbed the beer bong at his apartment. (CT 640, RT 1226.)

448. Ms. Mitchell testified at trial that she snorted three or four eleven-inch lines of cocaine on the night of the killings. (RT 9954.) On Mr. Demby's cross-examination, she testified that they were "giant lines." (RT 10149.) However, Mr. Demby failed to cross-examine her with her statement at polygraph examination that she snorted about five lines over the course of the evening (Appendix 14) or her testimony at the preliminary

hearing that she snorted two or three lines that were about twelve inches long and then three three-inch lines, in addition. (CT 648.) Had Mr. Demby elicited this testimony, he would have had an even stronger basis for arguing that Ms. Mitchell's claim that she went to sleep on the night of the killings was not believable, since the quantity of cocaine that she had consumed would have prevented her from sleeping for many hours. (See *People v. Bell* (1989) 49 Cal.3d 502, 539 [cocaine is a stimulant that causes sleeplessness].)

449. At trial, Ms. Mitchell testified that petitioner told her he was at the Morgan house on the night of the killing (RT 9992) and that he took something from the house to make it look like a robbery. (RT 10031.) She testified that petitioner or Reilly told her that the items that were taken were a gun, jewelry and coins. (RT 9998, 10126.) The clear implication of her testimony was that she believed the gun, jewelry and coins were taken on the night of the killings. Mr. Demby failed to introduce into evidence her statement at the polygraph interrogation on the afternoon of October 26, 1981, that Reilly had "offered [Costello] the job to do it and then paid him with a ring, some coins and a gun. And then Mark Costello went off and sold the stuff and screwed him over and kept the money for himself and didn't do anything." (Appendix 14.) This statement showed that her trial testimony was false and was a result of coercion and persuasion on the part of law enforcement, who had convinced her to revise and re-characterize each of her subjective recollections such that they would fit the prosecution's theory of petitioner's guilt. That is, although at the time of trial she may have truly believed that petitioner and Reilly had committed the killings and taken items to make it look like a robbery, that belief was false.

450. Mr. Demby failed to examine Ms. Mitchell at trial to elicit testimony similar to that which she gave at the 403 hearing to the effect that she no longer remembered what she did, where she was or whom she saw on the day of May 20th, 1981. (RT 1165.) She did not remember whether she knew what she and petitioner were going to do that night; she did not remember seeing petitioner walk into the 94th Aero Squadron, she did not remember whether he came in with anyone. (RT 1168.) The testimony would have supported the argument that Ms. Mitchell no longer had an independent memory regarding the night of the killings, and that her testimony in that regard was the product of coercive police interrogation tactics and confabulation.

451. At trial, Ms. Mitchell testified that either petitioner or codefendant Reilly had stated, in reference to the life insurance proceeds flowing from the killings: "'While I'm sitting in jail, at least it's collecting interest'; something in that line." (RT 10011.) The prosecutor then asked her if she remembered the amount of interest and she answered, "Ten and three-quarters sticks in my mind, but I could be wrong." (RT 10011.) The manner in which this testimony was framed suggested that the statement was originally made by petitioner or Reilly. Ms. Mitchell had testified at the preliminary hearing that the statement was originally made by codefendant Morgan and that Morgan's statement was merely repeated to her by petitioner or Reilly. Mr. Demby failed to impeach Ms. Mitchell with her testimony from the preliminary hearing that petitioner had told her that he had heard Cliff Morgan say, "'while I'm in here, I'm collecting twelve and three-quarters percent interest." (CT 581.) Nor did Mr. Demby make reference to the fact that, at the 403 hearing, she confirmed that her preliminary hearing testimony on the subject was true. (RT 1089.)

452. Neither Mr. Demby nor codefendants' counsel elicited from Ms. Mitchell that she told the police polygrapher on October 26, 1981, that she thought Marcus had done the killing. (Appendix 13.) Such evidence would have supported Mr. Demby's argument that Calvin Boyd and Marcus were the killers.

453. Neither Mr. Demby nor codefendants' counsel elicited from Ms. Mitchell her preliminary hearing testimony that, for as long as she had known petitioner, which was since February, of 1981, he had never had shoulder-length hair and had never looked as he did in the photo marked as Exhibit 4 at trial. (CT 1433, 1455) At the preliminary hearing, she testified that petitioner had brown hair, that she had never known petitioner to bleach his hair and that "dirty blond hair down to his shoulders" did not describe petitioner. (RT 1455.) This evidence was material to petitioner's defense insofar as this was the way in which Joe Dempsey described the man whom Reilly pointed out as the person who might commit the killings. (RT 8546.) Evidence that petitioner had not fit that description at any time during which Dempsey might have had contact with him and evidence that Dempsey's description more closely matched a photo of petitioner taken in August of 1980 (i.e., People's Exhibit 4 at trial) would have provided a basis for the argument that Dempsey's testimony was false and was the product of a suggestive photo show-up on the part of law enforcement.

454. Ms. Mitchell testified at trial that, in the county jail, Reilly showed her a copy of Debbie Sportsman's testimony from the preliminary hearing and that petitioner had told her some of the things that Sportsman had said in court. (RT 9977, 10272.) Mr. Demby failed to cross-examine Ms. Mitchell with her previous testimony at the 403 hearing that petitioner never told her what was testified to in court at the preliminary hearing. (RT

1040.)

455. Mr. Demby failed to elicit from Ms. Mitchell her previous testimony at the preliminary hearing that Reilly had told her so many different things that she did not know what to believe or what was true and that she had become very confused. (CT 585, 1429.)

456. Mr. Demby failed to elicit from Ms. Mitchell her previous statement that Reilly had told her he would not reveal the name of the killer because he was afraid that, if he did, he would be labeled a "snitch" and would be killed in prison. She had so indicated during the polygraph interrogation conducted on the morning of October 26, 1981. (Appendix 13.) Such evidence would have supported an argument that there was a reasonable explanation for the fact that neither Reilly nor petitioner had ever named the killer.

457. Mr. Demby also failed to elicit from Ms. Mitchell at trial her testimony at the 403 hearing that Reilly had told her he knew who had committed the killings and that, when the time was right, he would tell everyone. (RT 1092.) This testimony implied that Reilly knew petitioner was not the killer.

458. Mr. Demby failed to elicit from Ms. Mitchell her knowledge that, on the night of the killings, Calvin Boyd was walking around the Vose Street Apartments. At the 403 hearing, she testified that, when she was with Reilly, petitioner and Rice in Reilly's apartment, she knew that Calvin was "out there" and that she and the others did not want him to come into Reilly's apartment and bother them. (RT 1170) During the polygraph interrogation, she stated that they had seen Boyd walk by Reilly's apartment, so she and the others put a towel in the window so that he would not bother them. (Appendix 13.) Such evidence would have provided a

basis for arguing that Boyd's testimony and purported alibi for the night of the killings were false.

459. Mr. Demby failed to elicit from Ms. Mitchell at trial her previous statement that, prior to the killings, "Buck [i.e. Reilly] was always pulling Calvin on the side and they were always talking secrets." (Appendix 13.) This evidence would have supported an argument that Boyd's characterization of his discussions with Reilly regarding the killings was false and that, contrary to his claims, he was very much involved in the planning and execution of the crime.

460. At trial, Ms. Mitchell testified that, after petitioner and Reilly were in jail, she had talked to Marc Costello twice. Mr. Demby failed to elicit from Ms. Mitchell her testimony at the 403 hearing that petitioner never told her to talk to Costello. (RT 1184.) This evidence would have supported an argument that, to the extent it appeared Ms. Mitchell's contact with Costello was nefarious, it was not at petitioner's bidding.

461. At trial, Ms. Mitchell testified that she had seen what she believed was $1,000 in a box in her apartment and that she believed the money represented payment from codefendant Morgan, delivered to petitioner by Reilly, for petitioner's participation in the conspiracy. Mr. Demby failed to cross-examine Ms. Mitchell regarding whether petitioner had told her the money was his to keep. Had Mr. Demby inquired of Ms. Mitchell on this subject, she would have informed him that petitioner had in fact told her that he was holding the money for Reilly so that it would be safe from Boyd and Marcus, who had stolen from him before and were trying to get him to pay them for their role in the killings.

462. At trial, Ms. Mitchell testified that, at some point after petitioner's arrest, she had told petitioner's brother, John Hardy, to get rid

of a particular rifle which she believed was in a guitar case. (RT 10003.) She testified that she did this because petitioner told her to do so and because she believed the rifle "had something to do with the case." (RT 10003.) Mr. Demby failed to cross-examine Ms. Mitchell as to whether she knew why petitioner was in possession of this rifle and whether petitioner had told her the reason he wanted her to tell his brother to get rid of it. Had Mr. Demby so inquired, she would have testified that petitioner had told Ms. Mitchell the reason he wanted to get rid of the rifle was that he had just found out that it had come from the Morgan house; petitioner had also told her the reason he had been in possession of the rifle was that Reilly had lent it to him so that he and his brother could go hunting in the woods over the Memorial Day weekend. Mr. Demby was in possession of evidence confirming that petitioner liked to go hunting in the hills around Los Angeles. (Appendix 13.) Had Mr. Demby elicited this testimony, he would then have been able to argue that, although petitioner may in fact have told Ms. Mitchell to tell John Hardy to get rid of the rifle and to make sure she and John got their stories straight, he had done so because he had found out that the rifle was from the Morgan house and was afraid that any connection to the rifle would be used against him, even though he had not participated in the killings.

463. At trial, Ms. Mitchell testified that petitioner called her from the jail and told her to change her testimony about the rifle and that she should make it sound like the only rifle she knew about was another one that belonged to petitioner or his brother. (RT 10004.) She testified that she ran into John Hardy in the hallway outside the courtroom just before she testified at the preliminary hearing and he then said that he could not talk to her. (RT 10005.) Mr. Demby failed to impeach her with her prior

testimony from the 403 hearing, in which she stated that she did not remember who told her to change her testimony about the rifle, but she thought it might have been John Hardy. (RT 1082.) At the 403 hearing, she also testified that she had been "outside the courtroom" when she was told to change her testimony, that this occurred before she testified at the preliminary hearing and that the person told her to say that petitioner did not ask her to ask John to get rid of the rifle. (RT 1083.) This testimony indicated that it was not petitioner who told her to change her testimony, since he was in jail and could not have been the person outside the courtroom who so instructed her.

464. Mr. Demby failed to elicit from Ms. Mitchell her prior statement that Reilly had told her he had told the police about the killer when he was arrested the first time, "'but they didn't do anything about it.'" (Appendix 14.) This evidence would have supported an argument that petitioner was not the killer, but that once law enforcement had focused on Reilly and petitioner as the suspected killers, they disregarded any information that was not consistent with their theory of the crime.

465. At trial, Ms. Mitchell testified that, after petitioner was in jail, he asked her to destroy a pair of his boots, which looked just like the ones that he was wearing when he was arrested but were a different color; she claimed that she threw the boots in a garbage can. (RT 10046-10048, 10341.) The implication was that petitioner had directed Ms. Mitchell to destroy the boots because he feared they would show that he was at the Morgan's house on the night of the killings. However, the boots that petitioner was wearing when he was arrested were in evidence at the trial and had been tested for the presence of blood; the test had come back negative. (Appendix 50.) Mr. Demby failed to cross-examine Ms. Mitchell

with her testimony from the preliminary hearing that petitioner always wore the same boots and that those were the ones that were in evidence. (CT 424.) He also failed to cross-examine her to elicit her knowledge that petitioner's second pair of boots had been lost before the killings. Such testimony would have supported an argument that Ms. Mitchell's testimony in this regard was false and that petitioner did not have a second pair of boots at the time of the killings.

466. On automatic appeal before this Court, petitioner argued, based on the record on appeal, that Mr. Demby failed to cross-examine prosecution witnesses beyond repetition of the prosecutor's questions. This Court rejected that argument, stating: "In the absence of any direct exculpatory evidence, . . . we assume Demby was attempting to probe for inconsistencies in the stories of the various witnesses." (*People v. Hardy*, *supra*, 2 Cal.4th at pp. 195-196.) The evidence presented at the reference hearing demonstrates that powerful exculpatory evidence was available upon reasonable investigation, and hundreds of inconsistent statements on the part of each of the witnesses were in fact in Mr. Demby's possession at the time of trial. Mr. Demby's failure to probe or otherwise utilize these inconsistent statements on cross-examination cannot be now viewed as constitutionally adequate.

467. Mr. Demby unreasonably and prejudicially failed to request appropriate jury instructions, including but not limited to the following.

A. Mr. Demby unreasonably failed to request instructions on and object to improper instructions regarding conspiracy and fraud.

B. Mr. Demby unreasonably failed to object to instructions which effectively prevented the jury from evaluating the credibility of the unindicted accomplices an coconspirators.

C. Mr. Demby unreasonably failed to request instruction on the elements of Insurance Code section 556(a), the alleged object of the conspiracy. Petitioner hereby incorporates as if fully set forth herein Argument I of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. On automatic appeal, this Court held that the issue had been waived by counsel's failure to request the omitted instruction. (*People* v. *Hardy*, *supra*, 2 Cal.4th at 88.) Reasonably competent counsel would have requested the instruction and there is no reasonable justification for failing to do so.

468. Mr. Demby's ineffectiveness was not lost on petitioner's jury. Mr. Demby was often inaudible and spoke in a monotone; jurors had difficulty hearing him; he was unclear, disorganized, inarticulate and often incomprehensible; he was slow, repetitive and boring; he often appeared to be confused; he had annoying personal habits and mannerisms which irritated and alienated the jury; he was lacking in personal hygiene, his hair and beard were unkempt and he often appeared to have slept in his clothing. (See, e.g., RT 10089, 10090; Appendices 12, 46, 51.)

469. Each of the deficiencies delineated above, individually and cumulatively, prejudiced petitioner. Virtually every aspect of the prosecution's case could have been undercut, biased jurors could have been eliminated, and the prosecutor's misconduct could have been curtailed. In the absence of Mr. Demby's omissions, petitioner would not have been convicted of capital murder. The judgment must be reversed.

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XV

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BY HIS TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT THE CASE IN MITIGATION

470. Petitioner's death sentence and confinement were obtained in violation of the petitioner's right to the effective assistance of counsel, to due process and a fair trial, to a jury trial, to confrontation of witnesses, to present a defense, to a fair, individualized, reliable and/or nonarbitrary penalty determination and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16 of the California Constitution, in that petitioner's trial counsel unreasonably and prejudicially failed to investigate and present evidence in mitigation at the penalty phase of petitioner's trial. (*Ake v. Oklahoma* (1985) 470 U.S. 68; *Strickland v. Washington* (1984) 466 U.S. 668; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Horton v. Zant* (11th Cir. 1991) 942 F.2d 1449, 1462; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

471. A criminal defendant has the right to the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (See, e.g., *Strickland v. Washington*, *supra*, 466 U.S. 668, 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *In re Cordero*, *supra*, 46 Cal.3d 161, 179-180; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right

"entitles the defendant not to some bare assistance but rather to *effective* assistance. Specifically, it entitles him to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 215, quoting *United States v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202, emphasis in original, citations omitted; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 686; *In re Cordero*, *supra*, 46 Cal.3d at p. 180; *People v. Pope*, *supra*, 23 Cal.3d at pp. 423-424.) The defendant can reasonably expect that before counsel undertakes to act or not to act, he or she will make a rational and informed strategic and tactical decision founded on adequate investigation and preparation. (See, e.g., *In re Fields* (1990) 51 Cal.3d 1063, 1069; *In re Hall* (1981) 30 Cal.3d 408, 426; *People v. Frierson*, *supra*, 25 Cal.3d 142, 166; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.) If counsel fails to make such an informed decision, his action – no matter how unobjectionable in the abstract – is professionally deficient. (See, e.g., *In re Hall*, *supra*, 30 Cal.3d at p. 426; *People v. Frierson*, *supra*, 25 Cal.3d at p. 166; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.)

472. "Counsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts." (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 222.) Applying this primary duty to the penalty context, counsel has an obligation to investigate the client's character and background to become informed of "what mitigating evidence is available and what aggravating evidence, if any, might be admissible in rebuttal." (*In re Marquez* (1992) 1 Cal.4th 584, 606.) Moreover, "[c]ounsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226; see also *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112,

1117.)

473. Defense counsel preparing for a capital trial must conduct "a reasonably diligent preliminary investigation" so that counsel has "the factual framework within which to make a competent, informed tactical decision" regarding trial strategy. (*People v. Frierson*, *supra*, 25 Cal.3d at p. 164; *Caro v. Calderon*, *supra*, 165 F.3d at p. 1227 ["It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase."].)

474. An adequate investigation to support a tactical decision involves "substantial factual inquiry" (*In re Saunders* (1970) 2 Cal.3d 1033, 1048-1049; *People v. Frierson*, *supra*, 25 Cal.3d at pp. 162-164) and is not satisfied by simply reviewing reports prepared by the police or defense investigators (*In re Neely* (1993) 6 Cal.4th 901, 919; *In re Hall*, *supra*, 30 Cal.3d at p. 425; *Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083, 1093-1095) or by relying on statements of the client (see *People v. Mozingo* (1983) 34 Cal.3d 926, 933-934; *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1502).

475. To the extent that trial counsel's failure to investigate or present evidence was purportedly based on strategic considerations, those considerations do not withstand constitutional scrutiny. Before an attorney can make a reasonable strategic choice not to pursue a certain line of investigation, the attorney must obtain the facts needed to make the decision; an attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 690-691; see also *Griffin v. Warden, Maryland Correctional Adjustment Center* (4th Cir. 1992) 970 F.2d

1355, 1358; *Horton v. Zant* (11th Cir. 1991) 941 F.2d 1449, 1462.)

476. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's right to due process, a fair trial and a reliable guilt and penalty determination have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358)

477. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

478. This claim is presented in the manner of conforming the pleadings to the documentary and testimonial evidence presented at the reference hearing held herein. The instant claim is the one on which this Court issued the order to show cause on April 23, 1992. Counsel for petitioner believes that all of the evidence presented at the reference hearing was properly within the scope of the foregoing order to show cause and the amended reference order issued by this Court on July 20, 1994, and that such evidence proves petitioner's right to relief on the ground that petitioner's trial counsel provided ineffective assistance of counsel by failing to investigate and present mitigating evidence on petitioner's behalf at the penalty phase. The issuance of the order to show cause and reference order provided petitioner's counsel with subpoena power and a right to discovery, neither of which were available to counsel when the initial

habeas corpus petition was filed or at any time prior to the issuance of the order to show cause. (*See, e.g., People v. Gonzales* (1990) 51 Cal.3d 1179, 1261.) In addition to having access to significant information previously unavailable to petitioner, the order to show cause and reference order provided petitioner with the opportunity and obligation to present live testimony relevant to the claim. As is to be expected, the testimony and other evidence presented at the hearing was significantly more extensive than the facts alleged and proffered in the initial habeas corpus pleadings filed in this case. Accordingly, in an excess of caution, petitioner hereby raises this claim in order to conform the pleadings to the proof. By filing these supplemental allegations, petitioner in no way concedes that the evidence presented at the reference hearing was outside the scope of the order to show cause or reference order.

479. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

480. To the extent that some facts underlying this claim were proffered solely by means of sworn declarations at the reference hearing herein, the referee improperly prevented counsel from presenting direct testimony with respect thereto. The referee's rulings excluding such evidence denied petitioner due process, equal protection and a full and fair hearing. Petitioner hereby incorporates by reference as if fully set forth

herein Claim XXII, *infra*. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner.

481. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

A. Overview

482. Petitioner's trial attorney, Michael Demby, did not call a single witness or introduce a single exhibit into evidence at the penalty phase of petitioner's trial. The evidence now before this Court shows that the reason for this was that Mr. Demby's investigation was professionally deficient in virtually every respect. At the reference hearing, Mr. Demby attempted to justify his failure to investigate and present evidence of petitioner's background and character by asserting that, before trial, he had tentatively decided that his penalty phase defense would be lingering doubt and that throughout the entire trial, he would maintain the position that petitioner was not the killer. He viewed all evidence relevant to petitioner's background and character as inconsistent with a claim of innocence. He made this judgment without having consulted any mental health experts and on the basis of a few interviews of petitioner's family and friends that were conducted by Patricia Mulligan, then a second-year law student volunteering part-time in Mr. Demby's office. What little investigation Ms. Mulligan conducted into petitioner's character and background began in January, 1981, virtually ceased in March, 1981, and was completely inadequate. Moreover, although Mr. Demby intended to take the position throughout the guilt and penalty phase that petitioner did not participate in

the killings, his investigation of petitioner's guilt or innocence was wholly deficient, as well. Among other deficiencies, key investigative tasks which Mr. Demby himself had identified as necessary were never undertaken and whole areas of the investigation were abandoned months prior to trial. Those investigative efforts which were undertaken by Mr. Demby and the investigators working on the case were done shoddily and superficially.

483. As a result of insufficient investigation, Mr. Demby's decision-making at trial was fatally uninformed. Even if his failure to present mitigation had been the product of the strategic considerations as he claimed at the reference hearing, those strategic decisions would have been unreasonable and unjustifiable. Moreover, the evidence suggests that, at the time of the penalty phase, Mr. Demby did not in fact have a coherent strategy, but that some or all of the strategic considerations which he has advanced post-conviction were arrived at post-conviction as well.

484. Mr. Demby's failure to call any witnesses on petitioner's behalf at the penalty phase was by no means because evidence was unavailable. As shown at the reference hearing, a vast array of evidence was available that would have been consistent with, and would have bolstered, a defense of lingering doubt. However, Mr. Demby was unaware of that evidence. His investigation of mitigating evidence and preparation for the penalty phase were professionally deficient, constitutionally inadequate, and fell below the standard of reasonable competence in the community of capital defense attorneys at the time that petitioner's case was tried.

485. Mr. Demby was assigned to represent petitioner in January, 1982, and represented petitioner throughout the remainder of the trial court proceedings. (HT 1658.) Petitioner's was the first capital case Mr. Demby

had tried. (HT 2191.) Shortly after his assignment to petitioner's case, Mr. Demby met with petitioner, who provided extensive information regarding his life history, signed releases authorizing the disclosure of records to Mr. Demby and provided Mr. Demby with the names of family members and friends who could potentially contribute further information. (HT 1668-1678, 1709-1710; H.Exhs. 12 and 13; Report at pp. 3, 8.)

486. In mid-January, 1982, Mr. Demby assigned the task of interviewing petitioner's family and friends to Ms. Mulligan. Ms. Mulligan interviewed a number of petitioner's friends and family members whose names petitioner had provided. The majority of these interviews were conducted by telephone. Ms. Mulligan provided Mr. Demby with written reports of her work. Apart from one interview conducted in October of 1982, Ms. Mulligan stopped working on petitioner's case at the end of March, 1982, and did not attend petitioner's trial in 1983. Of the 17 witnesses Ms. Mulligan contacted, Mr. Demby spoke to three: petitioner's mother, Carol Hardy; petitioner's sister, AnaMaria; and petitioner's friend, Judy Metoyer (Norwood). (HT 407, 742, 1752, 1752, 1784,1785, 2162-2163; H.Exh. 33; Report at p. 4.)

487. In October of 1982, Ms. Mulligan, contacted Lawrence Silver, an attorney who was then representing petitioner in a Worker's Compensation claim. In her report to Mr. Demby, Ms. Mulligan wrote that Mr. Silver told her the following: while driving a city bus, petitioner had been injured in a robbery; petitioner had sustained a number of orthopedic injuries in the incident; and petitioner would recover insurance money as a result of the Worker's Compensation case flowing therefrom. (H.Exh. 33; Report at p. 8.)

488. Prior to trial, Mr. Demby obtained petitioner's employment

records from R.T.D., the bus company for which petitioner had worked as a bus driver when he was injured in the aforementioned robbery. These records included the "Doctor's First Report of Work Injury," the "Employee's Report of Injury," and the "Accident Report." (H.Exh. 18; HT 1706, 1793, 1794, 1797; Report at p. 8.) These records named petitioner's supervisor at R.T.D. and his treating physician, and indicated that the police and paramedics had been summoned to the scene of the robbery. (H.Exh. 18.)

489. On April 12, 1983, the District Attorney filed a document entitled "Notice to the Defense Pursuant to Sec. 190.3 P.C. Intent of Prosecution To Introduce Evidence in Aggravation," which stated that, should there be a penalty phase in petitioner's case, the prosecution would introduce in aggravation evidence of the family incident which led to petitioner's arrest on August 6, 1980, and that, in that regard, the prosecution would present the testimony of petitioner's family members. (CT 308-309.)

B. Mr. Demby's Investigation Was Professionally Deficient

490. In preparing for trial in petitioner's case, Mr. Demby was aware that, in 1978, petitioner had been committed to Camarillo State Hospital, a mental institution, for an episode of psychosis, that petitioner was diagnosed schizophrenic at that time, and that, upon his release, he had been referred for out-patient mental health care. (H.Exh. 8; HT 1705; Report at pp. 5, 89.) Mr. Demby was aware that conditions of probation imposed upon petitioner as a result of his misdemeanor conviction in 1980 included that he seek mental health counseling. (H.Exh. 85; Appendix 40.) Mr. Demby knew that petitioner had suffered several significant losses in 1979: i.e., the death of his girlfriend, Tina Shanks; the death of his

grandmother, and the suicide of his brother Bob. (HT 1669; Report at p. 89.) Mr. Demby knew that, also in 1979, petitioner had jumped off of a cliff in an apparent suicide attempt. (HT 1670; H.Exh. 33; Report at p. 89.) Mr. Demby knew that petitioner's father had been diagnosed paranoid schizophrenic. (H.Exh. 33.) One witness reportedly told Ms. Mulligan, Mr. Demby's law clerk, that petitioner was "not entirely sane." (H.Exh. 33; Report at p. 89.) Mr. Demby knew that, if there were a penalty phase, the prosecution would introduce evidence of the August 6, 1980, incident which led to petitioner's sole prior conviction and argue that this incident indicated that petitioner had a propensity for violence. (HT 1810-1811; Report at p. 88.) Mr. Demby was in possession of the arrest report from that incident, which indicated that petitioner was suicidal and unresponsive on the date in question. (H.Exh. 85; Report at p. 88.) Mr. Demby himself labeled petitioner's behavior on that date as "bizarre." (RT 14065-14066.) Mr. Demby also had interpersonal conflicts with petitioner before and during trial and knew prior to trial that petitioner's demeanor in the courtroom was likely to be a "problem." (RT A11-A12, A19-A21; A68, 1764-1766, 1788-1791, 3032-3033, 3053-3054, 3818-3819, 4524-4525, 4527-4529, 13899-13899HH; CT 279-287, 811-821; Demby, HT 2090; Report at p. 89.) Mr. Demby was aware, prior to trial, that petitioner had a lengthy history of drug abuse and that the prosecution was likely to present evidence of petitioner's drug use at the guilt phase, particularly with respect to the night of the murders.[49] (H.Exh. 33; HT 1774; Report at p. 90.) Mr.

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[49]Debbie Sportsman testified that every time she saw petitioner at the Vose Street apartments, he was drinking or getting high. (RT 7318.) Calvin Boyd testified that petitioner often joined the others who gathered on (continued...)

Demby knew that the prosecution's case-in-chief at the guilt phase would include evidence that petitioner had been spending a great deal of time with codefendant Reilly and other admitted coconspirators in the days or weeks leading up to the crime, and that the prosecution would also introduce evidence that petitioner was unemployed at the time of the crimes, did not have his own residence and had been staying with his girlfriend, Colette Mitchell, and his friend Steve Rice. Mr. Demby was on notice that the evidence would show petitioner was not functioning well in the weeks leading up to the crime.

491. In spite of the foregoing, Mr. Demby did not request or obtain the assistance of any mental health experts in petitioner's case. (HT 1701, 1705, 2171, 2174; Report at p. 5.) This omission was completely unjustifiable. (Report at p. 90.) Reasonably competent counsel in Mr. Demby's position would have, prior to the commencement of the guilt phase, consulted one or more mental health professionals on a host of questions relevant both to guilt and to penalty, including, but not limited to, the following: whether petitioner's behavior after the crimes was significant in any way to the question of his guilt or innocence; whether

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[49](...continued)
a regular basis at the Vose Street apartments to drink alcohol and smoke marijuana. (RT 8090-8091.) Steve Rice testified that, on the night of the killings, he got petitioner high on cocaine and that, also on that night, petitioner smoked marijuana and drank beer. (RT 9813, 9816, 9826, 9864-9865, 9871-9872.) Similar testimony about petitioner's use of drugs and alcohol on the night of the killings was provided by his then-girlfriend, Colette Mitchell. (RT 9949, 10116, 10350.) Mike Mitchell also testified that, on the night of the killings, he saw petitioner "beer bonging" and smoking what appeared to be marijuana; also in the room with petitioner and the other people was a mirror and a razor blade, which Mitchell testified were associated with the use of cocaine. (RT 9143-9144.)

petitioner's psychiatric profile suggested a propensity for violence of the nature at issue in the charged crimes; whether petitioner's demeanor in the courtroom was subject to petitioner's conscious control and, if not, whether a sympathetic explanation could be provided to the jury; whether there was evidence available to explain petitioner's drug use in a way that supported his claim of innocence; the significance of petitioner's prior psychiatric hospitalization and of the losses he had suffered in 1979; whether there was a sympathetic explanation for his behavior in the incident which led to his prior arrest on August 6, 1980; whether petitioner's behavior on that date indicated a propensity for violence; and whether there was some way in which to secure petitioner's trust and confidence. (HT 1545-1547, 2467-2468, 2488.) Reasonably competent counsel would have enlisted the help of experts to help understand the significance of records pertaining to petitioner's and his family's social history. (HT 2427.)

492. Mr. Demby failed to conduct a minimally adequate investigation into petitioner's social and family history, character and background. What little investigation Mr. Demby conducted in this regard was undertaken by Ms. Mulligan. (Report at pp. 4, 85.) In addition to the fact that Ms. Mulligan lacked sufficient training and experience to conduct the investigation, Mr. Demby unreasonably failed to provide her with sufficient supervision or guidance to compensate for her lack of knowledge.[50] Ms. Mulligan's interviews were superficial and failed to

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[50]As held by this Court in *In re Hall* (1981) 30 Cal.3d 408:

"if an attorney representing a defendant in a murder case relies on amateurs to gather defense information, he should be particularly vigilant in training and supervising them, and in following up the

(continued...)

uncover extensive information within the knowledge of the people that she interviewed. Her reports indicate that Mr. Demby failed to guide her in extremely important matters such as what areas of inquiry were necessary and potentially fruitful, the manner in which she approached witnesses and the need to prepare for interviews by obtaining and reviewing social history documents.

493. A number of witnesses whom Mulligan contacted were called as witnesses at the reference hearing and provided declarations which were relied upon by the mental health experts who testified at the reference hearing. The information provided in that testimony and those declarations was far more extensive than that reflected in Ms. Mulligan's reports. Moreover, some of the information found in Mulligan's reports was inaccurate and misleading with respect to the manner in which particular witnesses would testify. The following witnesses were interviewed by Ms. Mulligan, but testified at the reference hearing and provided petitioner's current counsel with declarations which included far more mitigating information than that contained Ms. Mulligan's interview reports: Carol Hardy, Pat DiNova, AnaMaria Kosciolek, Ben Artis, Mellonie Davis, Judy Norwood Metoyer, Rick Padilla, Jr., Lucy Rodriguez, Pat Stevens and Eileen West. (Compare H.Exh. 3-A and 3-H with H.Exh. 33.)

494. Mr. Demby's failure to guide Ms. Mulligan regarding potentially fruitful areas of inquiry is reflected in the way in which he himself interviewed Steve Rice. Mr. Rice was petitioner's good friend and sometimes roommate at the time of the killings; he had known petitioner's

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[50](...continued)
leads they develop." (*Id*. at p. 425.)

family for several years and stayed in petitioner's mother's home for a significant period of time. (HT 225.) Mr. Demby failed to ask Mr. Rice any questions regarding his knowledge of petitioner's background and character, petitioner's mental state at any time, petitioner's relationship with his family members, unusual behaviors on the part of petitioner's family or Mr. Rice's knowledge of the incident which led to petitioner's arrest on August 6, 1980. (Appendix 35.) Mr. Rice's testimony at the reference hearing shows that his knowledge in these categories was extensive, but Mr. Demby simply failed to inquire.

495. Mr. Demby failed to ensure that Ms. Mulligan or anyone else adequately investigated evidence of the hardships, traumas and losses suffered by petitioner as a child and as an adult. To the extent that he was aware of some of those events, he unreasonably failed to investigate the effect that those events had on petitioner and on his behavior. He failed to investigate the events in petitioner's life in the months leading up to the spring of 1981 and the possible causes of petitioner's low level of functioning at that time. He unreasonably failed to make sure that witnesses were asked about petitioner's and his family members' histories of mental illness, diagnosed or otherwise. He unreasonably failed to ask the relevant witnesses about petitioner's prior conviction and the incident underlying it. (See H.Exh. 33; Report at pp. 84-87.)

496. Mr. Demby unreasonably failed to investigate and present evidence of the impact that petitioner's execution would have on his loved ones. With respect to the few friends and family members who were interviewed, neither Mr. Demby nor Ms. Mulligan asked such potential witnesses about the impact petitioner's execution would have on them or on others. Neither Mr. Demby nor anyone working on petitioner's case

attempted to contact petitioner's children. (HT 2070.) Neither Mr. Demby nor anyone working on petitioner's case even obtained the birth certificates of petitioner's children. (H.Exhs. 33, 85; Report at p. 83.) These omissions were unreasonable and constitute deficient performance. (HT 2484.)

497. Mr. Demby unreasonably failed to investigate the facts underlying petitioner's sole prior conviction and the context in which that incident arose. (HT 2521.) In his closing argument at the penalty phase, he suggested that petitioner's jury should show the kind of restraint that was shown by the police who arrested petitioner but did not harm him. However, he failed to present to the jury any evidence of a reason for exercising such restraint. (HT 2523.)

498. Mr. Demby unreasonably failed to ensure that Ms. Mulligan or anyone else investigated evidence of petitioner's extensive history of good deeds and good character. (H.Exhs. 33, 85; Report at pp.74-82.) For example, Mr. Demby was aware at the time of trial that petitioner had been a bus driver for the city of Los Angeles and that, while a bus driver, petitioner had attempted to thwart a robbery on his bus and was injured in the ensuing scuffle. (HT 1670-1671, 1683, 1793, 1798-1799; H.Exh. 12; Report at p. 8.) Mr. Demby was aware of sufficient facts pertaining to that incident to know that it was potentially mitigating and bore further investigation. (Report at p. 8) Mr. Demby was also aware that, as a result, petitioner had a Worker's Compensation claim that was pending at the time of the killings and that petitioner had been involved in several other auto accidents and had filed insurance claims in connection therewith. (HT 1675, 1807-1808; H.Exh. 33; Report at p. 8.) Mr. Demby testified at the reference hearing that he wanted to present to petitioner's jury evidence that petitioner was expecting insurance money from his Worker's Compensation

case, as well as insurance payments from his car accidents, to show the jury that, if they found that petitioner had stated that he was expecting to receive insurance money, he was not referring to the life insurance proceeds potentially flowing from the victims' deaths. (HT 1673-1674, 1807, 2169; Report at pp. 32-33.) However, Mr. Demby and his staff failed to investigate the facts surrounding the incident on petitioner's bus. Mr. Demby did not attempt to obtain the fire department or police records pertaining to the incident to confirm that the incident had occurred and to ascertain whether those records corroborated the version of events petitioner had given after the incident. He failed to identify or interview Esther Meisel (the robbery victim, whose name was listed on the Fire Department records of the incident and presumably on the police report, now no longer in existence), any of the police or fire department personnel who responded to the incident, anyone from R.T.D. (the bus company for whom petitioner was working at the time of the incident), or any of the doctors who treated petitioner's injuries, to ascertain whether anyone could corroborate petitioner's version of events and to determine the amount of petitioner's potential monetary recovery. (Report at p. 74; HT 793-800; H.Exhs. 18, 35, 60, 85, SS.) Mr. Demby asked Ms. Mulligan to telephone petitioner's Worker's Compensation attorney, Lawrence Silver, to find out how much petitioner's case was worth. Mr. Demby did not ask to see Mr. Silver's file, nor did he speak personally to Lawrence Silver. Mr. Demby did not review the incident reports and medical records filed with the Worker's Compensation Appeals Board. (H.Exh. 85; Report at p. 74.) Although Mr. Demby interviewed Steve Rice, who testified at trial that

petitioner had said he was expecting to receive insurance money,[51] he failed to ask Steve Rice logical questions regarding his knowledge of petitioner's expectations, including when in relation to the killings petitioner had made any statement regarding expecting an insurance recovery. (Appendix 35.) Mr. Demby failed to investigate what petitioner might expect to recover by way of Worker's Compensation. (HT 2166.)

499. In spite of her inexperience and lack of supervision, Ms. Mulligan did acquire information which, to reasonably competent counsel, would have pointed up the urgent need for additional investigation, including extensive record gathering, re-interviewing those witnesses who had been interviewed, locating and interviewing additional witnesses and devising alternative ways of approaching witnesses who had initially been uncooperative. (HT 2435-2437, 2440, 2459, 2563.) Mr. Demby unreasonably failed to conduct such additional investigation. Indeed, Mr. Demby unreasonably allowed the investigation of potential mitigating evidence to be effectively abandoned when Ms. Mulligan ceased working on petitioner's case, over a year before the penalty phase of trial. The last contact anyone working on petitioner's case had with any of the potential witnesses Ms. Mulligan had contacted was approximately one and one-half years before the start of petitioner's penalty trial. (H.Exh. 33; Report at p. 76.) This constitutes deficient performance. (HT 2443.)

500. Neither Ms. Mulligan nor anyone else working on petitioner's behalf traveled to New York (where petitioner was born and lived until the age of 3), to New Jersey (where petitioner lived from ages 3 to 17) or to

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[51]At trial, Steve Rice testified that petitioner owed him $200 to $300 and said that he was going to collect some insurance money and buy Rice a motorcycle. (Rice, RT 9343-9344.)

Tennessee (where petitioner lived from ages 18 to 20). (H.Exhs 33, 85; Report at pp. 4-5.) There were no financial constraints on Mr. Demby's ability to travel out of state or to send investigators out of state. (HT 1769.) Reasonably competent counsel would have undertaken investigation in the geographic areas in which petitioner had resided, would have identified and located persons who knew petitioner and/or his family, and would have conducted thorough and probing in-person interviews of those persons regarding all possible areas of mitigation to which they could speak. (HT 2456-2459.)

501. Mr. Demby and his staff failed to locate and interview numerous friends, family members, teachers, and other social history witnesses. For example, Mr. Demby and his staff had no contact with the following witnesses who either testified at the reference hearing regarding some aspect of petitioner's personal and family history or provided declarations relied upon by the mental health experts who testified at the hearing: Caroline Abrams, Charles Behrensmeyer, Joan Davis, Kay Drosendahl, Rick Ginsburg, Ann Godfrey, Angela Hardy, Katherine Hardy, James Michael Hardy, Esther Meisel, Michael Mitchell, Phyllys Moore, Richard O'Brien, Leila Peay Hardy Ray, Robert Steiner, Dorothy Steiner, Leslie Stigers, Lois Thompson, Milton "Pete" Thompson, Gus Lopez, William Thompson. (See H.Exhs. 3-A, 3-H)

502. Mr. Demby failed to make reasonable attempts to interview petitioner's sister, Linda Barter (nee Hardy). Ms. Mulligan's report stated that Linda did not want to talk to her and believed there was nothing they could do for petitioner. (H.Exh. 33.) However, Ms. Mulligan's report did not indicate whether she had spoken to Linda directly or whether this information came from Carol Hardy, whom Mulligan was interviewing at

the time she received this information. At the reference hearing, Ms. Barter testified that she never spoke with Ms. Mulligan or anyone else from Mr. Demby's office. (HT 950-951.) Reasonably competent counsel would have attempted to make contact with Linda again, not in her mother's presence, and would have explained to her the ways in which she and others in the family could be helpful. (Report at p. 79.)

503. With the exception of petitioner's friend, Judy Metoyer, Mr. Demby failed to interview personally any of the potential penalty phase witnesses in this case, including petitioner's family members and friends, and instead relied on the unverified reports prepared by Ms. Mulligan. Although Mr. Demby spoke to petitioner's mother and sister, AnaMaria, he did not gather information from them. He based his decisions regarding whether or not to call witnesses on Ms. Mulligan's reports. Given Ms. Mulligan's lack of training and experience, this reliance was unreasonable.

504. As stated above, Mr. Demby was aware that, should there be a penalty phase in petitioner's case, the prosecution would introduce in aggravation evidence of the incident which led to petitioner's arrest on August 6, 1980, and that, in that regard, the prosecution would present the testimony of petitioner's family members, including petitioner's mother. (Report at p. 86.) Mr. Demby knew that Mr. Jonas would argue that the incident showed petitioner was a violent person and that his own family was afraid of him. (HT 1811-1812.) Evidence of the incident was the only aggravation, other than the circumstances of the killings, which the prosecution included in its notice of aggravation. (H.Exh. 36.) Petitioner had only the one prior conviction, so there was no danger that evidence mitigating the incident would have opened the door to any other criminal history evidence. Nevertheless, the evidence presented at the hearing

established that neither Mr. Demby nor his office conducted any meaningful investigation of the incident. Ms. Mulligan interviewed petitioner's mother, but did not discuss with her the events of August 6, 1980. (HT 238, 255-256, 666; Report at p. 86.) Mr. Demby spoke to Mrs. Hardy just before her testimony at the penalty phase and found out only that she blamed herself for the incident; however, he did not determine what she knew that could mitigate the incident and did not prepare her for her examination. (HT 661, 666, 2177.) As noted above, although Mr. Demby himself interviewed Steve Rice, who also had knowledge of the incident, he failed to inquire in this regard. (Appendix 35.) Although the prosecution provided Mr. Demby with a two-page arrest report and a supplemental probation report regarding the incident, no other records regarding the incident were in Mr. Demby's files. (H.Exh. 85; H.Exh. 3-C; Trial Exh. 104.) Mr. Demby failed to investigate those aspects of petitioner's personal and family history which were relevant to petitioner's state of mind at the time of the incident. He failed to consult with any mental health expert regarding the significance of petitioner's behavior on the date in question. (Report at pp. 86-87.) Accordingly, because Mr. Demby did not meaningfully investigate the August 6, 1980, incident, he was unaware of the vast majority of evidence available to mitigate the prosecution's case in this regard.

505. Mr. Demby failed to gather the extensive available records regarding petitioner and his immediate family. (Report at p. 84.) Reasonably competent counsel would have gathered all available records regarding petitioner and his family members, including but not limited to: medical records, psychiatric records, hospital records, social service records, military records, employment records, welfare records, jail records, criminal records, court records, juvenile records, probation records, police

reports, social security records, school records, adoption records, birth records, death records and marriage records. (HT 2426.) Reasonably competent counsel would have attempted to obtain all such records.[52] The need to gather such records was taught at seminars and was indicated in "all the literature." (HT 2428.) Records and other documentation of petitioner's social history were essential to any mental health expert's ability to assess competently petitioner's mental state at any given point in time and therefore to provide expert opinion testimony in mitigation. (H.Exh. 4, pp. 7-10; HT 1284; 1478-1479; HCT 307-312; Report at p. 44.) Moreover, records were known to provide unassailable evidence of particular events or circumstances in the client's background. The standard of care among capital defense attorneys at the time of petitioner's trial was that the collection of records should begin "right away." (HT 2429.) Regardless of the client's statements regarding his involvement in the crime, reasonably competent counsel would have gathered social history records that were at least as extensive as those presented at the reference hearing. (HT 2430, 2433.) Mr. Demby unreasonably failed to request or obtain all but a very small handful of these records. The records he

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[52]See *Hill v. Lockhart* (8th Cir. 1994) 28 F.3d 832, 845 ["'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' [citation], we believe that it was the duty of Mr. Hill's lawyers to collect as much information as possible about Mr. Hill for use at the penalty phase of his state court trial."]; *Kenley v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1307 ["None of the information we have discussed was hidden from counsel. References were made to it or it was brought to his attention in the course of his review of materials and his representation of Kenley. We believe that the evidence considered by counsel, along with the evidence that would have been discovered through further investigation, contained much potentially mitigating evidence."].)

obtained consisted of the following: some, but not all, of petitioner's school records; some, but not all, of petitioner's records from his stay at Camarillo State Hospital; one printout from the Department of Motor Vehicles regarding petitioner; the receipt for the rental car which petitioner had at the time of the killing, and petitioner's personnel file from his job as a bus driver. (H.Exh. 85.) From the prosecution, Mr. Demby received in discovery: petitioner's criminal history (CII), one supplemental probation report regarding petitioner and one arrest report, prepared in connection with petitioner's prior conviction. (H.Exh. 85.) Mr. Demby's failure to obtain any other records regarding petitioner or any of his family members constitutes defective performance.

506. In general, Mr. Demby failed to conduct an adequate investigation into petitioner's character and background. Mr. Demby's failure to investigate adequately petitioner's case prevented him from presenting any of the substantial mitigating evidence that was available, or from making reasonable strategic decisions in that regard.

C. Reasonable Investigation Would Have Produced A Wealth of Evidence Consistent with a Defense of Lingering Doubt

a. Evidence of Petitioner's Good Deeds and Good Character

507. The evidence presented at the reference hearing shows that reasonable and competent investigation would have revealed that, while petitioner was employed as a bus driver for R.T.D. in Los Angeles, he attempted to thwart a robbery on his bus and was injured in the process. At around noon on August 24, 1979, petitioner was working as a bus driver for R.T.D., when a robbery occurred on his bus. Esther Meisel, the robbery victim, was sitting at the back of the bus. An unidentified man sitting next

to her reached into her purse. Ms. Meisel grabbed the man's hand and a struggle ensued. Ms. Meisel screamed for help, and the robber began beating her in the face with his fist. (Report at p. 7.) Petitioner stopped the bus and remotely locked the back door. The robber succeeded in taking Ms. Meisel's purse and, unable to flee through the back door, ran to the front of the bus. There, petitioner attempted to stop him from fleeing, and the two men struggled. In the course of the struggle, the robber struck petitioner with a firearm and both men fell down the stairwell. Petitioner suffered injuries to the right wrist and ankle, the left scapula, and the cervical spine. The robber escaped and was never apprehended. The police and the fire department responded to the scene. (Report at p. 7.)

508. The evidence presented at the reference hearing shows that reasonable investigation would have revealed a wealth of other evidence showing that, both in childhood and adulthood, petitioner had positive attributes and a history of kindness to others. As a young child, petitioner was quiet, obedient, passive and well-mannered; he was never a discipline problem. As a child and as an adult, petitioner assumed a major role in the care of his younger siblings. Petitioner was trustworthy, gentle, playful, patient and caring. Petitioner cooked, cleaned, shopped for groceries, diapered and fed his infant sister, did laundry, walked his school-age sister to and from school, and helped with other household chores. Although he often had to abandon his own activities to care for his siblings, he did so without complaint or protest. Petitioner was protective of his mother and fought his putative step-father, Bill Thompson, in order to protect his mother from Thompson's abuse. (HT 613, 708.)

509. Starting at age 15, petitioner worked to help support his mother and siblings financially and gave his earnings to his mother. Even

after he had children of his own, petitioner continued to provide parent-like support, both financially and otherwise, to his younger siblings. Petitioner was extremely protective of his younger siblings and responsive when they asked for help. (Report at p. 35.)

510. During his marriage, petitioner was an involved father who spent time with his children, taught them, loved them and was proud of them. Although he had difficulty maintaining employment and experienced frequent periods of poverty and hunger, he never resorted to stealing to support his wife and child. (Report at p. 35.)

511. After petitioner's separation from his wife, petitioner contributed to the household expenses, visited his children regularly and frequently took them for weekends. Petitioner was very much a part of his children's lives and both children have fond memories of their father from this time period. However, starting in 1979, petitioner was prevented from seeing his children by his ex-wife, Pat, and her then-boyfriend, who was extremely jealous and forbade Pat to allow the children any contact with petitioner. Petitioner tried repeatedly to locate his children but was unable to do so. (Report at pp. 52-53.)

512. Petitioner was good with children, whether or not they were his own, and was like a father to his friend Judy Metoyer's daughter, Angela. As an adult, petitioner often was caring, kind and responsive to the needs of others. As an adult, petitioner took care of his brain-damaged and epileptic older brother. Petitioner was generally respectful to others, especially to women. Both as a child and as an adult, petitioner was kind to animals. Many witnesses did not believe petitioner capable of killing a woman and child. (HT 355, 409, 849, 893-894, 1014-1015.)

513. On August 24, 1979, petitioner attempted to thwart a robbery

on his bus and stop the robber from fleeing, and was injured in the process.

514. In August of 1980, petitioner was placed on formal probation and a fine was imposed. Petitioner paid the fine in full, reported to his probation officer and obtained psychological counseling, as ordered by the court; up until the time of his arrest in July of 1981, he attempted, with some success, to maintain employment.

515. In the face of an history of extreme child maltreatment, petitioner has consistently been described as caring, nurturing, gentle, loving, playful, nurturing and helpful to others.

516. As shown by the record of the reference hearing, evidence of petitioner's good character and good deeds was available to Mr. Demby from innumerable sources, including, but not limited to, the following witnesses, who were available and willing to testify at the time of trial: Richardo Padilla, Jr., Benjamin Artis, Lois Thompson, Linda Thompson Barter, Mellonie Davis, Patricia DiNova, Carolyn Hardy, Patricia Stevens, AnaMaria Hardy Kosciolek, Steve Rice, Katherine Hardy, James Michael Hardy, Rick Ginsburg, Judy Metoyer, Leslie Stigers, Eileen Goode West, Esther Meisel, Michael Mitchell, Joan Davis, Ann Davis Godfrey, Lucy Rodriguez, Gail Reuben, Anna Padilla and Johnnie Leger. (Report at p. 37.)

517. Also available to counsel was extensive documentary evidence of petitioner's good character and good deeds, including, but not limited to the materials gathered by habeas counsel and reviewed by Dr. Jon Conte prior to the reference hearing in this case. (H.Exhs. 3-B through 3-I.) Additional documents which have now been destroyed were in existence at the time of trial and were also available. Experts with qualifications similar to those of Dr. Conte were available at the time of trial to assess petitioner's

social history in general and/or specifically to summarize or synthesize the evidence of petitioner's good deeds and good character. Accordingly, even if for some reason a particular witness could not be called, petitioner's good character and good deeds were available at trial through the testimony of an expert. (Report at p. 37.)

518. Had Mr. Demby undertaken an adequate investigation, he would have been able to present to the jury evidence that petitioner had an extensive history of positive attributes and a history of kindness to others. Mr. Demby could have shown the jury that petitioner's attempt to thwart the robbery on his bus and to prevent the robber from escaping showed that petitioner had exhibited courage and unselfishness and that petitioner had a "willingness to perform good deeds (even at serious physical risk to himself)." (*Hall v. Washington* (7th Cir. 1997) 106 F.3d 742, 746-747, 752.)

519. Evidence of a defendant's good character has been found to have significant mitigating value. (See, e.g., *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1369 [court found that counsel "could have presented to the jury and the court emotional and substantial testimony of Jackson's good character and devotion to her family despite a life of hardship and abuse."]; *Jackson v. Dugger* (11th Cir. 1991) 931 F.2d 712 [counsel found ineffective for failing to present evidence of good deeds and nonviolent character in mitigation].)

520. The evidence would have undermined the prosecution's attempt to paint petitioner as a demon with no redeeming qualities, a person whose life had no purpose and was not worth sparing. Such evidence would have been powerful mitigation, insofar as it would have humanized petitioner, undermined the prosecution's characterization of him, and supported a defense of lingering doubt by showing that his character traits

were not those of a killer. In addition to its particular relevance to the prosecution's theory of the crime, evidence of good character and good deeds would have shown that petitioner's life had value and that he was deserving of mercy. Petitioner's jury heard none of this evidence.

b. Evidence that Petitioner's Children and Other Loved Ones Would Suffer Profound Loss if He were Executed

521. The evidence presented at the reference hearing showed petitioner has two children and many other friends and family who would experience irreparable and profound loss if petitioner were executed. The evidence showed that petitioner's children love their father and that ongoing contact with him is extremely important to them. The evidence showed that petitioner's execution would also deeply affect Pat DiNova, petitioner's former wife and the mother of petitioner's two children, would devastate petitioner's mother and sisters, and would profoundly affect Judy Metoyer, one of petitioner's friends, and her daughter, Angela, who regards petitioner as a father. This evidence exemplified the feelings held toward petitioner by his children and others, and showed that his relationships with those individuals were significant. (Report at p. 42.) Petitioner's jury heard none of this evidence.

522. The witnesses who testified at the hearing on this subject were: Carol Hardy, AnaMaria Kosciolek, Linda Barter, Pat DiNova, Kathy Hardy, James Michael Hardy and Judy Metoyer. (Report at pp. 42-43.) The referee found and the evidence shows that all of the evidence which petitioner presented at the reference hearing showing that petitioner's children and other family members loved him and would suffer irreparable and profound loss if he were executed was available at the time of trial.

(Report at pp. 42-43.)

523. Evidence of the impact of the defendant's execution on his loved ones or evidence that friends and family believe that the death penalty should not be imposed is admissible and relevant to the issue of penalty in a capital trial. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 456; *People v. Mickle* (1991) 54 Cal.3d 140, 194; *People v. Cooper* (1991) 53 Cal.3d 771, 844; *People v. Heishman* (1988) 45 Cal.3d 147, 194; see also *Oregon v. Stevens* (1994) 319 Ore. 573, 879 P.2d 162, 168.)

524. If Mr. Demby had conducted an adequate investigation, he would have been aware that petitioner was much loved by his children, other family and friends and that all of the reasons he has claimed as justification for not presenting such evidence could have been overcome. Such evidence would have provided the jury with powerful mitigation insofar as it would have shown that petitioner had significant and meaningful relationships, that he had children, family and friends who cared deeply for him and for whom he cared deeply, and that his execution would severely victimize a number of individuals who had nothing to do with the crimes of which petitioner had been convicted. If such evidence had been presented to the jury, at least some of the jurors would have voted to spare his life. (See, e.g., Appendix 12.)

c. Evidence that Petitioner Suffered Childhood Maltreatment, Trauma and Adult Loss

525. Reasonable investigation would have revealed extensive evidence that, as a child, petitioner suffered abuse, neglect and a virtually continuous series of traumatic experiences, and that, as an adult, he encountered further significant hardship related primarily to grief and loss.

526. Petitioner was born in New York City on May 28, 1954, the

third of his mother's six children. Petitioner's home at that time was marked by extreme poverty, instability, alcoholism, drug abuse, chaos, constant marital strife and physical danger. Petitioner's mother, Carolyn Steiner Hardy (Carol Hardy), was a depressed, grandiose, emotionally disturbed person, who sometimes engaged in prostitution. Petitioner's father, George Herbert Hardy, Jr. (Bill Hardy), was a violent, suicidal, mentally ill, alcoholic and drug addict. Petitioner's mother was Jewish; his father was not. Both families, particularly his, disapproved strongly of their marriage. (HT 187-192, 536, 539-574, 1285-1287; H.Exhs. N, KK, 4, 3-B, 3-I; Report at p. 44.)

527. At the time of petitioner's birth, a pattern of instability, turbulence and physical, psychological and verbal abuse had been thoroughly established in the relationship between petitioner's parents. Before petitioner was born, his father had been violent and abusive both to petitioner's mother and to his older brother, Bob, who was just one and a half years old when petitioner was born. Bill and Carol Hardy had separated several times. Shortly before she became pregnant with petitioner, Carol Hardy had filed for a divorce on the ground of extreme cruelty, but she and Bill Hardy had later reconciled. Both before and after petitioner's birth, Bill Hardy drank alcohol on a daily basis and became violent when under the influence. Bill Hardy became violently jealous when Carol Hardy gave attention to anyone else, including the children. (H.Exh. Z, KK, 4; HT 538-550, 561 1285.) This evidence confirmed and corroborated the evidence that similar behavior continued after petitioner's birth.

528. As a result of Bill Hardy's drug addiction, Carol Hardy experienced significant physical, emotion and financial stress during her

pregnancy. His inclination to buy drugs rather than food and other necessities, and the general uncertainty and insecurity that his addiction implied for the future, caused Carol Hardy to experience significant physical, emotional and financial stress during her pregnancy with petitioner. (HT 549, 1287-1288, 1437, 1458; H.Exhs. 4, KK; Report at p. 44.)

529. When petitioner was approximately six months old, Bill Hardy was fired from his job and, as a result, the Hardy family's poverty became more severe. In the ensuing months, Bill Hardy overdosed on drugs twice, was arrested four times, attempted suicide at least once, spent several months in jail and was repeatedly confined in a mental hospital. Carol Hardy received no financial support from her own family and, through welfare benefits and occasional acts of prostitution, she struggled to support herself and the two children. When petitioner was an infant and toddler, the Hardy family was often totally without food. (H.Exhs. AA, BB, KK, FFF, 3-A, 3-C, 3-E, 4; HT 202, 538-551, 554-574, 1035-1036, 1289.)

530. Bill Hardy was short-tempered and rageful, jealous and sexually aggressive; he had dramatic mood swings which were exacerbated by his use of alcohol. Because of his behavior, the family was forced to move frequently. Adding to the instability of his early childhood, petitioner had pneumonia and was hospitalized for two weeks at age eight months. (HT 558-561, 570-573,1294, 1296; H.Exhs KK, 4.)

531. On numerous occasions, Bill Hardy physically abused and threatened to kill petitioner, his mother and his brother. Even more frequently, Bill Hardy hit, beat or sexually assaulted petitioner's mother in petitioner's presence. Bill Hardy forced petitioner's mother to perform sex acts against her will; kicked her in the stomach, causing her to miscarry;

confined her against her will; threw a knife at her and the children; and hit her in the face so hard that she lost consciousness. On another occasion, Carol was lifting petitioner out of the crib when Bill Hardy punched her in the back, causing her to drop petitioner. On another occasion, Bill Hardy hit petitioner for crying. Another time, Bill Hardy dangled petitioner out a 12th story window, yelling to Carolyn that he would drop petitioner if she walked out the door. Bill Hardy threatened repeatedly to drown petitioner and his brother. On another occasion, Bill Hardy brandished a knife at Carol Hardy, who was holding petitioner in her arms and had Bob by her side, and threatened to kill them all. On another occasion, Bill Hardy demanded sex from Carol, held her down and beat her, while petitioner and his brother Bob screamed and Bob threw eggs to try to get their father to stop. On yet another occasion, Carol Hardy, pregnant again, was kicked by Bill Hardy in the stomach, causing a miscarriage. One time when Carol was sitting at a table with petitioner in her arms and petitioner's brother at her side, Bill Hardy threatened to kill them all and repeatedly threw a knife into the table in front of them Once, when Carol chastised Bill for stealing a woman's purse, he hit her so hard that she lost consciousness. (HT 29, 538-550, 561-562, 565-569, 572, 1290, 1295-1296; H.Exhs. KK, 4; Report at pp. 44-45.)

532. As an infant, petitioner was also severely neglected. Bill Hardy was unable or unwilling to care for petitioner in any meaningful way and demanded Carol Hardy's exclusive attention, forcing her to neglect the children as well. What little attention she could provide to the children was focused on petitioner's brother, Bob, who, from birth, was far more demanding, uncontrollable and difficult than petitioner. (H.Exhs. KK, 4; HT 1293-1294; HT 199, 538-577, 594, 1292-1293.)

533. In the Fall of 1955, when petitioner was approximately 18 months old, Bill Hardy tried to break down the door of the family's apartment and was again arrested. While Bill Hardy was in jail, petitioner's mother ended her relationship with him for the last time and petitioner never saw him again. Petitioner grew up without benefit of a father figure. Over the years, petitioner's mother became romantically involved with a number of men, including: from 1956 to 1963, Rick Padilla (Richard Padilla, Ricardo Padilla), the father of petitioner's sister, AnaMaria, and brother, John (as well as Ricardo Padilla, Jr., who testified at the reference hearing); and, from 1963 to 1971, William Thompson, the father of petitioner's sister Linda. None of Mrs. Hardy's boyfriends were willing to assume a paternal role vis-a-vis petitioner. (Report at p. 45; HT 535-537, 574-575, 582, 592, 607, 621, 628, 693-695, 720, 838, 906, 912, 993, 1297-1298, 1305; H. Exhs KK, QQ, BBB, 3-B, 4.)

534. In the spring of 1956, when petitioner was approximately two years old, his brother, Bob, was hit by a taxicab, received a severe head injury, and was hospitalized for several weeks; as a result, Bob suffered permanent brain damage, which had dramatic consequences for petitioner himself. Not long thereafter, Mrs. Hardy boarded the children out to a family and, while there, Bob was again severely injured and hospitalized when he burnt himself on a furnace in the basement where the boys had been sent for punishment. (Report at p. 45; H.Exhs. CC, KK, 3-H, 4; HT 576-577, 583.)

535. Throughout petitioner's childhood, he and his family lived in abject poverty. Whether a result of mental illness, lack of resources or simple indifference, petitioner's mother was unable or unwilling to provide adequate clothing, food, dental care, and/or medical care: petitioner was

dressed poorly, often in ill-fitting, ragged and dirty clothes; he was not given frequent enough baths; the children had no toys or bicycles. He and his siblings were underfed and often hungry. Until 1965, the Hardy family lived in "cold-water flats" or rooming houses; in 1965, they moved into an apartment building occupied by transients and poor people. Rick Padilla contributed little if any financial support. Bill Thompson began paying the family's rent in March of 1965, but the family continued to live in poverty, in part because Thompson often disappeared for lengthy period of time without providing for the family in his absence. During at least one such period, outsiders observed that the children were starving. Throughout petitioner's childhood, it was not unusual for him and his siblings to go hungry. In addition, petitioner did not receive dental care and or other needed treatment: although a social worker recommended that he be provided social service treatment, Mrs. Hardy would not allow it. Mrs. Hardy's behavior in this regard is corroborated by evidence of a pattern of behavior on her part in responding to her own treatment needs as well as those of her other children. (Report at pp. 45-46; H.Exhs. 3-A, 3-C, 3-E, 3-F, 4, DDD, FFF, KK, QQ, XX, YY; HT 592, 595, 605, 607, 700, 710, 718, 832, 833, 840, 868-869, 1266, 1307, 1316-1317, 1335, 1336.)

536. Petitioner's mother not only neglected petitioner's physical needs, she also failed to provide petitioner and his siblings with adequate structure, supervision and guidance in the home. The children were permitted to play in the street until late at night. Petitioner was permitted and even encouraged to skip school. Other examples of Mrs. Hardy's failure to provide supervision or guidance include at time when she found out that a plant petitioner had given her for Mother's Day belonged to a neighbor, she refused to return it to the neighbor; the neighbor was the one

who explained to petitioner that he should return the plant, which he then did. On another occasion, when asked about marijuana paraphernalia in her living room, Mrs. Hardy replied that her daughter smoked marijuana and there was nothing she could do about it. Evidence of such behavior on the part of petitioner's mother is corroborated by evidence of a family history of similar permissiveness. Mrs. Hardy's inattentiveness is further illustrated by the fact that she thought petitioner did very well in school, when in fact he did very poorly, particularly in junior high and high school, when he failed the eleventh grade. (H.Exhs. KK, AAA, DDD; 3-A, 3-C, 3-D, 3-F, 4; HT 611, 630, 1345.)

537. Several times in his early childhood, petitioner was effectively abandoned by his mother. When petitioner was approximately three years old, his mother left his brother Bob and him with another family for seven months. When petitioner was approximately four years old, Bob and he were sent to another "unofficial foster home," where they remained for approximately one and a half years. Carol Hardy's willingness to abandon petitioner and his siblings was again impressed upon petitioner when he was 10 years old: in 1964, petitioner's mother moved the family to Los Angeles, intending to stay there permanently, and left behind Bob, who was institutionalized in New Jersey at the time. Evidence of Mrs. Hardy's behavior in this regard is corroborated by evidence that she herself had a family history of similar treatment, as did her mother (petitioner's maternal grandmother), Rose Bernise Steiner. (HT 583, 587, 602, 1303-1304, 1322-1323; H.Exhs. KK, 3-C, 3-D, 4; Report at p. 46.)

538. Whether because of his injuries or because of congenital impairments, petitioner's brother Bob was a very difficult and demanding child with substantial behavioral problems and disabilities. Bob had a very

low I.Q., had difficulty in school, was placed in special education classes and failed the third grade twice; he was hostile, argumentative, defiant and resentful of authority and discipline; he was a fire-setter, aggressive toward others and accident prone; at times, he was depressed, sullen and withdrawn. (HT 593-594, 1314, 1320; H.Exhs. KK, 4.) At the age of nine, Bob was referred to the school psychologist, then to the school psychiatrist and then to a local social service organization, which for several years thereafter had a regular presence in the Hardy household. (H.Exhs. 3-C, 4.) In January, 1964, when petitioner was 10 years old, a psychiatrist found the relationship between Bob and his mother to be "pathogenic" and recommended that Bob be institutionalized. (H.Exhs. 3-C, 3-F, 4.) In the spring of 1964, Bob was sent to the Union Industrial Home in Trenton, New Jersey, where he remained until July of 1966. (H.Exh. 3-F, 4.) Upon his return home, Bob started school again, but dropped out within a year. Mrs. Hardy contacted a social service agency three times that year to request that Bob be removed from the home. (H.Exh. 3-C, 3-F, 4.) Bob's behavior problems included "defiance, delinquency, running away, use of drugs and sexual acting out." (H.Exh. 3-C.) In 1969, Bob refused to continue in counseling and the social service provider concluded that out-patient treatment offered no hope. (H.Exh. 3-C, 3-F.) Bob finally left home for good in 1969. (H.Exh. YY; HT 876-878.) Throughout petitioner's childhood and adolescence, Bob's needs overshadowed petitioner's. Mrs. Hardy was overwhelmed and often enraged by the challenge of dealing with Bob; at the same time, her relationship with Bob was extremely close and sexually charged; Mrs. Hardy's attention, as well as that of the available social service providers, was focused on Bob, with little or none left over for petitioner. Bob's problems were so severe that petitioner's needs were

hardly noticed and certainly were not addressed. (H.Exhs. KK, 3-C, 4; HT 1313.)

539. From 1957, when the Hardy family moved to New Jersey, until 1964, when the family moved to California, the Hardy family moved frequently; moreover, for several years during this period, petitioner and Bob were shuttled back and forth to their "foster home." (HT 585, 714; H.Exh. KK, 4.)

540. Adding to the instability and unpredictability of petitioner's environment, petitioner's mother was volatile and physically aggressive. In the years the family lived in New Jersey, it was not uncommon for Carol Hardy to become enraged, yell at the children, scream for them out the window, throw things and break objects in the house. She was uncontrollably obsessive about cleaning, moved the household furniture whenever she was upset and insisted that the children abide by strict housekeeping rules. Corroborating Mrs. Hardy's uncontrollable obsession with cleanliness is evidence that both of her parents exhibited the same characteristic. (HT 590, 648-649, 711, 713, 715, 893, 907-908, 913-914, 989, 1030, 1306; H.Exh. KK, QQ, YY, AAA, EEE, FFF, 3-A, 4.)

541. Petitioner was physically abused as a child by his mother, his brother and Bill Thompson. (Report at p. 46.) Carol Hardy herself did not hesitate to hit, grab or beat her children, often hitting them with the buckle end of a belt. As noted above, she had a short temper and it was not unusual for her to lose control. Pat DiNova observed Carol Hardy beat petitioner in the head with the buckle end of a belt when petitioner was 16 or 17 years old; during this incident, Mrs. Hardy was screaming and appeared to have lost control. Again, Carol Hardy's own childhood history corroborates the evidence that she was physically abusive to petitioner.

Further corroboration is provided by the fact that, as children, both of petitioner's brothers, Bob and John, were fire-setters, and studies show a correlation between fire-setting behavior and physical abuse. Petitioner was further victimized as a child by his brother, Bob, who bullied him, beat him up, killed his pets, threatened to kill him and chased him with knives. Petitioner also was physically abused by Bill Thompson, who joined the household when petitioner was about 10 years old. Thompson often came home drunk in the middle of the night and dragged petitioner out of bed to "wrestle" or to take a beating. Evidence of Thompson's behavior in this regard is corroborated by evidence that Thompson himself had a family history of similar behavior and that he behaved similarly toward petitioner's siblings. (Report at p. 46; HT 613, 705, 711, 713, 983-985, 992, 1276, 1314, 1320, 1458-1459; H.Exhs. EEE, 3-C, 4.) Thompson himself received severe and frequent beatings as a child. (Exh. XX, YY, 3-A, 4; HT 1326.) Long before the present case arose, petitioner's brother, Bob, told his then-wife that, when he was a child, Thompson used to come home drunk in the middle of the night and punch him (Bob) in the face while he was sleeping. (HT 876; H.Exh.YY.) Petitioner's sister AnaMaria, recalls that, when she was a child, Thompson frequently swatted her on the butt and smacked her in the back of the head. (HT 701-702; H.Exh. QQ.) Bill Thompson's brother, Ted, also had a habit of coming home at night drunk and fought with his wife, Lois Thompson. (H.Exh. XX, 4.)

542. Throughout his childhood, petitioner not only experienced physical violence, but also witnessed it perpetrated upon his loved ones, particularly his mother. Petitioner's mother was physically abused by petitioner's father, and by Rick Padilla and Bill Thompson. Petitioner's mother and Rick Padilla had loud arguments which often evolved into

physical fighting. Padilla was "a heavy drinker, a gambler and womanizer." (Exh. KK.) Petitioner's mother drank heavily at that time as well. Often, Padilla came to the Hardy residence after a night of drinking at a bar with other women and, inevitably, a fight ensued; sometimes, petitioner's mother went looking for Padilla and he beat her in response. Throughout the time that Padilla and petitioner's mother were romantically involved, Padilla was involved with at least one other woman with whom he had a child and with whom he lived the majority of the time; he was rarely present in the Hardys' home. Padilla and petitioner's mother often fought over the time that Padilla spent with his other girlfriend, Grace. In one fight, Padilla kicked petitioner's mother in the side, breaking her rib, and hit her in the face, breaking her teeth. In another fight, Padilla beat her and kicked out the windshield of her car from the inside. Such fights often occurred in petitioner's presence; as for those which resulted in physical injuries or property damage, petitioner was certainly aware that they had occurred, even if he did not witness them firsthand. (Report at p. 47; HT 488-591, 600, 608-610, 684, 1305-1306; H.Exhs. FF, KK, 4.)

543. The frequency and seriousness of violence petitioner witnessed was even greater during the years that petitioner's mother was involved with Bill Thompson. It was not unusual for Thompson to hit petitioner's mother in the face with a closed fist, rape her, strangle her, knock her against the wall, or throw objects at her. Once he broke her nose. Another time, during a forced act of intercourse, he punched her in the face with a closed fist, causing her to bleed from the area of her eye; he refused to allow her to tend to her injuries until he had completed the sexual act. Much of Thompson's abuse was administered in front of, or within earshot of, the children. Again, to the extent that petitioner did not see or hear these

incidents first-hand, he could not help knowing when Thompson had beaten his mother, given the extent of her injuries and the damage done to objects in the house. (Report at pp. 47-48; HT 600-601, 608-610, 613, 629, 703-704; H.Exh. KK, QQ, Exh. 3-D, 4.)

544. As a child, petitioner was also sexually abused, once by Rick Padilla's mentally retarded brother, Junior Padilla, and on other occasions by Bill Thompson. (Exh. 4, HT 1324, 1327.) Corroboration is provided by evidence that both of petitioner's molesters had been sexually aggressive or inappropriate towards others and evidence that Thompson himself had a family history of physical and sexual abuse. (HT 600, 608, 697, 707-708 1324-1327.)

545. Bill Thompson subjected petitioner and the other members of the family to frequent verbal abuse. He berated petitioner for being unmanly and called him degrading and humiliating names. He verbally abused petitioner's mother, routinely calling her "whore," "Jew," "kike," and "slut." He often said that all Jews were "niggers." He used ethnic slurs to refer to members of virtually every ethnic group, including Jews and Hispanics. Petitioner and all of his siblings were half Jewish, two of them were half-Puerto Rican, many of petitioner's friends were black and the neighborhood was racially mixed. Therefore, Thompson's verbal abuse was constant and directed at virtually everyone in petitioner's world. (HT 597-598, 699, 702, 916; H.Exhs. 4, C, KK.)

546. Petitioner's mother was also verbally abusive. When petitioner began dating Pat DiNova, who later became his wife, his mother referred to her as a "whore" and a "prostitute," and to Pat's sister, who was dating Ben Artis, a black man, as a "nigger lover." (H. Exhs. EEE, 3-A, 4; HT 981-983.)

547. Petitioner was ready, willing and able to take on extensive responsibilities in the care of his younger siblings, and Mrs. Hardy exploited that willingness. Mrs. Hardy called upon petitioner frequently to babysit and to assist with other household chores. She left petitioner alone with the three younger children for long periods of time, making it impossible for petitioner "to do the things kids want to do." (H.Exh. FF.) She allowed or encouraged him to skip school so that he could babysit and help with chores. It was not unusual for Mrs. Hardy to pull petitioner away from something he was doing, such as a basketball game or a concert, to babysit. She expected petitioner and his older brother, Bob, to help support the family financially. Since Bob was rarely in the home and was not trustworthy enough to help in this regard in any event, the pressure fell on petitioner's shoulders. Petitioner started working at age 15 to help support the family and always gave most, if not all, of his earnings to his mother. In 1966, a social worker noted that Mrs. Hardy's demands on petitioner were "excessive." (HT 614, 621-623, 716, 717, 719-723, 810, 960, 966, 983-988, 1021, 1343; H.Exhs. KK, QQ, WW, DDD, EEE, FFF, 3-A, 3-C.)

548. Corroborating the exploitative nature of Mrs. Hardy's relationship with petitioner is evidence that, in many other respects, Mrs. Hardy used her children to acquire money. She sold her first baby on the black market; she sued the taxicab company for the injuries Bob received in his childhood accident, expecting Bob to share the settlement money with her and becoming furious when he did not; she used her children to get financial assistance from various governmental agencies and opposed petitioner's eventual marriage to Pat DiNova because of the decrease in benefits she was to suffer as a result. She sued both Padilla and Thompson for child support; and she allowed a pedophile to take partially nude

photographs of her daughters in exchange for money. (HT 630, 729-730, 833, 878-879, 932-933, 995, 1040,1045,1331,1342; H.Exhs. CC, KK, XX, YY, BBB, EEE, FFF; 3-C, 3-D, 3-F.)

549. Petitioner's mother fell seriously ill several times. In July, 1963, when petitioner was nine years old, she had an illegal abortion, became septic and was hospitalized. When petitioner was 14 years old, his mother had a hysterectomy, which caused her to undergo surgically-induced menopause, which in turn caused her to become very depressed and unable to function for several weeks. On such occasions, responsibility over the younger children fell to petitioner. (H.Exhs. KK, 3-C, Exh. 3-D; HT 623.)

550. Throughout petitioner's childhood and early adulthood, his mother resorted to prostitution when in need of money. She often brought men home and the boys "saw a lot" around the house. She dressed provocatively and wore alluring lingerie or tight fitting clothes with heavy makeup and painted nails. (H.Exhs. KK, YY, AAA, DDD, 3-A, 3-C, 3-F, 4; HT 584, 606, 631, 969, 1457; Report at p. 48.) Evidence of such behavior on Carol Hardy's part is corroborated by evidence of a personal and family history of similar behavior: Carol Hardy's mother, Bernise Steiner, had modeled such parental behavior for Carol, who even as a child, had emulated her mother. As an adolescent and young adult, Carol worked as a model, a barker for a girlie show, a hat check girl and finally as a prostitute. (H.Exhs. KK, 3-A, 3-D, 4; Report at p. 48.)

551. The relationship between petitioner's mother and petitioner's older brother Bob was particularly sexualized. Numerous sources of information indicate that Mrs. Hardy behaved seductively and suggestively toward Bob. At the reference hearing, she confirmed that she thought Bob was sexually attracted to her. (H.Exhs. YY, 3-C, 3-F, 4; Report at p. 48.)

552. Petitioner was teased, humiliated and degraded by his peers for being poor, for the clothes he wore and for the way his mother dressed. He and his siblings were ostracized by at least some of the neighbors because of their mother's hostile behavior. Carol Hardy also inserted herself into petitioner's social interactions in a manner that was degrading and humiliating to petitioner and resulted in later teasing and taunting. At home, Carol Hardy ignored or belittled his interests. Evidence of her behavior toward petitioner is corroborated by evidence of a personal and family history of behavior similar to that which she directed at petitioner. Carol herself and her half-brother were treated similarly by their father and Dorothy Steiner (Carol Hardy's step-mother); Carol treated petitioner's brother, Bob, in similar fashion. (H.Exhs. WW, 3-A [Declarations of Bob Steiner, Rodriguez, J. Davis and Godfrey], 3-C [Jewish Family Service records], 3-F [Records of Division of Youth and Family Services], 4; Report at p. 48; HT 712, 809, 1318, 1332.)

553. Due to strained relations between Carol Hardy and her relatives, evidence which was corroborated by evidence of a history of hostility and feuding among the members of Carol's family, petitioner had no extended family to whom he could turn. (H.Exhs. KK, 3-A [Declaration of R. Steiner], 4.)

554. In addition to petitioner's difficulties at home, the environment in which he lived, Newark, New Jersey, in the 1960s was unstable, tense, dangerous and unpredictable. With rapidly changing demographics, the city was charged with racial tensions between whites and blacks. In 1967, with the worst housing and highest crime rate of any city in the United States, rioting erupted and several days of burning, looting and beatings ensued. The National Guard was sent into the city and was

stationed at petitioner's school; tanks and armored cars rolled down the streets; soldiers and snipers were stationed on rooftops; a curfew was imposed. In petitioner's neighborhood, bottles and other objects rained down from above, as people threw them from windows and rooftops; gunfire rang out frequently; local businesses were looted or burned; neighbors armed themselves. After the riots, virtually anyone who could afford to move out of the city did so. Petitioner's neighborhood became dangerous and violent. In the streets and in the schools, racial unrest was a constant threat. Petitioner was the only white player on his junior high school basketball team and got along well with other team members. On several occasions, petitioner was beaten by whites for having black friends. Racially motivated violence was common, especially at the high school petitioner attended, where, on repeated occasions, mounted police in riot gear were summoned to break up fights, and where silverware had to be removed from the cafeteria because it was being used as weaponry. The pressure for petitioner to isolate himself from his friends came from inside the home as well: Mrs. Hardy and Bill Thompson also disapproved of petitioner's interracial friendships, and petitioner was not allowed to bring black people into the family home. (H.Exhs. QQ, WW, AAA, DDD, 3-A [Declarations of J. Davis, Godfrey, Rodriguez], 3-C [Jewish Family Services records], 3-H [Newark Newspaper Articles], 3-I [Summary of *Rebellion in Newark: Official Violence and Ghetto Response*, by Tom Hayden], 4; HT 715-726, 803, 805-807, 914, 917-918, 961-962, 993, 1338-1339; 1341-1342.)

555. At age 16, petitioner began dating Pat DiNova (Pat Gregory, Pat May), whom he later married. Both petitioner's mother and Pat's father opposed the relationship. Petitioner's mother referred to Pat as a "whore"

and a “prostitute”; Pat’s father disapproved because of petitioner’s Jewish heritage. He repeatedly threatened to shoot petitioner and once went so far as to chase petitioner with a gun for having brought Pat home a minute late. When, in 1972, Pat found out she was pregnant, her father threatened to kill petitioner; petitioner’s mother tried to convince Pat to have an abortion but she refused. Mrs. Hardy moved the Hardy family from New Jersey to Tennessee, where Pat and petitioner secretly got married shortly before their first child, Kathy, was born. (Report at p. 49; H.Exhs. KK, EEE, 3-A [Declaration of Rodriguez], 3-B [Marriage certificate of James E. Hardy and Patricia Joan Gregory], 4; HT 627, 978, 981-983, 994, 996.)

556. Petitioner’s difficulties continued when, at the age of 18, he became a father and husband: his first child, Katherine Ruth Hardy, was born in 1972. From that time until to the end of his marriage, in 1976, petitioner struggled to support his own family while still responding to his mother’s demands. His mother continued to control him, telling him how to live his life and still expecting him to provide for her and help her. Petitioner’s wife and mother clashed. In 1974, Mrs. Hardy moved herself and petitioner’s three younger siblings from Tennessee to Los Angeles; petitioner and his family went to New Jersey but, on his mother’s urging, moved to Los Angeles soon thereafter. In Los Angeles, petitioner continued to respond to his mother’s needs and the conflict between Mrs. Hardy and petitioner’s wife resumed. (Report at pp. 49-50; H.Exhs. KK, EEE, 3-B [Birth Certificate of Katherine Ruth Hardy; Marriage Certificate of James Hardy and Pat Gregory]; H.Exh. 4; HT 630, 634, 736, 997-998, 1001-1003, 1021, 1349.)

557. Shortly after moving to California, petitioner found out that his mother was allowing his sisters to be photographed partially nude in

exchange for money. Petitioner was extremely upset by his mother's behavior and moved his family to a different neighborhood. (Report at p. 50; H.Exhs. EEE, 4; HT 731, 635, 731, 1003-1004.)

558. In May of 1975, petitioner's second child, James Michael Hardy, was born and the pressure of parenting became more intense. When James Michael was approximately one year old, petitioner's marriage fell apart: Pat asked petitioner to move out, and he did so. Petitioner was devastated. Both petitioner and Pat hold petitioner's mother -- her dependency upon and demands of petitioner -- largely responsible for the demise of their marriage. (Report at p. 50, H.Exh. FF, QQ, EEE, FFF, 3-H [*Patricia Hardy v. James Hardy*], 4; HT 732, 935, 1006.)

559. Shortly after the separation, petitioner's estranged wife, Pat, left Los Angeles for Chicago without telling petitioner where she was going or for how long, and without making arrangements for the care of the children. Petitioner, unable to care for them himself, brought them to his mother, where they remained until Pat returned to Los Angeles, approximately eight months later. In 1977, Pat filed for a divorce: the court granted her custody and ordered petitioner to pay child support and spousal support totaling $350 per month, as well as DiNova's attorney's fees and a community debt at a furniture store. Petitioner paid the attorney's fees and the debt and made child support payments regularly until April of 1978, when he was hospitalized at Camarillo State Hospital, a mental institution. (Report at p. 50; HT 637-638; H.Exhs. KK, EEE; 3-H [*Patricia Hardy v. James Hardy*], 4.)

560. From 1975 to approximately 1979, petitioner worked as a bus driver for R.T.D. The evidence showed that driving a bus is, in general, a very stressful occupation, and that petitioner's situation was more so than

usual because he was an "extraboard" driver, without a regular route, and was generally given the least desirable shifts in the least desirable neighborhoods. (Report at pp. 50-51; HT 1358, 1444, 1460; H.Exh. 3-H [Articles on Bus Driver Stress], 60.)

561. Not long after petitioner and Pat separated, petitioner became romantically involved with Tina Shanks (Tina Alexander) and the two began living together. To observers, petitioner appeared to be very much in love; he mentioned to several people that he wanted to marry Tina and attempt to secure custody of his children. However, in April of 1978, Tina told petitioner that she wanted to separate and, in response, petitioner ingested PCP, which triggered a psychotic episode, resulting in his hospitalization at Camarillo State Hospital. (Report at p. 51; Exh. S, KK, XX, YY, BBB, EEE, FFF, 4; HT 288, 639, 847, 884, 935, 1010, 1354.)

562. After petitioner's hospitalization, he and Tina reconciled, but separated again in the spring of 1979. Petitioner believed that this separation was, like the last one, only temporary. Before any reconciliation could occur, however, Tina was tragically killed in a car accident. Petitioner was devastated. When petitioner heard about Tina's death, he fell to knees sobbing, pounding his fists on the sink. After Tina's death, petitioner became noticeably more withdrawn and distant. (Report at p. 51; H.Exhs. S, QQ, WW, 3-B [Death Certificate of Tina Marie Alexander], 4, 33, 61; HT 288-290, 641, 737-738, 937-938, 1362.)

563. In spite of a life-time of strained relations between Carol Hardy and her mother, Bernise Steiner (Bernise Shaw), Bernise moved to Los Angeles in 1975. In June of 1979, Bernise died. (H.Exhs. KK, 3-B [Death Certificate of Bernise Shaw], 4; HT 637, 1362.)

564. In October of 1979, petitioner's brother, Bob, committed

suicide by shooting himself in the head while sitting in his car in front of the Hardy family's residence. Petitioner arrived in time to see Bob's body still in the car. The two eldest children in the Hardy family and the only two siblings with the same father, petitioner and Bob had been extraordinarily close. Bob moved to Los Angeles in 1978, after petitioner had been committed to Camarillo State Hospital; Mrs. Hardy had asked Bob to come help with petitioner's illness; Bob flew west immediately. In Los Angeles, petitioner and Bob became even closer friends. Although Bob had come to California to help petitioner, the roles were soon reversed, when Bob's own medical and psychological state deteriorated and petitioner took care of Bob. A few days before his death, Bob told petitioner he was going to kill himself, but petitioner did not believe him. (Report at pp. 51-52.) Bob's death had a profound impact upon petitioner. (H.Exh. X, KK, QQ, BBB, EEE, 3-B [Death Certificate of Robert William Hardy], 4, 33; HT 343-344, 347, 398-400, 535-537, 640, 641, 817, HT 1355, 1356, 1363.)

565. A few days after Bob's death, petitioner jumped off of a cliff while hiking in Angeles National Forest, severely injuring his legs and back. Petitioner was airlifted to a hospital and underwent surgery. He attended Bob's funeral on a gurney, transported by ambulance. Petitioner remained in the hospital for two weeks, and for several months after the accident, was in pain and under heavy medication. During his convalescence, he was depressed and irritable, moaning and crying, lying on the couch with casts on his legs, unable to walk. (Report at p. 52; H.Exhs. U, KK, 3-C [Petitioner's records from Kaiser on Sunset Blvd.], 4; HT 227, 346, 400-402, 655, 1365.)

566. As a result of his injuries, petitioner was unable to work and, by mid-1980, had lost his bus driving job and his apartment in Eagle Rock.

He appeared to be depressed and always down. (Report at p. 52.) He continued to be treated by his mother as "the black sheep of the family"; she never talked about him and seemed not to care if he was around. (HT 226, 228, 347, 350; H.Exhs. KK, QQ, 4.)

567. On August 6 of 1980, petitioner became involved in a dispute with his younger brother John which resulted in petitioner's arrest. (See section 4, *infra*.) As a result of that incident, petitioner spent 19 days in jail. At a court appearance on August 11, 1980, he appeared depressed, nervous and detached. (Report at p. 52; Conte, HT 1370; H.Exh. 3-H [Los Angeles County Jail records], 4; HT 351-352 .)

568. In August of 1980, petitioner's two dogs were killed. Petitioner had left them in the care of his younger sister and brother, Linda and John, who were keeping them in petitioner's car, with the windows rolled down and a pan of water. Someone closed the windows and took away the water and the dogs suffocated. (Report at p. 52.) When petitioner was told what had occurred, he wept. (H.Exh. 4; HT 231, 236, 657-658, 941, 1445.)

569. In 1980, petitioner's ex-wife, Pat, severed all communications between petitioner and his children. As noted previously, Pat had become romantically involved with (and ultimately married) Steve May, an abusive and jealous man, who prevailed upon her to break contact with petitioner completely. Pat took petitioner's children and left the Los Angeles area with May. Petitioner made concerted efforts to find them but was unsuccessful. (Report at pp. 52-53.) Several witnesses noted that petitioner frequently spoke of his children and expressed dismay over the fact that he could not see or talk to them. For example, on May 13, 1981, petitioner was visibly distraught because it was his son's birthday and he was unable

to make contact. (H.Exhs. U, KK, BBB, 3-A [Declaration of Rodriguez], 4; HT 293-295, 349, 657, 659, 734, 1366-1367, 1373-1374.)

570. At the time of trial, the witnesses who were available to testify regarding petitioner's lifetime of hardship and trauma include, but are not limited to: Caroline Abrams, Ben Artis, Linda Thompson Barter, Charles Behrensmeyer, Joan Davis, Mellonie Davis, Pat DiNova, Betty Downer, Burton Downer, Kaye Drosendahl, Rick Ginsburg, Ann Davis Godfrey, Angela Hardy, Carol Hardy, James Michael Hardy, Katherine Hardy, Anamaria Hardy Kosciolek, Gus Lopez, Esther Meisel, Judy Metoyer, Michael Mitchell, Phyllys Moore, Richard O'Brien, Ricardo Padilla, Leila Ray, Gail Rubin, Steve Rice, Lucy Rodriguez, Dave Shirley, Dorothy Steiner, Morris Steiner, Robert Steiner, William Steiner, Pat Stevens, Lois Thompson, Milton "Pete" Thompson, William Thompson and Eileen Goode West. (Report at p. 53.) Extensive documentation regarding petitioner's life and family history was readily available. (H.Exh. 3-B through 3-I.) Even more documentary evidence would have been available at the time of trial than at the time of the reference hearing, due to the destruction of some records in the interim.

571. The foregoing evidence would have made for powerful mitigation in that it would have elicited sympathy and mercy for petitioner and would have made even more significant the evidence of the many positive aspects of his character, his extensive history of good behavior and good deeds, and the important role he had played in the lives of his own family members and friends.

572. Evidence of a difficult family background is mitigation which has been recognized to be powerful and compelling. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Eddings v. Oklahoma* (1982) 455 U.S.

104, 116; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312 [counsel found ineffective for failing to present evidence of abuse which defendant suffered as a child]; *Hendricks v. Calderon*, *supra*, 70 F.3d at p. 1045 [trial counsel's failure to present evidence concerning Hendricks' difficult childhood was prejudicial]; *Pickens v. Lockhart* (8th Cir. 1983) 714 F.2d 1455, 1466 ["There is no dispute that evidence of a turbulent family background, beatings by a harsh father, and emotional instability may be relevant in mitigation."]; *Ford v. Lockhart* (E.D. Ark. 1994) 861 F.Supp. 1447, 1457 ["Evidence of a background of abuse is both relevant and important to a jury's determination of appropriate punishment."].) Such "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' [Citation.]" (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 319.)

573. The evidence was also mitigating insofar as it was a prerequisite to a mental health expert's ability to assess competently petitioner's mental state at any given point in time and therefore to provide mitigating expert testimony in that regard. (HT 1284, 1478-1479; H.Exh. 4; Report at pp. 43-44.)

574. The only evidence of this nature that the jury heard was his mother's passing statement at the penalty phase that petitioner's older brother had committed suicide.

575. If Mr. Demby had presented evidence of petitioner's difficult childhood, his family's history of substance abuse and mental illness, the breakup of his marriage, the suicide of his brother, the death of his

girlfriend, his own suicide attempt and the injuries he received and his history of mental health problems and symptoms, at least some jurors would have voted for life without the possibility of parole. (Appendix 12.)

1. Evidence Mitigating Petitioner's Prior Conviction

576. At the penalty phase of petitioner's trial, the only evidence which the prosecutor offered in aggravation, other than the circumstances of the capital crime, was that pertaining to petitioner's sole prior conviction and the underlying incident. Petitioner had been convicted of misdemeanor violations of disturbing the peace[55] and possession of nunchakus,[56] both stemming from an incident which occurred on August 6, 1980. The prosecution called three witnesses in this regard: Los Angeles Police Officer Michael Hansen, the arresting officer;[57] petitioner's mother, who

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[55]Pen. Code, § 415.

[56]Pen. Code, § 12020.

[57]Officer Hansen testified that, on August 6, 1980, he received a call reporting a "family dispute" at the home of petitioner's mother. (RT 13925.) He and his partner drove to that address and saw petitioner pacing back and forth in the driveway, holding a rifle "in a military march-type position." (RT 13926.) The officer parked the patrol car directly in front of petitioner, at which time petitioner leaned the rifle up against a wall with the butt on the ground. (RT 13927.) Officer Hansen told petitioner to walk away from the rifle, but petitioner did not comply. The officer noticed two knife handles in petitioner's waistband and told him to remove the knives; petitioner did so, setting the knives down on the ground next to the rifle. (RT 13930.) Petitioner then removed a pair of "nunchuks" from his waistband and held them in a "ready stance position." (RT 13932.) For approximately 20 or 25 minutes, petitioner failed to step away from the rifle and to disarm himself of the "nunchuks." (RT 13936.) During this time, petitioner stared straight ahead and appeared oblivious to his surroundings. (RT 13943.) Petitioner finally discarded the "nunchuks," when the officer

(continued...)

witnessed part of the incident which led to that arrest and subsequently requested that petitioner be subject to various probation conditions;[58] and Detective Richard Jamieson, who testified that petitioner ultimately pled no contest to the aforementioned charges.[59] In his closing argument at the

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[57](...continued)
talking to him put his own gun out of reach. (RT 13936.) Petitioner was arrested and the officers then determined that the rifle was not loaded. (RT 13944.) Officer Hansen testified that petitioner did not swing the "nunchuks," point the rifle or brandish the knives at any time. (RT 13944-13947.)

[58]Mrs. Hardy testified at the penalty phase that petitioner's brother John, was "drunk on the couch" at the Hardy residence when petitioner arrived at the apartment. The two brothers then got into a dispute. Petitioner pulled "a chain" off of John's neck and punched John, whereupon Mrs. Hardy called the police. (RT 13950, 13952-13953.) Petitioner found a rifle, some knives and the "nunchucks," which had belonged to his dead brother Bob, and went outside. Mrs. Hardy did not see what occurred thereafter. (RT 13930.) Mrs. Hardy testified that, when petitioner was prosecuted in connection with the incident, she requested that a condition of probation that petitioner not "harass, molest or annoy" anyone involved in the prosecution of the case be imposed. (RT 13951-13952.) She also answered in the affirmative when the prosecutor asked her if she had previously indicated that petitioner had some problems "with a drug called angel dust," that petitioner had been admitted to Camarillo State Hospital and that he had "walked away" from that facility. (RT 13954.) Mrs. Hardy testified that petitioner's brother Bob had been a brown belt in Karate and had committed suicide, that petitioner felt "very bad about his brother's death," and that he took up martial arts after it. (RT 13955.) On cross examination, Mrs. Hardy testified that she felt petitioner needed "emotional and physical and mental evaluation" at the time the incident occurred. (RT 13957.)

[59]Detective Jamieson testified that, according to court documents, petitioner entered a plea of no contest and was placed on probation, with the conditions "that [Mr. Jonas] discussed with Mrs. Hardy" in her testimony.
(continued...)

penalty phase, Deputy District Attorney Jonas argued that: the incident of August 6, 1980, showed that petitioner had a propensity for violence and a violent nature (RT 14025, 14034, 14045, 14047, 14051); Mrs. Hardy's request for the aforementioned conditions of petitioner's probation showed that, "force or violence was a part of Mr. Hardy's conduct in life at that particular time, to the point that Mrs. Hardy became very, very concerned" (RT 14045); the incident showed that petitioner was capable of becoming "fixed . . . in that violent moment," and going into "some type of trance-like state," and therefore how it was possible for him to commit the charged killings. (RT 14034, 14038.) Jonas further argued that, when confronted by the police in front of the apartment complex, petitioner wanted violence and "serious injuries" to result. (RT 14041.)

577. Reasonable investigation would have revealed evidence that the incident underlying petitioner's arrest on August 6, 1980, and subsequent misdemeanor conviction, brought to bear complex and long-standing intra-familial relationship dynamics and that petitioner's behavior on that date was not, as the prosecution urged, indicative of a propensity for violence. Such evidence would have been supportive of lingering doubt as well as lack of future dangerousness; it would have showed that petitioner's family was not, in fact, afraid of him; and it would have tended to mitigate petitioner's demeanor in the courtroom, as it demonstrated that, when distraught, petitioner has a fixed stare and a blank look.

578. The evidence which a defendant is entitled to introduce by way of mitigation at the penalty phase of a capital case includes evidence

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[59](...continued)
(RT 13961-13962; Appendix 52.)

which mitigates a prior conviction or prior bad act. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Siripongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1316 ["Few aspects of representation can be more critical than understanding the client's criminal history."]; *People v. Frye* (1998) 18 Cal.4th 894, 1015; *People v. Zapien* (1993) 4 Cal.4th 929, 989.)

579. Reasonable investigation would have revealed that, in August of 1980, petitioner's younger brother, John, was living with petitioner's mother in the apartment in front of which petitioner's older brother, Bob, had committed suicide less than a year before. As noted above, petitioner and Bob had been extraordinarily close, and Bob's suicide had been particularly devastating to petitioner. By the time of the incident in question, petitioner had lost his job and his apartment and had put his brother, John, in charge of his belongings. (HT 679; H.Exh 4.)

580. On August 6, 1980, petitioner came to the Hardy family's apartment in order to confront John about they way in which he had been disposing of petitioner's property. (HT 679-680; H.Exh. 4.) Petitioner found John there, wearing a medallion which Bob had worn when he was alive and at the time of his suicide. After Bob's death, petitioner had asked his mother to let him wear the medallion and she had refused. When petitioner saw John wearing the medallion, he became very upset and the two started to fight. Mrs. Hardy called the police. Petitioner found Bob's nunchakus, knives and rifle in the apartment, took them outside and began pacing back and forth in front of the building. (H.Exh. 4; HT 237, 540, 654, 680, 1368.) The police then arrived and the events described at trial by Officer Hansen ensued.

581. Reasonable investigation and consultation with qualified

mental health experts would have revealed that petitioner's behavior on August 6, 1980, was attributable to the fact he, like many members of emotionally deprived families, had attached symbolic significance to the objects formerly owned by his brother, Bob. This explanation was corroborated by the fact that, on the day after Bob's suicide, petitioner was wearing Bob's clothes and driving his car. Bob's possessions, including the medallion and the weapons which petitioner had in his possession when the police arrived on August 6, 1980, had great symbolic significance to petitioner. (HT 1010, 1368-1369,1544.) Reasonable investigation would have revealed that evidence was available to show that petitioner's assaultive behavior was sparked by the sight of the medallion, with its symbolic and historic significance, around John's neck. Indeed, petitioner was wearing the medallion when he was booked into jail that day. (H.Exhs. 3-H, 4.)

582. Reasonable investigation would have revealed that petitioner's assault of his brother was understandable, given that it occurred in the context of an intra-familial dispute over an object laden with symbolic and historic significance. This evidence would have undermined the reasonableness of the inferences drawn by the prosecution in its closing argument at penalty phase. The prosecution argued at trial that petitioner's behavior suggested a propensity for violence and an intent to harm. Reasonable investigation would have revealed that expert testimony was available to show that, by leaving his mother's apartment, petitioner's behavior suggested a desire to *avoid* harming others. (HT 1541.) The prosecution argued at trial that petitioner's possession of the weapons indicated a desire for violence and harm to others. Reasonable investigation would have revealed evidence that, for petitioner, the weapons had

significance as symbols rather than as tools with which to threaten or harm others. The prosecution argued at trial that the events of August 6, 1980, foreshadowed the Morgan killings and showed in petitioner a "seed" of an urge to kill. Reasonable investigation would have revealed evidence that aggression toward a loved one or family member does not indicate a propensity for violence toward strangers and that, both in magnitude and in nature, petitioner's behavior on August 6, 1980, in no way suggested that petitioner committed the Morgan killings. (HT 1456-1457, 1542-1543.) Reasonable investigation would have revealed that, given the circumstances, together with petitioner's history and psychiatric profile, petitioner's actions were an expression of distress, dissociation and suicidality, not a desire or inclination to harm others. (HT 1368, 1370, 1446, 1539-1541, 1543; H.Exh. 4.)

583. At trial, the prosecution argued that Mrs. Hardy's request for a probation condition that petitioner not "harass, molest or annoy" anyone involved in the prosecution of the case indicated that petitioner's own family was afraid of him. Reasonable investigation would have revealed that, throughout petitioner's life, his mother had rejected him time and time again. On numerous occasions, Mrs. Hardy denied petitioner things, abandoned him, ignored him, and excluded him. Reasonably competent counsel would have consulted a qualified mental health expert, would have provided that expert with a complete social and family history, and would have asked that expert to interview petitioner's mother. Such reasonable consultation and investigation would have revealed that evidence was available to show that Carol Hardy's request for an order that petitioner not "harass, molest or annoy" the family was not motivated by fear, but rather by a desire (perhaps unconscious) to exclude and/or reject petitioner. (HT

1372-1373.) Reasonable investigation would have revealed that petitioner's siblings continued to spend time with petitioner at the family residence, indicating that they did not fear him. (HT 1372-1373, 1447; H.Exh. 4.)

584. Reasonable investigation would have revealed that, between September of 1980 and July of 1981, when petitioner was arrested in the present case, petitioner reported to his probation officer, paid the fine in full, attended counseling (albeit resistantly) and worked at several different jobs. (H.Exh. 3-C.) Reasonably competent counsel would have presented this evidence to the jury at the penalty phase in mitigation.

585. Numerous lay witnesses and extensive documentary evidence were available to explain petitioner's and his family's history. Regarding the incident itself, both Steve Rice and Mrs. Hardy, petitioner's mother, had knowledge of additional information that significantly mitigated petitioner's behavior. Although Mr. Demby interviewed both witnesses, he did not interview them regarding this incident. Even though he knew Mr. Jonas would call Mrs. Hardy as a witness on the subject, Mr. Demby failed to discuss the matter with her. Extensive documentary evidence, including court records, probation records and booking records, generated in connection with the incident itself and the ensuing court proceedings, was also available at the time of trial. Some of this information was, in fact, provided to Mr. Demby by the prosecution. Additional information showing the history relevant to the incident (e.g., Mrs. Hardy's repeated rejection of petitioner, the suicide of petitioner's brother and its effect on petitioner) was available through numerous records and witnesses. Expert witnesses able to assess and to explain to the jury the relevant evidence of petitioner's life history and psychiatric profile, as well as the events of August 6, 1980, itself, were available as well. Such evidence would have

mitigated the only aggravation, other than the circumstances of the capital crime, that the prosecution offered at the penalty phase.

2. Mitigating Testimony of Mental Health Experts

586. As noted above, Mr. Demby consulted no mental health experts in preparation for trial. Reasonable investigation and consultation would have revealed that such experts could have provided a wealth of compelling evidence at the penalty phase to mitigate and explain the behaviors which the prosecution argued warranted the death penalty.

a. Petitioner's Symptoms of Mental Illness and Genetic Predisposition to Mental Illness

587. A social assessment and a psychiatric evaluation of petitioner by qualified mental health experts would have shown that petitioner was genetically predisposed to mental illness and had an extensive maternal and paternal family history of severe mental health symptoms including:

A. Depression. Petitioner's mother, Carol Hardy, exhibited symptoms of depression even as a child and young adult, continued to show symptoms of depression during petitioner's infancy, was diagnosed with chronic depression as an adult and continued to be depressed at the time of the reference hearing. (H.Exh. 4; Conte, HT 1249-1253, 1292; Jackman, HT 1489; Drosendahl, HT 201; K. Hardy, HT 301.) Petitioner's maternal grandmother, Bernise Steiner, had symptoms of, and was diagnosed with, depression. (H.Exh. 4; HT 1489.) Petitioner's father, Bill Hardy, Jr., showed symptoms of severe depression (H.Exh. 4; Conte, HT 1273; Jackman, HT 1488.) Petitioner's paternal great uncle, Duncan Ladd, and paternal second cousin, Elizabeth Ladd (who ultimately committed suicide), showed symptoms of severe and debilitating depression as well. (H.Exh. 4; Drosendahl, HT 204-205.) Petitioner's brother, Bob,

was severely depressed. (H.Exh. 4; Conte, HT 1279; Thompson, HT 835.) Symptoms of depression have also been exhibited by: petitioner's brother, John; petitioner's sister, Linda; petitioner's niece, Angela Hardy, and petitioner's nephew, Robert Warren Hardy. (Conte, HT 1281-1283; Kathy Hardy, HT 300; H.Exh. 4; Conte, HT 1283; Thompson, HT 848.)

B. Suicidality. Petitioner's mother, Carol Hardy, has been suicidal several times in her life, including as a child. (H.Exh. 4; C.Hardy, HT 668.) Petitioner's maternal grandmother, Bernise Steiner, attempted suicide at least twice, including once when she was pregnant with petitioner's mother. (H.Exh. 4; Conte, HT 1267.) Petitioner's father, Bill Hardy, Jr., attempted suicide several times and ultimately died of methyl alcohol poisoning, which may well have been suicide. (H.Exh. 4; Conte, HT 1273; C. Hardy, HT 604.) Petitioner's father had at least two relatives, including a first cousin, who had committed suicide. (C. Hardy, HT 668; H.Exh. 4; Conte, HT 1274-1275; Drosendahl, HT 204-205.) Petitioner's brother, Bob, attempted suicide repeatedly and eventually succeeded in taking his own life. (H.Exh. 4; Conte, HT 1277-1278; C. Hardy, HT 617.) Petitioner's niece, Angela Hardy, has also been suicidal. (HT 848.)

C. Hypomania. Hypomania is characterized by a high level of energy, increased sexuality, heightened levels of activity, euphoric mood, heightened self-esteem, inability to complete activities and shifting from subject to subject. (HT 1491.) Petitioner's mother and maternal grandmother have a history of hypomanic behaviors. (HT 1491.) Petitioner's brother, Bob, showed classic signs of hypomania and hyperactivity as a very young child (before the head injury he received when hit by a taxicab at age 3), throughout his childhood and adolescence, and as an adult. (H.Exh. 4; Conte, HT 1277, 1279, 1436; Carol Hardy, HT

577; Drosendahl, HT 200; Thompson, HT 836, 845.) Petitioner's paternal cousin, Elizabeth Ladd, also showed signs of hypomania. (HT 204.)

D. Hypersexuality. Both as a child and as an adult, petitioner's mother has displayed behaviors indicating hypersexuality, which is characterized by engaging in a very high level of sexual activity, wearing inappropriately revealing clothing and inappropriately sexualizing relationships (including those with her own children and their friends). (H.Exh. 4; HT 1492-1493.) Her mother, petitioner's maternal grandmother, displayed similar behaviors. (HT 1492-1493; H.Exh. 4.) Both women sometimes engaged in prostitution. (HT 1268.) Petitioner's paternal grandfather, Bill Hardy, Sr., appears to have been hypersexual as well: he behaved in an inappropriate sexual manner in front of his niece, then a child; he made frequent lewd comments about women; he tried to look down blouses of women appearing on television; and attempted intercourse with his niece, Phyllys Taylor Moore, then a teenager. (HT 180,184, 193; H.Exh. 3-A [Conte Binders: Declaration of Phyllys Moore].)

E. Hypergraphia. Hypergraphia is characterized by compulsive and extensive writing or drawing. Petitioner's mother, Carol Hardy, wrote extensively, including extremely long handwritten letters which were difficult or impossible for the reader to understand (H.Exh 4; Jackman, HT 1492-1494; Conte, HT 1258-1259); petitioner's father, Bill Hardy, Jr., painted extensively. (HT 174.)

F. Religiosity. Petitioner's mother, Carol Hardy (H.Exh. 4; HT 1493-1494) and brother, Bob (H.Exh. 4) displayed an extensive preoccupation with religion. Religiosity is consistent with hypomania. (HT 1494.)

G. Grandiosity. Petitioner's mother (Jackman, HT 1493-

1494; H.Exh. 4; Conte, HT 1265; Thompson, HT 839-840), maternal grandmother (Jackman, HT 1493-1494; H.Exh. 4; Conte, HT 1267-1269) and father (Drosendahl, HT 174) all exhibited indications of grandiosity, which is characterized by inflated self-esteem, a belief that one has special powers (Conte 1433; Jackman, HT 1495, 1498-1499, 1514, 1516).

H. Dramatic shifts of mood. Petitioner's mother, Carol Hardy, has, throughout her life, exhibited dramatic mood swings. (H.Exh. 4; Conte, HT 1256.) Other maternal relatives displaying such behavior include petitioner's maternal grandmother, Bernise Steiner (Exh. 3-A: Conte Binders: Declaration of Richard O'Brien) and petitioner's maternal great grandfather, Isadore Steiner (H.Exh. 4; Conte, HT 1269.) Petitioner's paternal family similarly had a history of mood swings: petitioner's father, Bill Hardy Jr., could be sweet one minute and belligerent the next, especially when under the influence of alcohol (H.Exh. 4); mood swings were also common among petitioner's paternal grandfather Bill Hardy Sr., petitioner's paternal grandmother and petitioner's paternal cousin, Elizabeth Ladd. (H.Exh. 4.) Both as a child and as an adult, petitioner's brother, Bob, had rapid and dramatic mood swings and was often happy one minute and extremely upset the next. (H.Exh. 4.) Petitioner's sister, Linda, was described by herself and others as easily angered. (H.Exh. 4; Conte, HT 1282.) Petitioner's niece, Angela, has also exhibited rapid and severe shifts in mood. (H.Exh. 4; Conte, HT 1283.) Petitioner's daughter, Kathy, has experienced mood swings as well. (HT 298.)

I. Distractability or difficulty maintaining attention and concentration. Family members displaying distractability, attention deficits and difficulty concentrating include: petitioner's mother, Carol Hardy (HT 1492-1494); petitioner's maternal grandmother, Bernise Steiner (Jackman,

HT 1492-1494); petitioner's maternal great grandfather, Isadore (H.Exh. 4) petitioner's father, Bill Hardy, Jr. (H.Exh. 4); petitioner's brother, Bob (H.Exh. 4; HT 338-339); petitioner's sister, Linda (H.Exh. BB); and petitioner's daughter, Kathy (HT 298).

J. Uncontrollable obsessive behaviors including gambling, compulsive cleaning and anxiety. Carol Hardy, petitioner's mother, cleaned obsessively and rearranged furniture when upset or under stress. (H.Exh. 4; Conte, HT 1262-1264, 1494.) Petitioner's maternal grandfather, William Steiner, was an obsessive gambler and fanatic about cleanliness: he became very upset if anything was out of place, he polished his shoes daily, he used a handkerchief only once and he forbade his son to use the shower unless he dried the shower walls immediately. (H.Exh. 4; Conte, HT 1270-1271; Jackman, HT 1491.) Petitioner's maternal grandmother, Bernise Steiner, cleaned obsessively, was nervous, kept price tags on items in her house, was obsessed with appearing young and was extraordinarily vain, to the point where she had a breast removed for cosmetic reasons. (H.Exh. 4; C. Hardy, HT 635-636, 1051; H.Exh. KK; Conte, HT 1267-1269; Ray, HT 893; Exh. 3-D [Rose Steiner JCCA Records].) Petitioner's maternal great uncle, Morris Steiner, was anxious and excitable and was discharged from the service because of "psychoneurosis," a term used in that era to describe psychosis born of mania. (HT 1269; H.Exh. 4.) Petitioner's maternal great grandfather, Isadore Steiner, was nervous and excitable. (HT 1269; H.Exh. 4.) Petitioner's paternal grandmother, Barbara Ladd Hardy, was obese, which suggested that she had an eating disorder. (H.Exh. 4; HT 1276.) Petitioner's brother, Bob, was obsessive about projects (although he rarely completed them) and was obsessive about cleanliness. (H.Exh. 4; HT

1279.) Petitioner's nephew, Robert Warren Hardy, is also obsessive about projects. (H.Exh. 4.)

K. Impulsivity. Carol Hardy was extremely impulsive. (HT 1497; H.Exh. 4.) The record reflects numerous examples of her impulsivity: in 1964, she suddenly uprooted the entire family and moved them from Newark to Los Angeles, only to move them back a few months later; one weekend she moved the entire household up the street without telling Bill Thompson, who was living with her at the time; she once gave petitioner's brother, Bob, permission to go to Tennessee with his then-girlfriend's family, but after they had left, Mrs. Hardy changed her mind and threatened to send the police after him if he did not return home immediately; when living in Los Angeles, she once removed money from her mother's bank account without asking, in order to satisfy a sudden urge to fly to the east coast for a visit. (HT 1256-1258.) Other members of the family who were impulsive include petitioner's maternal grandmother, Bernise Steiner (H.Exh. 4; HT 1267, 1497), and petitioner's brother, Bob (H.Exh. 4; HT 1276-1278, 1293-1294).

588. The evidence also indicated some family history of:

A. Low intellectual functioning. Petitioner's mother was described in her school records as "dull" (H.Exh. 4; H.Exh. 3-D [Carolyn Steiner school records]); petitioner's maternal great aunt, Belle Steiner, was described as "unquestionably mentally retarded," as well as "dull" and "slow" (H.Exh. 4; H.Exh. 3-D [Belle Steiner Juvenile Records]); petitioner's brother Bob had difficulty in school and had a very low IQ (H.Exh. 4; H.Exh. 3-C [Jewish Family Services records]); and petitioner's niece, Angela Hardy, is also very slow (HT 849; H.Exh. 4).

B. Seizures. Family members with diagnosed seizure

activity include petitioner's brother Bob (H.Exh. 4; Conte, HT 1278); petitioner's brother John (H.Exh. 4; Conte, HT 1281); petitioner's niece, Angela Hardy (H.Exh. 4; Conte, HT 1283); and petitioner's daughter, Kathy Hardy (HT 999).

C. Psychosis or other delusional thinking. Petitioner's father and mother both had episodes of delusional thinking (H.Exh. 4); petitioner's paternal grandfather was diagnosed with Organic Brain Syndrome (H.Exh. 4); petitioner's sister Linda was hospitalized with psychosis (HT 1282).

589. A significant number of petitioner's family members have been institutionalized in mental hospitals: petitioner's mother was institutionalized as a child. (H.Exhs. 3-C [JCCA records, C. Hardy dependency records], 4; HT 1251-1252); petitioner's father, Bill Hardy, Jr., was involuntarily committed to a mental hospital at least once (H.Exh. 4; HT 1273); petitioner's brother, Bob, was institutionalized as an adolescent (HT 1276); petitioner's paternal great uncle, Duncan Ladd, was institutionalized for insanity (H.Exh. 4; HT 1275), and petitioner's sister, Linda, was also involuntarily committed to a mental hospital (H.Exh. 4; HT 1282).

590. Many of petitioner's family have obtained, or have been recommended for, mental health treatment. Petitioner's mother was forced to undergo psychiatric evaluation and treatment as a child and adolescent. (HT 1252; H.Exh. 4.) Although resistant, she also obtained some treatment as an adult. (H.Exh. 3-D [Records of Los Angeles County Dept. of Mental Health]; H.Exh. 4.) Other relatives with a history of receiving or being referred for mental health treatment include: petitioner's maternal grandmother, Bernise (H.Exh. 4; HT 617-618); petitioner's maternal great

uncle, Morris Steiner, who was given a psychiatric discharge from the army (H.Exh. 4); petitioner's great uncle, Duncan Ladd, who was found not guilty of murder by reason of insanity (H.Exh. 4); petitioner's brother, Bob (H.Exh. 4); petitioner's brother, John (H.Exh. 4); and petitioner's sister, Linda (H.Exh. 4; HT 1282).

591. Also significant is a family history of resisting mental health care when it was recommended. Petitioner's mother declined mental health care for herself and for Linda and John, despite the fact such care was recommended by a variety of sources. (H.Exh. 4; Conte, HT 1266; H.Exh 3-D and F [Linda Thompson school records; John Hardy juvenile probation report of 12/10/76.) When petitioner was approximately 10 years old, a social worker recommended treatment for him but his mother prevented it. (H.Exh. 4.) As an adult, Bob often refused to take the medication needed to control his seizures. (H.Exh. 4.)

592. The testimony of Dr. Conte and Dr. Jackman further demonstrated that, throughout his life, petitioner has exhibited a wide range of psychiatric symptoms. (HT 1487.)

593. The evidence established that as a child, petitioner was passive, withdrawn and low-functioning. (HT 1294, 1500.) Dr. Jackman and Dr. Conte opined that, both as a child and as an adult, petitioner suffered from depression. (HT 1488.)

A. As an adult, petitioner tended to withdraw and become distant; particularly after his divorce, the loss of his children and the deaths of three of his loved ones in 1979, petitioner exhibited signs of depression. In 1978, he was described as withdrawn, distant and appearing "really down." (H.Exhs. BB, YY; Kosciolek, HT 735; H.Exh. 4.) In 1979, the year when petitioner suffered the death of his girlfriend, his grandmother

and his brother, he was observed to be distant, quiet, "zoned out," sad and lost. (H.Exh. U; Stigers, HT 350; H.Exh. 4.) At various times in 1980, petitioner appeared to be very low and withdrawn (H.Exh. O; Stigers, HT 351-352; H.Exh. 4); in 1980 and 1981, it was not unusual for petitioner to withdraw physically from social contact. (H.Exh. BB; H.Exh. 4.) In the spring of 1981, petitioner was described as often withdrawn, nonresponsive, quiet and depressed, "spaced out," with drooping facial features and glazed eyes. (H.Exh. 4; HT 71, 121, 1373.)

B. On at least two occasions, petitioner was suicidal. The expert testimony presented at the reference hearing showed that the incident in which petitioner jumped off of a cliff while hiking and injured his legs was a suicidal, or at least highly self-destructive, act (HT 1365), and that petitioner was suicidal on August 6, 1980, when he was arrested for possession of nunchakus. (HT 1542.) Dr. Conte also noted that, when petitioner went to the Friends of the Family counseling center in 1980, he was asked to sign a contract, which suggests that he may have been suicidal at that time as well. (HT 1371.)

594. Petitioner's life history and his symptom picture were consistent with the chronic psychic trauma that he experienced as a child. While petitioner's brother, Bob, responded to childhood trauma and stress by rebelling, petitioner's response was to withdraw and "retreat into an internal world." (HT 1502.) Petitioner's response to psychic trauma was to dissociate, whereby he would enter a state of mind in which he was mentally absent and would not experience pain. These dissociative episodes continued in petitioner's adulthood. (Jackman, HT 1502-1504; H.Exh. 4; H.Exh 3-A [Declarations of Godfrey, Declaration of Abrams]; H.Exh. 3-C [Los Angeles School records]; Conte, HT 1360-1361; Stigers,

HT 350; Ginsburg, HT 69-71, 121.)

595. Petitioner exhibited behaviors indicative of impulsivity and an inclination to undertake activities with a high risk of self-harm, which were symptomatic of depression, hypomania and/or attention deficit disorder. (HT 1334, 1359-1360,1382, 1511.) The evidence showed that, as a child, petitioner routinely played in a burned-out building, swam in a polluted river and jumped roof-tops with older, bigger boys. As an adult, petitioner dove off of a balcony into a swimming pool not immediately beneath him, caught a rattlesnake with his bare hands and placed it in a paper bag in the trunk of his car, attempted to thwart a robbery on his bus, jumped off of a cliff while hiking (which in fact resulted in severe injuries to petitioner's back and legs), and, on August 6, 1980, tried to goad the police into shooting him. (Jackman, HT 1496, 1508-1510; H.Exh. 4; Conte, HT 1359-1360; Kosciolek, HT 728; Artis, HT 821-824.)

596. Petitioner exhibits signs of distractability, another symptom of affective disorder, which was exemplified by the fact that, when petitioner worked as a bus driver, he had an unusually high rate of accidents. (Conte, HT 1358, 1373; H.Exh. 4; Jackman, HT 1506; H.Exh. 3-H and 3-I [R.T.D. Personnel records, Declaration of Gus Lopez].)

597. As an adult, petitioner experienced periods during which he had an extraordinarily high sex drive. In light of the family history, this indicated that petitioner suffered from hypomania. At times, petitioner was extraordinarily sexually active, having intercourse several times a day. (HT 1361, 1604.) Sometimes he had multiple sex partners at once. (H.Exh. 4; HT 235.) Sometimes he took his clothes off in public. (H.Exh. 4; Rice, HT 235-236; Mitchell, HT 423.) Particularly given the family history of hypersexuality associated with hypomania, petitioner's sexual behavior was

likely a symptom of hypomania. (HT 1606, 1645-1646.)

598. Starting in childhood, petitioner has suffered from inflated self-esteem and delusional beliefs. His delusional beliefs have included: that he has a God-given purpose; that he has been given special powers of enlightenment; that he has been bestowed with great wisdom; that he has the ability to communicate with his mother telepathically; that he can hear through walls; that he can control the weather; that he can control other people's thoughts. Petitioner has an inflated view of his own artistic abilities and his abilities in martial arts. Petitioner's thinking becomes more distorted when he is depressed and, when under the influence of drugs, petitioner sometimes experiences hallucinations and delusions. (HT 1425.) Given petitioner's life and family history, such delusional ideas are indicative of grandiosity, ideas of reference and hypomania. (HT 1495, 1497-1498, 1507-1508, 1512-1517; H.Exh. 4.)

599. The reference hearing evidence showed that petitioner had a preoccupation with cleanliness, as well as cycles of decreased sleep and appetite. These behaviors, particularly in the context of petitioner's family history, were indicative of hypomania. (HT 1495, 1497.)

600. Petitioner experienced several episodes of psychosis. The first known episode was in 1977, a short time after petitioner and his ex-wife separated, and appears to have been related to ingestion of PCP. (H.Exh. 4; HT 1354-1355, 1359, 1522-1523.) Petitioner's second known instance of psychosis was in 1978, when he was hospitalized at Camarillo State Hospital, again after suffering a significantly traumatic experience and ingesting PCP. (H.Exh. 4; HT 1355.) According to lay witnesses, he was talking to inanimate objects and hearing voices; his body was jerking, he was speaking incoherently; he was suffering from insomnia and anxiety.

(HT 639; Exh. FFF.) At the time of his hospitalization, his symptoms included hallucinations, delusions, inability to sleep, pacing and "uncontrollability," and blunt affect. (HT 1525.) Upon admission he was given a provisional diagnosis of "Psychosis with Drug or Poison Intoxication (other than alcohol) – PCP;" however, after three days at Camarillo, his diagnosis was changed to "Schizophrenia, Chronic Undifferentiated Type and Delusional, Grandiose as well as Persecutory." (H.Exh. 4; H.Exh. 8; H.Exh. 9; H.Exh. 3-C [Camarillo Records]) He was held at Camarillo for almost three weeks.[60] Upon release, although implicitly found not to be a danger to himself or others, petitioner's symptoms had not been eliminated and further outpatient treatment was recommended.[61] These facts, together with petitioner's family and life history, suggest that petitioner's psychosis was not simply the result of drug use, but was due to an underlying psychotic disorder, possibly an affective disorder, which had been exacerbated or compromised by the effects of PCP. (HT 1530-1535.)

601. Many, if not all, of petitioner's symptoms over the course of his life were consistent with affective disorder. (HT 1512-1513.) Petitioner's family history shows many blood relations with similar symptoms and affective disorders are known to have a genetic component.

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[60]Records show that he was at Camarillo State Hospital from April 30, 1978, to May 16, 1978. (H.Exh. 4; H.Exh. 8; H.Exh. 9; H.Exh. 3-C [Camarillo Records]; HT 1527-1528.)

[61]The symptoms which had not been eliminated were: disorientation, confusion and memory impairment; false sensory perception; and agitation. (Jackman, HT 1532-1533; H.Exh. 9; H.Exh. 4; Conte, HT 1421.) The fact that petitioner was released necessarily implied a finding that he was not a danger to himself or others. (HT 1610.)

(HT 1493-1499, 1506-1507.) Petitioner, as well as members of four generations of his family, suffered from an affective disorder. (HT 1496, 1507, 1623.)

602. In 1981, petitioner suffered from anxiety disorder. (HT 1537, 1623.) Throughout his life, petitioner has suffered from Post-Traumatic Stress Disorder (HT 1538, 1624, 1648) and a dissociative or depersonalization disorder. (HT 1538, 1623, 1647-1648.) At the time of the reference hearing, petitioner, completely drug-free, continues to exhibit symptoms of a thought disorder. (HT 1515.)

b. Evidence Explaining and Mitigating Petitioner's Drug Use

603. At the guilt phase of petitioner's trial, the jury heard a substantial amount of evidence indicating that petitioner was a drug user and was using drugs prior to and after the time of the killings. This evidence came in without objection from Mr. Demby. At the penalty phase, the prosecution introduced additional evidence of petitioner's history of drug use. (RT 13954.) In his closing argument at both the guilt and the penalty phases, Deputy District Attorney Jonas argued that petitioner used drugs and alcohol on the night of the killings to embolden himself to commit the crime. (See, e.g., RT 14038.) Mr. Jonas argued that alcohol did not impair petitioner's ability to comprehend, deliberate, premeditate and plan, but that petitioner deliberately used it to induce anger and the ability to do the deed, and to concoct an alibi. (RT 14050, 14051.)

604. Petitioner had a significant history of drug use, primarily dating from the time at which he and his former wife separated. (HT 1352, 1518; H.Exh. EEE.) The reference evidence showed that, from the separation until the time of his arrest, petitioner experimented with many

drugs and used cocaine, marijuana and PCP heavily. (Jackman, HT 1518.) Petitioner suffered from several substance abuse disorders, including marijuana dependence, cocaine dependence, and PCP abuse. (Jackman, HT 1538.)

605. Petitioner's family had an extensive history of substance abuse. Alcoholism was extremely common among those of petitioner's blood relations whose drinking habits were known. A startling number of petitioner's blood relations were alcoholics or habitually abused alcohol: petitioner's mother (H.Exh. 4; Conte, HT 1255, 1265; H.Exh. 3-A [Declaration of Godfrey]; H.Exh. 3-A [Declaration of J. Davis]; Exh. KK; K. Hardy, HT 300; H.Exh. 3-C [Jewish Family Services records]; petitioner's maternal grandmother, Bernise Steiner (H.Exh. 4; Conte, HT 1267; H.Exh. KK); petitioner's father, Bill Hardy, Jr., who died of methyl alcohol poisoning (H.Exh. 4; H.Exh. 3-D [Autopsy report for George Herbert Hardy, Jr.]; Conte, HT 1272; H.Exh. KK); petitioner's paternal grandfather, Bill Hardy Sr. (Conte, HT 1274; H.Exh. 4; Drosendahl, HT 175-178; Exh. 3-A [Declaration of Phyllys Moore]); petitioner's paternal grandmother, Barbara Ladd Hardy (Conte, HT 1274; Drosendahl, HT 175-178); four of Barbara Ladd Hardy's six siblings (H.Exh. 4; Drosendahl, HT 180); petitioner's brother Bob (H.Exh. 4); petitioner's brother, John (H.Exh. 4; Conte, HT 1281; K. Hardy, HT 300); and petitioner's sister, Linda (H.Exh. 4; H.Exh. KK; Kosciolek, HT 739-740; Barter, HT 939, 941, 943; Exh. BB; K Hardy, HT 300.)

606. Drug dependency was also widespread in petitioner's family. Petitioner's maternal grandmother, Bernise Steiner, was addicted to prescription medications. (H.Exh. 4; Carol Hardy, HT 618; Conte, HT 1268; Jackman, HT 1519-1520.) Petitioner's father, Bill Hardy, Jr., was

addicted to narcotics (H.Exh. 4; Exh. KK; C. Hardy, HT 553-554; H.Exh. 3-A [Declaration of Phyllys Moore]; H.Exh. 3-D [New York City court records, FBI Criminal history; Connecticut police records].) Petitioner's brother, Bob, was addicted to heroin and later used quaaludes and marijuana heavily. (H.Exh. 4; H.Exh. YY; Stigers, HT 338-339; Jackman, HT 1520.) Petitioner's brother, John, was addicted to cocaine. (H.Exh. 4; Conte, HT 1281; Padilla, HT 920; Jackman, HT 1520.) Petitioner's sister, Linda, used amphetamines, pills, L.S.D., and marijuana heavily, even as an adolescent. (Conte, HT 1282; H.Exh. 4; Barter, HT 944; Exh. BB; Jackman, HT 1520.)

607. Throughout petitioner's childhood, many, if not all, of the adults with whom he had the most contact were alcoholics and/or drug abusers: petitioner's father was an alcoholic and a heroin addict who died of methyl alcohol poisoning. (H.Exhs. 3-B, 3-D [Death certificate of George Herbert Hardy, Jr.; Autopsy report of George Herbert Hardy, Jr.].) Petitioner's mother was observed to drink frequently and has admitted that she drank heavily. (C. Hardy, HT 648; Exh. KK .) Rick Padilla, the father of petitioner's siblings AnaMaria and John, drank every day. (H.Exh. 4; C. Hardy, HT 647; Exh. KK].) Bill Thompson, the father of petitioner's sister Linda, drank from morning to night, in keeping with his own extensive family history of alcoholism. (Conte, HT 1328; C. Hardy, HT 597, 600; H.Exh. KK; Padilla, HT 915; H.Exh. AAA; H.Exh. DDD; Kosciolek, HT 699; Exh. QQ; Lois Thompson, HT 837; H.Exh. XX; H.Exh. 3-A [Declaration of M. Thompson]; H.Exh. 3-C [Jewish Family Services records]; H.Exh. 4; Jackman, HT 1519.) A history of alcoholism or drug abuse in the biological family tends to predispose an individual to substance abuse disorders. (Jackman, HT 1521.) Witnessing significant care-givers,

parent and parent figures, whether or not they are blood relations, abuse drugs is known to be correlated with a child's later development of substance abuse problems. (HT 1328.)

608. Taking into account petitioner's family history, his life experiences and his own symptomatology, a qualified expert would have opined that petitioner used drugs for purposes of self-medication: to relieve the psychic pain that he experienced as a result of his childhood maltreatment and hardship and as a result of the losses he experienced as an adult. (HT 1520.) Through drugs, petitioner unconsciously sought to alter his mood and achieve more readily the dissociation and withdrawal that, without benefit of drugs, was his natural response to psychic pain or trauma. (HT 1521.) The frequency and quantity of drugs petitioner used correlated to the severity of the distress that he was experiencing. (HT 1521.) Petitioner's drug use was very much related to his dissociative disorder. (HT 1505.) Drug use, and use of PCP especially, allowed petitioner to attain that dissociative state effortlessly. (Jackman, HT 1505-1506; Conte, HT 1361; H.Exh. 4.) Although petitioner had used drugs extensively, he had never done so in order to embolden himself and historically drugs had never had such an effect on him. (HT 1551.)

c. Evidence of Petitioner's Mental State at the Time of the Crime

609. The evidence presented at the reference hearing showed that, in the spring of 1981, petitioner was sometimes "manic" or "hyper," paranoid and jumpy and occasionally "hysterical"; on one occasion, he removed his clothes in public; on another, he was seen talking to himself. He occasionally spoke incomprehensibly. (H.Exh. 4; HT 424.) At other times, he appeared to be withdrawn and nonresponsive. He often "spaced

out" or became "blank" in the middle of a conversation; he was easily sidetracked. (H.Exh. 4.) He talked extensively about religion, mind control and his own martial arts abilities. (H.Exh. 4.) He complained of severe and debilitating headaches and photosensitivity. (H.Exh. 4.) He was heavily using alcohol and drugs, including cocaine, marijuana, PCP, and amphetamines. (H.Exh. 4.) In August of 1980, petitioner was ordered to undergo counseling as a condition of probation; although he went to Friends of the Family Counseling Agency several times, he stopped when he was asked to sign a contract. (H.Exh. 4.)

610. Taking into account the evidence of petitioner's behaviors, life experiences, psychiatric history and family history, a qualified expert would have found that, in the spring of 1981, petitioner was significantly "regressed" and his mental state had deteriorated. (HT 1373.) In 1979 and 1980, petitioner had suffered an overwhelming series of profound and significant losses in rapid succession. Because of these losses, petitioner experienced an increase in the magnitude of his already existing symptomatology: he became more depressed, distractible, hypersexual, and self-destructive; he experienced rapidly shifting moods; his substance abuse increased; his cognitive impairments became more severe. (H.Exh. 4.)

d. Evidence that Petitioner Lacked a Propensity for Violence

611. Throughout his life, petitioner has been subjected to abuse, violence, aggression, chaos and instability, and has consistently reacted to these experiences by withdrawing and becoming passive rather than acting out aggressively. (H.Exh. 4.) As a child and adolescent, petitioner was beaten and brutalized both at home and in the street. Nevertheless, by all accounts, he was a quiet, likeable, friendly, passive and sensitive child; he

was a follower, whose response to psychic and physical trauma was to withdraw and to retreat into fantasy. (HT 1330; H.Exh. 4.) He avoided fighting wherever possible. (C. Hardy, HT 620; Artis, HT 808-809; Padilla, HT 911; H.Exh. AAA; H.Exh. WW; Kosciolek, HT 725-726; H.Exh. QQ; H.Exh. 3-A [Declaration of Rodriguez]; H.Exh. 4.) When he or his friends were subjected to neighborhood violence, petitioner declined to seek retribution. (H.Exhs. EEE, QQ, 3-A [Declaration of Rodriguez], 4, QQ; HT 993.) He was passive, non-reactive and easygoing. (Kosciolek, HT 724-725; H.Exh. QQ; C. Hardy, HT 612; L. Thompson, HT 835; M. Davis, HT 967.) When his mother beat him, he did not fight back. (HT 983-985; H.Exh. EEE.) When his girlfriend Pat's father tried to provoke him or threatened him with a gun, he walked or ran away. (H.Exh. 3-A [Declaration of Rodriguez].) He was passive, withdrawn and introverted. (H.Exh. 4; Conte, HT 1318, 1336; H.Exh. 3-C [Jewish Family Services records]; C. Hardy, HT 611-612; H.Exh. 3-A [Declarations of J. Davis and Godfrey].) A qualified expert would have opined that this is not an unusual response to trauma and reflects a basic character type known as the "introverter." (HT 1319; H.Exh. 4.)

612. As an adult, petitioner's tendency toward passivity and withdrawal continued. In arguments with his former wife, Pat, petitioner withdrew both emotionally and physically. (H.Exhs. EEE, 4; HT 1006, 1021.) When petitioner and Pat separated, petitioner often appeared withdrawn. (H.Exh. 4.) No complaints of aggressive behavior were made against petitioner when he worked as a bus driver, a fact which is particularly significant given the nature of the job. (H.Exhs. 4, 60; HT 1358-1359.) In reaction to personal tragedy, petitioner withdrew both emotionally and physically. (H.Exh. 4.) When extremely distraught,

petitioner sometimes became suicidal. (H.Exh. 4.) Even in spring of 1981, when petitioner had deteriorated psychologically and was using drugs heavily, he was never seen to be physically aggressive or violent, even when angered. (H.Exh. 4; Mitchell, HT 424; Conte, HT 1373; Ginsburg, HT 70, 97.) To the extent that any aggressive behavior was attributed to petitioner, it was exclusively in the context of highly charged familial disputes and was not indicative of a propensity for violence outside such a situation.

e. The Significance of Particular Life Experiences

613. Although in some respects, the sympathetic significance of petitioner's life experiences is readily apparent to the average lay person, the evidence presented at the hearing showed that many events or circumstances in petitioner's life have particular significance that is understood only with the help of a mental health expert. A qualified mental health expert would have explained the significance of particular events that would not be apparent to a lay person. After reviewing the social history data provided by counsel, such an expert would have concluded that, both as a child and as an adult, petitioner's life has been riddled with events and circumstances known to have a profound negative impact on an individual's development and functioning. (H.Exh. 4.) Among the events whose significance could only be explained by an expert were the following:

A. Petitioner's hospitalization for two weeks at the age of eight months was significant because it forced petitioner to be separated from his mother at a critical developmental age. (HT 1294; H.Exh. 4.)

B. Petitioner's exposure to the physical abuse of his mother by his father, by Ricardo Padilla and by Bill Thompson was

significant because witnessing physical abuse of a loved one has an impact that is as profound as being physically abused first-hand. (HT 1291, 1306, 1329; H.Exh. 4.)

C. The evidence that Mrs. Hardy had symptoms of depression during petitioner's infancy was significant because the effect on a child of being raised by a mother who is clinically depressed is often similar to the effects of physical abuse. (HT 1292-1293.)

D. Although petitioner has no recollection of the first two years of his life, his experiences during that period of time nevertheless were highly significant to his development. (HT 1291-1292.) Dr. Conte noted that, "[t]he impact of experience on the individual is not just based on conscious memory. In many areas of mental health it is recognized that what we consciously know may be a distortion. . . . If you believe in psychological processes that are below conscious awareness, it follows that part of the mind or psyche can store experiences, even though the conscious mind does not have access to them." (HT 1428.) As stated by Dr. Conte, during that time, petitioner "suffered profound physical and psychological trauma, neglect and fundamental insecurity of such magnitude that it could only have permanently affected his psychological functioning." (H.Exh. 4.)

E. The accident in which petitioner's brother, Bob, was hit by a taxicab caused petitioner significant psychic trauma: although petitioner himself was not physically injured, the confusion, anxiety, fear and chaos which resulted from the accident, the focus of all attention on Bob, and Bob's ensuing medical and psychological disabilities, had a direct and lasting negative impact on petitioner. (H.Exh. 4.) Similarly, the incident in which Bob was burned himself on a furnace also caused petitioner significant psychic trauma. (HT 583, 1301; H.Exhs. KK, 4.)

F. The fact that petitioner was repeatedly “boarded out” as a young child was significant because a child of petitioner’s age would experience those events as permanent abandonments. (HT 1303-1305; H.Exh. 4.)

G. The physical abuse which petitioner experienced as a child was significant because physical abuse has a severe negative impact on a child’s development and functioning. Moreover, the abuse of petitioner by Bill Thompson was particularly significant because Thompson victimized petitioner after he had gone to bed at night: where a child is unable to feel safe even in sleep, a particularly high level of anxiety and stress results. (HT 1343.)

H. The isolation, humiliation and degradation petitioner experienced primarily at the hands of his mother constituted another significant assault on his psyche. (HT 1332-1333.)

I. The sexualized behavior between petitioner’s mother and brother was significant to petitioner’s psychological development: sexual behavior directed at a sibling makes a child feel excluded, invisible, uncomfortable, embarrassed, confused and jealous. (H.Exh. 4; HT 1311-1312.) Sexualized interaction between child and parent is a form of abuse or child maltreatment. (HT 1254.) The type of sexualized behavior which petitioner observed in his mother is also stigmatizing for a child and difficult to understand. (HT 1309-1310.)

H. Evidence that, as an adult, petitioner harbored no ill feelings toward his brother, Bob, does not disprove that their relationship was abusive and emotionally damaging. (HT 1458-1459.)

I. The evidence indicating the extent to which petitioner’s childhood environment was marked by chaos, racial unrest and

violence was significant because studies have shown that growing up in an urban war zone, under constant threat of being attacked or seeing others attacked, has a lasting negative impact on a child's development. (HT 1337-1340.) Petitioner was further isolated and rejected by his own family. (H.Exh. 4; HT 1342.)

J. Even if Mrs. Hardy tried to be a good mother, her impulsivity, inability to nurture, abandonment, neglect, selfishness, depression and sexualizing behavior made her the "archetype" of the bad parent. (HT 1307.) Corroborating and perhaps explaining Mrs. Hardy's bad parenting behavior is extensive evidence that she herself was the product of an multi-generational family history of neglect and failure to parent. (H.Exhs. 4, 3-A [Declarations of D. Steiner and R. Steiner], 3-D [JCCA Records of Caroline Steiner and of Rose Bernise Steiner], KK.)

K. The death of petitioner's dogs was extremely traumatic, because petitioner was a person who had always cared for and nurtured animals and because pets are often of great importance to abuse survivors. (HT 1371.)

L. Although to some extent the reasons for, and extent of, petitioner's devastation upon his brother's suicide would be readily apparent to a layperson, a qualified expert would have found a number of ways in which the death was significant to petitioner that would not be obvious to the untrained eye. Among them was the fact that, because petitioner had assumed a care-taking role with his younger siblings, Bob was petitioner's only true peer in the family. Also, petitioner blamed himself because he was the reason for which Bob had come to California, and this gesture on Bob's part was of tremendous significance to petitioner, for whom so few people had ever done anything. (HT 1363.) Petitioner

also blamed himself because he had not responded when Bob threatened suicide shortly before his death. (HT 1363-1365.) Evidence of the devastating effect Bob's suicide had on petitioner is provided by the fact that, three days after Bob's death, petitioner injured himself severely while hiking in what appears to have been a suicide attempt.

M. A qualified expert would have opined that, regardless of his guilt or innocence of the crime charged, the difficulty of petitioner's life experiences and the manner in which he had responded to them were sympathetic, weighed in favor of a sentence less than death and formed a strong basis for a plea of mercy. (HT 1375-1376.)

f. Evidence Mitigating Petitioner's Courtroom Demeanor

614. Mr. Demby testified that, during the trial, petitioner "stared at" various individuals in the courtroom. (HT 2038.) Jurors noticed that petitioner's demeanor in the courtroom was odd. (Appendices 12, 46, 51.) The prosecutor argued repeatedly that petitioner was cold, uncaring, disrespectful, dangerous and generally unsympathetic in the extreme.[62]

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[62]In closing argument at guilt phase, Deputy District Attorney Jonas made repeated reference to petitioner's "personality," and "attitude" (RT 12704, 13039, 13042) and argued that petitioner was "weird" (RT 12704, 12808, 13646) "creepy" (RT 12704, 13039), "crazy" (RT 12704, 12808, 13039, 13051, 13645, 13646) "odd" (RT 12704) "scary" (RT 12704), "procurable for a price" (RT 12727), someone who "just [doesn't] give a damn" (RT 12740), "cool" (RT 13039, 13044), "tough" (RT 13039, 13051, 13645), "a wild man" (RT 13041, 13053, 13646) who was able to kill as easily as "eating an apple" (RT 13053). At penalty phase, Mr. Jonas continued to make reference to petitioner's attitude (RT 14036, 14051) and "nature" (14051), arguing that petitioner was unremorseful (RT 14021, 14034), that he had a propensity for violence (RT 14025, 14034, 14036, 14044, 14045, 14047), that he could go into a "trance-like" state and

(continued...)

Although the prosecution did not explicitly refer to petitioner's demeanor in the courtroom, his arguments certainly focused the jury on petitioner's observable behavior and, by implication, condemned that behavior as indicative of evil.

615. At the reference hearing, the evidence showed that petitioner's behavior in the courtroom could have been explained and mitigated by a mental health expert familiar with the circumstances of the trial itself and with petitioner's social and psychiatric history. Dr. Jackman opined that petitioner's behavior in the courtroom, although inappropriate, was an expected reaction, given his psychiatric and social history, to the fact that he was in an environment over which he had no control and in which he had no power. (HT 1545.) Petitioner, on trial for his life, had lost all trust in Mr. Demby. (HT 1546.) Given these circumstances attendant to the trial, Dr. Jackman opined that petitioner was unable to express in any more decorous manner his feelings of frustration and dissatisfaction and his fear that he was not being adequately represented. (HT 1545-1546.) Dr. Jackman found that petitioner's behavior in the courtroom did not indicate that he was cold-hearted or uncaring or that he intended to intimidate. (HT 1626-1627.)

616. A qualified expert would have informed counsel that behavioral manifestations such as petitioner's are not likely to be subject to conscious control. (HT 1548.) Mr. Demby's response to petitioner's

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[62](...continued)
commit extreme acts of violence calmly and unemotionally (RT 14034, 14038) as if he "had sat down to a meal" (RT 14034), that he lacked respect for himself and for others (RT 14036, 14040) and that he lacked a conscience (RT 14036).

behavior was to instruct him to try to act differently. (HT 2040.) The evidence showed that, if consulted prior to trial, a psychiatric expert would have advised counsel that directly ordering petitioner to change his appearance was not a sound strategy for mitigating petitioner's courtroom demeanor.

g. Evidence that Petitioner Would Not be a Danger to Others in Prison

617. A qualified expert would have opined that petitioner would adjust well to prison life and, if incarcerated for life without possibility of parole, petitioner would not present a danger to others in the prison. Petitioner had a history of complying with authority and avoiding physical confrontations and was likely to stay to himself while in prison and to avoid trouble. (HT 1555-1556.) Although while in jail awaiting trial, petitioner had been charged with possession of nunchakus and possession of marijuana, there was no evidence that petitioner had ever used nunchakus against anyone; rather he had used them for exercise and the "nunchakus" he had in jail were made out of paper. With these facts, a qualified expert would have opined that petitioner possessed them for exercising and this did not indicate a propensity for violence. (HT 1556-1557, 1609.) Nor was the possession of marijuana an indication of dangerousness. A qualified expert would have opined that using marijuana would make petitioner less likely, rather than more likely, to be aggressive (HT 1557) and that petitioner's record of nonviolence showed a likelihood of future nonviolent behavior. (HT 1607.)

h. Analysis of Petitioner's Behavior Immediately After the Crime

618. A qualified expert, provided with all of the relevant data,

would have opined that petitioner's behavior after the killings indicated his innocence. Throughout his life, petitioner became distraught in response to traumatic experiences and his distress was visible to others in the form of depression, crying and withdrawal. (HT 1553.) Participating in the killings would have been a traumatic experience for petitioner. The fact that petitioner's behavior did not change after the killings was inconsistent with his participation in that crime. (HT 1552-1554.)

619. Between the time of the crime and the date of petitioner's arrest, petitioner exhibited no suspiciousness, evasiveness, guardedness and no attempt to flee or hide; he did not appear to be anxious, troubled or worried; he did not act as if he feared being watched or followed. A qualified expert, provided with all of the relevant data, would have come to the opinion that this behavior was inconsistent with his participation in the crime and that it further suggested petitioner's innocence. (HT 90, 110, 1552.)

i. Availability of the Foregoing Expert Opinions

620. The evidence presented at the reference hearing shows, and the referee found, that mental health experts such as Drs. Conte and Jackman, who testified at the reference hearing, as well as the information on which they relied in reaching their opinions, was available at the time of trial. (HT 1217, 1246, 1459-1460, 1478; Report at p. 64.) Even the few social history documents in Mr. Demby's possession prior to trial contained numerous indicators that petitioner suffered from symptoms of mental illness and had been subject to numerous assaults on his psychological development throughout his life. The data which a qualified mental health expert would have needed to perform a social history analysis was readily

available in this case. Evidence of the events and circumstances of petitioner's life was available from many sources. Numerous friends, acquaintances and family members were able and willing to tell what they knew about petitioner and his family.[63] Numerous documents, generated over the years as petitioner and his family-members came in contact with various institutions, were available upon request at the time of petitioner's trial. (See H.Exhs. 3-B through 3-I.) Additional documents, since destroyed, would have been available at the time of trial. (HT 2429, 2432-2434.) In the early 1980s, when Mr. Demby was preparing for trial, it was commonly recognized that a psychiatrist could not render a valid, professionally sound and accurate opinion regarding an individual's mental state without considering a social assessment or social history of the individual, including a multi-generational history of family members' psychiatric symptoms and behavior patterns. (HT 1476-1478.)

621. If Mr. Demby had at first conducted no additional investigation into petitioner's background, but had simply presented the little information which he had in that regard to a qualified expert, that expert would have advised him that a more thorough investigation was

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[63]At the reference hearing, 11 witnesses testified on petitioner's behalf regarding petitioner's childhood. Nine additional witnesses were available to testify via video conference. Twenty witnesses testified regarding petitioner's adulthood. Twenty-four witnesses testified to aspects of petitioner's family history. Approximately thirty-four witnesses provided statements under penalty of perjury to petitioner's current counsel and would have cooperated similarly with trial counsel had they been asked to do so. (See H.Exhs. 3-A, 3-I.) A number of petitioner's family members had died over the previous ten years (e.g., Betty Ladd Downer, Burton Downer, William Steiner, Bill Hardy, Sr.). Accordingly, more, rather than less, information was available to trial counsel at the time of trial than was available at the time of the reference hearing.

needed to render a competent mental health assessment. (HT 1374-1375.) For example, had Mr. Demby consulted a competent and qualified mental health expert, that expert would have informed him that evidence of petitioner's troubled life history or evidence of petitioner's and his family's mental illness would not undercut petitioner's claim of innocence or suggest to the jury that petitioner was a murderer. An expert would have informed Mr. Demby that it was not likely that petitioner's problematic courtroom demeanor was within his conscious control and that the strategy of telling petitioner to act differently was not likely to be effective. An expert would have explained to Mr. Demby that petitioner's drug use could be explained and made sympathetic; moreover, an expert could have shown Mr. Demby (and the jury) the speciousness of the prosecutor's theory that petitioner used drugs on the night of the killing to embolden himself. If Mr. Demby had presented the facts pertaining to petitioner's mental health history and the testimony of one or more mental health experts in this regard, the jury would have found petitioner's drug use to be mitigating and would have rejected the prosecution's claim that petitioner used drugs to embolden himself on the night of the crime. (Appendix 12.)

622. With the information that was available at the time of trial, one or more experts could have provided the jury with a sympathetic understanding, consistent with petitioner's innocence, of petitioner's lifestyle at the time of the killings, his demeanor in the courtroom, his use of drugs and his prior arrest and the incident that led to it. Expert opinion regarding petitioner's responses to the hardship, trauma, and abuse that he had suffered throughout his life would have been supportive of lingering doubt, an expert would have opined that the evidence indicated a very low likelihood that petitioner would ever become involved in a violent murder.

(HT 1451-1452, 1551, 1587, 1595.) Because this testimony would have shown that petitioner lacked a propensity for violence, this evidence strongly supported petitioner's lingering doubt defense.

623. Expert testimony would have shown that petitioner's symptomatology – in particular his grandiosity, a psychiatric symptom whereby the individual overvalues and exaggerates -- provided an innocent and reasonable explanation for any statements which the jury found he made regarding an expectation of insurance proceeds. (HT 1514-1515.)

624. At the penalty phase, Mr. Jonas' argued that petitioner's behavior when confronted by the police on August 6, 1980, and his suicidal behavior in general, showed a propensity for violence and an inclination to harm others.[64] The expert evidence would have shown that, when confronted by the police on August 6, 1980, petitioner was "was either out of touch with reality or he was dissociative and suicidal." (HT 1370.) A qualified expert, provided all of the relevant data, would have found no evidence that petitioner had a desire to harm others at that time. An expert would have found that, on this and other occasions, petitioner appeared self-destructive or suicidal, but exhibited no indication of a propensity to commit murder. (HT 1452-1457, 1543.) Accordingly, expert testimony would have bolstered the common sense view that suicidality does not imply a tendency for violence toward others.

625. Mr. Jonas argued that petitioner was living a life of hedonism,

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[64]At the penalty phase, Mr. Jonas argued that petitioner had "a total lack of care for himself as a human being," and that therefore he had no concern for others; he could "go jump off a cliff" or "go stab a young boy" or "stab the mother" and "it's all the same. There is no conscience, no remorse." (RT 14036.)

"pure and simple. . . . It wasn't because of some mental immaturity or mental problem of psychological difficulty. And if any of that had existed, you would have heard about it." (RT 14048.) Expert testimony would have shown petitioner was mentally ill and severely disturbed and that his drug use, his dependency on others, his ill-advised fraternization with undesirable individuals and his inability to maintain employment were the product of his symptomatology and his struggle to cope with a lifetime of hardship, trauma and loss. A qualified expert could have shown the jury that petitioner's social dysfunction at the time of the crime was not indicative of anger and a propensity for violence, as the prosecutor contended.

626. During penalty phase deliberations, jurors discussed whether or not petitioner had a motive for the killings and at least some jurors believed that petitioner committed the murders because he "simply needed an opportunity to vent his anger" or that "he was angry enough that he could kill for no other reason." (Appendix 12.) Had Mr. Demby presented the available evidence regarding petitioner's behavior and history, jurors would not have reached this conclusion and would have found that petitioner lacked a motive for the killings.

627. Expert testimony would have shown that petitioner did not have a propensity for violence or that he was likely to be dangerous in the future, but, to the contrary, had a lifelong history of passivity and introversion in response to trauma and that it was unlikely that he would be violent in prison.

628. Expert testimony would have shown that petitioner's family had an extensive history of mental illness and substance abuse, and that petitioner's own occasionally unusual behavior and use of drugs were

understandable byproducts of a history of psychic trauma and a genetic predisposition to mental illness.[65] An expert could have shown that, although petitioner had an extensive history of substance abuse, he had historically used drugs to self-medicate and soothe psychic pain; his drug use had never before prompted him to commit violent acts. Such testimony would have undermined the reasonableness of the prosecutor's claim that petitioner used drugs on the night of the killings in order to embolden himself. Expert testimony also would have provided a sympathetic explanation consistent with his claim of innocence for the evidence that, at the time of the killings, he was unemployed, dependent on others financially, using drugs, and associating with people who were planning a murder.

629. Expert testimony would have provided sympathetic explanations for petitioner's physical appearance in the courtroom and would have dispelled the inference that his fixed stare and blank look reflected anger, coldness and lack of remorse. Jurors noticed that petitioner's demeanor in the courtroom was odd, that he had "a fixed stare" (Appendices 12, 51), "a blank expression," that he seemed "blitzed out" and

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[65]Under the Eighth and Fourteenth Amendments, mitigation includes evidence of a history of mental illness among the defendant's immediate *and* distant family members. (*People v. Walker* (1948) 33 Cal.2d 250, 257 [defense evidence presented concerning Walker's family background included "a long history of insanity in both branches of the family," going back several generations]; *Hendricks v. Calderon* (N.D. Cal.1994) 864 F.Supp. 929, 935 [mitigation included evidence that "Hendricks' extended family [had] a high incidence of mental illness, substance abuse, suicide and attempted suicide," (*Id*. at pp. 934-935 [internal citations omitted]) and testimony from a clinical psychologist "that Hendricks [was] genetically predisposed and vulnerable to serious mental illness." (*Id*. at p. 935 [internal citations omitted].)

like a "zombie." (Appendix 51.) He seemed not to react to the witness testimony in the way that the other defendants did. (*Ibid*.) In deliberations, the jurors discussed these observations and wondered if he had mental problems. (*Ibid*.) However, since there was no evidence presented regarding petitioner's life or mental health, they did not take this into consideration in assessing penalty. (*Ibid*.)

630. Expert testimony would have shown that petitioner's history and psychiatric profile indicated that, had he committed the killings, he would not have behaved as he did after the killings and at the time of his arrest, that his behavior was inconsistent with his participation in the killings and thereby would have bolstered the claim that petitioner was not in fact the killer. As a general proposition, the testimony of mental health experts would have undermined the prosecution's attempt to demonize petitioner, would have bolstered his defense of lingering doubt and would have elicited sympathy and formed a strong basis for a plea for mercy.[66]

3. Evidence that Petitioner Was Not the Killer

631. At the reference hearing, petitioner presented evidence showing that extensive evidence was available to show that petitioner was not the killer of Nancy and Mitchell Morgan, but, because of the insufficiency of Mr. Demby's investigation, he was unaware of its availability. Petitioner hereby incorporates by reference as if fully set forth herein the facts set forth in Claim XIII, *supra*.

632. Upon reasonable investigation, Mr. Demby could have

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[66]Evidence concerning a defendant's "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 13-14 (conc. opn. of Powell, J.); see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 319.)

presented evidence at the penalty phase that Calvin Boyd had made statements to numerous individuals indicating that he had killed the Morgans, that petitioner had not accompanied him and that Marcus had driven the getaway car. Evidence was available to show that Boyd was known to carry a knife that matched the murder weapon, that Boyd had committed knife assaults in the past, that Boyd had pressured witnesses to provide him a false alibi and had threatened to harm others if they said anything to the police that would incriminate him, that Boyd had cuts on his hands after the killings, that Boyd had a motive to commit the killings, that Boyd had exhibited signs of consciousness of guilt after the killings and that Boyd had a reputation for violence. Evidence was also available to show that Boyd's statements and testimony incriminating petitioner and Reilly were lacking in credibility. Although Mr. Demby suggested to the jury at both the guilt and the penalty phase that Boyd and Marcus might have been the perpetrators of the Morgan killings, he presented no evidence at either phase of trial in support of that proposition. Such evidence, regardless of when it was presented, would have provided powerful support for a defense of lingering doubt at the penalty phase.[67]

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[67]Under Eighth Amendment jurisprudence, mitigating evidence in the context of a capital case is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [fn. omitted]; accord *People v. Harris* (1984) 36 Cal.3d 36, 62-64; *People v. Mickey* (1991) 54 Cal.3d 612, 692.) Furthermore, California law specifically provides that mitigation includes evidence of lingering or residual doubt. "[A] defendant may assert his possible innocence to the jury as a factor in mitigation under [Penal Code] section 190.3, factors (a) [the circumstances of the crime] and (k) [any other circumstance which extenuates the gravity of the crime]." (*People v.*
(continued...)

633. Upon reasonable investigation, evidence was available to explain petitioner's alleged statements prior to the killings that he expected to receive insurance money: that is, evidence that, in 1979, petitioner had a filed a Worker's Compensation claim from which, at the time of the killings, he could reasonable have expected to recover as much as eighty percent of his salary as a bus driver for up to two years; evidence that petitioner had been talking about his expectation of insurance proceeds

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[67](...continued)
Sanchez (1995) 12 Cal.4th 1, 77 (citation omitted).) Accordingly, under California law, a defendant in a capital case has the right to litigate or relitigate the issue of his guilt at the penalty phase of his trial. (See, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171, 1191-1192; *People v. Memro* (1995) 11 Cal.4th 786, 883; *People v. Wader* (1993) 5 Cal.4th 610, 660 ["Eighth Amendment concerns are satisfied when a capital defendant is not deprived of the opportunity to present evidence on lingering doubt and to have the jury weigh the evidence."]; *People v. Alcala* (1992) 4 Cal.4th 742, 766 ["[A] defendant may not be precluded from offering evidence on or arguing the relevance of lingering doubt in mitigation at the penalty phase."]; *People v. Fauber* (1992) 2 Cal.4th 792, 864; *People v. Cox* (1991) 53 Cal.3d 618, 677.) Moreover, as a matter of both statutory and constitutional law, mitigation includes evidence that the defendant had a "comparatively minor role" in the offense. (*Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1441 [trial court violated *Lockett* by excluding evidence that the key prosecution witness was the actual killer and more culpable than defendant]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-624 [error to exclude evidence that codefendant, not Mak, planned the crimes]; see also *Clabourne v. Lewis* (9th Cir. 1995) 64 F.3d 1373, 1387 [trial counsel found ineffective for failing to present evidence that codefendant was the mastermind of the crime and used the defendant to help him act out his fantasies]; *Smith v. Singletary* (11th Cir. 1995) 61 F.3d 815 [death sentence reversed where sentencer failed to consider, inter alia, relative culpability and that the defendant was influenced by the dominant personality of his accomplice]; Pen. Code, § 190.3, subd. (j) [jury is to consider "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."].)

since long before the killings; and evidence that petitioner suffered from psychiatric symptoms which were may well have caused him to overvalue or exaggerate the likely recovery. (Report at pp. 31-32.) The jury heard none of this evidence at either the guilt or the penalty phase. Such evidence would have supported the defense of lingering doubt by undermining the prosecution argument that petitioner was referring to the life insurance proceeds from the killing of the Morgans when he made the alleged statements regarding his expectation of an insurance recovery.

634. At the time of trial, evidence was available to show that Colette Mitchell, a key witness against petitioner at trial, had a reputation for dishonesty; that Mike Mitchell's testimony at the guilt phase of trial that he heard the shower running in the early morning hours of May 21, 1981, and saw a wet towel in the bathroom when he got up was misleading, because he was unable to distinguish the sound of the shower in his apartment from the sound of his neighbors showering and because the towel could have been used by his girlfriend, who had gotten up and showered before he did. The prosecution argued at the guilt phase that what Mike Mitchell heard was petitioner and Reilly showering in Reilly's apartment, that the towel was wet because petitioner and Reilly had used it after their shower, and that they had showered in the middle of the night because they had been covered with the blood of Nancy and Mitchell Morgan. Whether presented at the guilt phase or the penalty phase, evidence showing that Colette Mitchell was not credible and that Mike Mitchell's testimony regarding the shower was misleading would have bolstered a penalty phase defense of lingering doubt.

635. Upon reasonable investigation and consultation, expert opinion testimony that Nancy and Mitchell Morgan died significantly earlier

in the night than the prosecution claimed was also available. (Report at p. 31.) Had Mr. Demby consulted with a qualified expert in forensic pathology and provided that expert with all of the available data needed to render an opinion as to time of death, he would have learned that a reasonable and credible opinion as to the significance of that data was that Nancy and Mitchell Morgan were killed at around midnight on the night of their deaths and that the killing could not have taken place as late as 3:00 a.m. on May 21, 1981. Petitioner's whereabouts were firmly accounted for prior to 3:00 a.m. Accordingly, if such expert testimony had been presented to the jury at either the guilt or the penalty phase, it would have bolstered a penalty phase defense of lingering doubt. However, petitioner's jury heard no such testimony. Instead, the jury heard essentially no affirmative evidence to support of petitioner's claim of innocence and Mr. Demby's argument that there was still doubt as to his participation in the killings. If the jury had been provided with any evidence to support Mr. Demby's contention that petitioner was not the killer, they would have voted for a sentence less than death. (See Appendix 12.)

D. Mr. Demby's Purported Reasons Fail to Justify His Inaction

636. Mr. Demby's purported justification for not investigating or presenting any information regarding petitioner's character and background at the penalty phase of trial was that he intended to present a penalty phase defense of lingering doubt. He claimed that his strategy was to maintain the position that petitioner was innocent and he did not want to present any evidence inconsistent with that position. Mr. Demby's decision to rely on a lingering doubt defense did not excuse his failure to investigate and present mitigating evidence that was not inconsistent with that defense. The

evidence presented at the reference hearing was not inconsistent with a lingering doubt defense; in fact, as found by the referee, such evidence was actually supportive of that defense. For example, the "[e]vidence that petitioner had positive attributes and a history of kindness to others tended to humanize petitioner, and to support a defense of lingering doubt by showing that his character traits were not those of a killer (which in turn supported his claim of innocence)." (Report at p. 34.) Evidence that petitioner's children and other loved ones would suffer profound loss if he were executed was "consistent with lingering doubt insofar as it exemplified the feelings held toward petitioner by his children and others, and showed that his relationships with those individuals were significant." (*Id*. at p. 42.) "The mental health expert opinions which were presented at the reference hearing were mitigating and consistent with, or supportive of, the defense of lingering doubt." (*Id*. at p. 64.) In relying exclusively on a lingering doubt defense, when compelling mitigating evidence was available that was consistent with lingering doubt, Mr. Demby's performance was deficient. (HT 2471-2472.)

637. In addition, the evidence presented at the hearing demonstrates, and the referee found, that Mr. Demby's investigation of petitioner's innocence itself was severely deficient and that extensive evidence in support of a defense of lingering doubt was in fact available upon reasonable investigation. Petitioner hereby incorporates by reference as if fully set forth herein Claim XIII, *supra*. Mr. Demby's failure to investigate adequately petitioner's guilt or innocence not only undermines the reasonableness of his purported strategic decision not to present any evidence pertaining to petitioner's background and character at the penalty phase, but also constitutes deficient performance in its own right.

Reasonably competent counsel would not have proceeded at guilt and penalty phases on a theory that petitioner had not committed the killing without having adequately investigated petitioner's guilt or innocence.

638. In the habeas corpus proceedings held pursuant to this Court's order to show cause, Mr. Demby advanced various other purported strategic reasons for not investigating and presenting evidence of petitioner's background and character at the penalty phase. Each of those purported justifications is unreasonable.

639. Regarding the incident on petitioner's bus, Mr. Demby claimed at the reference hearing that his reason for not presenting evidence of that was that he did not regard it as an "heroic act" or a "particularly volitional act." (HT 1805, 1807.) Mr. Demby claimed that he believed the robber had "pushed Mr. Hardy aside as he left through the front door of the bus" and that, as a result, petitioner fell and was injured from the fall. (H.Exh. 43.) Mr. Demby also reportedly believed the injuries petitioner claimed in his Worker's Compensation claim were actually sustained when petitioner jumped off a cliff after his brother's suicide. Mr. Demby stated that "he did not want any evidence to come in from which the jury could infer that defendant Hardy had filed a fraudulent Worker's Compensation claim . . . ." (H.Exh. 45.) These purported excuses do not justify Mr. Demby's failure to present the evidence, as they are factually incorrect and based on inadequate investigation. In fact, petitioner's version of events could have been corroborated by the robbery victim had Mr. Demby made the effort to identify and interview her. Information in Mr. Demby's possession documented and corroborated the fact that petitioner had not been a passive victim but had attempted to thwart the robbery. Petitioner's Worker's Compensation Claim was filed in August of 1979, two months

before the incident in which petitioner jumped off a cliff, in October of 1979. Medical reports clearly showed that the injuries for which he was seeking Worker's Compensation benefits were in fact sustained in the robbery incident, not two months later in his suicide attempt. The evidence readily proved that petitioner's Worker's Compensation claim was not fraudulent. Thus, Mr. Demby's decision not to present evidence of the incident was based on faulty reasoning and insufficient investigation.

640. Mr. Demby has asserted that his decision not to present other good deed evidence at the penalty phase was based on a belief that petitioner's good deeds were all too remote in time relative to the killings. (H.Exh. 43.) Mr. Demby believed that, prior to the date of the crime (May 21, 1981), the most recent available good deed evidence was the incident involving the robbery on petitioner's bus, which occurred in August of 1979. (H.Exh. 43.) In fact, evidence of good deeds and good character dating from the period of time between the robbery incident and the date of the crime was available. For example, Judy Norwood Metoyer testified that in 1980 petitioner dropped everything he was doing and took a bus from Los Angeles to Texas to help her when she called and said was having some personal problems and needed to talk to him. (HT 404.) Leslie Stigers testified that, in 1979 and 1980, petitioner was kind, friendly and helpful, and that he helped her and others. (HT 332-334, 354.) Both Steve Rice and Rick Ginsburg, who did not know petitioner until shortly before the crime, testified that petitioner was kind to children. (HT 94, 249.) Mr. Rice testified that he was respectful towards women. (HT 272.)

641. The fact that some of the good character and good deed evidence concerned events that took place months or years before the charged crimes was not a legitimate or rational reason for not presenting

that evidence. One of the chief purposes of mitigating evidence at the penalty phase of a capital trial is to make the jury aware of any positive aspect of the defendant's character and record. (*People v. Belmontes* (1988) 45 Cal. 3d 744, 811, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, and *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Counsel is not excused from presenting evidence of good deeds simply because they happened some time before the crime. (See *Kenley v. Armontrout*, *supra*, 937 F.2d at p. 1308.) Moreover, the incident involving the robbery on petitioner's bus occurred approximately one and one-half years prior to the crime. Even if there had been no evidence of good deeds or good character during that period of time, one and a half years is not "remote." (Report at p. 75.)

642. Mr. Demby has attempted to justify his failure to call any good character witnesses by asserting that he feared that, if he put on good character witnesses, those witnesses "could and would have been impeached and discredited" by the prosecutor at trial with evidence that petitioner had killed a woman and child while they were asleep in their bed; that petitioner was unemployed and living off women at the time of the murders; that Steve Rice had testified that "[petitioner] would 'just bring bitches over [to Rice's apartment] and fuck them all day,'" that petitioner had his girlfriend Colette Mitchell commit perjury for him at the preliminary hearing; and that petitioner had "engaged in violence against members of his own family," which resulted in his conviction of a misdemeanor. (H.Exh. 43.) The "impeachment" material identified by Mr. Demby had already been put before the jury at the guilt phase; presenting good character evidence would not have opened the door to anything the jury had not already heard. Thus, Mr. Demby's purported rationale was

unreasonable. Mr. Demby also unreasonably failed to recognize that the inflammatory statement that petitioner would "'just bring bitches over [to Rice's apartment] and fuck them all day,'" which Mr. Demby attributed to Steve Rice (see H.Exh. 43) was actually made by Calvin Boyd, who claimed that Rice had made such a statement. (See RT 8119; see also HT 272.) Given Boyd's lack of credibility in general and his incentive to fabricate evidence in this case, Demby's reliance on this multiple hearsay evidence as a reason not to put on any mitigation at the penalty phase was unreasonable. Had Mr. Demby conducted reasonable investigation, he would have found that Rice did not make the alleged statement and that, if petitioner was in fact unusually active sexually, it was further evidence that he suffered from an affective disorder.

643. All of the "impeachment" material to which Mr. Demby has pointed is evidence or argument that was in fact made before the jury at the guilt phase. Accordingly, Demby's fear could not have been that presenting good character evidence would open the door to aggravating evidence not already introduced. Apparently, Mr. Demby feared that witnesses would change their opinions of petitioner's good character when confronted with particular evidence already in the record. Again, that fear was unreasonable and based on insufficient investigation. Many of the available witnesses were never contacted by Mr. Demby or anyone working with him. As for those who were, most were interviewed by Mr. Demby's law student, Ms. Mulligan. Ms. Mulligan's reports indicate that most, if not all, of these witnesses were aware at the time of their interviews that petitioner was charged with the killing of a woman and her child, but nevertheless held high opinions of petitioner's character. (H.Exh. 33.) To the extent that Mr. Demby feared the witnesses would not withstand cross-examination,

reasonably competent counsel would not have relied on the interviews conducted by an untrained, unsupervised first year law student, but would have contacted the witnesses himself and discussed the evidence or questioning about which he was concerned. Mr. Demby's failure to do so, while relying on this reasoning to support a decision to present no mitigation on petitioner's behalf, constitutes deficient performance. Had he done so, he would have found that, as is shown by their testimony at the reference hearing in this matter, none of the good character witnesses would have changed his or her opinion about petitioner when confronted with evidence of petitioner's guilt. The unreasonableness of Mr. Demby's fear that the prosecutor would have tried to impeach and discredit petitioner's mitigation witnesses with evidence presented at trial is further demonstrated by the fact that no such attempt was made with respect to codefendant Reilly's mitigation witnesses, who testified at the penalty phase. (Report at p. 216.)

644. Regarding petitioner's former wife, Pat DiNova, and her sister, Lucy Rodriguez, Mr. Demby purportedly feared that they would be impeached with evidence that, after petitioner and Pat separated, petitioner did not visit the children, did not pay child support much of the time, and was using drugs. (H.Exh. 43.) Again, Mr. Demby never spoke to Ms. DiNova or Ms. Rodriguez and instead relied on Ms. Mulligan's reports of her conversations with those witnesses and that reliance was misplaced. Ms. Mulligan's interviews and reports were superficial and incomplete. Neither she nor anyone else working on behalf of petitioner asked the logical follow-up questions or conducted follow-up investigation. Reasonably competent investigation, including reasonably thorough interviewing of Ms. DiNova and/or Ms. Rodriguez, would have revealed

that petitioner's lack of contact with his children was not of his own choosing. Rather, it was due to the fact that, after petitioner and Ms. DiNova separated, Ms. DiNova had become involved with (and ultimately married) a jealous, possessive and abusive man, who, by use of physical threats and violence, had forced Ms. DiNova to cut off all contact between petitioner and his children. (HT 1012-1213, 1017.) Petitioner, his mother and his siblings had made repeated efforts to try to find and contact the children but to no avail. Reasonable investigation would have revealed that petitioner's inability to see his children was a mitigating fact. (Report at pp. 77-79.) Reasonable investigation would also have revealed that petitioner had paid child support after he separated from Ms. DiNova, and that he continued to pay child support until he was committed to Camarillo State Hospital. (H.Exh. 3-H [*Patricia J. Hardy v. James E. Hardy]*; Report at p. 78.) Regarding petitioner's use of drugs, reasonable investigation would have shown that petitioner never used drugs in his children's presence and they never saw him under the influence of drugs. (HT 311, 313, 470, 480, 481.) Moreover, petitioner's drug use was related to his mental disorders and had a mitigating explanation. (HT 1615-1616.) Mr. Demby's purported reasons for not calling Ms. DiNova and Ms. Rodriguez, both powerful mitigation witnesses, were unreasonable and based on insufficient investigation. (Report at pp. 78-79.)

645. With respect to petitioner's sister, Linda Barter, Mr. Demby testified at the reference hearing that, at the time of trial, he believed she would not have made a good penalty phase witness. Again, Mr. Demby never spoke to her, but based this belief on a report written by Ms. Mulligan in which she stated that Linda did not want to talk to her and believed there was nothing they could do for petitioner. (H.Exh. 33.) Ms. Mulligan's

report does not indicate whether she spoke to Linda directly or whether the information in her report came from petitioner's mother, whom Mulligan was interviewing at the time. As stated above, Ms. Barter testified that nobody from the Public Defender's Office ever contacted her. (HT 950-951.) In any event, reasonably competent counsel would have attempted to make contact with Linda again, not in her mother's presence, and would have explained to her the ways in which she and others in the family could be helpful. Had someone spoken to Linda directly and explained the importance of her participation, she would have cooperated and provided the information to which she testified at the hearing. (HT 950-951.)

646. Mr. Demby testified at the reference hearing that Pat Stevens "would have made an excellent witness," but he did not want to call her at the penalty trial because he was afraid the jury would find out that she was a "call-girl," that she had introduced Carol Hardy to a pedophile, and that "subsequently this pedophile took pictures of Mrs. Hardy's daughters while they were scantily clad"; Mr. Demby testified that such testimony would have been inconsistent with "the theory I was using." (HT 2066-2067.) Neither of these purported justifications is a reasonable basis for not calling her as a witness. Neither fact would have impaired her value as a mitigating witness or reflected badly on petitioner. Indeed, the facts stated only reinforce her importance as a witness. Her involvement in prostitution corroborates the evidence that petitioner's mother worked as a prostitute as well. The evidence that she fostered a business relationship between petitioner's mother and a pedophile corroborated the evidence that petitioner's mother engaged in a pattern of exploitation of her own children. These facts were sympathetic to petitioner. Mr. Demby's failure to perceive the mitigating value of these two facts and their significance to petitioner's

mental health and social history revealed that he had not investigated petitioner's life sufficiently to make a rational decision regarding whether to call this witness. Ms. Stevens knew a great deal about petitioner and his family, especially petitioner's mother, that was available through no other source. The evidence she had to offer was important to the experts' and jury's understanding of petitioner. (Report at pp. 79-80.)

647. Mr. Demby's purported reason for not calling Judy Metoyer (Norwood) as a witness was that she was a former drug user who had participated in a drug rehabilitation program. Mr. Demby purportedly feared that petitioner's jury would think that she therefore was not a person of good character. (HT 2069-2070.) Mr. Demby also feared that her testimony would emphasize in the jurors' minds that petitioner was a drug user. These are not reasonable justifications for his decision not to call her. The fact that Ms. Metoyer was once addicted to drugs would have been excluded at trial; her character was not in issue and evidence of her former drug use would have been inadmissible. (See *People v. Cardenas*, *supra*, 31 Cal.3d 897, 906.) The fact that she was once addicted to drugs would not have affected her credibility as a witness. Even if evidence of Ms. Metoyer's former addiction had come in, there was a sympathetic explanation for her addiction. (HT 402-403.) However, due to inadequate investigation, Mr. Demby was not aware of that explanation. Whether or not the jury thought she was of good character was not material to the significance of her testimony – i.e., the effect of Bob's suicide on petitioner; the fact that he had been a good and caring friend to her and her daughter; and the impact of petitioner's execution on her and her daughter. Again, Mr. Demby evidently did not perceive the full significance and mitigating value of this evidence because he had not investigated petitioner's social

history and mental health sufficiently. Finally, given the fact that the jury already heard evidence that petitioner and many of his friends used drugs, the negative impact, if any, of Ms. Metoyer's former drug use would have been outweighed by the significance of Ms. Metoyer's testimony. (Report at pp. 80-81.)

648. The inadequacy of Mr. Demby's investigation, and concomitant unreasonableness of his strategic decisions, is further illustrated by the purported justifications he now advances for not calling Dave Shirley as a penalty phase witness: i.e., that Dave Shirley was on felony probation for possession of marijuana. (HT 2068.) Reasonable investigation would have revealed that Mr. Shirley was no longer on probation at the time of petitioner's trial; his probation had terminated successfully on April 12, 1981, almost a year and half before the start of petitioner's penalty trial. (H.Exh. 38; HT 2081.) Further, Mr. Shirley's possession of marijuana conviction would have been inadmissible for impeachment purposes. (See *People v. Spearman* (1979) 25 Cal.3d 107.) Accordingly, Mr. Demby's stated reasons for not calling Mr. Shirley were uninformed, were based on erroneous legal analysis and were unsupportable. (Report at pp. 81-82.)

649. Mr. Demby testified that he did not call Johnnie Leger because Ms. Mulligan reported that Ms. Leger had told her that petitioner could be easily influenced by his friends and Mr. Demby did not want the jury to hear this evidence. (HT 2064-2065.) Ms. Mulligan's report indicates that this is but one of the things that Ms. Leger told Ms. Mulligan. (H.Exh. 33.) Although Ms. Mulligan's report attributes this opinion to Ms. Leger, Ms. Mulligan's report would not have been discoverable by the prosecution at the time of petitioner's trial; therefore, the prosecution would

have had no reason to ask her for her opinion on the subject. Mr. Demby could have refrained from offering Ms. Leger's opinion if, as he testified, he did not want the jury to hear that petitioner was easily influenced by others. Finally, her opinion that petitioner was easily influenced by others was irrelevant to the evidence she had to offer – i.e., that petitioner was incapable of killing anyone, that he loves children and would never harm a child. Thus, Mr. Demby's reason for not calling Ms. Leger as a witness was unreasonable. (Report at p. 82.)

650. In several instances, Mr. Demby has attempted to justify his failure to call witnesses in mitigation on the ground that he wanted to keep from the jury particular statements contained in the reports of Ms. Mulligan's interviews of those witnesses. This rationale was unsound. Given Ms. Mulligan's lack of experience and training, it was unreasonable for Mr. Demby to rely on her reports as an accurate summary of the way in which the witnesses would testify after competent preparation. Reasonably competent counsel would have contacted the witnesses directly to ascertain whether particular problem statements were accurately reported or could be dealt with in a way that was not damaging to petitioner's case. To the extent that such statement were immutable, reasonably competent counsel would have called the witnesses but limited the scope of his direct examination to avoid particular danger zones. Moreover, as noted above, at the time of petitioner's trial, Ms. Mulligan's reports were not discoverable by the prosecution, so that the prosecution would not have been on notice of what questions to ask in order to elicit evidence damaging to the defense and the witnesses would not have been subject to cross-examination regarding prior inconsistent statements. Mr. Demby's attempt to justify his omissions by reference to damaging statements in Mulligan's reports was

unreasonable. (See Report at p. 82.)

651. Mr. Demby has not provided any reasonable justification for not investigating and presenting testimony from petitioner's other family members or friends concerning how petitioner's execution would affect them, for not apprising the jury of the fact that petitioner had two children and for not even eliciting such testimony from petitioner's mother when the prosecution called her as a witness at the penalty phase.

652. One of Mr. Demby's purported reasons for not presenting the testimony of petitioner's children at the penalty phase fail was that he feared that they would be "discredited by the prosecutor during cross-examination." (H.Exh. 43.) This was not a reasonable fear. It is not reasonable to assume that a prosecutor would gratuitously attack young children. (HT 2477.) Mr. Jonas did not attack petitioner's mother when she testified at the penalty phase, nor did he vigorously cross-examine the mitigation witnesses for petitioner's codefendant, Mr. Reilly. Mr. Demby's fear is therefore not supported by the record. (Report at pp. 82-84.)

653. Mr. Demby has also attempted to justify his failure to call petitioner's children at the penalty phase on the ground that he "did not believe that they had a lot of contact with [petitioner] in the last couple of years, that he was basically more interested in his lifestyle than in their welfare. And I thought that the jury might have assumed from that that he wasn't a good father to them." (H.Exh. 43.) This purported excuse also fails to justify Mr. Demby's inaction. Regardless of the amount of contact petitioner had with his children around the time of his trial, Mr. Demby could have called the children to testify about their love for their father, the important role he has played in their lives, and the impact that his execution would have on them. (Report at p. 83.) This evidence would have been

powerful mitigation, even if it had been true that petitioner was not always the perfect father. Moreover, Mr. Demby's belief that petitioner had shirked his duties as a father was incorrect and based on insufficient investigation. The fact that, at the time of trial, petitioner had been out of contact with his children was not of his own doing, but was a result of his ex-wife's relationship with her new boyfriend. Extensive evidence was available to show that petitioner had been a dutiful father until his ex-wife acceded to her jealous new boyfriend's demands to cut off petitioner's contact with his children. Due to the inadequacy of his investigation, Mr. Demby was unaware of this. Petitioner had paid child support regularly until he was committed to Camarillo State Hospital. Had Mr. Demby conducted an adequate investigation of petitioner's relationship with his children, he would have been in a position to meet any attack or argument by Mr. Jonas in this regard. (Report at p. 83.)

654. Neither Mr. Demby nor anyone working on petitioners case asked any potential witnesses about the impact that petitioner's execution would have on them or on other family members. Neither Mr. Demby nor anyone working for him on petitioner's case even attempted to contact petitioner's children. If, in fact, Mr. Demby made an affirmative decision not to call petitioner's children as witnesses for the reasons he has now stated, he could at least have informed petitioner's jury of their existence either through the introduction of documentary evidence, such as birth certificates, or by having them present in the courtroom and having them identified to the jury by petitioner's mother or former wife. (Report at pp. 83-84.) Neither Mr. Demby nor anyone working for him on petitioner's case attempted to obtain the birth certificates of petitioner's children, nor did he make any effort to have the children present in the courtroom.

655. As it was, Mr. Demby did not present testimony from any of petitioner's other family members or friends concerning how petitioner's execution would affect them. He did not even elicit this testimony from petitioner's mother when she was on the stand at the penalty phase. This indicates that Mr. Demby did not make a reasoned decision as to whether or not to present such evidence at the penalty phase. He had not investigated it and he did not even consider it.

656. Mr. Demby's decision-making at trial regarding whether to present evidence of petitioner's lifetime of hardship, trauma and loss was similarly based on insufficient investigation and unsupportable. Mr. Demby's purported reasons for not presenting any such evidence was that he felt such evidence would suggest to the jury that petitioner was guilty of the murders. (HT 1811-1812.) That rationale was unreasonable because it was made without the benefit of adequate investigation and without the advice of experts. (Report at p. 84.) Mr. Demby's failure to consult with any mental health experts left him uninformed regarding the significance of the evidence of petitioner's history and background. Had Mr. Demby consulted with qualified experts about petitioner's case, they would have explained to him the importance of information as to petitioner's reaction to the traumatic experiences and hardships he had experienced. Had Mr. Demby then gathered information of this nature and provided to the experts, he would have been informed (and would have presented to the jury) that petitioner's history suggested an aversion to violence. He would have learned that his fear that evidence of petitioner's background would suggest to the jury that petitioner was a murderer was unfounded. Petitioner's background suggested that he was unlikely to commit an act of violence such as the crimes charged. His inclination throughout his life had been to

shun violence, to react to trauma by turning inward and withdrawing rather than by becoming aggressive or violence toward others. A mental health expert, given full information regarding the events of petitioner's life and his behavior in response thereto, would have been able to demonstrate to the jury that petitioner did not have the background or profile of a killer, but that his psychiatric profile was such that it suggested that he could not have committed the killings. "Because Mr. Demby's reason for not presenting this evidence was uninformed, it was unsupportable. Even given the information Demby had, his decision to present *no* mitigating evidence about petitioner's background and history was unsupportable." (Report at p. 85, emphasis in original.)

657. At the reference hearing, Mr. Demby attempted to justify his inaction with respect to the evidence of petitioner's prior conviction by stating that he intended to "minimize" the evidence through cross-examination and argument. (HT 1812.) However, at the time Mr. Demby decided on this approach, he was unaware of the evidence which was available to mitigate the incident. Again, his unawareness was due to the insufficiency of his investigation. (Report at p. 86.) He failed to interview petitioner's mother, brother or Steve Rice, who were present at the time of the incident, to determine what they had observed. He failed to gather any records regarding the incident. Although he knew that the incident occurred at petitioner's family's home and involved his mother and brother, he failed to investigate the family dynamics and relationships or family history which influenced the situation. His "decision" not to present the available mitigation in this regard was uninformed and unsupportable. Furthermore, Mr. Demby's ad hoc cross-examination of Mrs. Hardy as well as his subsequent closing argument were both ineffective in mitigating the

incident. Mr. Demby's strategy for dealing with the August 6, 1980, incident was ineffective and fell below the standard of care of reasonably competent attorneys trying capital cases during the relevant period of time. (HT 2523-2525, 2466, 2470-2473, 2519, 2521; Report at pp. 87-88.)

658. Mr. Demby's purported justifications for not consulting with any mental health experts were specious. In spite of the fact that he never consulted any mental health experts, and so did not know what opinions they could offer, he claimed at the reference hearing that he did not present any expert testimony because he believed that such evidence would cause the jury to conclude with greater certainty that petitioner committed the murders in this case. (HT 2037-2038.) The evidence presented at the reference hearing demonstrates that Mr. Demby's reasoning was not only utterly uninformed but was also wrong. The testimony of the mental health experts at the reference hearing was *not* inconsistent with, but was in fact supportive of, a claim of innocence or lingering doubt. Because Mr. Demby never consulted any mental health experts, he was not aware of what expert testimony he was choosing not to present. (HT 2569.)

659. Mr. Demby's failure to consult or retain mental health experts was not the product of financial constraints. (HT 1789, 1790.)

660. Mr. Demby attempted to justify his failure to have petitioner examined by a psychiatrist on the ground that petitioner consistently maintained that he did not commit the murders and Mr. Demby believed that any evidence an expert could offer would undercut his lingering doubt argument at the penalty phase by causing the jury to conclude with even more certainty that petitioner committed the murders as charged. (HT 2037-2038.) Mr. Demby testified that, if petitioner had stated that he had committed the murders or that he had been at the murder house, Mr. Demby

would have had him examined by a psychiatrist. (HT 2037.) This purported justification for Mr. Demby's failure to investigate was unreasonable. (Report at p. 91.) Reasonably competent counsel would have known that some mental health expert testimony, such as that presented at the reference hearing herein, is not inconsistent with innocence or lingering doubt but can in fact bolster a claim of innocence or lingering doubt. (HT 2470-2472, 2480, 2515-2516; Report at pp. 91-92.) The fact that petitioner denied participation in the crime in no way eliminated the potential availability of relevant mitigating mental health evidence. (Report at p. 90; see also *State v. Wright* (1994 Del. Super) 653 A.2d 288, 299.) Mr. Demby's stated reasoning does not justify his failure to have petitioner examined by a mental health expert and to conduct a complete and thorough investigation of possible mental defenses. (Report at p. 91; see also *People v. Ledesma*, *supra*, 43 Cal. 3d at p. 222.; *People v. Mozingo* (1983) 34 Cal.3d 926, 934.)

661. Mr. Demby attempted to justify his failure to consult any mental health expert regarding the significance of petitioner's Camarillo hospitalization on the ground that he believed petitioner's hospitalization was due to a drug-induced psychosis and that it was therefore not favorable. (H.Exh. 44.) However, records in Mr. Demby's files reflected that, although petitioner was admitted to Camarillo State Hospital with a diagnosis of Drug Induced Psychosis, he was released from Camarillo State Hospital with a diagnosis of Undifferentiated Schizophrenia. (H.Exh. 8.) Given the change in diagnosis, Mr. Demby's assumption that petitioner's hospitalization signified nothing other than a drug-induced psychosis was unreasonable, as was his failure to consult a mental health expert before making any decision regarding the value of the records as mitigation. (HT

2469-2470; Report at p. 91.) Moreover, his decision was made on the basis of an incomplete set of records from Camarillo State Hospital and therefore was based on insufficient investigation. (HT 1530; Report at p. 91.)

662. Mr. Demby claimed that his decision not to pursue any explanation for petitioner's drug use or any evidence suggesting that petitioner suffered from symptoms of mental illness was based on his assumption that jurors do not like drug users or the insane and his fear that the jury would view evidence of petitioner's symptoms of mental illness as evidence of guilt. (HT 1819, 1852; Report at p. 93.) Mr. Demby acknowledged that he told respondent prior to the hearing that "if jurors feel defendants are truly insane and dangerous, they want to convict them and give them the death penalty in order to keep them off of the street." (HT 1792; Report at p. 93.) Mr. Demby made this assumption without ever before having tried a death penalty case and therefore having no prior experience with jurors' behavior or attitudes at a penalty phase. (HT 1658.) Assuming, arguendo, that Mr. Demby in fact believed prior to trial that all jurors took such a negative view of drug users and the mentally ill, it was even more imperative that he determine whether a sympathetic and mitigating explanation for petitioner's behavior and drug use was available. (Report at p. 93.) Mr. Demby knew that the jury was likely to hear evidence of petitioner's drug use and odd behavior from prosecution witnesses at the guilt phase and that, by the penalty phase, petitioner's jury would be aware that petitioner was a drug user. Nevertheless, Mr. Demby never consulted any expert in this or any other regard. Mr. Demby's failure to consult constitutes deficient performance. (Report at p. 94.)

663. Mr. Demby's decision not to investigate or present mitigating evidence pertaining to petitioner's drug use was also purportedly based on

the assumption that presenting no such mitigation would prevent Mr. Jonas from arguing to the jury that petitioner used drugs to embolden himself and to commit the murders. (HT 1820.) That reasoning was also specious. Evidence of petitioner's drug use had been presented at the guilt phase through prosecution witnesses, and the prosecutor had made that very argument at the guilt phase. (RT 12857, 12869, 13041.) Mr. Demby's rationale provides no justification for not investigating and presenting at the penalty phase evidence mitigating petitioner's drug use. Moreover, the fact that Mr. Jonas made this argument militated in favor of presenting evidence at the penalty phase to mitigate or rebut that argument.

664. In any event, Mr. Demby's claim that he made an affirmative decision not to pursue an explanation for petitioner's drug use rings hollow. Mr. Demby knew long before trial that evidence of petitioner's drug use and his symptoms of mental illness was likely to be presented by the prosecution at the guilt phase. Had he entertained the reasoning he has claimed, one would expect that he would have asked questions of prospective jurors on voir dire regarding their views on mental illness or drug users; he did not do so. (Report at p. 93.) If Mr. Demby were in fact concerned about the jury's negative views toward drug users, one would reasonably expect that he would have made efforts to obtain an order excluding or limiting the evidence of petitioner's drug use at the guilt phase, a request to which he may well have been entitled.[68] This he did not do. Accordingly, it is more likely that Mr. Demby simply did not

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[68]See *People v. Cardenas*, supra, 31 Cal.3d at p. 906 ["The rule applicable here is that evidence of an accused's narcotics addiction is inadmissible where it 'tends only remotely or to an insignificant degree to prove a material fact in the case . . . .'"]

understand how evidence of petitioner's drug use could be mitigated: he assumed that the only relevance of expert testimony regarding drug use was to support a claim of diminished capacity (see, e.g., HT 1791) and he arrived at his claimed justifications after trial, in response to the allegation of ineffectiveness. In any event, his failure to investigate and consult in this area constitutes deficient performance. (HT 2490, 2496, 2497; see also *Lankford v. Foster* (W.D. Va. 1982) 546 F.Supp. 241, 248.)

665. Mr. Demby has also claimed that his decision not to investigate or present mental health expert evidence was based on the fear that evidence offered to mitigate petitioner's drug use or to show that petitioner was mentally ill would be used by the jury against petitioner. (Report at p. 94.) That reasoning was also unsupportable. While petitioner's jury was free to accept or reject defense evidence concerning petitioner's drug use as mitigating evidence, neither the jury nor the prosecutor could use such evidence against petitioner in aggravation.[69] (Report at p. 94.) Also, if Mr. Demby feared that petitioner's jury might use this evidence against petitioner, he could have requested jury instructions telling the jury that any evidence concerning petitioner's mental health symptoms and/or use of drugs and alcohol could only be used as mitigating evidence.[70] (Report at p. 94.) In any event, Mr. Demby's failure to

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[69]See, e.g., *People v. Lucas* (1995) 12 Cal. 4th 415, 491, 494; *People v. Wader* (1993) 5 Cal.4th 610, 658-659; *People v. Cox* (1991) 53 Cal.3d 618, 673; *People v. Gallego* (1990) 52 Cal.3d 115, 208-209 (conc. opn. of Mosk, J.); *People v. Whitt* (1990) 51 Cal.3d 620, 654; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Adcox* (1988) 47 Cal.3d 207, 270; *People v. Davenport* (1985) 41 Cal. 3d 247, 288-290.

[70]As a general rule, it is presumed that the jury will understand and (continued...)

undertake reasonable and minimally competent consultation and investigation constitutes deficient performance.

666. Mr. Demby testified at the reference hearing that he feared that, if he put on a case in mitigation relying on psychiatric evidence, "the district attorney would have called somebody like Dr. Markman or somebody else to testify to counter the theory. I thought if I put that type of information on, the district attorney could use it against me." (HT 2088.) However, because Mr. Demby did not consult any experts or otherwise investigate the possible mental health evidence in petitioner's case, he had no knowledge what the possible theories might be and therefore could not possibly have determined whether "Dr. Markman or somebody else" could or would counter the defense theory. Moreover, at the reference hearing, respondent's counsel did not present any evidence "to counter the theory," or to establish that Dr. Markman or any other expert would have been available to rebut petitioner's evidence. Respondent's counsel had a purported psychiatric expert, Dr. John Stalberg, attend the reference hearing to assist and advise him. (See HT 1215.) Dr. Stalberg did not testify at the hearing, nor did respondent indicate any desire to call him as a witness. Respondent's counsel stands in the shoes of the prosecution. (*In re Fields* (1990) 51 Cal.3d 1063, 1071.) There is no evidence to support any claim by Mr. Demby or by respondent that the opinions provided by petitioner's mental health experts at the hearing could or would have been rebutted.

667. As stated above, Mr. Demby's claimed reasons for not consulting with any mental health experts are insupportable. As a result of

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[70](...continued)
follow such admonitions or instructions. (See *People v. Danielson* (1992) 3 Cal.4th 691, 722, and cases cited therein.)

his failure to consult with any such experts, his "decision" not to present expert testimony at the hearing was uninformed and unjustifiable, as he was unaware of what he was foregoing. (Report at p. 88; HT 2515; see *In re Saunders* (1970) 2 Cal.3d 1033, 1048-1049; see also *People v. Frierson* (1979) 25 Cal. 3d 142, 162-163; *Hill v. Lockhart*, *supra*, 28 F.3d at p. 845; Report at p. 88.)

668. In spite of the various purported justifications which Mr. Demby has advanced, the evidence presented at the reference hearing indicares that, at the time of the penalty phase, he did not in fact have any coherent penalty phase strategy and that many or all of the strategic considerations which he has advanced post-conviction were arrived at post-conviction as well. As noted above, Mr. Demby's investigation of mitigating evidence had, for all intents and purposes, ceased well over a year prior to the commencement of penalty phase. At the penalty phase, Mr. Demby did not request any instruction addressing the concept of lingering or residual doubt as a basis for a sentence less than death, nor did he mention either term in his closing argument. If Mr. Demby had in fact feared at the time of trial that mitigation would be taken by the jury as evidence of guilt or evidence in aggravation, he would have voir dired the jury to identify and remove potential jurors who indicated that they would be unable to follow the law and would use evidence of a defendant's difficult background as evidence of guilt. Mr. Demby failed to do so. Nor did he request any jury instructions at the penalty phase to guard against the misuse by the jury of the small amount of background evidence that he elicited during his cross-examination of Mrs. Hardy. In addition, as found by the referee in his report, Mr. Demby's cross-examination of petitioner's mother further belies his claimed strategic reason for not offering any

evidence in mitigation, as he elicited from Mrs. Hardy brief references to many of the matters he now says he did not want to present to petitioner's jury out of fear that such evidence would suggest to the jury that petitioner was guilty of the murders. (Report at p. 85.) Moreover, he asked questions of her on cross-examination that arguably would have opened the door to bad character evidence. This belies Mr. Demby's claim that he chose not to ask about "anything good" about petitioner because he was afraid that the witnesses would say "something bad" about him. (HT 2071.) Rather than entertaining the strategic reasoning he now professes, the evidence indicates that Mr. Demby's investigation was so lacking that he had essentially no choice but to proceed without presenting any evidence at the penalty phase. He was unaware of what evidence was available, so that his failure to investigate made the choice for him. (See, e.g., Earley, HT 2533, 2571.)

669. Petitioner does not question the appropriateness of a decision to maintain a claim of innocence throughout the trial, since the evidence supports the position that petitioner was not the killer. However, the fact that Mr. Demby chose such an approach without conducting an adequate investigation of the killings themselves, as well as Mr. Demby's decision not to present any mitigating evidence, in spite of the fact that wealth of mitigation consistent with innocence was available, was truly unreasonable and professionally indefensible.

E. Prejudice

670. Petitioner's jury was unable to make an "individualized" sentencing decision, one based not only on the prosecutor's version of the case, but on who petitioner truly was. The were provided far from a complete or accurate picture of petitioner, but instead received only the prosecutor's one-sided presentation upon which to evaluate petitioner's

character, a presentation which, by design, portrayed petitioner as an unmitigated monster with no redeeming qualities. The prosecutor argued that petitioner had the character traits of the killer: he was violent, uncaring and cold-hearted. The prosecutor argued that petitioner's conduct "wasn't because of some mental immaturity or mental problem or psychological difficulty [because] if any of that had existed, you would have heard about it." (RT 14048.) He elicited from petitioner's mother evidence to the effect that petitioner had "had some problems with a drug called angel dust" (RT 13954), and argued that petitioner's use of alcohol and drugs on the night of the killings, rather than being a mitigating factor, enabled petitioner to commit the crimes and to establish an alibi (RT 14038, 14051). The prosecutor made repeated reference to petitioner's attitude (RT 14036, 14051) and "nature" (RT 14051), arguing that petitioner was unremorseful. (RT 14021, 14034.) The prosecutor pointed to petitioner's fight with his brother and argued that this incident showed that petitioner had a propensity for violence and a violent nature (RT 14025, 14034, 14045, 14047, 14051); that his mother's request for various conditions of petitioner's probation showed that, "force or violence was a part of Mr. Hardy's conduct in life at that particular time, to the point that Mrs. Hardy became very, very concerned" (RT 14045); that the incident showed that petitioner was capable of becoming "fixed . . . in that violent moment," and going into "some type of trance-like state," and commit extreme acts of violence calmly and unemotionally (RT 14034, 14038) as if he "had sat down to a meal" (RT 14034), which indicated that it was possible for him to commit the charged killings. (RT 14034, 14038.) The prosecutor argued that petitioner lacked respect for himself and for others (RT 14036, 14040) and that he lacked a conscience (RT 14036). The prosecutor further argued

that, when confronted by the police in front of his mother's apartment complex, petitioner wanted violence and "serious injuries" to result. (RT 14041.)

671. Reasonably competent counsel would have presented at least some of the wide variety of mitigating evidence which was available at the time of petitioner's trial in order to counter or forestall the prosecutor's evidence and argument. Instead, all petitioner's jury heard was Mr. Demby's very brief penalty phase closing argument. This argument, which occupies only 11 pages of reporter's transcript, did virtually nothing to make up for his failure to present any mitigating evidence on petitioner's behalf.

672. The only information presented by Mr. Demby at the penalty phase of petitioner's trial consisted of his desultory cross-examination of petitioner's mother, who had been called by the prosecutor to testify concerning petitioner's altercation with his brother John. (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 127.) Mr. Demby's cross-examination of Mrs. Hardy occupies approximately three pages of reporter's transcript and elicited brief (and often unfocused) responses on each of the following: petitioner blamed himself for his brother Bob's suicide; petitioner jumped off of a cliff shortly after Bob's suicide, was hospitalized and subsequently lost his job at R.T.D.; petitioner used drugs; petitioner had emotional and mental health problems; petitioner's marriage had failed; petitioner had attended an Outward Bound Program; and petitioner liked hiking and camping. (RT 13956-13959.) The evidence presented at the reference hearing showed that Mr. Demby did little or nothing to prepare petitioner's mother for her testimony (Report at p. 87; see also HT 666), and the "consequence of this minimal preparation is plainly evident." (*Cunningham*

v. Zant (11th Cir. 1991) 928 F.2d 1006, 1017.) Furthermore, Mr. Demby never once referred to petitioner's mother's testimony in his closing argument, "thereby failing to place this evidence squarely in front of the jury." (*Cunningham v. Zant*, *supra*, 928 F.2d at p. 1018.)

673. Mr. Demby's cross-examination of petitioner's mother raised more questions in the minds of the jurors than it answered. Moreover, the value of her testimony, if any, was undermined by Mr. Demby's failure to present any of the corroborating evidence which was presented at the reference hearing. As a consequence, this "case is more akin to those cases in which no mitigating evidence was put on." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044; see also *Smith v. Stewart* (9th Cir. 1999) 189 F.3d 1004, 1011; *Commonwealth v. O'Donnell* (Pa. 1999) 740 A.2d 198, 214, fn. 13.) In sum, "the family portrait painted at the [reference] hearing was far different from the unfocused snapshot handed the superior court jury [by trial counsel]." (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081.)

674. Because of Mr. Demby's incompetence and inaction, the jury never heard critical evidence pointing to petitioner's innocence of the actual killings. Because of Mr. Demby's incompetence, the prosecutor's characterization of petitioner as violent, hateful, angry, dangerous, cold, uncaring and subhuman went unchallenged.

675. Because Mr. Demby's deficient performance deprived petitioner's jury of critical mitigating evidence regarding the circumstances of the offense and petitioner's character and background, the jurors could not focus on petitioner's unique characteristics in its deliberations, and its penalty determination became a foregone conclusion. Mr. Demby's deficient performance never subjected the prosecution's case to

"meaningful adversarial testing" and this resulted in a total breakdown in the adversary system which is reversible per se. (*United States v. Cronic*, (1984) 466 U.S. 648, 659; *Kubat v. Thieret* (7th Cir. 1989) 867 F.2d 351, 369.)

676. Reversal is also required under the less stringent test of *Strickland v. Washington* (1983) 466 U.S. 668, because there is a reasonable probability that, but for Mr. Demby's deficient performance, the result of the proceeding would have been different. (*Id*. at p. 694.) Here, it is impossible to have any confidence in the reliability of the penalty verdict in petitioner's case. The jurors knew practically nothing sympathetic about petitioner; what little they knew about him came almost exclusively from the prosecutor's one-sided presentation. Moreover, many of the negative things the jurors had heard about petitioner, and upon which they undoubtedly relied, were false.

677. All of the evidence that was presented at the reference hearing was readily available to Mr. Demby at the time of petitioner's trial but, due solely to his ineffectiveness, was not presented at trial. (See Report at pp. 94-95.) Mr. Demby's failure to present "the abundant and available background evidence on [petitioner] in any credible form fully satisfies the prejudice required under *Strickland*." (*Hendricks v. Calderon*, *supra*, 70 F.3d 1032, 1045; see also *Bean v. Calderon*, *supra*, 163 F.3d 1073, 1081; *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154, 1157; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 651.)

678. Mr. Demby's failure to present the available mitigating evidence at petitioner's trial distorted the balance of aggravating and mitigating circumstances. At petitioner's penalty trial, the prosecution relied on two types of aggravating evidence: the circumstances of the

offense and petitioner's two misdemeanor convictions stemming from the altercation he had with his brother. The prosecution's aggravating evidence is not sufficient by itself to negate the reasonable probability that a jury presented with the available mitigating evidence would not have sentenced petitioner to death. (Compare *Bean v. Calderon*, *supra*, 163 F.3d 1073, 1081.) Furthermore, the mitigating evidence that was presented at the instant reference hearing not only presents a sympathetic picture of petitioner, it also undermines significant aspects of the prosecution's case against him. (See *Brown v. Myers*, *supra*, 137 F.3d at p. 1157 ["The missing testimony . . . would have altered significantly the evidentiary posture of the case."].)

679. Petitioner has established prejudice by demonstrating that Mr. Demby unreasonably failed to investigate and present substantial, credible mitigating evidence. Faced with the storehouse of available mitigating evidence, "it is very likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" (*Bean v. Calderon*, *supra*, 163 F.3d 1073, 1081, quoting *Strickland v. Washington*, *supra*, 466 U.S. 668, 695-696.)

680. The judgment must be reversed.

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XVI

PETITIONER'S TRIAL ATTORNEY PROVIDED INEFFECTIVE REPRESENTATION AT THE PENALTY PHASE OF PETITIONER'S TRIAL

681. Petitioner's death sentence and confinement are unlawful and were obtained in violation of the his rights to the effective assistance of counsel, to due process and a fair trial, to confrontation of witnesses, to present a defense, to a jury trial, to a fair, individualized, reliable and/or nonarbitrary guilt and penalty determination and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, section 1, 7, 13, 15, 16 and 17 of the California Constitution in that Michael Demby's conduct at the penalty phase of petitioner's trial was prejudicially deficient. (*Strickland v. Washington* (1984) 466 U.S. 668; United States v. Cronic (1984) 466 U.S. 648; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Horton v. Zant* (11th Cir. 1991) 942 F.2d 1449, 1462; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.)

682. To the extent that Mr. Demby's conduct was purportedly based on strategic considerations, those considerations do not bear constitutional scrutiny. Before an attorney can make a reasonable strategic decision, he must obtain the facts needed to make an informed decision; an attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 690-691; see also *Griffin v. Warden, Maryland Correctional*

Adjustment Center (4th Cir. 1992) 970 F.2d 1355, 1358 [deficient performance by counsel may in fact deprive him/her of the ability to make a strategic or tactical decision]; *Horton v. Zant* (11th Cir. 1991) 941 F.2d 1449, 1462 [a "strategic" decision cannot be reasonable where the attorney has failed to investigate his options and make a reasonable choice between them].)

683. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's rights to due process, a fair trial and a reliable death judgment have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358.)

684. This claim conforms the pleadings to the testimonial and documentary evidence presented and/or proffered at the reference hearing. Apart from those facts which derive from the declarations of petitioner's jurors, the facts underlying this claim were presented at the reference hearing held pursuant to this Court's order to show cause. The following facts were relevant to the order to show cause and reference questions, supportive of the claim that petitioner was deprived of the effective assistance of counsel at the penalty phase and admissible at the reference hearing on that issue. However, these facts also established a factual basis for the present claim.

685. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all

exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

686. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

687. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

688. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. To the extent that some facts underlying this claim were proffered solely by means of sworn declarations, at or before the reference hearing herein, the referee improperly prevented counsel from presenting direct testimony with respect thereto. The referee's rulings excluding such evidence denied petitioner of a full and fair hearing. Petitioner hereby incorporates by reference as if fully set forth herein Claim XXII, *infra*. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

689. Mr. Demby unreasonably, unjustifiably and prejudicially failed to object to highly prejudicial and improper comments and/or

statements made by the prosecutor during the penalty phase, including, but not limited to, those set forth in Argument XXIX of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal and those set forth above in Claims VII and XI, *supra*. For example:

A. The prosecutor stated improperly that he had an obligation to present mitigating evidence, thereby implying that he would have presented any mitigation regarding petitioner if any existed. Mr. Demby unreasonably failed to object. Contrary to this Court's finding on automatic appeal (see *People* v. *Hardy*, *supra*, 2 Cal.4th at p. 210), Mr. Demby did not present any mitigating evidence on petitioner's behalf. As a result, the jury gleaned from the prosecutor's comments that the reason no mitigation was presented on petitioner's behalf was that none existed.

B. The prosecutor improperly offered the jury his own personal opinion that petitioner deserved the death penalty and suggested that the jury should accept his conclusion because of his additional knowledge and experience and because he was aware of facts outside the record which militated in favor of the death penalty.

C. The prosecutor improperly advised the jurors that they could properly consider as an aggravating circumstance petitioner's lifestyle of "hedonism."

D. The prosecutor improperly implied that the absence of any evidence of extreme mental disturbance or moral justification was an aggravating factor. (*People v. Davenport* (1985) 41 Cal. 3d 247, 288-290.)

E. The prosecutor improperly urged the jury to consider nonstatutory aggravating evidence, including alleged threats to the Sportsmans and alleged requests that various witnesses lie under oath, in violation of *People v. Boyd* (1985) 38 Cal.3d 762, 775-776.

F. The prosecutor improperly argued that the jury was legally obligated to vote for the death penalty if it found that aggravation outweighed mitigation, improperly directing the jury that a death sentence would be mandatory under those circumstances and diffusing the jury's sense of responsibility for its verdict.

G. The prosecutor's argument conveyed to the jury that it should not consider sympathy, mercy or pity for petitioner in determining how to vote at the penalty phase and that petitioner had already received more than he deserved of sympathy, mercy, pity and "due process."

H. The prosecutor improperly argued that an aggravating factor against petitioner was that he had not expressed remorse.[71] Under the

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[71]In his penalty phase closing argument, Mr. Jonas argued as follows:

> "The one thing that can be said for Mr. Reilly is that at one point in time a few days after that crime there was some sense of at least shedding, getting it off, with a repentant attitude, perhaps a wish in his mind that it hadn't have happened; that it was terrible; it was a horrible occurrence, something that he couldn't cope with and had to get rid of it some way. 'You don't know what it's like to stab somebody,' the attempt to get some type of solace or comfort from somebody else, which is a natural human response.
>
> "Not once do you ever have that type of response from Mr. Hardy. And, ladies and gentlemen, I submit to you that, that is extremely frightening because it shows two things, one a total lack of care from himself as a human being, a lack of care for himself as an entity, and if you don't care for yourself, it's very difficult to care from someone else. And secondly, that shows a total lack of respect for the human as an individual. And he can go jump off a cliff. He can go stab a young boy. He can stab the mother. He can make love to Colette. And it's all the same. It's all the same. There is no

(continued...)

federal Constitution, no adverse inferences may be drawn from defendant's silence at sentencing. (*Mitchell v. United States* (1999) 526 U.S. 314; *Estelle v. Smith* (1981) 451 U.S. 462-463.)

I. Knowing that petitioner had been committed to a psychiatric hospital and diagnosed as Chronic Undifferentiated Schizophrenia, the prosecutor argued that petitioner had never suffered from any emotional or psychological difficulty.

690. Mr. Demby failed to attempt to introduce at the penalty phase the fact that Colette Mitchell was subjected to repeated polygraph examinations by the prosecution and was falsely informed that the results showed she was lying. Mr. Demby consulted a polygraph expert, who reviewed the tape recording and data from the police polygraphs of Ms. Mitchell. Mr. Demby's expert concluded that the results indicated that Ms. Mitchell was deceptive on all points, which in turn indicated either that she was the stabber or that she was an unfit subject for the polygraph. (Appendix 23.) Reasonably competent counsel would have attempted to present at the penalty phase the fact that Ms. Mitchell had been subjected to the polygraph and the analysis of the results by an independent expert to show that her testimony at trial was false and was the product of coercive police tactics.

691. Fundamental capital jurisprudence extant at the time of

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[71](...continued)
conscience, no remorse. 'It's what I want to do. It's what my attitude tells me to do,' or 'I'm mad about this. This is what I'm going to do. This is what I'm going to take. I'm doing it.'

"And I submit to you, ladies and gentlemen, that our law provides for that type of attitude." (RT 14035-14036.)

petitioner's trial established the need for individualized consideration as a constitutional requirement in imposing the death sentence. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 ["in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."].) Hence, the jury's focus must be on the particular defendant's culpability, not on that of his codefendants. (*Enmund v. Florida* (1982) 458 U.S. 782, 798.) Moreover, to comply with the strictures of the United States Constitution, the unique finality of the death penalty requires a reliable determination of the appropriateness of the penalty: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

692. Had Mr. Demby renewed his motion for severance prior to the commencement of the penalty phase, and supported that motion with the following authorities and argument, petitioner would have been entitled to a separate penalty trial. If the trial court had erroneously denied such a motion, petitioner would have been entitled to a reversal of the judgment on appeal, because as the joint trial was in fact prejudicial.

A. In a joint penalty trial, petitioner would not (and did not) receive the individualized and reliable penalty determination to which he was entitled. In such a proceeding, the jury's examination of petitioner's

codefendants' culpability was highly likely to (and in fact did) influence its assessment of the petitioner's culpability, thereby infecting the jury's determination with impermissible, irrelevant and/or unreliable considerations. (See *Beck v. Alabama* (1980) 447 U.S. 625, 642.) For example, mitigation presented on behalf of petitioner's codefendant, Reilly, was likely to (and in fact did) inure to petitioner's detriment: to the extent that the jury accorded mitigating weight to codefendant Reilly's evidence, petitioner's case in mitigation was correspondingly weakened and the jury became more biased against petitioner who appeared to have no excuse for his conduct. (See appendix 12.) Accordingly, the joint trial was likely to, and in fact did, produce an effect analogous to that which was found impermissible by this Court in *People v. Davenport, supra,* 41 Cal.3d at pp. 288-290.

B. A joint penalty trial was also likely to violate petitioner's right against self-incrimination. The evidence suggested that codefendant Reilly was remorseful for his participation in the charged crimes. (See RT 7358-7364, 7369, 7727, 7835.) Petitioner, on the other hand, maintained his innocence prior to and during trial; he did not express remorse for the crime as he denied participation in it. Given a joint penalty trial, however, the likely outcome was that the jury would consider petitioner's failure to express remorse as aggravation. The Fifth Amendment right against compelled self-incrimination applies with undiminished force to the penalty phase of a capital trial. (*Estelle v. Smith*, *supra*, 451 U.S. at p. 463; see also *Mitchell v. United States*, *supra*, 526 U.S. 314.) Accordingly, any adverse consideration by a sentencing jury of a capital defendant's failure to incriminate himself – whether by cooperating with the police investigation, confessing to his role in the offenses charged

or expressing remorse either before or after conviction – violates that defendant's Fifth Amendment rights (*Carter v. Kentucky* (1981) 450 U.S. 288; *Griffin v. California* (1965) 380 U.S. 609), and, by extension, his Eighth Amendment rights as well. (*Zant v. Stephens* (1983) 462 U.S. 862, 885 [suggesting that the Eighth Amendment is violated by the state's attachment of "aggravating" label to defendant's assertion of constitutional right].)

C. A joint penalty trial also effectively invites the jury to compare the defendant's relative participation in the crime. This risk was particularly strong in petitioner's case, where the jury was instructed that "minor participation" in the offense was a factor to be considered in assessing penalty, but was not told that this factor could be considered only as mitigation and its converse could not be considered aggravating. The jury instructions thus invited the jury to assess who had the greater role in the crime and to consider that person to be more deserving of the death penalty. The prosecution's theory was that petitioner was the actual killer, whether or not codefendant Reilly participated in the killing, and thus this comparative analysis was likely to inure to petitioner's detriment. Again, evidence which is properly only mitigating as to one defendant becomes de facto aggravating as to the other.

D. At a joint penalty trial, the jury would also be likely to accord more weight than it would at a separate trial as to evidence in aggravation presented as to petitioner if no similar aggravating evidence was presented against petitioner's codefendants. Again, this in fact occurred here, as petitioner's prior conviction was viewed as aggravating evidence against petitioner and no similar aggravating evidence was presented against codefendant Reilly.

693. Mr. Demby failed to object to the trial court's statement in chambers to Juror Hernandez, which effectively instructed him that the jury was not permitted to consider sympathy for the defendants during penalty deliberations. Petitioner hereby incorporates by reference the facts set forth in paragraph 785, *infra*.

694. Mr. Demby's performance fell below the level of reasonable competence insofar as he failed to request instructions on lingering doubt and failed to tell petitioner's jury that they could consider lingering doubt as a factor in mitigation in making their penalty determination. (See HT 2485; 2501.)

695. Mr. Demby failed to request instructions that evidence of his background could not to be used in aggravation. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776.) The instructions given permitted the jury to consider petitioner's background, character and lifestyle as aggravating.

696. Mr. Demby failed to request that the jury be instructed at the penalty phase that no adverse inference could be drawn from petitioner's failure to testify.

697. Mr. Demby failed to request instruction clarifying the extent to which jury could consider sympathy and sentiment in penalty decision. Nothing explained that they could be influenced only by sympathy for defendants, not by sympathy for victims. As a consequence of this, as well as the improper comment by the trial court to juror Hernandez, instructing him that sympathy could not be considered, jurors excluded sympathy from their consideration during penalty deliberations. (Appendix 12, 46.)

698. Mr. Demby failed to the instruction informing jurors that, if they found aggravation outweighed mitigation, they were required to vote for the imposition of the death penalty. This instruction was erroneous and

its prejudice was compounded by the prosecutor's argument to the jury at the penalty phase that "once you get to the particular point [where aggravation outweighs mitigation], there's only one penalty that can be imposed, and that is the death penalty." (RT 14016). He argued, "once you cross the line, you are obligated . . . by the law . . . to return a verdict of death." (RT 14054.) Contrary to this Court's prior holdings in this and other cases, at least some of petitioner's jurors in fact interpreted this instruction literally and believed that they were compelled to vote for the death penalty if aggravation outweighed mitigation.

699. Mr. Demby failed to object to the allegation and finding of two multiple murder special circumstances. On automatic appeal, this Court found it unlawful to impose two multiple murder special circumstances and one of the two. However, the jury considered both multiple murder special circumstances as aggravating circumstances, thereby skewing their assessment of the relative weight of aggravation and mitigation. Accordingly, the error was prejudicial.

700. Mr. Demby's closing argument at the penalty trial was deficient under then prevailing professional norms. He failed to articulate competently the concept that jurors should vote for life without the possibility of parole if they had any doubt regarding petitioner's guilt. He failed to argue that sympathy was a permissible consideration, or articulate any basis for such sympathy. In addition to his failure to deliver any meaningful content, his argument was devoid of emotional impact and failed to impart upon the jury the significance of the decision that they were being asked to make. His argument was ineffectual and ineffective. (HT 2488-2489, 2503-2504.)

701. Mr. Demby failed to present the evidence in mitigation of

which he was aware. Even with the constitutionally inadequate investigation that Mr. Demby had conducted, he was aware that petitioner had suffered a difficult life, that he had two children, that he had been diagnosed with mental illness, and that he had attempted to thwart a robbery on his bus in 1979. Even with the information he had, a purported strategy to present no evidence in mitigation at the penalty phase was unjustifiable.

702. Mr. Demby abdicated his responsibility to petitioner by arguing against him on his request to represent himself and by calling petitioner a liar at the hearing thereon. (See *Ferguson v. State* (Miss. 1987) 507 So. 2d 94.) Furthermore, during the hearing, petitioner made clear that it was his fervent desire to present evidence in mitigation at the penalty phase. Mr. Demby's refusal to do so violated his ethical responsibility and duty of loyalty to petitioner. (Duty of Loyalty -- ABA Model Rules of Professional Conduct, comment to Rule 1.7: "Loyalty is an essential element in the lawyer's relationship to a client.") At the reference hearing, Demby claimed that petitioner's repeated *Marsden* motions and request to represent himself were simply a ruse, designed to inject error into the record, and that Mr. Demby simply went along with petitioner, although, in his estimation, petitioner did not truly believe that his representation was deficient. To the extent that Mr. Demby accurately depicted his interpretation of these events, his "collusion" in petitioner's purported attempt to perpetrate a fraud on the trial court was also unethical. Mr. Demby's conduct violated petitioner's right to counsel.

703. In the months leading up to the trial, Mr. Demby and his staff conducted minimal guilt investigation and totally ceased any penalty phase investigation. Nevertheless, Mr. Demby repeatedly requested continuances and based those requests on the claim that investigation was ongoing.

Petitioner, not surprisingly, became increasingly frustrated and angry at Mr. Demby, seeing month after month of continuance requests, with little or no work being done. (HT 2492.) Petitioner's statements at the *Faretta* hearing reveal that petitioner wanted a penalty phase defense to be presented and wanted evidence presented on his behalf. (HT 2493.) Petitioner's complaints and disagreements with Mr. Demby's performance were avoidable; the breakdown in the relationship between petitioner and Mr. Demby was an outgrowth of Mr. Demby's unreasonable failure to investigate petitioner's defense. Reasonably competent counsel would have conducted reasonable investigation. Had such investigation been done, the attorney-client relationship would not have broken down. With a breakdown in the attorney-client relationship like that which occurred between Mr. Demby and petitioner, reasonably competent counsel would have moved to withdraw from the case, would have concurred in petitioner's desire to obtain new counsel, and would not have called petitioner a liar or opposed his claim that a conflict of interest had arisen.

704. Mr. Demby claimed that the attorney-client relationship had not, in fact, broken down, that he got along well with petitioner and that petitioner's attempts to get Mr. Demby removed from his case were simply efforts to inject an appellate issue into the record.

705. Assuming, arguendo, that Mr. Demby testified truthfully at the reference hearing, his testimony constitutes an admission of behavior which was both unethical and fell bellow the prevailing professional norms. Mr. Demby testified that, contrary to the petitioner's contentions, he and petitioner did not have any real disagreements as to tactics at trial and that, although petitioner filed a civil suit against Mr. Demby and his office, petitioner told Mr. Demby privately that he would withdraw Mr. Demby as

a defendant if the civil court were going to find for petitioner. (HT 2034.) Mr. Demby testified that petitioner's *Marsden* motions, his requests that he be given new counsel, and his request to represent himself were not sincere but rather were made solely to build error into the record for purposes of appeal. (RT 2097-2098.) To the extent that petitioner's efforts to persuade the trial court that there had been a breakdown in the attorney-client relationship were false, Mr. Demby violated his ethical duties as an officer of the court, as well as his constitutional duty to provide petitioner with competent representation. (See HT 2491-2492.)

706. In the absence of the foregoing deficient acts and omissions on the part of petitioner's counsel, petitioner would not have been sentenced to death.

707. The judgment must be reversed.

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XVII

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE HEARING PURSUANT TO PENAL CODE SECTION 190.4(e)

708. Petitioner's death sentence and confinement are unlawful and were obtained in violation of the his rights to the effective assistance of counsel, to due process and a fair trial, to confrontation of witnesses, to present a defense, to a fair, individualized, reliable and/or nonarbitrary penalty determination and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, section 1, 7, 13, 15, 16 and 17 of the California Constitution in that petitioner's trial counsel unreasonably and prejudicially failed to investigate and present evidence in mitigation at the hearing on the modification of the verdict pursuant to Penal Code section 190.4(e). (*Strickland v. Washington* (1984) 466 U.S. 668; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

709. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's rights to due process, a fair trial and a reliable death judgment have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

710. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

711. The facts in support of this claim include, but are not limited to, the following:

712. Even if, arguendo, trial counsel had a legitimate strategic reason for not presenting evidence in mitigation at the penalty phase, no such reason can conceivably justify a failure to present evidence in mitigation to the trial court, after the jury had unanimously found that the death penalty was appropriate. All available evidence in mitigation could have been presented to the trial court at the hearing pursuant to Penal Code section 190.4, subdivision (e).

713. Petitioner hereby incorporates by reference as if fully set forth herein the facts set forth in Claim XVI, *supra*.

714. Had the available mitigating evidence been presented at the hearing pursuant to Penal Code section 190.4, subdivision (e), the trial court would have modified the verdict and petitioner would not have been sentenced to death.

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XVIII

PETITIONER IS INNOCENT OF CAPITAL MURDER

715. Petitioner's conviction, sentence and confinement are unlawful and were obtained in violation of his rights to due process and a fair trial, to confrontation, to the effective assistance of counsel, to a jury trial, to conviction upon proof beyond a reasonable doubt, to accurate, reliable, non-arbitrary, non-capricious guilt and penalty determinations and to be free from cruel and unusual punishment, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendment of the United States Constitution and Article I, sections 1, 7, 13, 14, 15 and 17 of the California Constitution, and Penal Code section 1473, in that petitioner is innocent of capital murder.

716. To the extent that the facts underlying this claim could not reasonably have been discovered by petitioner's trial counsel prior to sentencing in this case, those facts constitute newly discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings such that petitioner's rights to due process, a fair trial and a reliable death judgment have been violated and collateral relief is appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358.)

717. This claim conforms the pleadings to the testimonial and documentary evidence presented and/or proffered at the reference hearing. With few exceptions, the facts underlying this claim were presented at the reference hearing held pursuant to this Court's order to show cause. The facts relied upon herein were relevant to the order to show cause and reference questions, supportive of the claim that petitioner was deprived of the effective assistance of counsel at the penalty phase and admissible at the reference hearing on that issue. However, these facts also established a

factual basis for the present claim.

718. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

719. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

720. In the event that this Court finds that the instant claim should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

721. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. To the extent that some facts underlying this claim were proffered solely by means of sworn declarations, at or before the reference hearing herein, the referee improperly prevented counsel from presenting direct testimony with respect thereto. The referee's rulings excluding such evidence denied petitioner of a full and fair hearing. Petitioner hereby incorporates by reference as if fully set forth herein Claim

XXII, *infra*. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

A. Calvin Boyd Was the Actual Killer

a. Boyd Made Numerous Admissions of Participation in the Killings

722. Petitioner hereby incorporates as if fully set forth herein paragraph 324, *supra*.

b. Boyd Carried a Knife That Matched the Murder Weapon

723. Petitioner hereby incorporates by reference paragraph 325, *supra*, as if fully set forth herein.

c. Boyd Had a Habit of Committing Assaults by Knife

724. Petitioner hereby incorporates by reference paragraph 325, *supra,* as if fully set forth herein.

d. Boyd Had a Reputation for Violence and a Habit of Threatening and Assaulting Others

725. Petitioner hereby incorporates by reference paragraph 326, *supra*, as if fully set forth herein.

e. Boyd Had Cuts on His Hands after the Killings

726. Petitioner hereby incorporates by reference paragraph 327, *supra*, as if fully set forth herein.

f. Boyd's Alibi for the Night of the Crime Was False

727. Petitioner hereby incorporates by reference paragraph 328, *supra*, as if fully set forth herein.

g. Boyd Had a Motive to Commit the Crime

728. Petitioner hereby incorporates by reference paragraph 329, *supra*, as if fully set forth herein.

h. Boyd's Behavior after the Killings Showed Consciousness of Guilt

729. Petitioner hereby incorporates by reference paragraphs 50-77, 330, 438, *supra*, as if fully set forth herein.

i. Boyd Knew Facts about the Crime That Nobody Other than a Participant Would Know

730. Petitioner hereby incorporates by reference paragraph 324, *supra*, as if fully set forth herein. Boyd knew facts about the crime that law enforcement had intentionally kept confidential: e.g., that a pillow had been on the head of Mitchell Morgan when he was stabbed (RT 6719-6721)

B. Key Witness Testimony Against Petitioner At Trial Was False

731. Petitioner hereby incorporates by reference Claims VI, XIII, *supra*, as if fully set forth herein.

C. The Killings Occurred At A Time When Petitioner Could Not Have Participated

732. Petitioner hereby incorporates by reference paragraphs 342-350, *supra*, as if fully set forth herein.

D. Petitioner's Behavior After The Killings And At The Time Of His Arrest Indicate That He Was Innocent

733. Petitioner hereby incorporates by reference paragraphs 364-383, *supra*, as if fully set forth herein.

E. Marcus Was One of the Killers

734. Before the crime, Marcus said that he was going to commit the killings. (RT 8210-8213, 8436-8437.)

735. On the night of the killings, Marcus insisted that Boyd's wife, Arzetta Harvey, lend him money for gas. (RT 8204.)

736. Marcus had a motive: he would do anything for cocaine (RT

8159). In fact, he was losing his residence because he was spending his rent money on cocaine (RT 8205, 8212).

737. Marcus carried a gun (RT 8433) and petitioner declined to participate in the killing.

F. Reilly Was Seen Leaving the Vose Street Apartments Alone on the Night of the Murders

738. Petitioner hereby incorporates by reference as if fully set forth herein the facts set forth in paragraph 320, *supra*.

G. The Prosecution Engaged in a Pattern of Misconduct Which Skewed the Evidence and the Fact-finding Process

739. Petitioner hereby incorporates by reference Claims VI, VII, VIII, IX, X and XI, *supra*, as if fully set forth herein.

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XIX

PETITIONER WAS DEPRIVED OF THE RIGHT TO COUNSEL BY VIRTUE OF AN IRRECONCILABLE CONFLICT

740. Petitioner's conviction, sentence and confinement are unlawful and were obtained in violation of his right to the effective assistance of counsel, to due process and a fair trial, to a jury trial, to a reliable guilt and penalty determination, to conviction upon proof beyond a reasonable doubt, to accurate, reliable, non-arbitrary, non-capricious guilt and penalty determinations and to be free from cruel and unusual punishment, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendment of the United States Constitution and article I, sections 1, 7, 13, 14, 15 and 17 of the California Constitution, and Penal Code section 1473, in that he was forced to go to trial represented by counsel with whom he had an irreconcilable conflict. (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166; *United States v. Moore* (9th Cir. 1998) 159 F.3d 1154.)

741. Petitioner hereby incorporates by reference as if fully set forth herein Arguments I and VII of the Appellant's Opening Brief and of the Reply Brief, and Arguments II, B and C of the Petition for Rehearing filed on petitioner's behalf on automatic appeal.

742. In its opinion on automatic appeal, this Court found no irreconcilable conflict and characterized the claim as flowing solely from the fact that Mr. Demby was named as a defendant in petitioner's federal lawsuit. This Court's rejection of that claim was based on a finding that Mr. Demby did not believe the lawsuit would inhibit his legal representation of petitioner, and "the trial court, apparently aware of both Mr. Demby's reputation and the quality of his representation in this case to

that point, accepted this explanation at face value." (*People v. Hardy*, *supra*, 2 Cal.4th at 137.) This Court found petitioner's lawsuits were solely for purposes of delay. (*Id.* at p. 138.) This Court also found that the trial court's inquiry into the matter was sufficient.

743. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

744. The evidence presented at the reference hearing shows, inter alia, that: (1) petitioner and Demby were in fact embroiled in a very real conflict related very directly to Michael Demby's ineffectiveness; (2) the conflict did not arise as a result of petitioner's lawsuit but the lawsuit was the result of the conflict; (3) the lawsuits, although perhaps poorly crafted, were not frivolous and were not filed for the purpose of delay; and (4) the trial court's inquiry into the basis for petitioner's request to have Mr. Demby relieved as counsel was not adequate.

745. Petitioner hereby incorporates by reference as if fully set forth herein the entire record of the proceedings held pursuant to this Court's reference order herein.

746. The trial court did not read the papers petitioner had filed in federal court, nor did it inquire into the basis for petitioner's allegation therein that he was being deprived of the effective assistance of counsel.

Reasonable inquiry would have revealed that petitioner in fact did not trust Mr. Demby and, although untrained in the law and perhaps unable to perceive in precisely what ways Mr. Demby's representation was deficient, petitioner's lawsuits and his repeated attempts to have Mr. Demby relieved as counsel were filed because of a very real and well-founded perception Mr. Demby was not providing him with the effective assistance of counsel. Had the trial court undertaken an adequate inquiry into the quality of Mr. Demby's representation of petitioner, it would have become apparent that the conflict and petitioner's complaints regarding the representation he was receiving from Mr. Demby were well-founded. The court would similarly have discovered that petitioner's relationship with Mr. Demby was clouded by distrust, misgivings and a total breakdown in communications.

747. On February 3, 1983, Mr. Demby advised the trial court that petitioner was concerned that he had been denied a speedy trial and that the re-assignment of his case from Mr. Bardsley to Mr. Demby had resulted in that denial. (RT 1765.) Mr. Demby noted that it was petitioner's contention that the case would have gone to trial earlier if it had not been reassigned, whereas Mr. Demby needed the time for preparation. (RT 1765.) Mr. Demby asked the court to appoint separate counsel to advise petitioner and "do whatever should be done" with regard to protecting his rights for that issue. (RT 1765.) The trial court reserved decision on the matter.

748. On February 7, 1983, Mr. Demby again suggested that the court appoint separate counsel do delve into the question of whether there had been sufficient "good cause" for the repeated continuances over petitioner's objection and to represent petitioner with respect to litigating that issue. (RT 1790-1791.)

749. On February 14, 1983, the trial court appointed attorney David A. Bermann pursuant to Penal Code section 987.2, to represent petitioner in connection with his speedy trial motion and his conflict with the Los Angeles County Public Defender's Office. (CT 216, RT 1910.)

750. On February 18, 1999, Mr. Bermann filed a "Notice of Motion to Dismiss; Declaration of David A. Bermann, memorandum of Points and Authorities," on petitioner's behalf. (CT 221-242.)

751. On February 23, 1983, a hearing was held on petitioner's motion to dismiss for violation of his statutory rights under Penal Code section 1382 and his right to due process. Mr. Bermann appeared on petitioner's behalf at that hearing. Mr. Bermann's statements at that hearing reveal that, although appointed to represent petitioner with regard to his conflict with the Public Defender's Office, Mr. Bermann had failed to investigate the nature and quality of Mr. Demby's investigation on petitioner's behalf, an issue which was inextricably intertwined with petitioner's objections to repeated continuances and therefore with his conflict with the Public Defender's Office. Mr. Berman's representation of petitioner violated petitioner's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution insofar as he failed to investigate and present evidence that Mr. Demby had failed to conduct a competent investigation on petitioner's behalf. Mr. Bermann unreasonably failed to consult adequately with petitioner himself (see RT 4527) and with Mr. Demby and failed to inquire into and investigate the status of Mr. Demby's investigation on petitioner's behalf. Reasonably competent counsel in Mr. Bermann's position would have investigated the nature and progress of Mr. Demby's investigation and trial

preparation. Had Mr. Bermann conducted reasonable investigation into Mr. Demby's representation of petitioner, he would have found that, although the repeated continuances may have provided Mr. Demby with time and opportunity to conduct reasonable and necessary investigation on petitioner's behalf, Mr. Demby had not in fact availed himself of that opportunity. The inadequacy of Mr. Demby's investigation was not known to petitioner personally at that time, as petitioner was not fully informed of the status of Mr. Demby's investigation and, unschooled in the law, would have been unable to assess its adequacy even if he had known precisely what Mr. Demby and his office had and had not done on his behalf. Had Mr. Bermann undertaken reasonable investigation in the matter, he would have discovered the inadequacy of Mr. Demby's representation. Mr. Bermann would have requested that the hearing on February 23, 1983, be ex parte and, once that request was granted, would have presented evidence showing the inadequacy of Mr. Demby's investigation and representation, as well as the breakdown in communications between petitioner and Mr. Demby which had long since occurred. Through such evidence, Mr. Bermann would have shown a factual basis for his contention that there had not in fact been good cause for the repeated continuances over petitioner's objection, that Mr. Demby was not in fact ready for trial even on that date (when jury selection in petitioner's case had already commenced), and that petitioner's contentions that he was being deprived of the effective assistance of counsel and that his counsel was laboring under a conflict of interest were well-founded. Had Mr. Bermann presented such evidence, petitioner's motion to dismiss would have been granted and/or new counsel would have been appointed who would have conducted a competent investigation on his behalf. In either event, the outcome of the trial would

have been different. As it was, petitioner's motion to dismiss was denied at the close of the hearing on February 23, 1983.

752. On March 7, 1983, *before* petitioner filed suit against Mr. Demby and the Los Angeles County Public Defender's Office, petitioner, on his own behalf, filed a document entitled "Declaration of Conflict of Interest Attorney-Client Pursuant to Business and Professional Code Section 6068." (CT 268-270.) In that document, petitioner requested "substitution of attorney of record, Michael H. Demby," alleging that Mr. Demby was "'failing to put [certain facts] before the court'" and that he "'failed to investigate [relevant] evidence.'" (CT 269; *People v. Hardy*, *supra*, 2 Cal.4th at p. 132.) The trial court held a *Marsden* hearing, the transcript of which is no longer available, and denied the motion.

753. It was only after that, on March 10, 1983, that petitioner filed his first federal civil suit against Mr. Demby and his office, alleging, inter alia, that he was being deprived of the effective assistance of counsel, that his counsel had "failed and/or refused to assist in the planning and implementation of defense strategy and/or plaintiffs [sic] defense."

754. On March 31, 1983, petitioner filed in the trial court a document entitled, "Habeas Corpus Petition; Order to Show Cause." (CT 279-287), alleging, inter alia, ineffective assistance of counsel and requesting appointment of private counsel to represent him at a hearing on the petition. On April 11, 1983, without conducting a hearing or any other inquiry into the matter, the trial court denied the habeas corpus petition. (RT 6266.)

755. On April 18, 1983, petitioner filed a motion to dismiss, again alleging ineffective assistance of counsel and specifically that he had never spoken to his investigator. (CT 311-321.)

756. Finally, on September 13, 1983, after the guilt phase verdict and prior to the commencement of penalty phase, petitioner again requested to have Mr. Demby relieved, arguing that he had not been competently and adequately represented. (RT 13899A.) The trial court denied that motion without adequate inquiry. (RT 13899B.) Immediately thereafter, petitioner, presumably in desperation, requested permission to represent himself. (RT 13899B.) Petitioner alleged that he and Mr. Demby had "had a conflict of interest . . . throughout this whole case" (RT 13899C) and that, since before the trial started, there had been "a total breakdown of communication." (RT 13899E.) Petitioner noted that Mr. Demby had failed to present a defense on his behalf, that his case had been continued for 15 months so that Mr. Demby could investigate and then Mr. Demby made a "tactical decision of no defense." (RT 13899D.) Mr. Demby, in violation of his most basic ethical and legal duties of loyalty to his client, then called his client a liar. (RT 13899D.) Mr. Hardy's subsequent statements amount to a demand that Mr. Demby investigate and present a penalty phase defense, and an allegation that he was failing to do so. The trial court noted that petitioner had "had a divergence of opinion with Mr. Demby since the outset." (RT 13899I.) However, the trial court refused to inquire further into the adequacy of Mr. Demby's investigation or representation and denied petitioner's request to represent himself. (RT 13899J.)

757. The evidence presented at the reference hearing herein shows that Mr. Demby's investigation was in fact woefully inadequate. Petitioner hereby incorporates by reference as if fully set forth herein Claims XIII, XIV, XV, XVI, XVII, *infra*. His investigation of Calvin Boyd ceased in September,1982 (5 months prior to trial), and was deficient in virtually every respect. (HT 1748-1749.) He had not consulted with any experts.

He had not investigated the victims' time of death. He had not investigated petitioner's life or family history. He had done virtually no penalty phase preparation. Mr. Demby's voir dire of the jury was aimless and deficient. Petitioner hereby incorporates by reference paragraph 413, *infra*.

758. The evidence now in the record further shows that, at all of the times that he requested to have Mr. Demby relieved, petitioner had tremendous conflicts with Mr. Demby and did not trust him. (HT 662, 1546-1548, 2493.) The trial court was aware of this conflict. The jury observed that petitioner seemed angry and/or detached. Communications between petitioner and Mr. Demby had broken down long before trial because, even with no legal training, petitioner could perceive that his case had been continued and continued, purportedly in order to conduct further investigation, but little if any investigation had been done. (HT 2494.)

759. Petitioner's conflict with Mr. Demby became even more pronounced between the guilt phase, when Mr. Demby failed to call a single witness on petitioner's behalf, and the penalty phase, when Mr. Demby intended not to call a single witness on petitioner's behalf. (HT 1546-1548.) Petitioner's statements at the hearing between guilt and penalty phases amounted to a demand that Mr. Demby put on a penalty phase defense and a recognition on petitioner's part that his background should be known to the jury. (HT 2495, 2561.)

760. Mr. Demby's testimony at the hearing that he and petitioner did not have a conflict was not credible and amounts to an admission of unethical conduct on Mr. Demby's part. Demby testified that he and petitioner did not have any real disagreements over trial tactics and that petitioner told him he would withdraw Demby's name from the lawsuit if the court was going to find against him. (HT 2034-2035.) He further

testified that petitioner's lawsuits and requests to have him relieved were undertaken solely for purposes of making an appellate record, that petitioner did not in fact distrust Demby, and that Demby simply allowed petitioner to lie to the court so that he could make a good appellate record. (HT 2097-2098, 2494.)

761. The breakdown in the relationship between Mr. Demby and petitioner resulted in a denial of counsel and a denial of the right to effective assistance of counsel. The conflict was extensive and only became more pronounced as petitioner's trial wore on. The trial court's inquiry into the matter was minimal and inadequate. The attorney appointed to investigate the allegations and represent petitioner in that regard failed to provide adequate assistance of counsel. The court failed to question either petitioner or Mr. Demby privately and in depth. The judgment must be reversed.

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THE JOINT TRIAL WAS UNCONSTITUTIONAL

762. Petitioner was deprived of his rights to due process and a fair trial, to an impartial jury, to confrontation, to conviction on proof beyond a reasonable doubt, to the effective assistance of counsel, to a fair, impartial, individualized, reliable and/or nonarbitrary guilt and penalty determination, and to be free cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogues, by virtue of being tried jointly with codefendants Reilly and Morgan. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, sections 1, 7, 15, 16, 17.)

763. Prior to trial, counsel for petitioner's two codefendants, Mark Reilly and Clifford Morgan, both filed motions to sever their client's trials from the others. (CT 148 et. seq.) On February 3, 1983, the court held in camera hearings and questioned each of the three defense counsel individually as to what their respective defenses would be. (Sealed RT of 2/3/83.) The prosecutor requested an in ex parte in camera hearing as well. (RT 1724-1727.) Prior to ruling on the prosecutor's request, the court stated, "let's listen to what they [i.e., defense counsel] have to say first." (RT 1727.) The severance issue was then argued by all parties. (RT 1727-1740) Counsel for codefendant Morgan argued, inter alia, that, if a severance was not to be granted, codefendant Morgan should be given a separate jury. Petitioner's trial counsel, Mr. Demby, joined in the codefendants' motion(s) to sever but not in the request for separate juries. (RT 1727, 1732.) Apart from joining in the arguments filed by petitioner's codefendants, the only argument made by Mr. Demby in support of the motion to sever was that, "[i]f this case gets to the penalty phase I think it is

asking one jury too much to try to decide the lives of three individuals. It is an awesome responsibility they are going to have, and when you multiply that so that they have to make the decision three times, it's more than one should have to ask any individual." (RT 1732.) The prosecutor argued, inter alia, that the effect of a joint trial on the penalty phase had "nothing to do with the severability of the case." (RT 1739).

764. Initially, the court denied the motion to sever and granted codefendant Morgan's request for a separate jury. (RT 1741-1742; CT 206.) The prosecutor immediately notified the trial court that he would be "running a writ," and renewed his request for an ex parte in camera hearing. (RT 1743) Counsel for codefendants Reilly and Morgan objected to this procedure; Mr. Demby did not. (RT 1724-1726, 1743, 1745) The court held an ex parte in camera hearing with Deputy District Attorney Jonas. (RT 1747-1748; Sealed RT of 2/3/83.) At that hearing, the court noted that it had found petitioner's and his codefendants' defenses to be "diametrically opposed." (Sealed RT of 2/3/83 at p. 16) On the following court day, February 7, 1983, the court vacated its ruling regarding separate juries. By way of explanation, the court stated only that it had reviewed the decisional law on the issue of severance and the notes of the in camera hearing. (RT 1767; CT 207.)

765. On numerous occasions during the trial, Mr. Demby renewed his objection to the joint trial and joined in the mistrial motion made by counsel for codefendant Reilly after closing arguments at guilt phase, on the ground that the joint trial was even more prejudicial than anticipated because, in closing argument, counsel for codefendant Morgan accused petitioner and codefendant Reilly of being solely responsible for the killings. (RT 1802, 4449-4450, 7073, 12456, 13454-13455, 13508-13512,

13517, 13521, 13551-13560, 13899V-13899W.) After the penalty verdict, counsel for codefendant Reilly filed a motion for new trial based in part on the failure to grant separate trials. (CT 650 et seq.). Petitioner's counsel joined in that motion. (RT 14407-14435, 14438.)

766. Petitioner hereby incorporates by reference as if fully set forth herein pages 71 through 80 of Brief of Amicus Curiae, California Appellate Project, in Support of Appellant [Mark Reilly], and argument IV of the Appellant's Opening Brief filed on behalf of codefendant and appellant Mark Reilly.

767. Petitioner hereby incorporates by reference as if fully set forth herein Argument II of the Brief of Amicus Curiae and Argument IV of Appellant's Opening Brief, both filed on behalf of codefendant Reilly on automatic appeal from the judgment of death.

768. The prejudice which petitioner suffered as a result of the joint trial cannot be overemphasized. The evidence of codefendant Morgan guilt was the strongest, while of petitioner's was the weakest. Morgan testified at the trial and his demeanor during his testimony only made the jury more certain of his guilt. (Appendix 12.) Moreover, Morgan's testimony prejudiced petitioner as it prompted the jury to wonder why petitioner did not testify and suggested to them that his testimony would have been equally as damaging as, or more damaging than, Morgan's. The jury heard extensive evidence regarding Morgan's various character flaws, his business dealings, his illicit relationships with various women, the degree to which he had over-insured his wife and child, his unseemly behavior before and after the killings and at the funeral of his wife and child, his wife's medical history and numerous hearsay statements he had purportedly made displaying his intentions and expectations regarding the death of his wife

and child and the financial benefit he would reap as a result. Such evidence would have been of minimal or no relevance at a trial of petitioner separately. Indeed, at a separate trial, petitioner would have stipulated to Morgan's guilt and participation in the murder conspiracy, rendering moot (and probably inadmissible) all of the distasteful details regarding Morgan personally. The jury would not have seen Morgan on a day-to-day basis or heard him testify. Instead, at the joint trial, petitioner suffered the negative spillover effect of the jury's wrath toward Morgan, whose despicable character was literally on display via the testimony of witnesses (including Morgan himself) and his own behavior in the courtroom. When Morgan's case was later severed from petitioner's for purposes of the penalty phase, petitioner's jury felt cheated. The jurors wanted to sentence Morgan to death and talked about that desire in deliberations. (Appendix 12.) The jurors' strong feelings of hatred toward Morgan influenced their decision regarding penalty for petitioner and they were unable to render an individualized sentencing determination. In addition, as a result of being jointly tried with Morgan, petitioner had to deal with Morgan's trial counsel, who, because petitioner's defense was diametrically opposed to Morgan's, acted at times as a second prosecutor.

769. Petitioner also suffered prejudice by being jointly tried with codefendant Reilly. The evidence of codefendant Reilly's guilt, like that of codefendant Morgan's, was very strong, while the evidence of petitioner's guilt was weak. As a result of being jointly tried with codefendant Reilly, the jury heard extensive evidence of codefendant Reilly's criminal activities both before and after his arrest. Moreover, petitioner's defense that Reilly was directly involved in the killings was diametrically opposed to Reilly's defense that he was not.

770. Petitioner was also prejudiced by the fact that the joint trial allowed the prosecutor to take use relative culpability at the penalty phase as a nonstatutory aggravator against petitioner to argue for the death penalty. (See *People v. Davenport* (1985) 41 Cal. 3d 247, 288-290.)

771. Should this Court decline to address the merits of this argument on the ground that it should have been raised on automatic appeal, petitioner has been deprived of the effective assistance of appellate counsel.

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BOTH GUILT AND PENALTY VERDICTS MUST BE REVERSED BECAUSE OF JURY MISCONDUCT, PREJUDGMENT AND EXPOSURE TO IMPROPER AND UNRELIABLE INFLUENCES

772. Petitioner's guilt and penalty verdicts and judgment of death were obtained in violation of his state and federal constitutional rights to due process and a fair trial, to the effective assistance of counsel, to confrontation, to present a defense, to conviction on proof beyond a reasonable doubt, to the presumption of innocence, to a unanimous verdict, to an impartial jury, to a fair, reliable and non-arbitrary judgment free from the influence of extrajudicial, inaccurate, irrelevant and prejudicial information, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16 of the California Constitution, in that members of petitioner's jury engaged in serious and prejudicial misconduct; at least one member of petitioner's jury prejudicially concealed information requested during jury selection; at both the guilt and the penalty phase of trial, members of the jury discussed the evidence with one another and prejudged the appropriate outcome prior to deliberations; members of the jury were biased and unqualified to sit as jurors; members of petitioner's jury discussed and relied upon improper, irrelevant, extra-judicial and/or unreliable considerations in deliberating as to both guilt and penalty; one juror slept through so much of the trial that he was unable to fairly consider the case; the jury's penalty verdict was the product of mistake and confusion as to the import of the instructions; (*Gray v. Mississippi* (1987) 481 U.S. 648, 668; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio*

(1978) 438 U.S. 586; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *United States v. Cronic* (1984) 466 U.S. 648, 659; *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548; *Smith v. Philips* (1982) 455 U.S. 209, 217; *Beck v. Alabama* (1980) 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *Tumey v. Ohio* (1927) 273 U.S. 510, 535; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, cert. denied at 523 U.S. 1103; *In re Hitchings* (1993) 6 Cal.4th 97, 110; *People v. Nesler* (1997) 16 Cal.4th 581; *People v. Galloway* (1927) 202 Cal. 81, 89-92.)

773. To the extent that any evidence in support of this claim is excluded from consideration and/or deemed inadmissible by operation of Evidence Code section 1150, that evidentiary prohibition must give way to petitioner's constitutional and statutory rights to fair litigation of his claims. (See *Durr v. Cook* (1979) 589 F.2d 891, 893.)

774. In the event that this Court finds that reasonably competent trial counsel would have been aware of the facts underlying this claim and would have presented those facts as well as the instant argument in support of a motion for mistrial or new trial, petitioner has been deprived of the effective assistance of counsel at trial and reversal is required.

775. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas corpus.

776. In the event that this Court finds that the instant claim should

have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

777. To the extent that the facts set forth below were not known to the prosecution and could not have been reasonably discovered by petitioner's trial counsel, they constitute newly-discovered evidence casting fundamental doubt on the accuracy and reliability of the proceedings, undermining confidence in the outcome and violating petitioner's rights to due process, a fair trial, and reliable guilt and penalty determinations. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Gardner v. Florida*, *supra*, 430 U.S. 349, 358)

778. Had it not been for the referee's denial of discovery, improper restrictions on the presentation of evidence at the reference hearing, and the prosecution's violation of its duty of disclosure both at trial and post-conviction, additional facts in support of this claim would be available to petitioner. The facts which are presently known to counsel in support of this claim include but are not limited to the following:

779. During jury selection, the foreperson of petitioner's jury, Bob Carter, then a prospective juror, concealed that he had previously served on two juries: a criminal case involving a kidnap and robbery and a civil case involving a claim of medical malpractice. (RT 3411.) When the jury retired to deliberate, Mr. Carter volunteered to be the foreman. (Appendix 51.) Once selected to be the foreman, he discussed with the other jurors extraneous legal principles. (Appendix 51.) The injection into deliberations of extraneous law gives rise to a presumption of prejudice that Mr. Carter was prejudicially and improperly influenced in his own deliberations and improperly and prejudicially influenced the deliberations of the other jurors.

780. Both at the guilt phase and at the penalty phase, jurors committed prejudicial misconduct by improperly discussing the case amongst themselves repeatedly prior to deliberations. As a result, jurors formed opinions about the credibility of witnesses, the strength of the evidence and petitioner's guilt prior to guilt phase deliberations and at least one juror, Henry Save, determined the question of penalty before the case was submitted for penalty phase deliberations. (Appendices 12, 46.)

781. Several jurors committed prejudicial misconduct in that they concealed actual bias against petitioner at the penalty phase, refused to follow the court's instructions, were unable or unwilling to consider imposing the sentence of life without the possibility of parole and prejudged the question of the appropriate penalty prior to the commencement of penalty phase deliberations. (See Appendices 12, 46.) The bias of some jurors devolved from the fact that one of the individuals killed was an eight-year old child. (Appendix 46.) These facts also show that, contrary to this Court's holding on petitioner's automatic appeal, the trial court's denial of petitioner's request for modification of the *Witherspoon* questions during sequestered voir dire was prejudicial. Petitioner hereby incorporates by reference as if fully set forth herein Argument XXIII of Appellant Hardy's Supplemental Opening Brief filed on petitioner's behalf on automatic appeal. The improper restrictions on voir dire resulted in petitioner's fate being determined by one or more jurors who were actually biased in favor of the death penalty and were unable or unwilling to consider the penalty of life without the possibility of parole. This actual bias also demonstrates the prejudice which resulted from Mr. Demby's ineffectiveness in questioning prospective jurors during general voir dire. (See paragraph 413, *supra*.)

782. During penalty deliberations, jurors committed prejudicial

misconduct in that they improperly and prejudicially discussed and relied upon non-statutory circumstances in aggravation as factors weighing in favor of a sentence of death for petitioner. The non-statutory aggravating circumstances which jurors discussed, considered and relied upon include but are not limited to: evidence that petitioner abused drugs and alcohol, had a loose sex life, was unemployed, depended upon his girlfriend financially and frequented a poverty-stricken, drug-infested and distasteful environment; and speculation regarding the cost of the two sentencing options to the taxpayers. (Appendix 12, 46.) As a result of this misconduct, petitioner was sentenced to death on the basis of aggravating factors other than those permitted by Penal Code section 190.3 and was deprived of the benefits of state law at sentencing. The fact that the jury considered petitioner's lifestyle and environment as aggravation also demonstrates the impropriety and prejudicial impact of the jury's visit to the Vose Street apartment complex and counsel's failure to object thereto, for it was during that visit that the jury experienced firsthand that petitioner had been frequenting a poverty-stricken, drug-infested and generally distasteful environment. The fact that the jury considered petitioner's lifestyle as evidence in aggravation also demonstrates that, contrary to this Court's holding on automatic appeal (cf. *People v. Hardy*, *supra*, 2 Cal.4th at pp. 207-208), the trial court's failure to instruct the jury that the defendants' background could be used only as mitigation was in fact prejudicial. Petitioner hereby incorporates by reference as if fully set forth herein Argument XXVI of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. Further, the jury's consideration of petitioner's lifestyle as aggravation demonstrates that the prosecutor's argument encouraging the jury to consider petitioner's lifestyle in

determining penalty was prejudicial. (Cf. *People v. Hardy*, *supra*, 2 Cal.4th at p. 211.) Petitioner hereby incorporates by reference as if fully set forth herein Argument XXIX of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal.

783. At least one of the jurors, Henry Save, committed prejudicial misconduct in that he slept through much of the trial. Mr. Save slept through essential portions of the trial and was not able fairly to consider the case. Mr. Save's sleeping gives rise to a presumption of prejudice. Particularly in light of the fact that the case against petitioner was weak and that Mr. Save prejudged at least the penalty, the totality of the circumstances indicate that the presumption of prejudice is not rebutted.

784. Petitioner's jury unconstitutionally and prejudicially committed prejudicial misconduct in that it excluded from consideration its own compassion, sympathy and mercy for petitioner, and one or more jurors considered irrelevant and inflammatory extra-judicial information in determining the appropriate penalty. Immediately prior to opening statements at the penalty phase, Juror Ralph Hernandez, who worked as an ambulance driver, informed the trial court in chambers that, during the break between the guilt and penalty phase, he had seen codefendant Morgan being put into a wheelchair and wheeled on a ramp by sheriff's deputies at the hospital. (RT 13910-13911.) The trial court inquired briefly of Juror Hernandez as to whether he could continue to serve as a juror and asked, inter alia, the following question: "You feel you can continue as a juror in this matter without being influenced by bias or prejudice or by any sympathy or – towards any party in this case or any of the attorneys?" (RT 13913.) Mr. Hernandez replied in the affirmative and was permitted to remain on the jury. Whether reasonably or not, Juror Hernandez apparently

interpreted this question as an instruction that it was improper for jurors to be influenced by sympathy for the defendants in assessing penalty. Juror Hernandez' understanding of this "instruction" was not corrected by the penalty phase instructions, when the trial court improperly failed to expressly state that the jury was permitted to consider sympathy for the defendants. Petitioner hereby incorporates by reference as if fully set forth herein Argument XXVII from Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. During deliberations, Juror Hernandez communicated to his fellow jurors that they could not consider sympathy for the defendants in determining penalty. Other jurors shared, or were convinced by, Juror Hernandez' understanding. As a consequence, several jurors who were sympathetic to petitioner and had initially voted for life without the possibility of parole changed their respective votes to death. (Appendices 12, 46.) To the extent that the trial court's instructions implied that the jury was permitted to consider sympathy for the defendants during penalty deliberations, juror Hernandez and other jurors committed misconduct in ignoring that implication and urging others to do the same and a presumption of prejudice arises as a result. Contrary to this Court's finding on automatic appeal (*People v. Hardy*, *supra*, 2 Cal.4th at p. 203), the jurors did not in fact understand from the instructions given that they were permitted to consider sympathy for the defendants. The jury's understanding was as if they had been instructed to exclude sympathy for petitioner – an entire class of mitigation – from consideration in its deliberations. Whether a result of the trial court's instructions or jury misconduct or both, the jury's misapprehension unconstitutionally influenced the verdict.

785. Jurors committed prejudicial misconduct in that they

improperly discussed and considered improper and irrelevant facts regarding the victims as aggravating circumstances weighing in favor of the death penalty. Juror Davis considered evidence that Nancy Morgan was a meticulous housekeeper and a loving wife and mother, both of which were factors irrelevant to the circumstances of the crime. (Appendices 12.) This discussion and consideration demonstrates that, contrary to this Court's rulings on automatic appeal, the admission of improper victim impact evidence was prejudicial the resulted in jurors improperly and prejudicially relying upon unconstitutional and nonstatutory aggravating circumstances in determining penalty. (Cf. *People v. Hardy*, *supra*, 2 Cal.4th at pp. 200-201.) The nature of the jury's discussion and consideration also demonstrates that, contrary to this Court's holding on automatic appeal, the tour of the crime scene was prejudicial insofar as it exposed jurors to extraneous and irrelevant information which it then discussed, considered and relied upon as aggravation in assessing penalty. (Cf. *People v. Hardy*, *supra*, 2 Cal.4th at p. 176-177.) Petitioner hereby incorporates by reference as if fully set forth herein Arguments XX and XXVIII of Appellant Hardy's Supplemental Opening Brief filed on petitioner's behalf on automatic appeal.

786. Petitioner's jury committed prejudicial misconduct by speculating during penalty phase deliberations that petitioner might be released if not sentenced to death. (Appendix 12.) The jury discussed this possibility and at least one juror changed her vote because of the discussion. (*Ibid*.) Another juror believed that the courts were not permitting executions to go forward and that, even if sentenced to death, petitioner would not be executed. (Appendix 51.) One more of the jurors was therefore influenced by improper and erroneous speculation and/or

extrajudicial information in determining and deliberating as to the appropriate punishment.

787. The jury discussed and considered petitioner's failure to testify in reaching a verdict as to guilt and penalty. (Appendix 46.) The jury's consideration of this improper factor, in violation of its express instructions not to do so, constituted prejudicial misconduct. Moreover, it demonstrates that, contrary to this Court's holding on automatic appeal, the failure to reinstruct jury at penalty phase that it could draw no inference from failure to testify at penalty phase was prejudicial. Petitioner hereby incorporates by reference as if fully set forth herein Argument XXX of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. It also demonstrates that, contrary to this Court's holding on automatic appeal (*People v. Hardy*, *supra*, 2 Cal.4th, 157-161), the comments made by counsel for codefendant Morgan in his closing argument guilt phase drawing the jury's attention to the fact that petitioner had not testified were prejudicial. Petitioner hereby incorporates by reference as if fully set forth herein Argument VII of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal.

788. One or more members of petitioner's jury committed prejudicial misconduct in that they received and considered irrelevant extrajudicial information: during jury selection, one or more of the prospective jurors who were ultimately empaneled heard through the courtroom door some of the proceedings that occurred in chambers, including the trial court's individualized questioning of other prospective jurors. (Appendix 46.) As a result, one or more of the seated jurors was aware of and therefore influenced by information which the court and

counsel had intended the jury not to hear and believed it had not heard.

789. Petitioner was deprived of his statutory and constitutional rights by the jury's consideration of irrelevant and inflammatory evidence: one or more jurors was convinced that the death penalty was warranted by the crime scene photographs erroneously admitted into evidence at the penalty phase. (Appendix 46.) Petitioner hereby incorporates by reference as if fully set forth herein Argument XXXI of Appellant Hardy's Supplemental Opening Brief filed on petitioner's behalf on automatic appeal. Contrary to this Court's finding on automatic appeal that any error in admitting the photographs was harmless and that it was not "reasonably possible the admission of the photographs altered the result of the penalty phase" (*People* v. *Hardy*, *supra*, 2 Cal.4th at 200), the photos inflamed at least one juror's passions and caused at least one juror to pre-judge the appropriate penalty. The admission of the photographs was prejudicial.

790. Petitioner's statutory and constitutional rights were violated by the jury's exposure to inflammatory and irrelevant information and by the jurors' misconduct in engaging in an experiment during the visit to the crime scene. Petitioner hereby incorporates by reference Argument XX of Appellant Hardy's Supplemental Opening Brief, filed on petitioner's behalf on automatic appeal. At the crime scene, the jury saw a red palm print on wall and several large spots on the carpet which looked like blood stains. (RT 7104-7106.) The judge allowed each of the jurors to open and close the front door. (RT 6939-6942.) Contrary to this Court's conclusion on automatic appeal (*People v. Hardy*, *supra*, 2 Cal.4th at pp. 176-177), the jury's exposure to this inflammatory and irrelevant evidence was prejudicial. During deliberations, the jurors discussed their observations at the scene and at least some of the jurors believed that the stains they saw

were blood left from the murders.[72] (Appendices 12, 46.) The jurors also discussed during deliberations the force needed at the time of the tour to open and close the front door and concluded that this indicated the killer must have been familiar with the front door. (Appendix 46.) As a result of the tour, the jury considered and relied upon irrelevant, inflammatory, inadmissible and prejudicial evidence in deliberating as to guilt and penalty.

791. Contrary to this Court's finding on automatic appeal (cf. *People v. Hardy*, *supra*, 2 Cal.4th at pp. 201-202, 211), the instructions and argument provided to the jury at the penalty phase led at least some members of the jury to believe that, as a matter of law, they no choice but to vote for death if they found that aggravation outweighed mitigation. (Appendix 12.) Petitioner hereby incorporates by reference as if fully set forth herein Argument IX of Appellant Hardy's Opening Brief, filed on petitioner's behalf on direct appeal. As a result of the trial court's unadorned "shall instruction," the jury discussed and concluded that the death penalty was mandatory if they found that aggravation outweighed mitigation, even if they thought life without the possibility of parole was the appropriate punishment. Petitioner's jury was misled and the penalty verdict was reached in violation of petitioner's state and federal constitutional rights.

792. The jury committed prejudicial misconduct in that one or more jurors considered whether or not codefendant Morgan deserved the death penalty in determining penalty as to petitioner. (Appendix 12.) As a

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[72] Although Detective Jamieson testified, several days after the crime scene tour, that the stains on the wall were not a result of the crime charged, his testimony was less than pellucid and the jury clearly misinterpreted what he was saying.

result of this misconduct, petitioner was deprived of his statutory and constitutional rights to an impartial jury, due process, a fair trial and a fair and reliable individualized penalty determination, devoid of the influence of improper, arbitrary or irrelevant considerations.

793. Petitioner's statutory and constitutional rights were violated by the jury's consideration of two multiple murder special circumstances as aggravating circumstances weighing in favor of a sentence of death. On automatic appeal, this Court vacated one of the two multiple murder special circumstances. The jury's penalty deliberations were influenced by the consideration of an improper aggravating circumstance. Particularly in light of the many other improper considerations which influenced the jury's deliberations, it was improper for this Court to reweigh the aggravating and mitigating circumstances to arrive at a conclusion that the error was harmless.

794. Petitioner's conviction and sentence were obtained as a result of multiple constitutional violations which separately and cumulatively undermined the fairness of the entire capital trial and constitute structural defects in the trial which are prejudicial per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-310; *Gomez v. United States* (1989) 490 U.S. 858, 876; *Gray v. Mississippi*, *supra*, 481 U.S. 648, 668; *Rose v. Clark* (1986) 478 U.S. 570, 579, fn. 7; *Tumey v. Ohio*, *supra*, 273 U.S. 510, 535; *Dyer* v. *Calderon* (9th Cir. 1998) 151 F.3d 970, 972, n. 2. The foregoing evidence demonstrates a reasonable possibility that one or more juror voted for the death penalty because of bias, prejudice, improper influence or an erroneous or improper factor. (*Clark v. United States* (1933) 289 U.S. 1, 11; *Dyer v. Calderon*, *supra*, 151 F.3d 970, 983-985; *People v. Nesler*, *supra*, 16 Cal.4th at 578; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112,

disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Robertson* (1982) 33 Cal3d 21, 55.)

795. The judgment must be reversed.

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XXII

PETITIONER HAS BEEN DEPRIVED OF A FULL AND FAIR HEARING IN THIS HABEAS CORPUS PROCEEDING

796. During the course of the litigation in this case, petitioner's constitutional and statutory rights to due process and fundamental fairness, to the effective assistance of habeas counsel, to present evidence, to compel the attendance of witnesses and to confront witnesses, and to a full and fair hearing of his claims have been violated. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, sections 1, 7, 15, 16, 17; Pen. Code § 1484; see *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 15; *Townsend v. Sain* (1963) 372 U.S. 293, overruled in part by *Keeney v. Tamayo-Reyes*, *supra*, 504 U.S. at p. 5; *Young v. Weston* (9th Cir. 1999) 192 F.3d 870, 876; *In re Avena* (1996) 12 Cal.4th 694, 730; *In re Clark* (1993) 5 Cal.4th 750, 780.

797. This claim conforms the pleadings to the testimonial and documentary evidence presented at the reference hearing held herein. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People* v. *Hardy*, *supra*, 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

798. The referee improperly denied petitioner's requests for discovery of a wide variety of information relevant to this Court's order to show cause. The referee improperly denied as overbroad item numbers 13,

14, 18, 21, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 42 of petitioner's discovery request filed June 6, 1996. (HT 27-42; HCT 233-277.) Petitioner subsequently filed a supplemental discovery motion narrowing each of the denied requests. (HCT 379-390.) With the exception of item 8 of the supplemental request, formerly item 35 of the original request, the referee improperly denied the supplemental discovery motion in its entirety. (HT 1068, 1075.) In denying petitioner the requested discovery, the referee abused his discretion and prevented petitioner from obtaining a full and fair hearing.

799. Although the referee granted discovery of a number of categories of information, he improperly found that the prosecution's response to those requests had been "adequate." The referee so ruled with respect to the following categories of evidence which petitioner requested in his discovery motion filed June 6, 1996: item numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 27, 28, 29, 43. (HT 24-42; HCT 233-277.) The referee erred in finding the prosecution's response adequate. Immediately prior to the referee's ruling, respondent's counsel, Deputy Attorney General Roy Preminger, stated repeatedly and unequivocally that he had provided counsel with all discoverable material in his personal possession, but that he was refusing to obtain and disclose to petitioner information in the hands of other law enforcement agents. (HT of 5/3/96 at pp. 8-9; HT 3, 6-8, 18.) Respondent's counsel's view of the nature and scope of its duty pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny was erroneous. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 432.) The referee's ruling adopting or ratifying that view denied petitioner discovery of material to which he was entitled and permitted law enforcement to shield material from discovery by simply not providing it to

Deputy Attorney General Preminger. The referee's ruling was an abuse of discretion and prevented petitioner from obtaining a full and fair hearing.

800. Petitioner was denied a full and fair hearing by respondent's failure to disclose information favorable to petitioner. Respondent has an ongoing duty to disclose evidence favorable to petitioner after judgment is entered. Petitioner hereby incorporates by reference as if fully set forth herein the facts set forth in Claim IX, *supra*. Respondent's failure to disclose information favorable to petitioner prevented petitioner from obtaining a full and fair hearing.

801. Respondent's failure to disclose Mr. Jonas' immunity letter written on behalf of Calvin Boyd (Appendix 1) violated both the referee's express discovery order (HT 1075) and the constitutional mandate of *Brady* and its progeny. The letter was favorable and material insofar as it showed Mr. Boyd to be utterly lacking in credibility and showed Deputy District Attorney Jonas to be dishonest, lacking in objectivity, inclined to suppress evidence and willing to use his position to further his own personal agenda. Mr. Jonas' letter stated that Boyd had never been a suspect in this case, when in fact he (Jonas) knew that Boyd had been arrested as a suspect (RT 8145-8146, 10414) and was named as a coconspirator in the various complaints and informations filed by Mr. Jonas in this case (CT 1-9, 11-17, 55-73). Had Mr. Jonas' immunity letter been disclosed in a timely fashion, petitioner could and would have proffered a stronger basis for items 38 and 39 of his discovery request filed on June 6, 1986, and the referee would have ordered disclosure of the information requested therein.

802. The referee improperly denied petitioner's request for certificates of materiality to compel the attendance at the reference hearing of five material witnesses who resided outside the state of California: i.e.,

Ruth Simpson, Richard Simpson, William Thompson, Carol Abrams and Phyllys Moore. (HT of 2/16/96; 3/21/96; HCT28-47, 70-71, 78-79, 84-87, 94-95.) The referee's stated basis for refusing to issue the certificates was that the testimony would be "redundant," "cumulative," "not relevant" or "only remotely relevant." (HT of 2/16/96; HT of 3/21/96.) Petitioner's request for the certificates was supported by a detailed proffer showing that each witnesses' testimony was relevant to the questions before the referee, including, but not limited to, the determination of what mitigation was available to Mr. Demby at the time of trial. (HCT 157-206.) The testimony of the five witnesses at issue would have been admissible at a penalty phase. To the extent that any such testimony would not itself have been admissible, it would nevertheless have been material and relevant to the questions pending before the referee in the present case insofar as it was information which would have led Mr. Demby to other admissible mitigating evidence (e.g., expert opinion testimony). In denying petitioner's request for certificates of materiality, the referee abused his discretion and prevented petitioner from obtaining a full and fair hearing.

803. The referee improperly excluded evidence of petitioner's family history on relevancy grounds. (See, e.g., HT 171-172, 175, 188, 189, 217-218, 476, 564, 580-581, 625, 636, 649, 656, 845, 892, 947-949, 980.) Prior to the taking of evidence herein, petitioner presented expert opinion evidence and legal argument showing that detailed family history information is essential to a forensic mental health expert's ability to arrive at a competent and sound scientific conclusion as to any of the mental state issues relevant to mitigation; petitioner argued that, in order to show what mitigation was available to counsel at the time of trial and to comply with this Court's mandate in *In re Fields* (1990) 51 Cal.3d 1063, 1071, it was

necessary for petitioner to present such foundational evidence via live testimony. (HCT 288-295, 307-312.) Nevertheless, the referee excluded live testimony regarding petitioners' family history finding that it would not be sufficiently relevant to be admissible at a penalty phase, that petitioner's mental health experts could rely on hearsay and that it was not necessary for the referee to receive live testimony regarding every fact upon which the experts relied. (See, e.g., HT 217-218, 564, 656, 845, 869, 948.) The referee expressed continual impatience when counsel attempted to elicit testimony regarding events or circumstances which petitioner himself did not observe or experience personally.[73] The referee's ruling was improper, both because some or all of the evidence would have been admissible at a penalty phase and because, even if not admissible at a penalty phase, it was relevant and admissible at this proceeding. This Court's reference order required a determination of what mitigation was available to Mr. Demby at the time of petitioner's trial. Because the family history information at issue was foundational and essential to the experts' ability to provide competent and relevant mitigating testimony, petitioner had a right and obligation to demonstrate that the family history information was available at the time of trial and that it was available from multiple sources. In

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[73]At the reference hearing, the referee repeatedly admonished petitioner's habeas counsel to hurry, not to elicit testimony regarding family history, and not to elicit testimony on the same subject from more than one witness. For example, the referee repeatedly admonished petitioner's counsel to "move on" (HT 476, 578, 581, 625, 980, 997, 1341), "move along" (HT 992), "move it along" (HT 2421, 2460), "refine those questions" (HT 2469), "get to it" (HT 297, 395), "let's go" (HT 474), "get to the quick" (HT 972), "narrow it" (HT 972), "get to the point" (HT 541, 588), "focus on the issue" (RT 582, 867) and "focus on new information" (HT 868).

excluding evidence of petitioner's family history, the referee erred and prevented petitioner from presenting all of the evidence relevant to this Court's order to show cause.

804. The referee improperly excluded the opinion testimony of Dr. Jay Jackman as to whether, in his scientific opinion as a psychiatric expert, petitioner's behavior during the incident which led to his prior conviction indicated a propensity for violence. (HT 1543.)

805. The referee improperly excluded certain evidence as cumulative, including the testimony of five out-of-state witnesses whom petitioner sought to call via video-conference and whom the referee had previously ruled were material. (HCT 209-212, 215-220, 453-455; HT 501, 972, 2624-2626.) Petitioner's detailed offer of proof as to those five witnesses showed that their testimony was not cumulative of other evidence presented at the hearing. (HCT 157-206; H.Exh. 3-A, 3-H; HT 2624-2626.) Moreover, to the extent that any of the proffered evidence might have been properly excluded as cumulative at a penalty trial, that was not a legitimate basis for excluding the evidence at this proceeding. The number and variety of sources from which any particular piece of information was available was highly relevant to the issues before the referee. Critical to a fair assessment of the adequacy of Mr. Demby's investigation and the reasonableness of his decisions not to present any mitigation are such factors as: the ease with which the evidence could have been obtained, the degree to which the evidence was corroborated and the choice of witnesses from whom the evidence could have been elicited. In excluding the testimony of the five witnesses petitioner sought to call via video-conferencing and in preventing petitioner from eliciting other testimony on the ground that it was repetitive or cumulative of other witnesses'

testimony, the referee improperly disregarded the distinction between the evidence admissible at a penalty trial and the evidence admissible at a hearing to determine the effectiveness of trial counsel. The referee's improper exclusion of evidence as cumulative prevented petitioner from presenting all mitigating evidence that was arguably available to Mr. Demby and deprived him of a full and fair hearing.

806. The referee improperly excluded certain evidence on the ground that it was hearsay. (See, e.g., HT 345, 352-354, 947-949) Again, the referee improperly disregarded the distinction between a penalty trial and the hearing before him. This Court's reference order required the referee to determine what mitigating evidence was available to Mr. Demby. That inquiry necessitated consideration not only of evidence which would itself have been admissible at trial, but also of information which itself might not have been admissible but which would have led Mr. Demby to admissible evidence. For example, petitioner's habeas counsel attempted to elicit from petitioner's sister that Steve Rice had told her that he knew Calvin Boyd was the killer because he had seen cuts and bruises on his hands right after the killings. The referee sustained an objection to this testimony on hearsay grounds. (HT 948-950.) The evidence was nevertheless admissible on the question of what evidence was available to Mr. Demby at the time of petitioner's trial. The evidence showed that, if Mr. Demby had interviewed petitioner's sister competently and maintained contact with her throughout petitioner's trial, she would have told him of Mr. Rice's statement and he then could have elicited the information directly from Mr. Rice when he testified at trial. The fact that the information was available from petitioner's sister, as well as from Mr. Rice himself, is relevant to show the multiplicity of sources through which Mr.

Demby might have been made aware of the evidence, which in turn is relevant to the adequacy of his investigation. The referee's exclusion of evidence on hearsay grounds prevented petitioner from demonstrating fully the inadequacy of Mr. Demby's investigation and the information which was available to him at the time of trial.

807. The referee improperly excluded impeachment evidence relevant to Calvin Boyd's credibility as a witness. (HT 2614-2615.) To impeach Mr. Boyd's testimony at the hearing, petitioner sought to present the testimony of four additional witnesses: Linda Lennon, Connie Rogan, Seth Chazin and T. J. Hicks. Lennon would have testified that she met Boyd when they both were in a drug treatment program; Boyd told her he had entered the program only to avoid going to jail; Boyd broke the rules of the facility regularly; Boyd told her he had used drugs throughout the 1980s; Boyd told her he had once "knifed a woman;" she became pregnant with Boyd's child and, during her pregnancy, Boyd assaulted her physically; she left him because he was abusive and threatened to kill her. (H.Exh. 73; HT 2616.) Connie Rogan would have testified that: she witnessed Boyd's assault of Linda Lennon; Boyd was selling drugs in 1990; and she saw Marcus in Boyd's company sometime in 1990. (H.Exh. 74; HT 2616.) Seth Chazin is an attorney who, at the time of the hearing, was employed by the State Public Defender's Office. T. J. Hicks is a private investigator, who also was then working on petitioner's behalf. Hicks and Chazin both would have contradicted Boyd's testimony at the hearing by stating that: they interviewed Boyd together at Boyd's home; this was the only interview of Boyd conducted by either Chazin or Hicks; neither Chazin nor Hicks badgered Boyd or attempted to plant ideas in his head. (HT 2684.) Hicks would further have testified that he had a subsequent contact with

Boyd at a chance meeting in the San Diego airport. Hicks said hello to Boyd but did not discuss petitioner's case at that time. Hicks was traveling alone. (HT 2685.) The referee's exclusion of such evidence deprived petitioner of a full and fair hearing.

808. The referee improperly permitted Mr. Demby to testify to whether his trial strategy would have been different if he had been aware at the time of trial of all of the information presented at the reference hearing. (RT 1841-1842; 2027-2033) Pursuant to the "contemporary assessment rule," such testimony is irrelevant and should not be considered in assessing Mr. Demby's effectiveness. (See, e.g., *Lockhart v. Fretwell* (1993) 506 U.S. 364, 372; *Burris v. Parke* (7th Cir. 1997) 116 F.3d 256, 259; *Hendricks* v. *Calderon* (9th Cir. 1995) 70 F.3d 1032, 1036, 1039.) The referee's ruling admitting Mr. Demby's testimony in this regard deprived petitioner a full and fair hearing.

809. The prejudice flowing from the referee's improper rulings cannot fully be assessed until this Court issues its opinion in the present case and rules on the instant supplemental allegations. In the event that this Court fails to treat the claims alleged herein as a supplement to the original petition, to permit petitioner to conform the pleadings to the proof, to consider the evidence presented at the reference hearing in support of the claims alleged herein, or to reverse the judgment against petitioner in its entirety, petitioner will have been prejudiced by the denial of a full and fair hearing in this habeas corpus proceeding.

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XXIII

THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL

810. The California statutory scheme under which petitioner was convicted and sentenced to death, as set forth in California Penal Code sections 189 *et seq*., violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, 17 and 24 of the California Constitution, in that the California statutes fail to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion. (See *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.) [death penalty statute must provide "a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not"].)[74] The facts supporting this claim, include, but are not limited to, the following:

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[74]In *Furman v. Georgia*, *supra*, the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. Because each of the justices in the majority wrote his own opinion, the scope of and rationale for the decision was not determined by the case itself. Justices Stewart and White concurred on the narrowest ground, arguing that the death penalty was unconstitutional because a handful of murderers were arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (*Id*. at pp. 309-310 (conc. opn. of Stewart. J.), 311-13 (conc. opn. of White, J.).) In *Gregg v. Georgia* (1976) 428 U.S. 153, the plurality understood the Stewart and White view to be the "holding" of *Furman* (*id*. at pp. 188-189), and in *Maynard v. Cartwright* (1988) 486 U.S. 356, a unanimous Court cited to the opinions of Stewart and white as embodying the *Furman* holding. (*Id*. at p. 362.)

811. The Eighth Amendment to the United States Constitution imposes various restrictions on the use of the death penalty as a punishment for crime. One such restriction is that any legislative scheme defining criminal conduct for which death is the prescribed penalty must include some narrowing principle that channels jury discretion and provides a principled way to distinguish those cases in which the death penalty is imposed from the many cases in which it is not. A death-eligibility criterion that fails to meet this standard is deemed impermissibly vague under the Eighth Amendment. (*Maynard v. Cartwright* (1988) 486 U.S. 356; *Godfrey v. Georgia* (1980) 446 U.S. 420.)

812. A death penalty statute must take into account the Eighth Amendment principles that death is different, and that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (See *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 877, fn.15; see also *Adamson v. Ricketts* (9th Cir. 1988) 856 F.2d 1011, 1025 [blanket eligibility for death sentence may violate the Fifth and Fourteenth Amendment due process guarantees as well as Eighth Amendment].)

813. In order to meet the concerns of *Furman*, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. For example, in *Zant v. Stephens*, *supra*, the Supreme Court stated:

> "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible fo the death penalty." (462 U.S. at p 878.)

It was the Supreme Court's understanding that, as the class of death-eligible murderers was narrowed, the percentage of those in the class receiving the

death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline.

> "As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries – even given discretion not to impose the death penalty – will impose the death penalty in a substantial portion of the cases so defined. If they do, 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." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 222 (conc. opn of White, J.).)

814. At the time of the decision in *Furman*, the evidence before the Supreme Court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (408 U.S. at p. 386, fn. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . . ." (408 U.S. at p. 309, fn. 10.)[75] Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible

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[75]In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment." (428 U.S. at 182, fn. 26, citing *Woodson v. North Carolina* (1986) 428 U.S. 280, 295-296, fn. 31.)

defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

815. California's death penalty statute, which was enacted by voter initiative, violates the Eighth Amendment by multiplying the "few" cases in which the death penalty is possible into the many. In fact, it was enacted for precisely this unconstitutional purpose. The proponents of the initiative measure (Proposition 7), as part of their Voter's Pamphlet argument that the initiative statute was necessary, described certain murders that were not covered by the existing death penalty statute, and then stated:

> "And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would*." (Appendix 53 [1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7," emphasis added].)

816. Under California's statutory scheme, the class of first degree murderers is narrowed to a statutorily death-eligible class by the special circumstance provisions set forth in Penal Code section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468.) From its inception, the California statutory scheme included so many special circumstances, so broadly construed, that the special circumstances have never accomplished any substantial narrowing. As of the date of the offense charged against petitioner, 19 "special circumstances" existed under Penal code section 190.2, encompassing 27 distinct categories of first-degree murderers, embracing every type of murder likely to occur. The over-inclusive nature of the death penalty law in California means that death eligibility is the rule, not the exception, as required by the Eighth Amendment.

817. In addition, an empirical study of published decisions of the

California Supreme Court and the Courts of Appeal showed that the death penalty in California continues to be "imposed wantonly and freakishly." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 222 (conc. opn of White, J.).) During the period 1988-1992, approximately 9.6% of convicted first degree murders were sentenced to death. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1328.) During the year that petitioner was charged with the death penalty, there were slightly fewer special circumstances than existed during the years of the empirical study; however, the felony-murder and lying-in-wait special circumstances were in effect and operated to make the vast majority of first degree murders death-eligible. (*Id*. at pp. 1319-1324.) Thus, it is reasonable to infer from the results of the study that the 1981 statutory scheme in place at the time of petitioner's trial failed to perform any real narrowing function.

818. California's statutory scheme under which the vast majority of first degree murderers are death-eligible does not "genuinely narrow." (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) In addition, that scheme, in which only a small fraction of those statutorily death-eligible are sentenced to death, permits an even greater risk of arbitrariness than the schemes considered in *Furman*, and, like those schemes, is unconstitutional.

819. Because the statutory scheme under which petitioner was convicted and sentenced to death is unconstitutional, the judgment and sentence of death in this case must be ordered vacated.

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XXIV

PETITIONER'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW

820. In violation of rights guaranteed under the Second, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, petitioner's sentence of death was unlawfully imposed without regard to international treaties and law to which the United States is a signatory, and which obligate the United States to comply with human rights principles. Petitioner has been denied his right to the minimum international, federal and state law guarantees for a fair trial and a competent defense. He has been denied his right to a fair trial, appeal and habeas by an independent tribunal. He has also been denied the minimum guarantees for his defense, including the right to counsel of his choice; the right to have adequate time and facilities for the preparation of his defense; the right to a fair procedure to protect him from acts of authority that, to his prejudice, violate fundamental constitutional rights; the right to due process; the right to equal application of the law; the right to be free from cruel, inhuman, or degrading punishment; the right to be free from the arbitrary deprivation of life, the right to be free from discrimination on the basis of race, sex, and property in violation of rights enunciated in international agreements to which the United States is a party, customary international law and international norms ("*jus cogens*") as set forth in and informed by the Universal Declaration of Human Rights (Appendix 54), the American Declaration of the Rights and Duties of Man (Appendix 55), the International Covenant on Civil and Political Rights (Appendix 56), the International Convention on the Elimination of All Forms of Racial Discrimination (Appendix 57), the Safeguards Guaranteeing Protection of

the Rights of Those Facing the Death Penalty (Appendix 58), the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Appendix 59), and the Guidelines on the Role of Prosecutors (Appendix 60). Such violations of petitioner's rights under international law require the immediate reversal of his conviction and sentence.

821. Petitioner hereby incorporates by reference, as if fully set forth herein, the certified record on appeal and all other documents filed in this Court in the case of *People v. James Edward Hardy* (Los Angeles County Sup. Ct. No. A148767; Supreme Court No. S004607), as well as the record of all proceedings held in the instant matter, including all prior habeas corpus petitions, allegations, exhibits, appendices, pleadings, motions, testimony and argument, and including any pleadings, evidence or other materials proffered but stricken or excluded by the referee.

822. Petitioner hereby incorporates by reference all the appendices to these supplemental allegations, as if fully set forth herein. Each and every allegation made herein is based on each and every document contained in the appendices as well as the entire record of proceedings held in the trial court, on direct appeal and in the instant habeas corpus proceedings.

823. The State of California is bound through the Supremacy Clause of Article VI of the United States Constitution to abide by treaties entered into by the United States, as well as by customary international law and *jus cogens* because under the Supremacy Clause, customary international law and *jus cogens* controls over state law. (See *Kansas v. Colorado* (1906) 206 U.S. 46; *Zschernig v. Miller* (1968) 389 U.S. 429, 441; *Clark v. Allen* (1947) 331 U.S. 503, 508; *Missouri v. Holland* (1920)

252 U.S. 416, 433-435.) A treaty to which the United States is a party is the "supreme Law of the Land" which binds state and federal courts. (U.S. Const. art. VI; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Thus, the State of California is bound to afford petitioner his rights as set forth in the treaties to which the United States is a signatory party. With equal force, the State of California is bound to afford petitioner rights as established by customary international law and *jus cogens*. As held by the Supreme Court in *The Paquette Habana* (1900) 175 U.S. 677:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*Id*. at p. 700; see also Rest.3rd Foreign Relations Law of the United States (1987), §§ 111, 702.)

Through treaty ratifications, nations promote the growth of customary international law norms that then become binding law. Agreements which have been ratified by a large number of nations give rise to a rule of customary international law which is then binding on all nations, whether ratified by that nation or not. (Rest.3rd Foreign Relations Law of the United States, § 102; cf. *Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876 [customary international law prohibition against torture reflected in torture convention to which only 95 countries were state parties].) Thus, the State of California is bound to follow international law as set forth in and informed by treaties to which it is a party and customary international law and *jus cogens.*

824. Pursuant to articles 10 and 11, of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 of the International Covenant of Civil and Political

Rights (Appendix 56), article 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (Appendix 58), and article XII of the Guidelines on the Role of Prosecutors (Appendix 60), petitioner is entitled to a fair trial, due process, prosecution free from misconduct, and non-arbitrary treatment and punishment. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of the right to a fair trial, due process, prosecution free from misconduct, and non-arbitrary treatment and punishment by the State's deliberate, negligent, reckless and prejudicial misconduct in investigating, developing and presenting its case against petitioner which fatally corrupted the fact-finding process and result in the arbitrary imposition of the death penalty. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

825. Pursuant to articles 10 and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), Article VI, section 1 of the International Covenant of Civil and Political Rights (Appendix 56), article 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (Appendix 58), and article XII, of the Guidelines on the Role of Prosecutors (Appendix 60), petitioner is entitled to a fair trial, due process, prosecution free from misconduct, and non-arbitrary treatment and punishment. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of the right to a fair trial, due process, prosecution free from misconduct, and non-arbitrary treatment and punishment because his trial judge had actual bias and committed

misconduct by entertaining an ex parte communication with the prosecutor and acting as an advocate for the government. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

826. Pursuant to articles 10 and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI, and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix55), article VI, section 1 and article XIV, sections 3(b) and (d) of the International Covenant of Civil and Political Rights (Appendix 56), and article 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (Appendix 58), petitioner is entitled to a fair trial, due process, non-arbitrary treatment and punishment, legal assistance of his own choosing, and the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of his right to fair trial, due process, non-arbitrary treatment and punishment, legal assistance of his own choosing, the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing because: his trial attorney failed to investigate and present evidence undermining the prosecution's theory of petitioner's guilt; his trial attorney failed to investigate, develop, prepare, and present a case in mitigation at the penalty phase of petitioner's trial; petitioner's trial counsel operated under an irreconcilable conflict of interest; trial counsel abandoned petitioner, declined to abide by petitioner's demand for a defense, and violated his ethical duties; and petitioner's appellate counsel failed to provide effective assistance when by failing to

raise a severance claim in petitioner's automatic appeal. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

827. Pursuant to articles 10 and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 and article XIV, sections 3(b) and (d) of the International Covenant of Civil and Political Rights (Appendix 56), petitioner is entitled to a fair trial, due process, and non-arbitrary treatment and punishment, legal assistance of his own choosing, and the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of the right to a fair trial, due process, and non-arbitrary treatment and punishment, legal assistance of his own choosing, and the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing when the trial court denied his request for self representation. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

828. Pursuant to articles 10 and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI, and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 of the International Covenant of Civil and Political Rights (Appendix 56), petitioner is entitled to a fair trial, due process, and non-arbitrary treatment and punishment. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth

herein, petitioner was deprived of the right to a fair trial, due process, and non-arbitrary treatment and punishment because of serious and prejudicial jury misconduct and extraneous influences upon the jury. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

829. Pursuant to articles 10 and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XXV, XXVI, and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 of the International Covenant of Civil and Political Rights (Appendix 56), petitioner is entitled to a fair trial, due process, and non-arbitrary treatment and punishment. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of the right to a fair trial, due process, and non-arbitrary treatment and punishment when the trial court tried petitioner jointly with his codefendant. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

830. Pursuant to articles 8, 10, and 11 of the Universal Declaration of Human Rights (Appendix 54), articles XVIII, XXIV, XXV, XXVI, and XXVIII of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 of the International Covenant of Civil and Political Rights (Appendix 56), petitioner is entitled to a fair trial, due process, the right to submit respectful petitions, the right to a fair procedure to protect him from acts of authority that, to his prejudice, violate fundamental constitutional rights, the right to an effective remedy by a competent tribunal for acts violating the fundamental rights granted him by the constitution of common law, and the right to be free from non-arbitrary treatment and punishment. As set forth in the instant Supplemental

Allegations, incorporated by reference as if fully set forth herein, petitioner was deprived of the right to a fair trial, due process, the right to submit petitions, the right to a fair procedure to protect him from acts of authority that, to his prejudice, violate fundamental constitutional rights, the right to an effective remedy by a competent tribunal for acts violating the fundamental rights granted him by the constitution of common law, and the right to be free from non-arbitrary treatment and punishment because he was not afforded a full and fair hearing on his automatic direct appeal and in the habeas corpus proceedings. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

831. Pursuant to article 5, 7 and 10 of the Universal Declaration of Human Rights (Appendix 54), articles II, XVIII, XXIV, XXV and XXVI of the American Declaration of the Rights and Duties of Man (Appendix 55), article VI, section 1 of the International Covenant of Civil and Political Rights (Appendix 56), article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (Appendix 57), article 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (Appendix 58), and article 2 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Appendix 59), petitioner is entitled to equality in application of the law and the right to be from non-arbitrary, cruel, infamous, inhuman, or unusual treatment and punishment. As set forth in the instant Supplemental Allegations, incorporated by reference as if fully set forth herein, the death penalty as applied by the State of California is discriminatory on the basis of race, property, and sex, is arbitrarily applied and constitutes cruel, infamous and unusual treatment and punishment. Therefore, imposition of a death sentence upon petitioner

violated, and continues to violate his rights to equality in application of the law and the right to be free from non-arbitrary, cruel, infamous or unusual treatment and punishment. Such deprivation of petitioner's rights under international law requires reversal of his conviction and sentence.

832. To the extent that the State of California claims that it is not obligated to enforce petitioner's rights under international law due to reliance on a reservation, understanding or declaration of the United States Senate purporting to modify, alter or diminish petitioner's rights under international law, petitioner alleges that any such reservations, understandings or declarations are invalid as a violation of the separation of powers doctrine. The United States Senate in exercising its power under Article II, section 2, of the United States Constitution to advise and consent to a treaty made by the president, cannot consistent with the constitutional separation of powers purport to impose reservations on treaties which wholly or partially abrogate the treaty signed by the president. In particular, the United States Senate's "understanding" that Article 14, section 3 of the International Covenant on Civil and Political Rights does not apply to court-appointed counsel is not valid because it undermines and wholly abrogates the purpose of the treaty. (Appendix 56.) The Senate does not have the power under Article II, § 2 of the United States Constitution to make reservations and understandings which materially alter the agreements. Any attempt to do so is invalid as a violation of the separation of powers doctrine, and is thus invalid and unenforceable.

833. To the extent that the State of California claims that it is not obligated to enforce petitioner's rights under international law because it claims that any treaty or agreement is not self-executing, and therefore not enforceable by petitioner as an individual, petitioner hereby alleges that the

Supremacy Clause declares treaties to be "the Supreme Law of the Land" and directs the courts to give them effect without waiting for enabling legislation. The history of the Supremacy Clause shows that its purpose was to make treaties enforceable in the courts at the behest of affected individuals without the need for additional legislation. (See Carlos Manual Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am.J.Int'l L. 695 (1995).) The United States Constitution does not authorize the Senate to make a treaty "non-self-executing" and thus deprive individuals of using the treaty as a defense in litigation. Any declarations that provisions of any treaty are "non-self-executing" violate the Supremacy Clause, by purporting to deprive the treaty of its explicit Constitutional status as part of the "supreme Law of the Land," and/or the separation of powers doctrine, by usurping the power of the judiciary to interpret the law, and are therefore invalid.

834. For all the reasons set forth above, petitioner's conviction and death sentence must be vacated.

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XXV

TO EXECUTE PETITIONER AFTER SUCH LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF INTERNATIONAL LAW AND PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

835. Execution of petitioner following his confinement under sentence of death for more than 16 years would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, article I, sections 1, 7, 15, 16 and 17 of the California Constitution, and customary international law.

836. The facts underlying this claim are contained in the record of the proceedings held on petitioner's pending habeas corpus petition. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People v. Hardy* (1992) 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

837. Petitioner was sentenced to death on February 1, 1984. He has been continuously confined under sentence of death for more than 16 years. His automatic appeal was pending from 1984 through 1992. In addition, in 1991, petitioner filed a petition for writ of habeas corpus and those collateral proceedings are still pending before this Court. Specifically, on July 26, 1991, petitioner filed a petition for writ of habeas corpus. In 1992, this Court issued an order to show cause why that writ should not be granted. On April 28, 1993, this Court issued a reference

order. On May 19, 1993, this Court issued an amended reference order and named the Honorable Judge Paul Flynn as referee. On July 20, 1994, this Court issued a second amended reference order. In June and July of 1996, Judge Flynn held an evidentiary hearing regarding the claims raised in the petition. The hearing was continued to February of 1997 for an additional two weeks of testimony. Judge Flynn issued his findings on September 16, 1999. This matter is currently pending before this Court.

838. Petitioner's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (Pen. Code, § 1239, subd. (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139, relying on *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834.)

839. An automatic appeal requires a full and fair review of the trial court proceedings based on a complete record (*Chessman v. Teets* (1957) 354 U.S. 156; Pen Code, § 190.7; Cal. Rules of Court, rule 39.5) and effective appellate representation (*People v. Barton* (1978) 21 Cal.3d 513, 518; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Silva* (1978) 20 Cal.3d 489; *In re Smith* (1970) 3 Cal.3d 192). As noted above, over four years lapsed between the date petitioner was first sentenced to death and the date the record was certified complete.

840. Excessive delays occurred in the post-conviction habeas corpus proceedings. Regarding these delays, Judge Flynn noted that:

> "These proceedings have been fraught with delays caused, inter alia, by the theft of materials from petitioner's counsel's automobile, absence of funding for the State Public Defender's Office for at least two extended periods of time, extensive disputes between the parties over the accuracy of the record, the referee's heavy trial load and a

> stay of the proceedings per order of the Supreme Court at the request of petitioner's counsel. In addition, the subject matter is complex, both factually and legally." (Report at p. 2.)

841. The delays in petitioner's automatic appeal and habeas corpus proceedings are attributable to the system that is in place, established by state law. While the writ proceedings were initiated by petitioner and were not automatic, the substantial delays attendant to those proceedings have little if anything to do with the exercise of any discretion on petitioner's part. (Cf. *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-1467 [claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner], adopted en banc, 57 F.3d 1493.) The delays here have been caused by "negligence or deliberate action by the State." (*Lackey v. Texas* (1995) 514 U.S. 1045, 131 LED.2d 304 (mem. opn. of Stevens, J.); see also *Elledge v. Florida* (1998) 525 U.S. 944 (dis. opn. of Breyer, J.).)

842. The fact that petitioner's automatic appeal and habeas corpus proceedings have been pending during his confinement on death row does nothing to negate the cruel and degrading character of long-term confinement under judgment of death. In *Lackey v. Texas*, *supra*, the defendant argued that his 17 years on death row violated the Eighth Amendment. The Supreme Court denied certiorari, but Justice Stevens, in a memorandum opinion, stressed the importance of the claim "with its legal complexity and its potential for far-reaching consequences." (*Lackey v. Texas*, *supra*, 131 LED.2d at p. 306.) Justice Breyer agreed that the issue was an "important undecided one." (*Ibid*.) In addition, Justice Stevens noted that "'when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible

feelings to which he can be subjected during that time is the uncertainty during the whole of it.'" (*Id*. at pp. 304-305, citing *In re Medley* (1890) 134 U.S. 160, 172.) Justice Stevens further noted that under *Gregg v. Georgia* (1976) 428 U.S. 153, the death penalty was upheld against Eighth Amendment attacks because it "might serve 'two principal social purposes: retribution and deterrence.'" However, Justice Stevens pointed out, 'it is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death." (*Lackey v. Texas*, *supra*, 113 LED.2d at p. 304.) Quoting Justice White in *Furman* v. *Georgia* (1972) 408 U.S. 238, 312, Justice Stevens also wrote that "when the death penalty 'ceases realistically to further these purposes . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (*Lackey v. Texas*, *supra*, 131 LED.2d at p. 305.) Lackey was granted a stay of execution, however, and his case was remanded for consideration of his petition. (See *Lackey* v. *Scott* (1995) 131 LED.2d 741.)

843. The United States stands virtually alone among the nations of the world in confining individuals for periods of many years while continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* (1989) 11 Eur. H. R. Rep. 439. In *Soering*, *supra*, the European Court of

Human Rights refused to extradite a man detained in England and wanted in Virginia on capital murder charges. The court's decision was partly rendered due to the "death row phenomenon" existing in the United States – that is, the extremely long duration of stay on Death Row, coupled with severe conditions and "mounting anguish."

844. In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. (*People v. Chessman* (1959) 52 Cal.2d 467, 498-500.) But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well.

845. While the Ninth Circuit rejected a claim of this type in *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491-1492, revd. on other grounds (1992) 506 U.S. 40, vacated (1993) 986 F.2d 1583, that rejection was deprived of persuasive force when the Arizona Supreme Court subsequently reduced Richmond's death sentence to a sentence of imprisonment because he had changed during his excessively long confinement on death row. (*State v. Richmond* (1994) 180 Ariz. 573, 886 P.2d 1329.)

846. Further, the process used to implement petitioner's death sentence violates international treaties and laws which prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the

United States ten years later. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

847. Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a lawful sanction. (*Ibid*.) Petitioner has made a prima facie showing that his convictions and death sentence were obtained in violation of both federal and state law.

848. In addition, petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." (Camus, *Reflections on the Guillotine*, in Resistance, Rebellion and Death (1961) pp. 173, 200.) The international community has increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica*, *supra*; *Soering v. United Kingdom*, *supra*.)

849. The violation of international law occurs even when a

condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death and with the expectation that they will be used by death-sentenced prisoners. Petitioner's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death.

850. Further, in addition to the actual killing of a human being and the years of psychological torture leading up to the act, the method of execution employed by the State will result in the further infliction of physical torture and severe pain and suffering upon petitioner.

851. For the foregoing reasons, petitioner's death sentence must be vacated permanently.

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XXVI

PETITIONER'S CONVICTION AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL VIOLATIONS ALLEGED IN THE INSTANT HABEAS CORPUS PETITION AND ON AUTOMATIC APPEAL

852. Petitioner's conviction and sentence of death were obtained as the result of literally dozens of errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including, inter alia: the effective assistance of trial counsel, selection of an unbiased jury; the presentation of false, inaccurate, incomplete and unreliable evidence in the guilt and penalty phases; state misconduct including but not limited to the destruction of evidence, the intentional presentation of false and misleading evidence, witness intimidation and prosecutorial misconduct at the guilt and penalty phases; numerous instructional errors; interference with the jury's deliberations at the guilt and penalty phases; and an unfair sentencing proceeding.

853. Petitioner incorporates by reference, as if fully set forth herein, the certified record on appeal and all other documents filed in this Court in the case of *People v. James Edward Hardy* (Los Angeles County Sup. Ct. No. A148767; Supreme Court No. S004607), as well as the record of all proceedings held in the instant matter, including all prior habeas corpus petitions, allegations, exhibits, appendices, pleadings, motions, testimony and argument, and including any pleadings, evidence or other materials proffered but stricken or excluded by the referee.

854. Justice demands reversal of petitioner's conviction and sentence of death because the cumulative effect of all the errors and violations alleged in the present petition and on his automatic appeal "was

so prejudicial as to strike at the fundamental fairness of the trial." (*United States* v. *Parker* (6th Cir. 1993) 997 F.2d 219, 222 (citation omitted); see also *United States* v. *Tory* (9th Cir. 1995) 52 F.3d 207, 211 [cumulative effect of errors deprived defendant of fair trial]; *Kelly* v. *Stone* (9th Cir. 1975) 514 F.2d 18, 19 [inflammatory statements during argument, taken together, denied defendant a fair trial].)

855. The facts underlying this claim are contained in the record of the proceedings held on petitioner's pending habeas corpus petition. Petitioner hereby incorporates by reference as if fully set forth herein: the reporter's transcript of all proceedings held before the referee; all pleadings, orders and other documents filed before the referee; all exhibits proffered before the referee, whether or not such exhibits were admitted into evidence; the record on automatic appeal in *People v. Hardy* (1992) 2 Cal.4th 86; all pleadings and other documents filed on petitioner's behalf before this Court on habeas corpus; and all appendices attached hereto.

856. Each of the specific allegations of error and constitutional violation presented in the instant petition, whether or not it justifies vacation of the judgments of conviction and/or sentence or issuance of the writ standing alone, must be considered in the context of all the other such allegations set forth in the petition and on petitioner's automatic appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir.1988)." (*United States v. Frederick* (9th Cir.1996) 78 F.3d 1370, 1381; see also *United States v. Green* (9th Cir.1981) 648 F.2d 587, 597 [combination of errors and lack of balancing probative value and prejudicial

effect of testimony and lack of limiting instruction required reversal].) "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." (*United States v. Sepulveda* (1st Cir. 1993) 15 F.3d 1161, 1196; see also Taylor v. Kentucky (1978) 436 U.S. 478, 486-488 & fn. 15; *In re Gay* (1998) 19 Cal.4th 771, 826; *People v. Hill* (1998) 17 Cal.4th 800, 844; *In re Jones* (1996) 13 Cal.4th 552, 583, 587; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.)

857. When all of the errors and constitutional violations are considered together, it is clear that petitioner has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair trial, and his right to a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state analogues.

858. In light of the many errors and constitutional violations which occurred over the course of the proceedings in petitioner's case, this Court must reevaluate the claims of error raised by petitioner in his automatic appeal. This is especially so with respect to those claims which this Court found to be harmless. Such claims include, inter alia: (1) the conflict of interest issue (see *People v. Hardy*, *supra*, 2 Cal.4th at pp. 135-139); (2) the erroneous admission of various hearsay statements that were not made in furtherance of the alleged conspiracy (*id*. at p. 145-148); (3) the trial court erred in finding that Ron Leahy was a coconspirator (*id*. at pp. 150, 153); (4) the improper comment on petitioner's failure to testify by codefendant Morgan's counsel (*id*. at pp. 153-161); (5) the various instances of guilt phase prosecutorial misconduct (*id*. at pp. 171-173); (6) the various acts of juror misconduct (*id*. at pp. 173-177); (7) the failure to provide defense

discovery (*id*. at p. 178-179); (8) shackling petitioner in the jury's presence at the jury viewing of the crime scene (*id*. at p. 180); (9) the erroneous admission of bad character evidence (*id*. at pp. 181-182.); (10) various instructional errors at the guilt phase (*id*. at pp. 182-19s3); (11) the improper double counting of the multiple-murder special circumstance finding (*id*. at p. 191); (12) the erroneous denial of petitioner's *Faretta* motion (*id*. at pp. 193-196); (13) the failure to explain codefendant Morgan's absence from the penalty phase (*id*. at p. 197); (14) the admission of prejudicial photographs at the penalty phase (*id*. at pp. 199-200); (15) instructional errors at the penalty phase (*id*. at pp. 201-208); and (16) various acts of prosecutorial misconduct committed by the prosecutor during his penalty phase closing argument (*id*. at pp. 208-212).

859. In light of the cumulative effect of all the errors and constitutional violations which occurred over the course of the proceedings in petitioner's case, petitioner's conviction and sentence must be vacated to prevent a fundamental miscarriage of justice.

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PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

860. Consolidate his Supplemental Allegations to Conform the Pleadings to the Proof with his pending habeas corpus petition;

861. Upon consolidation, grant his pending petition for writ of habeas corpus ordering that his convictions and sentences in Los Angeles Superior Court case no. A-148767, including his conviction for capital murder and his sentence of death, be vacated forthwith; and

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

DATED: May 3, 2000

Respectfully submitted,

LYNNE S. COFFIN
State Public Defender

ROBIN KALLMAN
Deputy State Public Defender

PETER R. SILTEN
Deputy State Public Defender

Attorneys for Petitioner

VERIFICATION

I, ROBIN KALLMAN, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California. I am one of the attorneys representing petitioner, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file these Supplemental Allegations to Conform the Pleadings to the Proof on petitioner's behalf. I am making this verification because petitioner is incarcerated in Marin County, and because these matters are more within my knowledge than his.

I have read the foregoing Supplemental Allegations and know the contents of the Supplemental Allegations to be true.

Signed May 3, 2000, at San Francisco, California.

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ROBIN KALLMAN
Deputy State Public Defender

DECLARATION OF SERVICE

Re: In re JAMES EDWARD HARDY No. S022153

I, Veronica Ezechukwu, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

SUPPLEMENTAL ALLEGATIONS TO CONFORM THE PLEADINGS TO THE PROOF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

BILL LOCKYER
Attorney General of the State of California
ATTN: ROY PREMINGER
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Each said envelope was then, on May 3, 2000, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Signed on May 3, 2000, at San Francisco, California.

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DECLARANT