IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

RENO,

On Habeas Corpus.

CAPITAL CASE
S124660

Los Angeles County Superior Court No. 445665
The Honorable John A. Torribio, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

Court Rules

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **RENO,** On Habeas Corpus.	**CAPITAL CASE** S124660

PRELIMINARY STATEMENT

Petitioner, a homosexual pedophile, confessed to three homicides. In 1976, in Ford Park in Bell Gardens, he slit 12-year-old Scott's and 10-year-old Ralph's throats when Scott called him a "fucking faggot" and Ralph woke up and screamed. In 1978, in South Gate, he took 7-year-old Carl, Jr. to his apartment, taped his hands, choked him with clothesline when he asked to leave, attempted anal sex, set up an alibi, and dumped Carl's body in a remote area, where he later took police.

Petitioner waived his right to a jury trial, and following a court trial, he was found guilty of second-degree murder of the 1976 killing of Scott F. (Count I) and guilty of first-degree murder as to the 1976 killing of Ralph C. (Count II) and the 1978 killing of Carl C., Jr. (Count III). (Pen. Code, § 187.) In connection with the 1978 murder count, the court found the multiple-murder special-circumstance allegation true, but found the felony-murder (lewd or lascivious conduct) special-circumstance allegation not true. (Former Pen. Code, §§ 190.2, subds. (c)(3)(iv) and (c)5).) After a penalty trial, the court imposed a judgment of death for the 1978 murder. (CT I 248, 262.)

On automatic appeal, this Court reversed, holding the trial committed prejudicial error in summarily denying petitioner's motion for discovery of

information regarding complaints against police officers, including the four officers who participated in petitioner's interrogation. This Court further held there was sufficient evidence to support the trial court's verdicts on the three homicide counts, and double jeopardy principles therefore did not bar re-prosecution of petitioner for second-degree murder on the Scott F. charge (Count I) and for first-degree murder on the Ralph C. and Carl C., Jr. charges (Counts II and III). (*People v. Memro (I)* (1985) 38 Cal.3d 658; S004312). The case was remanded to the trial court on June 6, 1985, and petitioner's 1982 petition for writ of habeas corpus was denied by this Court as moot on August 15, 1985. (*In re Memro*, case no. S044437 [hereinafter referred to as the "1982 habeas"].)

Following retrial, the jury found petitioner guilty of the second degree murder of Scott F. and of the first-degree murders of Ralph C. and Carl C., Jr. (Pen. Code, § 187.) The jury also found true a multiple-murder special-circumstance allegation as to Count III. (Pen. Code, § 190.2(a)(3).) After a penalty trial, the jury returned a verdict of death on Count III, and the trial court entered judgment accordingly on July 17, 1987. (CT II 455, 565, 577.)

On November 30, 1995, this Court affirmed the judgment in full on automatic appeal. (*People v. Memro (II)* (1995) 11 Cal.4th 786; case no. S004770.) On June 28, 1995, this Court denied petitioner's petition for writ of habeas corpus "on the merits." (*In re Memro*, case no. S044437 [hereinafter referred to as "1995 habeas"].) On October 7, 1996, the United States Supreme Court denied the petition for writ of certiorari. (*Memro v. California*, case no. 95-9021.)

On September 8, 1998, petitioner filed a habeas corpus petition in the United States District Court for the Central District of California. (*Reno v. Calderon, Warden*, case no. CV 96-2768 (RT).) On October 7, 1998, respondent filed a motion to dismiss the federal petition for failure to exhaust

most of the grounds for relief. On May 7, 1999, the Central District Court struck the unexhausted claims from the petition, stayed and held the exhausted claims in abeyance, and ordered petitioner to file an exhaustion petition in this Court.

Five years later, May 10, 2004, petitioner filed the instant "exhaustion" petition for writ of habeas corpus. By letter dated May 21, 2004, this Court requested respondent to file an informal response to the petition pursuant to Rule 60 of the California Rules of Court.

ARGUMENT

I.

PETITIONER'S PIECEMEAL PRESENTATION OF CLAIMS BARS THEIR CONSIDERATION

This is the second time petitioner has sought habeas corpus relief from this Court. His first habeas petition was filed 85 days after the filing of his reply brief. He returns nine years after his first habeas corpus petition was denied on the merits.

Piecemeal collateral attacks on a final judgment are not condoned. (*In re Clark* (1993) 5 Cal.4th 750, 769-770.) Therefore, before the claims in this successive petition may be entertained on their merits, petitioner must either (1) explain and justify his failure to present them in a prior habeas corpus petition or (2) allege facts demonstrating a fundamental miscarriage of justice. (See *id.* at pp. 774-775.)

If the factual basis of a claim was previously unknown to the petitioner, and he had no reason to know of the claim, the claim will be considered on the merits if asserted promptly even when presented in a successive petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 775.) However, the Court will look to not just what petitioner himself knew but also to what his then counsel, at the time of the prior habeas corpus petition, knew and to whether the facts *could* have been discovered earlier, either by petitioner or by his attorney. (*Id.* at pp. 775, 779.) Therefore, initially, petitioner

> """must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier . . . ."""" (*Id.* at p. 779.)

Here, all of petitioner's claims are based on facts which were known to him, or should have been known to him, at the time of his earlier habeas corpus petitions. As to those claims, the proffered explanations and justifications for

not including the claims in an earlier habeas corpus petition are inadequate.

The following claims are repetitious, in that he presented them to this Court in his first petition: Claims 5, 7, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 29, 30, 34, 36, 37, 63, 69, 85, 86, 87, 89, 90, 94, 100, 101, 102, 107, 108, 109, 110, 118, 120, 121, 122, 125, 127, and 140.

The following claims are successive, and there is no justification for not including them in the first habeas corpus petition, since they were presented to this Court on appeal: Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 24, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 77, 80, 81, 83, 93, 94, 96, 98, 99 (raised on appeal in *Memro I*), 112, 113, 121, 125, 126, 128, 129, and 130.

The following claims are successive, and there is no justification for not including them in the first habeas petition, since they arise from facts apparent in the trial and appellate record: Claims 7, 11, 14, 22, 23, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69 (raised in habeas corpus petition following first conviction and in habeas petition following second conviction), 72, 74, 75, 76, 78, 79, 82, 84, 85, 88, 89, 90, 92, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 130, 133, 134 135, 136, 137, 138, 139, 140, and 143.)

The following claims are successive, and there is no justification for not presenting them in the first habeas petition, since, even though they are based on facts outside the trial record, they are stem from facts that either were known or could have been known--through the exercise of reasonable diligence--at the time of trial or at the time of the filing of the earlier habeas corpus petition: 71, 88, 91, 92, 108, 109, and 141.

As his reason for not raising this final classification of claims in an earlier habeas corpus petition, petitioner suggests that prior appellate and habeas counsel were ineffective. (Petn. 17-18, 517-519.) According to petitioner, his

current counsel allegedly discovered the claims only after their appointment by the federal court on December 18, 2001. (Petn. 17.) Generally, a change of counsel is irrelevant, however; the Court looks to what petitioner and/or his then counsel knew or could have known at the time of the filing of the earlier habeas corpus petitions, not when current counsel learned of the information.

Consideration may be given, however, to a claim that prior habeas corpus counsel did not adequately represent counsel. But "mere omission" of a newly developed claim does not establish prior habeas corpus counsel incompetency. (*In re Clark*, *supra*, 5 Cal.4th at pp. 779-780.) The petitioner must allege "with specificity" the facts underlying an assertion that the omission of a claim reflects incompetence of counsel. (*Id.* at p. 780.)

> This means petitioner must allege with factual specificity that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.

(*Ibid.*)

Here, petitioner conclusory allegations fail to make the requisite showing. (Petn. 17-18, 517-519.) He suggests that the same appellate counsel who failed to recognize the claims in the first instance could not be expected to recognize his own ineffectiveness for failing to spot the errors. (Petn. 517-519.) This does not satisfy the requirement either, however.

Having failed to adequately explain and justify not raising the above-listed claims in a prior habeas corpus petition, those claims will be barred unless petitioner has alleged facts demonstrating a fundamental miscarriage of justice.

> "A fundamental miscarriage of justice is established by showing: (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 error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted under an invalid statute." (*In re Clark, supra*, 5 Cal.4th at p. 759.)

As to all the unjustified successive claims cited above, however, petitioner has alleged no facts demonstrating a fundamental miscarriage of justice so as to permit consideration of the claims on the merits. Accordingly they are barred.

II.

PETITIONER'S DELAY IN THE PRESENTATION OF CLAIMS BARS THEIR CONSIDERATION

A successive petition, such as this one, "is, of necessity, a delayed petition." (*In re Clark, supra*, 5 Cal.4th at p. 770.) Just as piecemeal collateral attacks on a final judgment are not condoned, so too are untimely ones. "All petitions for writs of habeas corpus should be filed without substantial delay." (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3 [hereafter Policies], standard 1-1; also *In re Clark, supra*, 5 Cal.4th at pp. 782-786; *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn.1.)

Under the Policies, standard 1-1.1, a petition for writ of habeas corpus in a capital matter will be presumed timely filed, i.e., without substantial delay, if done so within 90 days of appellant's reply brief. (*In re Sanders* (1999) 21 Cal.4th 697, 704-705.) Petitioner's appeal having concluded in 1995, patently the instant petition is not presumptively timely under standard 1-1.1. Under the

Policies, standard 1-1.2, a petition filed more than 90 days after the reply brief may nevertheless establish the absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel

> (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

(Original emphasis.)

If a petition filed more than 90 days after the reply brief does not state specifically when the factual and legal bases for the claims became known, the merits of the claims will not be considered absent application of an exception to the procedural bar. (*In re Clark*, *supra*, 5 Cal.4th at p. 799.) This is so because, without specific allegations when a petitioner became aware of the factual and legal bases for the claims presented, "it is impossible to determine whether the claims are raised within a reasonable time . . . ." (*Id.* at p. 786.)

If petitioner has delayed in the presentation of his claims, the Court will look to the reasons proffered to justify his delay. (*Ibid.*) In turn, if those reasons are found wanting, the unjustifiably delayed claims will be barred unless the petition alleges facts which would establish a fundamental miscarriage of justice had occurred. This is the same miscarriage-of-justice exception considered when a claim is presented for the first time in a successive petition. (*Id.* at pp. 797-798; see Arg. I, *ante*.)

The following claims were previously presented to this Court on direct appeal and/or in the first habeas corpus petition and, by definition, are untimely in these proceedings: Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69 (habeas petition following first conviction), 70, 73, 77, 80, 81, 82, 83, 84, 85 (habeas

petition following first conviction), 86, 87, 89, 90, 92, 93, 94, 96, 100, 101, 102, 107, 108, 109, 110, 111, 112, 113, 128, 129, and 130.

The following claims are based on facts that either were readily apparent in the record or were known or could have been known–through the exercise of reasonable diligence–at the time of trial or during the pendency of the appeal: Claims 13, 14, 22, 23, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 78, 79, 88, 91, 95, 97, 98, 99, 103, 104, 105, 106, 108, 109, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143.

Given that the claims are based primarily on facts known or discoverable at the time of trial, so that both the factual and legal bases for the claims should have been known a long time ago, petitioner cannot justify his substantial delay in raising these claims. (See Policies, Std. 1-1.2; *In re Clark*, *supra*, 5 Cal.4th at p. 786 [many claims based on facts known at time of trial]; *People* v. *Jackson* (1973) 10 Cal.3d 265, 268-269.)

The only proffered justification for the delay is the conclusionary assertion that appellate and habeas counsel were ineffective in failing to recognize, investigate and present these claims. (Petn. 12, 17-20, 517-519.) When the proffered justification for a delayed petition is ineffectiveness of prior counsel, the petitioner must allege, again "with *specificity*," and demonstrate that the issue is one which "would have entitled petitioner to relief" had prior counsel raised it earlier, and that "counsel's failure to do so reflects a standard of representation falling below that to be expected" of a criminal defense attorney. (*In re Clark*, *supra*, 5 Cal.4th at pp. 774, 780; italics added.) Petitioner has not included the necessary allegations or showing, making his proffered justification inadequate.

Alleging when current counsel became aware of the facts and the claims (Petn. 17-18) does not satisfy the requirement that the petition must allege when

petitioner and any of his counsel knew or should have known of the facts and the claims. Specifically, what is missing is an allegation that neither trial nor appellate or habeas counsel were aware of these reports or their contents. (*In re Clark*, *supra*, 5 Cal.4th at pp. 775, 799.) That is not surprising, however, since the facts underlying the claims were as available to petitioner's prior counsel as they were to present counsel. (See Evid. Code, §§ 1016, 1017, 1023; *People v. Lines* (1975) 13 Cal.3d 500, 514-515.)

Thus, the above-listed claims should be denied as untimely.

III.

PETITIONER IS NOT ENTITLED TO A SECOND APPEAL

Petitioner alleges numerous violations of his constitutional rights which were raised and rejected on appeal, or which, by virtue of his sole reliance on the trial record, could have been raised on appeal. Petitioner forthrightly acknowledges that he has repeated many of the claims already presented and rejected by this Court on appeal (Petn. 21), and he recognizes that most of the other claims could have been presented on appeal because they are based on the trial record, but he insists that their omission on appeal was due to ineffective assistance of appellate counsel. (Petn. 517-518.) The argument is unavailing.

As a general rule, a convicted criminal defendant may not use habeas corpus as a second appeal. Neither issues which were actually raised on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225), nor issues which could have been but were not (*In re Dixon* (1953) 41 Cal.2d 756, 759), will be considered on habeas corpus absent strong justification or the applicability of at least one of four narrow exceptions. (*In re Harris* (1993) 5 Cal.4th 813, 825-829, & fn. 3.)

Assuming for the sake of argument only ineffective assistance of appellate counsel is "strong justification" for permitting a habeas corpus

petitioner a second opportunity to bite the appellate apple (see *In re Dixon*, *supra*, 41 Cal.2d at pp. 759-760 [no claim made that petitioner was in any manner deprived of the right to assistance of an attorney during the time he could have appealed]), then it should be incumbent on petitioner to allege with specificity "that the issue is one which would have entitled petitioner to relief" had counsel raised it on appeal, and that "counsel's failure to do so reflects a standard of representation falling below that to be expected" of a criminal defense attorney. (See *In re Clark*, *supra*, 5 Cal.4th at p. 780 [requiring specificity when alleging ineffective assistance of counsel as justification for filing a successive and/or delayed petition].) Since petitioner's assertion of ineffective assistance of appellate counsel is not specific (Petn. at 517-518), his proffered justification for seeking a second appeal is inadequate.

Absent the necessary justification, an appellate issue will not be entertained on habeas corpus unless: (1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris*, *supra*, 5 Cal.4th at p. 834); (2) the confining court lacked subject matter jurisdiction (*id.* at p. 836); (3) the confining court acted in excess of its jurisdiction (*id.* at p. 840); or (4) the issue is based on intervening new law (*id.* at p. 841). Petitioner does not assert that these exceptions apply to his appellate claims. (Petn. 517-518.) Even assuming that he did, the first exception goes beyond a "mere assertion that one has been denied a 'fundamental' constitutional right." (*In re Harris*, *supra*, 5 Cal.4th at p. 834.)

Rarely will a denial of a fundamental constitutional right be one which also "strik[es] at the heart of the trial process." (*Id.* at p. 836.) Although the Court has not yet defined the exact boundaries of this exception (*ibid.*), it is narrower than ordinary reversible error which results in a miscarriage of justice. (*Id.*, at p. 834 [*Waltreus* exception for error which results in a miscarriage of justice, discussed in *In re Winchester* (1960) 53 Cal.2d 528, 532, is

inappropriately broad].) Arguably the exception may encompass only errors which can never be harmless, e.g., complete denial of counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335). In any event, petitioner's conclusory assertion of "miscarriage of justice" (Petn. 18, 21) is inadequate and not well-founded.

The following claims were presented and rejected by this Court on direct appeal: Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 15, 16, 17, 18, 19, 24, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 77, 80, 81, 83, 93, 94, 96, 98, 112, 113, 121, 125, 126, 128, 129, and 130. They are therefore barred. (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225.)

The following claims are based solely on the trial record and therefore could have been raised on appeal: Claims 7, 11, 13, 14, 22, 23, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 72, 74, 75, 76, 78, 79, 82, 84, 85, 88, 89, 90, 92, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 130, 133, 134, 135, 136, 137, 138, 139, 140, and 143. They are therefore barred. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Even assuming *arguendo* the claimed errors would be ordinarily reversible, they do not fall within the boundaries of errors that are both clear and fundamental errors and ones which strike at the heart of the trial process. (*In re Harris*, *supra*, 5 Cal.4th at p. 834.)

Consequently, whether petitioner now seeks to raise new claims or just to rework old ones, the exception to the no-second appeal rule does not apply.

Accordingly, the above-listed claims are procedurally barred.

IV.

PETITIONER'S WAIVER OF APPELLATE CLAIMS BARS THEIR CONSIDERATION EVEN ON HABEAS CORPUS

As demonstrated in the previous argument, several of petitioner's claims are appellate in nature and, therefore, should not be entertained on habeas corpus. This is true, respondent submits, even as to claims which were not preserved for appellate review by an objection at trial. The claimed errors still rely on matters within the appellate record and still remain in essence appellate claims. (See *In re Harris*, *supra*, 5 Cal.4th at p. 828, fn. 7.)

To the extent, however, this Court might consider entertaining petitioner's appellate claims on habeas corpus, petitioner's failure to object at trial precludes relief. (*In re Seaton* (2004) 34 Cal.4th 193, 198-201 [failure to preserve issue for appeal also precludes consideration of issue on habeas corpus].) The Legislature intends the direct appeal to be the normal avenue of relief for criminal defendants unjustly incarcerated by events occurring on the record at trial. (*In re Harris*, *supra*, 5 Cal.4th at pp. 827-828, fn. 7.) The Legislature, as does this Court, also intends most errors occurring at trial to be brought to the immediate attention of the trial court so they can be corrected or avoided. (Evid. Code, §§ 353, 354; Pen. Code, § 1259; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

Allowing a criminal defendant to raise a claim of unobjected-to trial error for the first time in a petition for writ of habeas corpus would have the unwanted effect of discouraging the defendant both from objecting at the appropriate time at trial and from using the appellate process. Such discouragement serves no legitimate criminal justice purpose. Moreover, allowing unpreserved claims to be raised on habeas deprives the trial court in the first instance of the opportunity to correct any error and cure any defect.

There exists one exception: there is no duty to object at trial when the facts supporting the objection did not come to light until after the trial and were not reasonably discoverable before then. (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) However, "[a] habeas petitioner may not avoid this procedural bar by relying on facts that, although newly learned, add nothing of substance to what the defense knew or *should have known* at the time of trial." (*Id.*, at pp. 200-201, citing *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34.) Moreover, the failure to object at trial may be asserted in a habeas corpus petitioner "clothed in 'ineffective assistance of counsel' raiment." (*In re Harris*, *supra*, 5 Cal.4th at p. 833.)

Accordingly, to the extent this Court might consider entertaining petitioner's appellate issues on habeas corpus, this Court should take notice of its own records (see *In re Clark*, *supra*, 5 Cal.4th at p. 788, fn. 35) and find petitioner to have forfeited the following claims by not objecting or otherwise asking the court to rule on the issue at trial: Claims 13, 14, 22, 23, 42, 43, 50, 51, 52, 54, 64, 69, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 99 (alleging ineffective assistance at first trial), 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 133, 134, 135, 136, 137, 138, and 139.

Thus, petitioner's failure to object bars relief for these claims.

V.

NONE OF PETITIONER'S CLAIMS ESTABLISH A PRIMA FACIE CASE FOR RELIEF

A habeas petitioner must plead and prove sufficient grounds for relief by stating fully and with particularity the facts upon which relief is sought. The petitioner must also provide copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. An appellate court must summarily deny the

petition if it determines that no prima facie case has been stated because, even assuming the petition's factual allegations are true, the petitioner would not be entitled to relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475, emphasis in original; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 814; *In re Clark, supra,* 5 Cal.4th at pp. 764, 766-767, 781, 797-798; *In re Swain* (1949) 34 Cal.2d 300, 304.)

In *People v. Duvall, supra,* 9 Cal.4th 464, this Court enunciated the following principles applicable to these proceedings:

> Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. [Citations.] Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." [Citation.]
>
> To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and "[i]f the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists." [Citation.] The petition should both (i) state fully and with particularity the facts on which relief is sought [citations] as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citations.] "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." [Citation.] We presume the regularity of

proceedings that resulted in a final judgment [citation], and, as stated above, the burden is on the petitioner to establish grounds for his release. [Citations.]

An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition.

(*Id.*, at pp. 474-475, emphasis in original; see also *People v. Visciotti* (1996) 14 Cal.4th 325, 351; *People v. Romero* (1994) 8 Cal.4th 728, 742; *In re Robbins*, *supra*, 18 Cal.4th 770, 814; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258; *In re Clark, supra,* 5 Cal.4th at pp. 764, 766-767, 781, 797-798.)

A post-conviction habeas corpus attack on the validity of a judgment "is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*In re Clark*, *supra*, at pp. 766-767.)

Further, when the basis of a challenge to the validity of a judgment is ineffective assistance of trial counsel, a defendant must demonstrate that counsel's performance was deficient in that his representation fell below an objective standard of reasonableness under prevailing professional norms and was not the result of an informed tactical decision. He must also show prejudice flowing from counsel's performance by showing a reasonable probability that, but for counsel's unprofessional acts or omissions, the result of the proceeding would have been different, and where prejudice is lacking, the claim may be rejected without addressing whether counsel was incompetent. Mere conclusory allegations of defective performance and resulting prejudice are insufficient (especially when the petition was prepared by counsel); thus, the petitioner must set forth fully and with particularity the facts supporting each claim of deficient performance and resulting prejudice,

and, in addition, must provide documentary support--in the form of reasonably available affidavits or declarations--for the alleged facts, as well as for his claim that counsel's action or inaction was not the result of a reasonable tactical decision. (*People v. Farnam* (2002) 28 Cal.4th 107, 147-148; *People v. Cunningham* (2001) 25 Cal.4th 926, 1031; *In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Holt* (1997) 15 Cal.4th 619, 704; *In re Avena* (1996) 12 Cal.4th 694, 721; *In re Ross* (1995) 10 Cal.4th 184, 204; *People v. Beeler* (1995) 9 Cal.4th 953, 1009-1010; *People v. Duvall, supra*, 9 Cal.4th at pp. 474-475; *People v. Berryman* (1993) 6 Cal.4th 1048, 1108-1109; *People v. Cudjo* (1993) 6 Cal.4th 585, 623; *In re Alvernaz* (1992) 2 Cal.4th 924, 945-946; *People v. Karis* (1988) 46 Cal.3d 612, 656; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

In the instant matter, petitioner has not alleged sufficient facts to entitle him to relief as to any claim in that they are conclusory, do not allege specific facts with particularity, and are speculative claims unsupported by sufficient documentary evidence. In addition to relying on the facts set forth in the petition, petitioner suggests as to every claim there may be other facts yet to be developed supportive of the claim. (Petn. at 20, 22-23, 520.) Irrespective of the existence of such other facts, however, the appropriate disposition of a habeas corpus petition must be based on the factual allegations already contained within it. (*In re Clark, supra*, 5 Cal.4th at p. 781, and fn. 6 ["inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect"].)

A. CLAIMS RELATING TO PETITIONER'S ARREST, SEARCH AND CONFESSION

Claim 1. Petitioner's Arrest Was Unlawful

Petitioner contends, as he did on appeal (AOB 62-83), that his arrest was illegal. (Petn. at 23-36.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 838-843.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 2. Petitioner's Confession To The South Gate Police Was Coerced

Petitioner contends, as he did on appeal (AOB 91-108), that the trial court's determination that his confession was freely and voluntarily given was not supported by substantial evidence. (Petn. 36-48.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 822-827.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 3. The Search Of Petitioner's Residence Was Unlawful

Petitioner contends, as he did on appeal (AOB 83-85), that the trial court erred in finding that he voluntarily consented to the search of his apartment and garage. (Petn. 49-52.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 846-847.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 4. Petitioner Did Not Knowingly and Intelligently Waive his *Miranda* Rights

Petitioner contends, as he did on appeal (AOB 108-110), that his waiver of his constitutional rights was not knowing and intelligent. (Petn. 52–53.) The

identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 823-835.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 5. Petitioner's Claim Of Coercion and Involuntariness Has Not Been Fully And Fairly Adjudicated

Petitioner asserts, as he did on appeal (AOB 33-50, 53-62) and on his habeas (HCP 5-9, 11-20, 23-25, 36-38, 44-45, 47-48), that his claim of coercion and involuntariness were not fully and fairly adjudicated as a result of improper denial of discovery, deliberate police destruction of evidence, the use of jailhouse informants, informant perjury, the state courts' refusal to take corrective action, and this Court's refusal to grant him adequate resources to investigate the issues. (Petn. 53-54.) The sub-claims were rejected by this Court on direct appeal (*Memro*, 11 Cal.4th at 822-32, 836-838) and on habeas (1995 denial on the merits). Therefore, no prima facie case for relief has been stated as to this cumulative claim.

Claim 6. Petitioner's Second Confession Was The Product Of The First Involuntary Confession And Was Also Inadmissible

Petitioner contends, as he did on appeal (AOB 110-111), that his second confession in the presence of Bell Garden police officers was the illegal fruit of his first involuntary confession to the South Gate police officers. (Petn. 54.) The identical claim was rejected by this Court on direct appeal after finding the first confession voluntary. (*Memro*, 11 Cal.4th at pp. 822-827.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 7. Petitioner's Rights Were Violated By The Denial Of His Right To Bail

Petitioner alleges, as he did his prior habeas corpus petition (HCP 51-52), that his constitutional rights were violated by the Police Department's failure to inform him he could be released on bail. (Petn. 54-55.) The identical claim was rejected on the merits by this Court on the prior habeas. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

B. CLAIMS RELATING TO THE RETRIAL

Claim 8. Petitioner's Prosecution For First-Degree Murder On Count III Violated The Prohibition Against Double Jeopardy Under The State And Federal Constitutions

Petitioner contends, as he did on appeal (AOB 18-28), that his retrial for first-degree murder on Count III following the trial court's implied acquittal of first-degree murder during the first trial was a violation of the double jeopardy provisions of the state and federal Constitutions. (Petn. 55-63.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 9. Petitioner's Prosecution On Count III Violated His Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments

Petitioner contends, as he did on appeal (AOB 28-33), that his retrial on Count III violated his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because his conviction was predicated upon facts

rejected by the original trier of fact after an acquittal on at least one theory of murder in the first trial. (Petn. 63-66.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 822; see also *Memro I*, 38 Cal.3d at pp. 690, 695, 699-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 10. Petitioner Was Acquitted Of Felony-Murder On Count III And Retrying Him Under That Theory Violated Double Jeopardy Principles

Petitioner contends, as he did on appeal (AOB 18-28), that retrying him on a felony-murder theory of first-degree murder violated the constitutional prohibitions against double jeopardy because the trier of fact at the first trial found the felony-murder special circumstance not true. (Petn. 66-71.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 11. Petitioner's Constitutional Rights Were Violated By The Failure To Follow Statutory Requirements Regarding Charges Of Felony-Murder

Petitioner asserts that his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated by the prosecution's failure to charge him *at the first trial* separately with the underlying felony of lewd conduct with a minor (Pen. Code, § 288), as required by Penal Code section 190.1. (Petn. 71-74.) However, at the second trial, petitioner was *not* charged with a felony-murder special circumstance. Therefore, the requirement that the felony underlying a felony-murder special circumstance be separately charged and proved (Pen. Code, § 190.1) did not apply.

In addition, the failure to separately charge the felony underlying a special circumstance is not necessarily error. (*People v. Morris* (1988) 46 Cal.3d 1, 14.) Moreover, at the conclusion of the first trial, the court, sitting as the trier of fact, found the felony-murder special circumstance *not true*. Thus, petitioner was not harmed by the failure to separately charge him with the underlying felony at the first trial. (*People v. Robertson* (1982) 33 Cal.3d 21, 47 [finding error to be harmless]; *People v. Velasquez* (1980) 26 Cal.3d 425, 434 [same].)

Therefore, petitioner has failed to state a prima facie case on the merits as to this claim.

Claim 12. Petitioner Was Acquitted Of Premeditated Murder In Count III And Retrying Him Under That Theory Violated Double Jeopardy Principles

Petitioner contends, as he did on appeal (AOB 18-33), that retrying him on a premeditated theory of first-degree murder in Count III violated double jeopardy principles based on this Court's findings that there was insufficient evidence of premeditated murder. (Petn. 74-76.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 13. Trying Petitioner Under A Felony-Murder Theory For Count I Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory At The First Trial

Petitioner avers that his retrial on Count I under a felony-murder theory violated the constitutional prohibition against double jeopardy because at the

first trial, the trier of fact found him guilty of only second-degree murder on Count I. (Petn. at 77-78.) But this Court found sufficient evidence of malice to reprosecute petitioner for second-degree murder on Count I. (*Memro I*, 38 Cal.3d at pp. 666, 700.) At the retrial of Count I, the prosecutor charged petitioner only with second-degree murder, and the trial court expressly instructed the jury that petitioner was charged in Count I only with murder in the second degree. (CT 507.)

Thus, at the retrial, petitioner was never placed in jeopardy for first-degree murder on Count I. Petitioner has failed to state a prima facie case as to this claim.

Claim 14. Denial Of Petitioner's Right To Counsel At The Penalty Phase Of The First Trial Deprived Petitioner Of Due Process At The Retrial

At the conclusion of the guilt phase of *the first trial*, the trial court granted petitioner's first motion to discharge appointed counsel, but then when petitioner was not satisfied with the duly appointed substitute counsel because of a difference over tactics, the trial court refused to appoint another substitute counsel. (FRT 894-920.)[1/] The trial court continued the penalty phase twice so petitioner could prepare to proceed in pro per or hire an attorney to represent him at the penalty phase. (FRT 920-942.) Petitioner represented himself at the penalty phase, which consisted only of argument and no presentation of evidence by either side. (FRT 942-945.)

Petitioner maintains that the trial court's decision at the first trial violated his constitutional right to counsel at the first trial and deprived him of due process at the retrial. He posits that this Court should have held in *Memro I* that

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1. The Reporter's Transcript from the first trial, part of the augmented record on appeal from the second trial, are referred to herein as FRT.)

this was a gross violation of his right to counsel and should not have permitted a retrial of the penalty phase against petitioner, thereby precluding retrial with a death-qualified jury that was predisposed to convict him and then to impose the death penalty. (Petn. 78-88.) But this Court's reversal of the judgment of conviction precluded adjudication of any of the penalty phase claims, and petitioner has cited no case that would require elimination of the penalty phase upon reversal of the conviction and remand for re-trial of the guilt phase.

Petitioner has failed to state a prima facie case for relief on the merits as to this claim.

Claim 15. Petitioner's Rights Were Violated By The Prosecution's Use Of Perjurious Jailhouse Informants

Petitioner asserts, as he did on appeal (AOB 59-62), and on habeas (HCP 15-20), that four commonly known jailhouse informants examined on voir dire in an Evidence Code section 402 hearing were government agents who elicited information from petitioner on behalf of the Los Angeles County Sheriff's Department. (Petn. 88-91.) The identical claim was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 824-825, 827-828; 1995 denial on the merits.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 16. Petitioner's Rights Were Violated By The False And Perjurious Testimony Of Anthony Cornejo

Petitioner asserts, as he did on appeal (AOB 59-52), and on habeas (HCP 15-20), that permitting Anthony Cornejo to testify at the Evidence Code section 402 hearing that petitioner told him his confession was voluntary and uncoerced violated his constitutional rights. (Petn. 92-93.) The identical claim

was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 827-828; 1995 denial on the merits.) Therefore, no prima facie case for relief has been stated as to this claim.

C. CLAIMS RELATING TO DISCOVERY

Claim 17. Failure To Provide Discovery Of The Prior Citizen Complaints Against The Police Officers Denied Petitioner A Fundamentally Fair Trial

Petitioner asserts, as he did on appeal (AOB 33-50), and on habeas (HCP 11-15), that his constitutional rights were violated by the failure to provide discovery of the personnel and citizen complaint files of the police officers who were present when he confessed. (Petn. 93-101.) The identical claim was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 829-832; 1995 denial on the merits; see also *Memro I*, 38 Cal.3d at pp. 674-690.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 18. Petitioner's Rights Were Violated By The Destruction Of The South Gate *Pitchess* Records

Petitioner asserts, as he did on appeal (AOB 33-50), and on habeas (HCP 11-15), that his constitutional rights were violated by the inadvertent, good faith destruction of the personnel and citizen complaint files of the police officers who were present when he confessed. (Petn. 101-104.) The identical claim was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 829-832; 1995 denial on the merits; see also *Memro I*, 38 Cal.3d

at pp. 674-690.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 19. The Prosecution Violated Petitioner's Rights By Failing To Disclose Approximately 400 Pages Of Discovery

Petitioner asserts, as he did on appeal (AOB 53-59), and on habeas (HCP 5-9), that the delay in turning over about 400 pages of reports gathered by the Bell Gardens Police Department during the investigation of the murders of Scott F. and Ralph C. violated his constitutional rights. (Petn. 104-117.) The identical claim was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 836-838; 1995 denial on the merits.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 20. The Prosecution Violated Petitioner's Rights By Withholding *Brady* Evidence Regarding Benefits Paid To Jailhouse Informants Who Testified At A Pretrial Hearing

Petitioner alleges, as he did on habeas (HCP 20-23), that the prosecution violated his constitutional rights by withholding evidence with which to impeach the jailhouse informants' testimony at the Evidence Code section 402 hearing. (Petn. 117-120.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 21. The Prosecution Violated Petitioner's Rights By Failing To Disclose Exculpatory Evidence In Discovery Regarding The Prior Felony Convictions And Probationary Status Of Prosecution Witness Scott Bushea

Petitioner alleges, as he did on the prior habeas (HCP 25-28), that the prosecution's failure to disclose evidence of witness Scott Bushea's prior felony convictions and probationary status deprived petitioner of his constitutional rights. (Petn. 120-122.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

D. CLAIMS RELATING TO TRIAL COURT ERRORS

1. PRETRIAL ERRORS

Claim 22. Petitioner's Rights Were Violated By Assignment Of A Commissioner, Rather Than A Judge, To Preside Over His Case

Petitioner avers that assignment of the case to a commissioner, instead of a superior court judge, violated his constitutional right to a fair trial and a reliable determination of guilt and penalty. (Petn. 122-123.) He signed a written stipulation, however, to have the case heard by the commissioner (CT 221; RT A294-A300), and he includes no reasonably available documentary evidence to substantiate his conclusory claim that his waiver was not knowing and intelligent. Counsel may stipulate to trial of a capital case by a court commissioner without an express wavier by the defendant. (*In re Horton* (1991) 54 Cal.3d 82, 95-96.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 23. Petitioner's Conviction And Sentence Must Be Reversed Because Of The Commissioner's Bias

Petitioner avers that the trial court commissioner who sat as the judge on his case improperly displayed hostility and bias toward petitioner, thereby rendering his constitutional right to a fair trial before a fair tribunal. (Petn. 123-128.) A claim of judicial hostility or bias is not preserved, however, unless the defendant voices a contemporaneous objection, in order to provide the court with an opportunity to remedy any perceived error and to dispel any misunderstanding with appropriate admonitions. (See *People v. Snow* (2003) 30 Cal.4th 43, 78; *People v. Boyette* (2002) 29 Cal.4th 381, 459; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107-1109; *People v. Wright* (1990) 52 Cal.3d 367, 411.)

Even on the merits, petitioner cannot prevail. The only cited instances of hostility or bias were merely the commissioner's understandable frustrations during the long trial, but the comments never resulted in the trial court favoring the prosecution during any of its rulings or in front of the jury. Petitioner has not shown that the judge's comments were so prejudicial that they denied petitioner a fair trial. (*People v. Snow*, *supra*, 30 Cal.4th at p. 78.)

Thus, petitioner has failed to make a prima facie case for relief.

Claim 24. The Trial Court Violated Petitioner's Right To A Speedy Trial And Due Process

Petitioner asserts, as he did on appeal (AOB 124-130, 135-136), and on habeas (HCP 48-50), that after remand, the trial court violated his statutory right to a speedy trial by granting continuances to his trial attorneys over his objection. (Petn. 128-130.) The identical claim was rejected on the merits by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 852-853;

1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 25. Petitioner Was Deprived Of A Full And Fair Hearing On His Motion To Suppress Evidence

Petitioner alleges, as he did on habeas (HCP 28-31), that he was denied a full and fair hearing on his motion to suppress evidence at the first trial because the judge was prejudiced against him and counsel ineffectively failed to recuse the judge from hearing the motion. (Petn 130-132.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 26. Petitioner Was Deprived Of A Fair And Accurate Suppression Motion Hearing At The First Trial

Petitioner alleges, as he did on habeas (HCP 32-36), that he was denied a fair and accurate hearing on his suppression motion at the first trial as a result of a misstatement of information in the missing-juvenile report on Carl C. and the destruction of police dispatch tapes. (Petn 132-135.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim in these proceedings.

Claim 27. The Trial Court Erred In Failing To Exclude Witnesses During The Hearing On The Motion To Suppress Evidence

Petitioner contends, as he did on appeal (AOB 86-87), that the trial court erroneously denied his request to exclude witnesses during the hearing on his motion to suppress evidence at the trial. (Petn. 135-137.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 844.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 28. The Trial Court Erred In Failing To Dismiss The Information Based Upon The Unlawful Seizure Of Petitioner's Privileged And Confidential Legal Materials

Petitioner contends, as he did on appeal (AOB 50-52), that the seizure and scrutiny of several transcripts and legal papers from his jail cell at the conclusion of the first trial violated his constitutional rights. (Petn. 138-139.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 835-836.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 29. The Trial Court Erred In Failing To Suppress The Jailhouse Informant's Testimony

Petitioner asserts, as he did on appeal (AOB 59-62), and on habeas (HCP 23-25), that the trial court erred in failing to exclude jailhouse informant Anthony Cornejo's false testimony at the hearing on petitioner's motion to suppress his confession. (Petn. 139-141.) The identical claim was rejected by this Court on the merits on direct appeal and on habeas. (*Memro*, 11 Cal.4th at

pp. 825-828; 1995 habeas denial). Therefore, no prima facie case for relief has been stated as to this claim.

Claim 30. The Trial Court Erred In Denying Petitioner's Motion To Relitigate The 1538.5 Motion

Petitioner asserts, as he did on appeal (AOB 87-91), and on habeas (HCP 36-38), that the trial court's refusal to hear his Penal Code section 1538.5 motion de novo was error. (Petn. 141-143.) The identical claim was rejected by this Court on the merits on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 844-845; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 31. The Trial Court Erred In Failing To Grant Severance Of Count III

Petitioner contends, as he did on appeal (AOB 111-120), that the trial court erroneously failed to grant his motion to sever of Counts I and II from Count III. (Petn. 143-152.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 847-851.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 32. The Trial Court Erred In Failing To Conduct An In Camera Hearing Regarding The Renewed Severance Motion

Petitioner contends, as he did on appeal (AOB 121-123), that the trial court erroneously refused to hold an in camera hearing on his renewed severance motion. (Petn. 152-154.) The identical claim was rejected by this

Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 848-849, 851.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 33. The Trial Court Erred In Denying Petitioner's Motions For Substitute Counsel

Petitioner contends, as he did on appeal (AOB 130-140), that the trial court erroneously denied his multiple motions for substitute counsel. (Petn. 154-167.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 853-859.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 34. The Trial Court Erred In Failing To Grant Petitioner's Requests To Be Housed In High Security

Petitioner alleges, as he did on habeas (HCP 15-20, 24), that the trial court's denial of his request to be housed in the high security jail module was error because it resulted in his exposure to jailhouse informants. (Petn 167-170.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 35. The Trial Court Erred In Failing To Order Separate Transportation For Petitioner

Petitioner avers that the trial court's refusal to order that the County Sheriff provide special, separate transportation for petitioner was error. (Petn. 170-173.) However, the circumstances under which a criminal defendant is handled outside the courtroom are clearly within the discretion of the law

enforcement personnel in charge of out-of-court activities. (*People v. Hill* (1998) 17 Cal.4th 800, 841, fn. 7.) Moreover, petitioner has failed to show how his transportation to the courthouse affected his ability to receive a fair trial since his statements on the bus were never introduced at trial.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 36. The Trial Court Committed Constitutional Error In Considering Jailhouse Informant Anthony Cornejo's Testimony During The Evidence Code Section 402 Hearing

Petitioner asserts, as he did on appeal (AOB 59-62), and on habeas (HCP 23-25), that the trial court's consideration of Anthony Cornejo's perjured testimony at the hearing on the voluntariness of petitioner's confession was error. (Petn. 174-176.) The identical claim was rejected by this Court on the merits on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 825-828; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 37. The Trial Court Erred In Admitting Evidence From Jailhouse Informant Anthony Cornejo

Petitioner asserts, as he did on appeal (AOB 59-62), and on habeas (HCP 23-25), that the trial court's admission of Anthony Cornejo's perjured testimony at the hearing on the voluntariness of petitioner's confession violated his Sixth Amendment right to counsel. (Petn. 176-180.) The identical claim was rejected by this Court on the merits on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 825-828; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

2. GUILT PHASE

Claim 38. The Trial Court Denied Petitioner His Right To Cross-examine And Present A Defense

Petitioner contends, as he did on appeal (AOB 164-167), that the trial court erroneously precluded him from cross-examining Mrs. Fowler about the ages of Scott Fowler's older friends and that the error violated his rights to cross-examine and present a defense. (Petn. 180-182.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 867-868.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 39. The Trial Court Erred In Failing To Take A Personal Waiver Under *Boykin-Thal*

Petitioner contends, as he did on appeal (AOB 167-169), that defense counsel's concession to the jury that petitioner killed Carl C. (Count III) was tantamount to a guilty plea and required that petitioner personally waive his *Boykin-Tahl* rights. (Petn. 182-183.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 857-858.) Moreover, arguing that a defendant is guilty of second-degree murder, but not first-degree murder, is not deficient performance. (*People v. Ochoa* (1998) 19 Cal.4th 353, 434-435; see also *People v. Cain* (1995) 10 Cal.4th 1, 30-31 [not incompetent tactical choice to concede the burglary and murder, in light of defendant's confessions to police, while arguing against the special circumstance]; *People v. Wright, supra*, 52 Cal.3d at p. 415 [concession that defendant committed the acts, but that the evidence did not support the underlying felony in a felony-murder case, demonstrated plausible tactical decision].)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 40. The Trial Court Erred In Admitting Prejudicial Cumulative Photographs Of The Victims

Petitioner contends, as he did on appeal (AOB 161-164), that the trial court's admission of allegedly cumulative and unduly prejudicial autopsy photographs of the three murder victims was an abuse of discretion. (Petn. 183-185.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 865-867.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 41. The Magazines And Photographs Of Young Boys Were Improperly Admitted

Petitioner contends, as he did on appeal (AOB 152-161), that the trial court abused its discretion in admitting photographs and magazines depicting nude young boys because they were irrelevant and unduly prejudicial and their admission was violative of petitioner's right to due process. (Petn. 185-190.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 864-865.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 42. Confining Petitioner To A Marked Squad Car In Full Sigh Of The Jury While The Jury Viewed The Crime Scene Was A Deprivation Of Petitioner's Fifth Amendment, Sixth And Fourteenth Amendment Rights

Petitioner's motion for a jury view of the crime scene was granted. (RT 2538-2539.) Petitioner avers, however, that transporting him to the scene in a marked black-and-white patrol car, and confining him to the marked squad car with leg and waist chains during the jury view, deprived him of his

constitutional right to be present at trial because he was not allowed to get out, view the scene, and hear any testimony taken at the scene. (Petn. 190-194.) A showing of necessity for restraints during a jury view is not required, however, and petitioner has failed to show that the trial court abused its discretion in ordering the security measures. (See Pen. Code, § 1119; *People v. Hardy* (1992) 2 Cal.4th 86, 180 [no abuse of discretion in ordering defendant to be shackled during jury view]; *People v. Roberts* (1992) 2 Cal.4th 271, 306-307.)

Indeed, it has been held that a trial court may control the conditions under which the defendant views the scene, and a defendant on trial for murder may be confined in a patrol car in the custody of several officers. (*People v. Benjamin* (1975) 52 Cal.App.3d 63, 76-77; see also *People v. Cooks* (1983) 141 Cal.App.3d 224, 323; *People v. O'Brien* (1976) 61 Cal.App.3d 766, 779-780.) Furthermore, presence at a jury view of the crime scene is not a critical stage of a criminal proceedings, no loss of constitutional rights occurs if the jury views the scene in his absence. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 106-108, 110-112; *People v. Bonney* (1861) 19 Cal. 426, 446, quoted with approval in *Snyder, supra*, at p. 112; *People v. Benjamin, supra,* 52 Cal.App.3d at p. 77; *People v. Lindsay* (1964) 227 Cal.App.2d 482, 507; see generally *People v. Bloyd* (1987) 43 Cal.3d 333, 359-360; *People v. Harris* (1981) 28 Cal.3d 935, 955.) Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 43. Shackling Petitioner In Court Deprived Him Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights

Petitioner avers that the use of leg and waist chains to restrain him in court denied him his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Petn. 194-197.) However, petitioner was wearing leg or waist restraints only *after* the jury had returned guilty verdicts, and even

then, only during a *Marsden* hearing *outside the jury's presence*, and only while *in lock-up* one day after being transported to the courthouse. (RT 2893/6-2893/7, 2925-2928.) The only other occasion was during a *pre-trial* hearing on discovery compliance. (RT 60.)

Thus, the jury never saw any restraints on petitioner, and he does not contend otherwise. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 945-946; *People v. Rich* (1988) 45 Cal.3d 1036, 1084-1085; *People v. Duran* (1976) 16 Cal.3d 282, 287, fn. 2, and cases cited; *People v. Allen* (1986) 42 Cal.3d 1222, 1264.) Moreover, he has not demonstrated that the shackling interfered in any way with his ability to communicate with defense counsel.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 44. Petitioner's Due Process Rights Were Violated When The Trial Court Admitted Character Evidence And Instructed The Jury To Consider It

Petitioner contends, as he did on appeal (AOB 152-161), that the nude photographs and magazines seized from his apartment were inadmissible propensity evidence and that the trial court erred in giving a cautionary instruction that told the jury not to consider the evidence as proof of bad character or disposition, but only for the limited purpose of determining if they tended to show a common plan or scheme, and hence, intent or motive. (Petn. 197-203.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 864-865.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 45. Allowing The Admission Of The Magazines, Photographs And Books Violated Petitioner's Eighth And Fourteenth Amendment Rights

Petitioner contends, as he did on appeal (AOB 152-161), that the trial court's admission of the nude magazines, photographs found in his apartment constituted a violation of his Eighth and Fourteenth Amendment rights because the result was that he was convicted merely for his status as a pedophile and child molester. (Petn. 203-204.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 864-865, 867.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 46. The Trial Court Erred By Overruling Trial Counsel's Objection For A Failure To Comply With A Discovery Order By The Bell Gardens Police Department And For Allowing It To Be Introduced As Surprise Testimony, In Violation Of Petitioner's Fifth, Sixth, Eighth, And Fourteenth Amendment Rights

Petitioner avers that he was unfairly surprised at the second trial with information that had never been supplied to him as part of the pre-trial discovery ordered by the trial court: the fact that the plastic gallon-size milk jug found at the scene of the 1976 murders of Scott F. and Ralph, Jr. had been cut in a specific manner, to wit, with the top lopped off so as to keep the handle intact. (Petn. 204-208; see *Memro*, 11 Cal.4th at p. 811.) However, petitioner's own confession referred to this unique fact that only the killer would have known (See *Memro*, 11 Cal.4th at p. 815), testimony concerning the cutting of the top of the plastic container was adduced at the first trial (FRT 753-754, 757), and the plastic bait bottle itself was introduced into evidence as People's Exhibit 5 (FRT 756, 826). In addition, the Bell Gardens Police Report

provided to counsel for petitioner in 1986 clearly lists the finding of the plastic bait container at the scene, together with "a matching piece of clear plastic which matched the cutout of the bait container." (Petn. Exh. S-A at 18.)

It appears that at the second trial, defense counsel were not caught by surprise when testimony was introduced concerning the plastic bottle having been cut in a certain unique way, but claimed not to know that this fact had purposely never been revealed to the press "so if [the detectives] ever did find the suspect and question him, [the detectives] would not have to speculate about whether or not the person [who] had given [them] [this unique piece of information] was telling the truth [because he could not have obtained it from any media reports]." (RT 2504-2505; see also RT 2508.) But the fact that this fact had been withheld from the media and kept secret was not a discoverable fact unless it was itself memorialized in some writing, because the discovery order referred only to "*lists* of items or evidence not released to the newspapers prior to defendant's arrest." (RT 2514.) In other words, petitioner was not entitled to discovery of the learned facts that had been withheld from the press, unless a note to that effect was written down in one of the reports. (RT 2515.)

Here, the detectives provided certain facts about the 1976 killings to the media, but did not tell the media about the unique way the plastic gallon container had been cut. However, they never wrote down the fact that they purposely were not revealing to the press the unique way the plastic gallon container had been cut, and the prosecutor and defense counsel did not learn about this until the middle of trial, two days before Sergeant Barclift testified to this fact. (RT 2508-2509, 2516-2517.) Thus, since it was a fact that was never memorialized, and was not evidence acquired by the police during the investigation, it was not discoverable. Furthermore, when asked how knowledge before trial about the officers' decision not to provide this unique

fact to the press would have changed any of the defense strategy in the case, defense counsel would provide no explanation. (RT 2510-2515.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

3. GUILT PHASE INSTRUCTIONAL CLAIMS

Claim 47. The Court Erred In Failing To Give Defense Requested CALJIC No. 2.91

Petitioner contends, as he did on appeal (AOB 169-173), that the trial court incorrectly concluded there was no eyewitness testimony as to the perpetrator of Counts I and II and therefore erred in not giving CALJIC No. 2.91 or his special instruction on the prosecution's burden to prove identity beyond a reasonable doubt. (Petn. 208-211.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 868-869.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 48. The Trial Court Erred In Failing To Instruct Sua Sponte On The Lesser Offense Included Within The Felony Charge Of Lewd Act With A Minor

Petitioner contends, as he did on appeal (AOB 176-179), that the trial court was obligated to instruct sua sponte on misdemeanor child molestation and contributing to the delinquency of a minor as allegedly lesser included offenses to the lewd conduct, which the jury was told could be a predicate for first-degree murder on Count III. (Petn. 211-212.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 870-873.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 49. The Trial Court Erred In Failing To Instruct Pursuant To CALJIC No. 17.01 That The Jurors Must Unanimously Agree On The Lewd Act Constituting The Underlying Felony Charge

Petitioner contends, as he did on appeal (AOB 175-176), that the trial court was required to give a unanimity instruction sua sponte regarding the particular lewd act which would justify a felony murder conviction on Count III. (Petn. 212-213.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 869-870.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 50. The Trial Court Committed Reversible Error By Failing To Instruct The Jury That Shackling Had No Bearing On The Determination Of Guilt Or Penalty

Petitioner avers that the trial court erred in failing to instruct the jury sua sponte to disregard the shackles and chains placed on petitioner during the jury view of the Ford Park crime scene. (Petn. 213-214.) As discussed above, however (Claim 43, *ante*), petitioner remained in the back seat of the patrol car during the entire jury view, and there is absolutely no evidence that any juror ever saw any restraints on petitioner's ankles or wrists. Consequently, there is no showing he was prejudiced by the shackling, and to instruct the jury as petitioner contends should have done would have brought to the jurors' attention something of which they were completely unaware. (See *People v. Combs* (2004) 34 Cal.4th 821, 836; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1213; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 51. The Trial Judge Deprived Jurors Of Their Fact-finding Role By Ordering Them To Presume That Petitioner's Purported Confession Was Voluntary, On Violation Of Petitioner's Fifth, Sixth, Eighth, And Fourteenth Amendment Rights

Petitioner avers that the trial court erroneously instructed the jury to presume that petitioner's confession was voluntary. (Petn. 215-217.) The contention is belied by the record. The trial court properly determined, outside the jury's presence, that petitioner's confession was voluntary (RT 2250-2251, 2266), as it was required to do. (*People v. Markham* (1989) 49 Cal.3d 63; Evid. Code, §§ 402(b), 405, 406.)

The trial court did *not* instruct the jury to presume that his confession was true and voluntary, as petitioner suggests, but rather only told the jurors that they were not to concern themselves with the issue of whether the proper *Miranda* rights were given and waived. (RT 2378.) The trial court properly instructed the jurors that they were the exclusive judges as to whether petitioner made the confession and, if so, whether his statements were true, in whole or in part. It also properly admonished the jury that evidence of petitioner's confession should be viewed with caution. (CT 477; CALJIC No. 2.70; see *People v. Beagle* (1972) 6 Cal.3d 441, 455-456.)

Therefore, petitioner has failed to make a prima facie case for relief as to this claim.

Claim 52. The Trial Court's Improper Instruction To The Jury That Petitioner's Confession Was Voluntary Amounted Improper Vouching

Petitioner avers that by instructing the jury that it must take as a given fact that petitioner was properly advised of his constitutional rights and waived

them, the trial court was improperly vouching for the credibility of the police officers. (Petn. 217-218.) Respondent disagrees. The trial court was merely advising the jurors that the question of whether petitioner had waived his *Miranda* rights was for the court to determine and that they did not need to decide that issue. The trial court was not stating or implying that the officers were credible witnesses as to these facts or the facts to which they would be testifying at trial.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 53. The Trial Court Erred In Failing To Tell The Jury Sua Sponte That Count I Was Charged Only As Second Degree Because The Facts Would Not Support A First-degree Charge

Petitioner avers that the trial court was obligated to inform the jury that the reason the homicide in Count I was charged only as a murder in the second degree was because the facts surrounding the commission of that homicide would not support a first degree murder charge. (Petn. 218-221.) But such an instruction is never required in a criminal case, and petitioner has cited no case in support of his citation of error. (See RT 2233.) The reasons for charging a particular crime, or for not charging a higher degree of an offense, are simply not relevant, and the trial court properly found that any attempt by petitioner to use the requested instruction as support for his argument that the jury should decide the sufficiency of the factual showing on Count III by analogy to the factual showing on Count I would have been completely misleading, would "confuse the issues," and would "creat[e] havoc." (RT 2223-2224, 2230, 2233; see *People v. Wash* (1993) 6 Cal.4th 215, 252-254 [trial court properly denied

motion to inform jurors that retrial resulted from a hung jury and not from appellate reversal of the death penalty.)

As stated by the prosecutor, "[F]or the jurors to hear essentially two murders that are more or less identical as to Count 1 and to be told that Count 1 is a second degree [would be] very prejudicial to the prosecution." (RT 2222.) Thus, the trial court properly instructed the jury to judge each count independently of the other two counts and not to concern itself or speculate as to why Count I charged only second-degree murder and not first-degree murder. (RT 2225, 2233, 2766; CT 507.) Petitioner posits that this instruction encouraged the jury to speculate that Count I was limited to second-degree murder "because of some legal technicality and not because of a prior factual determination (Petn. at 220), but this conjecture on the part of the jury as to the reason for the charging would be a direct violation of the instruction, and petitioner cannot be allowed to ground his entire argument on a false assumption: that the jury should be presumed *not* to have followed the court's instruction not to speculate. In any event, petitioner withdrew his request for the special instruction. (RT 2233.)

Therefore, petitioner as failed to state a prima facie case for relief as to this claim.

Claim 54. Instructing The Jury Pursuant To CALJIC No. 8.31 Unconstitutionally Lessened The Prosecution's Burden Of Proof

Petitioner avers that the trial court erred in instructing the jury with regard to Count I on second-degree murder as a killing resulting from an intentional act dangerous to life, pursuant to CALJIC No. 8.31. He asserts that this instruction lessened the People's burden of proof because the murder here – committed by bending Scott F.'s throat backwards and slitting his throat with

a two-inch knife – could not have been an implied malice murder, but rather only the other variety of second-degree murder: an intentional, unpremeditated murder, as covered by CALJIC No. 8.30, which was also given here. (Petn. 221-224; see CT 491-492.) But petitioner did not object (RT 2680-2681), and the issue has therefore been waived. (See *People v. Toro* (1989) 47 Cal.3d 966, 977-978.)

Moreover, CALJIC No. 8.31 is a correct statement of the law. (*People v. Swain* (1996) 12 Cal.4th 593, 601-603.) *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 106-108; *People v. Watson* (1981) 30 Cal.3d 290, 300.) Therefore, by definition, its elements do not lower the prosecution's burden of proof simply because the evidence shows that the People have met their burden on the alternate theory of second-degree murder. In other words, by demonstrating that petitioner intended that his act result in Scott's death when he slit his throat, the People met a higher level of proof, but if some jurors felt that the prosecution had only proved that petitioner slit Scott's throat without intending that he die, that was still sufficient to constitute second-degree murder because it was clearly an act "involving a high degree of probability that it [would] result in death," and the act was either done "with wanton disregard for human life," or "the natural consequences of the act [were] dangerous to life." (CALJIC No. 8.31.)

Therefore, no prima facie case for relief has been made as to this claim.

Claim 55. The Trial Court Erred By Giving A Misleading Jury Instruction, When A More Precise Instruction Was Requested By Trial Counsel, And The Giving Of The Instruction Violated Petitioner's Due Process Rights Under The Fourteenth Amendment

Petitioner avers that the trial court erred in giving CALJIC No. 8.75, regarding the order in which to decide first-degree murder, second-degree murder, and manslaughter. He maintains that the trial court should have replaced the word "both" with "either or" in the following sentence: "If you unanimously agree that the defendant is guilty of said offense charged in both Counts 2 and 3, you will have your foreman date and sign the verdict form to which your verdicts apply" because it wrongly implied that if the jury found petitioner guilty on Count II, it was required to find him guilty on Count III. (Petn. 224-226.) The argument is not supported by logic or the law.

On appellate review, a challenged instruction must be viewed in light of the entire charge to the jury, and an appellant must demonstrate a reasonable likelihood that the jury understood the instructions as he asserts. (*People v. Benson* (1990) 52 Cal.3d 754, 801.) Here, petitioner has failed to make the required showing. The jury was instructed that "[e]ach count charge[d] a distinct offense," that it "must decide each count *separately*, and that its "finding as to each count must be stated in a separate verdict." (CT 514, italics added; CALJIC 17.02.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

4. PENALTY PHASE

Claim 56. The Trial Court Erred In Rejecting The Waiver Of Jury For The Penalty Phase

Petitioner contends, as he did on appeal (AOB 185-187), that the trial court improperly sustained the prosecutor's objection to petitioner's request to waive the jury at the penalty phase. (Petn. 226-228.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 875.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 57. The Trial Court Erred In Failing To Order Trial Counsel To Inform Petitioner Of The Penalty Phase Preparation And Plan

Petitioner contends, as he did on appeal (AOB 187-193), that the trial court erroneously refused to order defense counsel to reveal the defense strategy for the penalty phase to petitioner. (Petn. 228-231.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 875-877.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 58. The Trial Court Erred In Admitting Petitioner's Testimony At The Penalty Phase

Petitioner contends, as he did on appeal (AOB 198-202), that the trial court erred in permitting him to make a statement to the jury at the penalty phase, asking the jury to "return with a verdict of death as the appropriate penalty." (Petn. 231-232.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 878.) Therefore, no prima facie case for relief has been stated as to this claim.

5. PENALTY PHASE INSTRUCTIONAL ERROR

Claim 59. The Trial Court Failed To Tailor The Instruction Concerning The Factors In Aggravation Which The Jury Could Consider

Petitioner contends, as he did on appeal (AOB 206-209), that the trial court erred in failing to grant defense counsel's request that certain allegedly inapplicable factors be omitted from CALJIC No. 8.84.1. (Petn. 232-234.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 880.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 60. The Trial Court Erred In Failing To Instruct On The Elements Of The Uncharged Offense As The Penalty Phase And In Describing That Offense In Highly Inflammatory Language

Petitioner contends, as he did on appeal (AOB 209-211), that the trial court erred by failing to instruct the penalty jury sua sponte on the elements defining cruel and inhuman bodily injury upon a child (Pen. Code, § 273d), the other criminal activity evidence offered in aggravation, and by using the highly inflammatory language of Penal Code section 273d, as compared to the more neutral terms of assault under Penal Code section 245. (Petn. 234-235.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 880-881.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 61. The Jury Was Improperly Instructed As To The Scope Of Mitigating Evidence It Could Consider

Petitioner contends, as he did on appeal (AOB 211-214), that the trial court's failure to instruct that the penalty jury could consider evidence of his "background" misled the jury into disregarding pertinent mitigating evidence, in violation of the Eighth and Fourteenth Amendments. (Petn. 235-237.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 881.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 62. The Trial Court Erred In Instructing The Jury That There Must Be Unanimous Agreement As To Penalty

Petitioner contends, as he did on appeal (AOB 214-217), that his constitutional rights to due process and a reliable penalty determination were violated because the jurors were instructed that they had to agree on the penalty verdict and were not instructed on the consequences of a deadlock. (Petn. 237-239.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 882.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 63. The Trial Court Erred In Refusing A Lingering Doubt Instruction At The Penalty Phase

Petitioner asserts, as he did on appeal (AOB 217-218) and on habeas (HCP 50-51), that the trial court's refusal to give a lingering doubt instruction was prejudicial error. (Petn. 239-244.) The identical claim was rejected on the merits by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at p.

883; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 64. The Death Verdict Must Be Reversed Because The Trial Court Failed To Instruct The Jury That The Guilt-Phase Instruction To Disregard The Consequences Of Its Verdict Did Not Apply To Its Deliberations At The Penalty Phase

Petitioner avers that the trial court was required to instruct the penalty phase jury sua sponte to disregard CALJIC No. 1.00, which properly informed the jury at the guilt phase not to be influenced by pity or sympathy and to reach a just verdict "regardless of the consequences." (Petn. 244-245.) This Court has previously rejected the same argument. This Court has expressly held that giving CALJIC No. 1.00 at the guilt phase does not necessarily result in prejudicial carry-over to the penalty phase and that there is no requirement to countermand CALJIC No. 1.00 at the penalty phase. (*People v. Frye* (1998) 18 Cal.4th 894, 1025; *People v. Avena* (1996) 13 Cal.4th 394, 437; *People v. Medina* (1995) 11 Cal.4th 694, 779-780.)

Therefore, petitioner has failed to make a prima facie case for relief as to this claim.

6. SENTENCING

Claim 65. The Trial Court Erred In Denying Petitioner's Automatic Motion For Modification Of Sentence

Petitioner contends, as he did on appeal (AOB 218-224), that the trial court erred prejudicially in denying his automatic motion for modification of

sentence. (Petn. 245-248.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 883-886.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 66. The Trial Court Erred In Considering The Sealed 1979 Probation Report

Petitioner contends, as he did on appeal (AOB 222, 224-225), that the trial court improperly considered the sealed 1979 probation report from the first trial in denying the sentence modification motion. (Petn. 248-249.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 886.) Therefore, no prima facie case for relief has been stated as to this claim.

E. CLAIM RELATING TO EVIDENTIARY ISSUES

Claim 67. There Was Insufficient Evidence That Carl C. Jr., Was Killed In The Course Of The Felony Defined By Penal Code Section 288 At The Time Of The Offense

Petitioner contends, as he did on appeal (AOB 140-146), that the evidence was insufficient to sustain first-degree murder conviction on Count III under the felony-murder theory because there was no evidence he attempted to sodomize, or formed to intent to sodomize, Carl C. until after he was dead. (Petn. 249-251.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 861-862; see also *Memro I*, 38 Cal.3d at pp. 695-699.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 68. There Was Insufficient Evidence Of Willful, Deliberate And Premeditated Murder As Defined Under California Law At The Time Of The Offense In Counts II And III

Petitioner contends, as he did on appeal (AOB 146-152), that the evidence of premeditation and deliberation was insufficient to support the first degree murder convictions on Counts II (Ralph C.) and III (Carl C., Jr.). (Petn. 251-253.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 862-864; see also *Memro I*, 38 Cal.3d at pp. 690-695, 699-700.) Therefore, no prima facie case for relief has been stated as to this claim.

F. CLAIMS RELATING TO PROSECUTORIAL MISCONDUCT

1. GUILT PHASE

Claim 69. The Prosecution's Presentation Of Facts Was Directly Contrary To Those Contained In The Missing-juvenile Report

Petitioner avers, as he did in the habeas corpus petition following his first conviction (1982 Habeas at 11-13), and in his 1985 habeas corpus petition (HCP 32-35), that at the Penal Code section 1538.5 hearing prior to the first trial, the prosecutor improperly presented testimony from Officer Sims that petitioner was the last person seen with Carl C., Jr., at 6:00 p.m. on October 22, 1978, when the prosecutor knew from the missing-juvenile report that Carl C., Jr.'s brother was the last person to see him, at 7:00 p.m. on October 22, 1978. He complains that the missing-juvenile report contradicted this significant factor relied upon by the arresting officer and the trial court in reaching their probable cause determinations, and he faults defense counsel for not using the

report to cast doubt on Officer Sims's testimony and the legality of the arrest. (Petn. 253-254.) The assertion is unavailing.

As shown by Officer Schoonover's declaration (Exh. A), the missing-juvenile report (Petn., Exh. S-H, at 451) was taken by him at 9:02 p.m. on October 22, 1978. At that time, Carl Jr.'s 13-year-old brother, Scott, told Officer Schoonover he had last seen Carl Jr. "a few hours ago." Officer Schoonover then listed on the report 7:00 p.m." as only the "approximate" time Scott Carter had last seen his brother. In addition, the evidence showing what time it was when petitioner arrived at the Carter residence, allegedly took Carl Jr. to get a Coke at Winchell's, and allegedly watched him walk home, varied from 6:00 p.m. (FRT 60-63, 70-72, 89-90), to 6:45 p.m. (FCT 19), to "later than 7:00 p.m." (Exh. B [arresting officer's report], at p. 9.)

Thus, the information on the missing-juvenile report was a mere approximation and was inconclusive in terms of who was the last person to see Carl Jr. on October 22, 1978. It did not "directly contradict" the testimony of Officer Sims on this point, who testified truthfully that he *believed* petitioner was the last person to have been with Carl Jr. before his disappearance. Furthermore, as pointed out by the trial court in denying the motion to suppress, although Scott may have been the last person to "see" his brother Carl Jr., petitioner was still the last person to have "been with" Carl Jr. before his disappearance, and any variance would have made no difference in the lower court's rulling. (FRT 352; see *People v. Hernandez* (1981) 47 Cal.3d 315, 342-343.) Consequently, the prosecutor did not present any false evidence that was substantially material and probative on the issue of the legality of the arrest.

Petitioner has failed to establish even a prima facie case that Officer Sims's testimony was false. (See *In re Pratt* (1980) 112 Cal.App.3d 795, 876-877; see generally *Napue v. Illinois* (1959) 360 U.S. 264, 272.) Moreover, he has failed to show that the prosecution was aware of any alleged falsity or that

the alleged false evidence was of such significance that it might have affected the outcome of the trial. (*In re Hall* (1981) 30 Cal.3d 408, 424; *In re Pratt*, *supra*, 112 Cal.App.3d at p. 865; *In re Wright* (1978) 78 Cal.App.3d 788, 807-808.) Thus, this Court correctly rejected the claim on the merits when it denied the 1985 habeas corpus petition. (1985 habeas denial.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 70. The Prosecution's Failure To Inform Petitioner Of The Theory Of First-degree Murder On Which It Would Rely In Proving Count III Violated Petitioner's Rights

Petitioner contends, as he did on appeal (AOB 173-175), that the prosecutor committed misconduct by failing to inform petitioner until a guilt phase instruction conference that it would be relying on a felony-murder theory to prove the first-degree murder of Carl C., Jr. (Petn. 255-256.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 869.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 71. The Prosecutor Committed Misconduct In Violation Of Petitioner's Constitutional Rights By Failing To Disclose Impeachment Evidence Regarding Jailhouse Informant Anthony Cornejo

Petitioner avers, once again, that jailhouse informant Anthony Cornejo gave false testimony at the section 402 hearing on petitioner's motion to suppress the confession. (See Claims 15, 16, 29, 36, 37.) This time, he casts the issue as one of prosecutorial misconduct, claiming that the prosecutor violated petitioner's constitutional rights by not disclosing evidence available from other cases which would have undermined Mr. Cornejo's credibility in the

eyes of the trial court at the pre-trial hearing. (Petn. at 256-265.) But, as this Court found in rejecting petitioner's other claims relating to Mr. Cornejo's testimony at the section 402 hearing (*Memro*, 11 Cal.4th at pp. 825-828; 1995 denial on the merits), Cornejo's testimony at the hearing was "thoroughly impeached" as a notorious jailhouse informant" (*id.*, at p. 827; see RT 28-41, 996-1005, 1618-1625), the prosecutor did not mention Mr. Cornejo's testimony in arguing the confession was voluntary (RT 2246-2248), the trial court neither considered nor relied on any of Cornejo's testimony at the confession suppression hearing (RT 76, 991-992, 997-998, 1001, 2259-2251; Exh. C), and Mr. Cornejo did not testify at trial.

Therefore, petitioner has failed to make a prima facie case for relief

2. GUILT PHASE ARGUMENT

Claim 72. The Prosecutor Committed Misconduct By Misstating The Law During Argument

Petitioner avers that the prosecutor was guilty of misconduct when, during his argument to the jury, he stated that lewd conduct under Penal Code section 288 included "any touching." (Petn. 265-267.) The claim is unavailing.

The misconduct issue was waived by petitioner's failure to object or request any curative admonition. There was no objection or request for an admonition by the defense at the time of, or after, the trial prosecutor made this comment. Thus, the issue is waived, even though this is a capital case. (*People v. Mincey* (1992) 2 Cal.4th 408, 446; *People v. Fierro* (1991) 1 Cal.4th 173, 213.) Since the comment was non-prejudicial and not emphasized, any potential harm could have been cured by an objection and an admonition. (*People v. Mincey* (1992) 2 Cal.4th 408, 446; *People v. Murtishaw* (1981) 29 Cal.3d 733, 758-759, and fn. 20.)

Moreover, the jury was properly instructed that lewd conduct requires proof beyond a reasonable doubt of "any touching of the body . . . with the specific intent to arouse, appeal to, or gratify the sexual desires of either part," and that "it is not necessary that the bare skin be touched," but could be "through the clothing of the child." (CT 488; CALJIC No. 10.30.) The jury was also admonished that the statements of the attorneys were not evidence and that the jury "must accept and follow the rules of law as [the trial court] state[d] them." (CT 456, 459; CALJIC Nos. 1.00, 1.02.)

Therefore, petitioner has failed to make a prima facie case for relief.

Claim 73. The Prosecutor Committed Prejudicial Misconduct During The Guilt Phase By Commenting On Petitioner's Failure To Testify

Petitioner contends, as he did on appeal (AOB 179-181), that the prosecutor's guilt phase argument about petitioner's failure to name the other person seen with the Ford Park victims before their deaths was improper comment on his right to remain silent. (Petn. 267-269, 279.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 873-874.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 74. The Prosecutor Committed Misconduct During Guilt Phase Argument When He Took Advantage Of Erroneous Instructions Regarding Count I

Petitioner avers that when the prosecutor reminded the jurors that the court had instructed them not to consider why petitioner was only charged with second-degree murder on Count I, the prosecutor committed misconduct by

adding that it was "for a special legal reason" that they did not "need to concern [themselves] with." (Petn. 269-271.) Petitioner's position is untenable.

Petitioner is foreclosed from raising the issue as a result of his failure to object or request a curative admonition. (See generally *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Berryman, supra,* 6 Cal.4th at p. 1092; *People v. Clair*, *supra*, 2 Cal.4th at p. 685.) Moreover, the claim is devoid of merit. The prosecutor was merely referring to the court's instruction on this point, which was perfectly proper. (See Claim 51, *ante*; see also *People v. Wash*, *supra*, 6 Cal.4th at pp. 252-254.) Therefore, petitioner has failed to state a prima facie case as to this claim.

Claim 75. The Prosecutor Committed Misconduct By Commenting On Petitioner's Sexuality And Potential Punishment

Petitioner avers that the prosecutor improperly argued to the guilt phase jury that petitioner might have mused before killing the victims that it would not be so bad to be sent to prison because "they'll feed me and clothe me," and "since I don't like – I have no interest in women anyway, that part of it won't be so bad." (RT 2786; Petn. 271-272.) The argument is unavailing. Because an objection could have cured any harm, the contention is not cognizable. (*People v. Riel* (2000) 22 Cal.4th 1153, 1196-1197; *Memro*, *supra*, 11 Cal.4th at p. 879; *People v. Benson, supra,* 52 Cal.3d at p. 794.)

Moreover, the claim is without merit. The prosecutor was not mischaracterizing the evidence or referring to the punishment that petitioner should receive, but was merely demonstrating to the jurors that petitioner had sufficient time to reflect, deliberate and premeditate his act before killing. In context, the jury could not have understood the prosecutor's brief and relatively bland comment to be a request to impose the death penalty, as petitioner suggests.

Therefore, petitioner has failed to state a prima facie case on the merits as to this claim.

Claim 76. The Prosecutor Committed Misconduct By Arguing Erroneous Definitions Of Second Degree Murder

Petitioner avers that the prosecutor was guilty of misconduct because he argued both theories of second-degree murder as to Count I. (Petn. at 272-274.) Because defense counsel neither objected nor requested an admonition from the trial court to cure any perceived harm, petitioner's claim has not been preserved. (*People v. Lucero* (2000) 23 Cal.4th 692, 723; *People v. Lewis* (2001) 25 Cal.4th 610, 670.) It lacks merit in any event.

For the reasons stated above (see Claim 54, *ante*), this alternative theory of second-degree murder, even assuming arguendo it was easier to prove, would still constitute second-degree murder. Petitioner cannot be heard to argue that since the evidence clearly showed that he intended to kill Scott when he slit his throat, the prosecutor could not argue that he would also be guilty of second-degree murder if the jury found that he slit Scott's throat – a dangerous act the natural consequences of which are death – without necessarily intending that he die.

Therefore, petitioner has failed to state a prima facie case on the merits as to this claim.

77. The Prosecutor Committed Misconduct By Arguing Two Theories Of First-Degree Murder In Count III, In Violation Of Double Jeopardy Principles

Petitioner contends, as he did on appeal (AOB 18-28), that his retrial on a felony-murder theory of first-degree murder on Count III violated the constitutional prohibition against double jeopardy, and that, therefore, the

prosecutor improperly argued both theories of first-degree murder as to Count III. (Petn. 274-278.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 78. The Prosecutor Committed Misconduct By Unconstitutionally Shifting The Burden Of Proof Onto Petitioner And His Trial Attorney

Petitioner avers that the prosecutor improperly shifted the burden of proof when he commented that there was no evidence in the record suggesting that the crimes were anything other than what the prosecutor suggested, that he assumed that defense counsel would state what the crimes were during his argument, that there was no evidence to explain why petitioner would want to confess if he had not committed them, and that defense counsel was reluctant to ask any of the prosecution witnesses if petitioner was in the park on the evening of the killings. (Petn. 278-280.) The claim is without merit.

Petitioner's failure to object to the alleged misconduct or to request any admonition therefor bars assertion of the claim of misconduct in these proceedings. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1177; *People v. Pinholster* (1992) 1 Cal.4th 865, 963.) Moreover, the prosecutor's remarks were proper comments on the state of the evidence. (See generally *People v. Clair, supra,* 2 Cal.4th at p. 662; *People v. Fierro*, *supra*, 1 Cal.4th at p. 213.) Therefore, petitioner has failed to state a prima facie claim for relief as to this claim.

Claim 79. The Prosecutor Committed Misconduct In Commenting On A Possible Retrial

Petitioner avers that the prosecutor improperly quipped that defense counsel had exaggerated the height and weight of Officer Greene, and that "[i]f we have this trial again in another 10 years, I'm sure he'll be six foot eight and 290 [pounds]." He insists that this comment implied that another jury had already convicted petitioner of the charged crimes, thereby lessening their "sense of responsibility." (Petn. 280-281.) The claim cannot withstand scrutiny.

The citation of misconduct was not preserved and has been waived. (*Memro*, 11 Cal.4th at p. 879; see generally *In re Seaton*, *supra*, 34 Cal.4th at pp. 198-201.) Thus, the issue is not cognizable in these proceedings.

Furthermore, the claim is without merit. First, the prosecutor stated that he was making only "a small point," and the comment was extremely brief and completely in jest. Second, the remark in no way implied that there had been a prior trial. Third, even if it could be inferred from the comment that there might have been a previous trial, the remark did *not* imply that it had resulted in a guilty verdict, but more probably would have been interpreted by reasonable jurors to mean that it had resulted in a mistrial following a hung jury, which would have redounded to petitioner's benefit.

Therefore, petitioner has failed to make a prima facie case as to this claim.

3. PENALTY PHASE

Claim 80. The Prosecutor Committed Misconduct By Cross-examining Petitioner Regarding The Appellate Process

Petitioner contends, as he did on appeal (AOB 202-204), that after he testified that the jury should return a verdict of death, the prosecutor improperly cross-examined him about his intention to appeal the conviction and asked if his reason for requesting the death penalty was merely to gain a faster and more direct access to this Court. (Petn. 281-282.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 878-879.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 81. The Prosecution Did Not Provide Adequate Notice Of The Evidence It Would Present At The Penalty Phase Under Penal Code Section 109.3

Petitioner contends, as he did on appeal (AOB 197-198), that the prosecution failed to provide the statutorily required notice of the aggravating evidence it intended to introduce at the penalty phase. More specifically, he argues that once the trial court ruled that evidence of petitioner's prior felony conviction for the assault on David S. was not admissible as an aggravating factor because petitioner's guilty plea in this case was taken without proper advisements and waivers, petitioner was led to believe that evidence of the underlying conduct would not be admitted either. (Petn. 282-284.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 877-878.) Therefore, no prima facie case for relief has been stated as to this claim.

4. PENALTY PHASE ARGUMENT

Claim 82. The Prosecutor Committed Misconduct When He Misstated The Reasonable-doubt Standard During The Penalty Phase Argument

Petitioner contends, as he did on appeal (AOB 18-28), that his retrial on a felony-murder theory of first-degree murder on Count III violated the constitutional prohibition against double jeopardy, and that, therefore, the prosecutor improperly argued both theories of first-degree murder as to Count III again during the penalty phase. (Petn. 286-287; see Claim 77.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 83. The Prosecutor Committed Misconduct When He Argued Both The Felony-Murder Theory And The Premeditated Murder Theory

Petitioner contends, as he did on appeal (AOB 18-28), that his retrial on a felony-murder theory of first-degree murder on Count III violated the constitutional prohibition against double jeopardy, and that, therefore, the prosecutor improperly argued both theories of first-degree murder as to Count III again during the penalty phase. (Petn. 286-287; see Claim 77.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 820-822; see also *Memro I*, 38 Cal.3d at pp. 690-700.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 84. The Prosecutor Committed Misconduct With His Comments About Petitioner's Testimony

Petitioner contends, as he did on appeal (AOB 204-206), that the prosecutor committed misconduct in arguing to the jury that life without parole was "legally not worse" than death and that they should not assume that, if given life without parole, petitioner would simply sit around all day racked by regret over the crimes he had perpetrated. (Petn. 287-288.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 879-880.) Therefore, no prima facie case for relief has been stated as to this claim.

G. CLAIMS RELATING TO INEFFECTIVE ASSISTANCE OF COUNSEL

1. INVESTIGATION

Claim 85. Trial Counsel's Failure To Examine Sergeant Carter's Contemporaneous Notes Of The Confession Constituted Ineffective Assistance

Petitioner alleges, as he did in the 1982 habeas corpus petition after the first conviction (1982 habeas at 2, 14-17), that defense counsel were derelict in not examining Sergeant Carter's notes taken during petitioner's confession in 1978. He avers that if defense counsel had scrutinized them and had hired an expert to testify as to the date on which the notes were "likely" to have been written, they would have learned that they were not actually written at the time of the confession, but "sometime after the . . . interrogation" and could have prevented Sergeant Carter from using the notes to refresh his recollection. (Petn. 288-289.) The argument is not persuasive.

Petitioner's allegation is wholly conclusory and unsupported by any affidavit by a handwriting expert or document authentication expert to

substantiate his bald claim that "[i]t is reasonably *evident* that the notes are inconsistent with contemporaneous interrogation notes." (Petn. 288.) Since petitioner has not refuted Sergeant Carter's sworn authentication of the notes as contemporaneous to the interview with petitioner (Exh. D), he has failed to demonstrate that his attorneys' representation on this point was deficient. Furthermore, since he has provided no declaration to support his allegation, he cannot show prejudice from defense counsels' having failed to hire an expert.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 86. Trial Counsel Rendered Ineffective Assistance By Failing To Investigate And Present Evidence Regarding Alternate Suspects

Petitioner alleges, as he did on habeas (HCP 45-47), that his attorneys' representation was deficient as a result of their failure to conduct an investigation into third party culpability and to present evidence regarding a "multitude" of alternate suspects as to Counts I and II. (Petn 289-298.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 87. Trial Counsel Rendered Ineffective Assistance By Their Failure To Adequately Investigate The Identity Of The Actual Killer Or Killers In The 1976 Offenses

Petitioner alleges, as he did on habeas (HCP 45-47), that his attorneys were incompetent because they failed to investigate the identity of the actual perpetrator of the homicides charged in Counts I and II. (Petn 298-299.) The

identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

2. PRE-TRIAL

Claim 88. Trial Counsel Rendered Ineffective Assistance By Failing To Attack The Credibility Of The Police Officers

Petitioner faults defense counsel for failing to file a second *Pitchess* motion regarding the officers' lack of credibility or untruthfulness. He speculates that, if such evidence existed, it could have been presented at trial to impeach the officers' credibility at the pre-trial hearings and at trial. (Petn. 299-303.) He provides no evidence, however, in support of his speculative assertion.

Petitioner's allegation is conclusory and unsupported by any declaration or affidavit. He has failed to specify any facts that could have been marshaled to attack the credibility of the officers, and he sheds no light on the existence or admissibility of any alleged

evidence bearing on the officers' credibility. Thus, petitioner has failed to sustain his burden of setting forth specific facts which, if true, would justify relief.

Therefore, petitioner has failed to state a prima facie case on the merits as to this claim.

Claim 89. Trial Counsel Were Ineffective For Failing To Raise Issues Concerning The Missing-Juvenile Report

Petitioner assails trial counsels' effectiveness, as he did on habeas (HCP 32-38), and in the 1982 habeas corpus petition following the first trial (1982 habeas at pp. 4-10), concerning counsels' failure to use the missing-juvenile report to contradict Officer Sims's testimony and thereby to prevail in his motion to re-litigate the Penal Code section 1538.5 motion. (Petn. 303-305.) However, as shown above, the statement in the missing-juvenile report that Carl Jr.'s brother last saw him at 7:00 p.m. was only a rough estimate, and the evidence adduced at the hearing, including Officer Sims's testimony, showed that the time at which petitioner took Carl Jr. to buy a Coke could have been anywhere from 6:00 p.m. to *after* 7:00 p.m. (See Claim 69, *ante*.) Thus, defense counsel understandably and reasonably decided that the missing-person report would not serve to undermine the probable cause determination because it did not really conflict with the other evidence presented at the hearing. (Petn. Exh. S-H, at 453.)

Moreover, Officer Sims's good faith belief that petitioner was the last person seen with Carl C., Jr. was only one of many circumstances considered by him in deciding to arrest petitioner. (FRT 62-63.) In addition, the trial court cited several factors in concluding there was probable cause to arrest petitioner, only one of which was the fact that petitioner may have been the last person to be with Carl C., Jr. before his disappearance. (FRT 351-352.) Thus, even if that one factor were eliminated from the probable cause calculus, the remaining facts and circumstances known to the officers at the time of petitioner's arrest on October 27, 1978, were sufficient to support a finding of probable cause.

The lawfulness of his arrest would have been upheld even if his trial counsel had attempted to impeach the officer with the missing-juvenile report. Consequently, contrary to petitioner's contention, he would not have prevailed

in his motion to suppress. Thus, the identical claim was correctly rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 90. Trial Counsel Were Ineffective By Virtue Of Their Failure To Investigate And Present Scientific Evidence Or To Cross-examine The Coroner Regarding The Exact Timing Of The Lewd Conduct Or Attempted Lewd Conduct In Connection With Count III

Petitioner alleges, as he did on habeas (HCP 41-42), that his counsels' representation was defective because they failed to present evidence, either through a forensic expert or through cross-examination of the deputy coroner, on whether the sodomy preceded the killing. (Petn. 305-308.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Moreover, although defense counsel is of course entitled to cross-examine a witness, he is "not required to do so upon pain of being branded incompetent," and whether a witness should have been more rigorously cross-examined is a matter normally left to counsel's discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 218; *People v. Freeman* (1994) 8 Cal.4th 450, 513; *People v. Cox* (1991) 53 Cal.3d 618, 662.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 91. Trial Counsel Were Ineffective Because They Failed To Impeach Mr. Cornejo At The Hearing On The Confession-Suppression Motion

Petitioner takes his attorneys to task for failing to impeach Mr. Cornejo, the jailhouse informant, with certain available documents that would have

proved that Mr. Cornejo had committed perjury in the past and was not trustworthy. (Petn. 309-313.) However, as pointed out above, with regard to Claim 71, this Court found that Cornejo's testimony at the hearing was "thoroughly impeached" as a notorious jailhouse informant" (*Memro*, 11 Cal.4th at pp. 825-828; see RT 28-41, 996-1005, 1618-1625); the prosecutor did not mention Mr. Cornejo's testimony in arguing the confession was voluntary (RT 2246-2248); the trial court neither considered nor relied on any of Cornejo's testimony at the confession suppression hearing (RT 76, 991-992, 997-998, 1001, 2259-2251; Exh. C); and Mr. Cornejo did not testify at trial..

Thus, petitioner has failed to show that his attorneys' alleged omissions in this regard could have prejudiced him. Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 92. Trial Counsel Rendered Ineffective Assistance By Failing To Bring The Order From The First Trial To The Trial Court's Attention

Petitioner accuses his trial attorneys of incompetence as a result of his failure to bring to the trial court's attention the order issued by the 1979 trial court requiring special transportation to and from the court. He posits that the trial court at the re-trial would have been inclined to grant the request had it known of the prior order, which was never rescinded. (Petn. 313.) The claim is meritless.

As stated above (see Claim 35, *ante*) the circumstances under which a criminal defendant is handled outside the courtroom are clearly within the discretion of the law enforcement personnel in charge of out-of-court activities. (*People v. Hill* (1998) 17 Cal.4th 800, 841, fn. 7.) Petitioner has failed to cite any authority for the proposition that the trial court at the second trial would have been required to honor or follow the trial court regarding special

transportation at the first trial, and he has not demonstrated that, even if defense counsel had brought this previous order to the trial court's attention, it would have re-issued the same order. Moreover, petitioner has failed to show how his transportation to the courthouse affected his ability to receive a fair trial since his statements on the bus were never introduced at trial.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 93. Trial Counsels' Ineffectiveness Denied Petitioner His Right To A Speedy Trial

Petitioner contends, as he did on appeal (AOB 124-130, 135-136), and on habeas (HCP 48-50), that his new attorneys were so dilatory and lax in preparing for the retrial following remand that the trial court was forced to grant several continuances over petitioner's strenuous objections, thereby depriving him of his right to a speedy trial. (Petn. 314-317.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 852-853; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 94. Trial Counsel Rendered Ineffective Assistance By Failing To Use The Police Missing-Juvenile Report To Impeach Key Prosecution Testimony And Otherwise Undermine The Legality Of Petitioner's Arrest

Petitioner re-alleges (see Claim 89), as he did on the prior habeas (HCP 32-35), and in the 1982 habeas corpus petition following the first trial (1982 habeas at 4-10), that counsel were derelict in failing to use the missing-juvenile report on Carl C., Jr. to impeach Officer Sims at the hearing on the Penal Code section 1538.5 motion. (Petn. 317-319.) The identical claim was rejected by

this Court when it denied the prior petition on the merits. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

3. JURY ISSUES

Claim 95. Trial Counsel Rendered Ineffective Assistance During Voir Dire

Petitioner assigns as ineffective assistance of counsel his attorneys' failure to object to the alleged deficiencies in the jury questionnaires to be distributed to the prospective jurors, their failure to cure the deficiencies with adequate follow-up questions during voir dire, and their failure to exercise challenges for cause and peremptory challenges against certain prospective jurors. (Petn. 319-323.) The conjectural claim is "Monday-morning quarterbacking" at its worst. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 571.) The assertion that somehow, if trial counsel had only conducted voir dire more to petitioner's current liking, petitioner would have fared better at trial, cannot withstand scrutiny.

Petitioner's allegations are conclusory and unsupported by any declaration or affidavit from his trial attorneys addressing whether counsel had informed tactical reasons for retaining these jurors. He has not alleged fully and with particularity the specific questions that should have been asked of these prospective jurors, the specific answers that would have been given had the questions been asked, exactly what new information would have been revealed, and why these answers would have invariably induced the trial court to excuse the prospective jurors for cause or would have prompted a reasonably competent attorney to exercise a peremptory challenge to remove these prospective jurors. (See *People v. Freeman* (1994) 8 Cal.4th 450, 485 [because the use of peremptory challenges is inherently subjective and intuitive, an

appellate record will rarely disclose reversible incompetence in this process]; *People v. Montiel* (1993) 5 Cal.4th 877, 911 [same].) Nothing demonstrates that counsel lacked plausible, tactical reasons for asking these persons few or no follow-up questions, and petitioner has failed to show that a challenge for cause to theses prospective jurors would have succeeded with further questioning or to show that the exercise of peremptory challenges against these jurors would have yielded a more favorable result. (See *People v. Slaughter, supra,* 27 Cal.4th at pp. 1219-1220.)

Thus, petitioner has not demonstrated how he was prejudiced. He has shown neither that the actual jury was biased nor that it is reasonably probable a different jury would have been more favorably disposed towards him. (*People v. Freeman, supra,* 8 Cal.4th at p. 487.) Thus, no constitutional deficiency in counsels' performance has been shown. (See *People v. Tuilaepa* (1992) 4 Cal.4th 659, 687.)

Therefore, petitioner has failed to state a prima facie case for relief.

Claim 96. Failure To Conduct An Effective Voir Dire To Ascertain Juror's Attitudes And Biases Regarding The Death Penalty Constituted Ineffective Assistance Of Counsel

Petitioner contends, as he did on appeal (AOB 196-197), that defense counsel failed to make any attempt to rehabilitate jurors who were excused for their general opposition to the death penalty and failed to challenge certain jurors for cause. (Petn. 323-328.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 817-819; see also *People v. Tuilaepa, supra,* 4 Cal.4th at p. 587.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 97. Trial Counsel Rendered Ineffective Assistance By Failing To Excuse A Juror Who Knew One Of The Witnesses

Petitioner avers that defense counsel's representation was inadequate because they failed to excuse a juror who knew Officer Barclift of the Bell Gardens Police Department, one of the investigators assigned to investigate the 1976 double homicide. Juror Zinn had seen Officer Barclift when he worked as a police liason for the casino where she worked. (Petn. 328-331.) But the record does not indicate defense counsel had no sound tactical reason for their decision not to excuse her, and petitioner has not demonstrated that counsels' choice was unprofessional or prejudicial. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 485; *People v. Montiel*, *supra*, 5 Cal.4th at p. 911.)

Therefore, petitioner has failed to state a prima facie case.

Claim 98. Petitioner's Right To Effective Assistance Of Counsel Was Violated As A Result Of Counsel's Failure To Conduct An Adequate Voir Dire

Petitioner contends, as he did on appeal (AOB 196-197), that defense counsel failed to make sufficient attempts to rehabilitate jurors and to ask follow-up questions in various areas. (Petn. 331-332.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 817-819; see also *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 587.) Therefore, no prima facie case for relief has been stated as to this claim.

4. CONFLICT OF INTEREST ISSUES

Claim 99. Petitioner Was Denied His Right To The Assistance Of Counsel To Assist Petitioner On His Motion For Substitute Counsel At The First Trial

Petitioner contends, as he did on his first appeal, that the trial court's failure to appoint special counsel to assist him in litigating his *Marsden* motion at the conclusion of the guilt phase of the *first* trial violated his right to the assistance of counsel. He also complains that the trial court violated his right to counsel when, after it granted his first *Marsden* motion and appointed substitute counsel, it granted petitioner's second *Marsden* motion, but refused to appoint substitute counsel, thereby forcing petitioner to represent himself at the penalty phase of the *first* trial, which, following jury waiver, was to the court. (Petn. 332-336.) The claim is not cognizable in these proceedings, however, as explained above. (See Claim 14, *ante*.)

Moreover, a trial court is not required to appoint independent counsel to litigate a *Marsden* issue before the trial court. (*People v. Hines* (1997) 15 Cal.4th 997, 1025; *People v. Carpenter* (1997) 15 Cal.4th 312, 375.) Furthermore, the trial court did not grant the second *Marsden* motion because any real conflict existed, but because petitioner preferred to proceed in pro per rather than have the second attorney represent him (FRT 892-942), and petitioner has failed to demonstrate that the trial court's action was erroneous. (See *People v. Lawley* (2002) 27 Cal.4th 102, 149; *People v. Clark* (1992) 3 Cal.4th 41, 110; *People v. Windham* (1977) 19 Cal.3d 121.

Therefore, no prima facie case for relief can been stated as to this claim.

Claim 100. Petitioner's Rights Were Violated As A Result Of Counsel's Conflict Of Interest As Essential Witnesses In The Case

Petitioner alleges, as he did on habeas (HCP 43-44), that he was denied the right to present evidence at trial of Jose Feliciano's prior inconsistent statement because Feliciano made the statement to defense counsel during an interview at which no defense investigator was present. (Petn. 336-337.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 101. The Trial Court Failed To Conduct The Constitutionally Required Inquiry Into The Alleged Conflict Of Interest

Petitioner alleges, as he did on habeas (HCP 43-44), that he was denied the right to present evidence of Jose Feliciano's prior inconsistent statement at trial because defense counsel was the only one present during the interview with Feliciano. (Petn. 336-337.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

5. GUILT PHASE ISSUES

Claim 102. Trial Counsel Rendered Ineffective Assistance By Failing To Impeach The Forensic Pathologist With His Preliminary Hearing Testimony

Petitioner alleges, as he did on habeas (HCP 41-42), that his attorneys' representation was inadequate because they failed to engage in thorough, extensive cross-examination of Dr. Choi, Chief of the Medical Division of the

Los Angeles County Coroner's Office, regarding the presence of acid phosphatase and the timing of the sodomy. (Petn. 337-340.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Furthermore, although defense counsel is of course entitled to cross-examine a witness, he is "not required to do so upon pain of being branded incompetent," and whether a witness should have been more rigorously cross-examined is a matter normally left to counsel's discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 218; *People v. Freeman, ,supra,* 8 Cal.4th at p. 513; *People v. Cox* (1991) 53 Cal.3d 618, 662.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 103. Trial Counsel Rendered Ineffective Assistance By Failing To Challenge The Inconsistencies Between Petitioner's Confessions And Certain Witness Statements

Petitioner avers that his counsel was derelict in failing to point out to the jury the alleged contradictions between petitioner's first and second confessions and the alleged discrepancies between his confessions and certain witness statements. (Petn. 340-346.) However, the only "discrepancies" are minor and inconsequential, and petitioner has failed to overcome the "strong presumption" that the attorneys' decision not to point out these trivial inconsistencies was the result of an informed, objectively reasonable tactical choice as to what to emphasize during closing argument, i.e., "for tactical reasons rather than through sheer neglect." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 7-8 [124 S.Ct. 1, 157 L.Ed.2d 1] ("even if some of the arguments would unquestionably have supported the defense, it does *not* follow that counsel was incompetent for failing to include them"].) "Judicious selection of argument for summation is a core exercise of defense counsel's discretion, " and "[f]ocusing on a small

number of key points may be more persuasive than a shot gun approach." (*Id.*, at p. 8.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 104. Trial Counsel Were Ineffective By Failing To Impeach Witness Jose Feliciano After He Erroneously Identified Petitioner On Redirect At Trial

Petitioner alleges, as he did on habeas (HCP 43-44), that his trial attorneys were derelict in failing to impeach witness Feliciano after, on redirect examination, he identified a photograph of petitioner as one of the two men who were with the two boys in the park. (Petn. 346-350.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Moreover, as pointed out by this Court, the parties entered into a stipulation before the jury that Feliciano was shown a folder containing six photographs and that he identified a photograph of a person other than petitioner. (*Memro, supra*, 11 Cal.4th at pp. 859-860.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 105. Trial Counsel Rendered Ineffective Assistance By Failing To Argue Effectively To The Jury During The Guilt Phase The Applicability Of The Second-Degree Murder Maximum On Count One

Petitioner takes his defense counsel to task for failing to use to his advantage in the second trial the finding at the first trial that the murder of Scott F. (Count I) was only second-degree murder. He insists that counsel should have followed up on the court's instruction that the jury should not consider--or

speculate about--the reason why petitioner was charged only with second-degree murder (RT 2766; CALJIC No. 8.75) by arguing to the jury "as to how that instruction should be applied." (Petn. 350-354.) What petitioner is really arguing, therefore, is that defense counsel should have argued to the jurors that they *disregard* the trial court's instruction and that they speculate that petitioner was charged only with second-degree murder because the facts were insufficient to prove first-degree murder (and, by analogy, the facts must also be insufficient to prove first-degree murder on the other two counts).

As stated above (see Claim 53, *ante*), such an argument would have been impermissible, since it would directly conflict with the trial court's admonition to the jurors *not* to speculate as to the reasons for the charge on Count I being only second-degree murder. The trial court properly found that any attempt by petitioner to use the requested instruction as support for his argument that the jury should decide the sufficiency of the factual showing on Count III by analogy to the factual showing on Count I would have been completely misleading, would "confuse the issues," and would "creat[e] havoc." (RT 2223-2224, 2230, 2233.) This appeal to engage in conjecture would have been a direct violation of the instruction, and petitioner cannot show that his attorneys were incompetent for failing to make an argument that the trial court would not have allowed.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 106. Trial Counsel Rendered Ineffective Assistance By Failing To Inform The Jury That The Word "Both" In CALJIC No. 8.75 Should Be Understood As "Either Or"

Petitioner assails defense counsel for failing to explain to the jury that there was no "linkage" between Counts II and III and that each should be

decided separately. He reasons that since the evidence for first-degree murder was stronger on Count II (the evidence showed that Ralph C. was killed because he was a witness), and since Count III was the only death-eligible count, it was incumbent on defense counsel to try to link Count III to the second-degree murder by arguing to the jury that, if guilty at all on Count III, petitioner was guilty of only second-degree murder as to that count. (Petn. 354-355.) The assertion is without merit.

As pointed out above (see Claim 55, *ante*), the jury was instructed that "[e]ach count charge[d] a distinct offense," that it "must decide each count *separately*, and that its "finding as to each count must be stated in a separate verdict." (CT 514, italics added; CALJIC 17.02.) Thus, the trial court did precisely what petitioner now claims counsel should have done: "explain to the jury that they were to make a determination on each count independently." (Petn. 354.) Consequently, counsel cannot be faulted for failing to do reiterate the point.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

6. PENALTY PHASE ISSUES

Claim 107. Petitioner Was Denied Effective Assistance As A Result Of Trial Counsels' Failure To Investigate And Represent Available Mental Defense

Petitioner alleges, as he did on habeas (HCP 38-41), that defense counsel were derelict in failing to present evidence contained in certain reports from Atascadero State Hospital on his sexual deviation and from family members that would have shown the petitioner had abnormalities in the temporal-occipital areas of the brain, that he suffered amnesia about an incident where he

assaulted a nine-year-old boy with a Coke bottle, and that he suffered physical and mental abuse as a child. (Petn. 355-358.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, he has failed to present a prima facie case for relief as to this claim.

In addition, petitioner has failed to demonstrate, through reasonably available declarations from trial counsel or the mental health expert who consulted trial counsel, that the results of the electroencephalogram in 1972 would have provided or led to the discovery of any mitigating evidence or that a more complete psychiatric evaluation and evaluation of alleged environmental factors, such as physical or mental abuse, head trauma, a dysfunctional family, or mental impairments would have led to a more favorable result at the guilt phase. (See *In re Jackson* (1992) 3 Cal.4th 578, 604-605; *People v. Deere* (1991) 53 Cal.3d 705, 713-714; *People v. Bloyd, supra,* 43 Cal.3d at pp. 363-364.) He has not shown that effective representation mandated a lengthy presentation of a broad range of witnesses describing in detail various aspects of his family and childhood background or that there is a reasonable probability that, with such a presentation, the sentencer would have concluded that death was not warranted. (See *In re Andrews* (2002) 28 Cal.4th 1234, 1256; *In re Marquez* (1992) 1 Cal.4th 584, 606; *In re Jackson, supra*, 3 Cal.4th at pp. 604-605, 614-615.) What is more, petitioner has presented no evidence that should have alerted counsel to a need for further, neurological testing. (See *People v. Beeler, supra,* 9 Cal.4th at pp. 1007-1010; *People v. Payton* (1992) 3 Cal.4th 1050, 1075.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 108. Petitioner's Right To Due Process And Effective Assistance Were Violated As A Result Of Counsels' Failure To Investigate And Present Available Mitigating Penalty Phase Evidence

Petitioner alleges, as he did on habeas (HCP 38-41), that his attorneys' representation was defective because they failed to present mitigating character and background evidence, such as evidence of an abusive childhood and petitioner's hospitalization at Atascadero State Hospital for his abnormal sexual impulses. (Petn. 358-361.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) In addition, the record does not disclose the existence, availability, or relative weight of such mitigating evidence, and the record does not suggest the reasons counsel may have had for declining to present such evidence. (See *People v. Lewis, supra,* 25 Cal.4th at p. 675.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 109. Trial Counsel Rendered Ineffective Assistance For Failing To Present Available Mitigating Evidence At The Sentencing Phase Of Trial

Petitioner alleges, as he did on habeas (HCP 38-41), that his attorneys' representation was defective because they failed to present mitigating character and background evidence, such as evidence of an abusive childhood and a dysfunctional extended family. (Petn. 361-368.) The identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Since petitioner only speculates as to the probable content or substance of this mitigating testimony, he cannot show that the failure to present it amounted to ineffective assistance or probably affected the penalty determination. (See *People v. Cudjo, supra,* 6 Cal.4th at p. 634; *People*

v. Wrest (1992) 3 Cal.4th 1088, 1116; *People v. Payton, supra,* 3 Cal.4th at p. 1075.)

Therefore, no prima facie case for relief has been stated as to this claim.

Claim 110. Trial Counsel Rendered Ineffective Assistance In Failing To Argue Lingering Doubt

Petitioner alleges, as he did on habeas (HCP 50-51), that the jury should have been informed that they could consider any lingering doubts about his guilt in considering the appropriate penalty. (Petn. 368-370.) But counsel did argue lingering doubt during closing argument (RT 2985), and the identical claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 111. Petitioner Was Denied Effective Assistance With Respect To David Schroeder's Testimony

Petitioner finds fault with his trial attorneys for failing to investigate and present evidence at the penalty phase regarding inconsistencies in David Schroeder's testimony concerning petitioner's assault of Schroeder in 1972 when Schroeder was nine years old. (Petn. 370-371.) But, as noted by this Court, defense counsel received the entire district attorney's file of the Schroeder incident and were fairly warned of the prosecution's intent to present this as evidence in aggravation, even though it was not permitted to present evidence of the actual conviction. (See *Memro*, 11 Cal.4th at 877-878; see also Claim 81, *ante*.) Consequently, defense counsel cannot be accused of lack of preparation, and petitioner has failed to demonstrate how counsel could have cast any doubt on the substance of David Schroeder's testimony.

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

H. CLAIMS RELATING TO JURY ISSUES

Claim 112. Petitioner Was Denied An Impartial Jury Drawn From A Fair Cross-section Of The Community

Petitioner contends, as he did on appeal (AOB 123-124), that the jury venire in the Norwalk Superior Court violated his right to a representative cross-section of the community. (Petn. 371-401.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 851-852.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 113. Petitioner's Rights Were Violated As A Result Of Extreme Under-Representation Of Hispanics And African-Americans In The Jury Pool

Petitioner contends, as he did on appeal (AOB 123-124), that his constitutional rights were violated because Hispanics and African-Americans were under-represented in the jury pool. (Petn. 401.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 851-852.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 114. The Denial Of A Fair Cross-section Of Jurors In The Guilt Phase Violated Petitioner's Constitutional Rights

Petitioner alleges that the death-qualification process itself denied him his constitutional right to a fair and impartial jury at the guilt phase. (Petn. 401-

404.) This identical claim has been rejected by this Court. (*People v. Balderas* (1985) 41 Cal.3d 144, 190-191.) Therefore, petitioner cannot make a prima facie case for relief as to this claim.

Claim 115. Juror Zinn Committed Juror Misconduct In Violation Of Petitioner's Fifth, Sixth, Eighth And Fourteenth Amendment Rights

Petitioner avers that, even though defense counsel chose to decline the trial court's invitation to excuse Juror Zinn when she realized she knew Officer Barclift (see Claim 97), she still should have been discharged by the trial court for not mentioning that she knew Officer Barclift in her written juror questionnaire. (Petn. 404-407.) But petitioner has not demonstrated that Juror Zinn was in any way deceptive or less than candid in her written answers. The question asking if she had "any friends or relations in law enforcement" would not necessarily apply to Officer Barclift, since she had only seen him at work, and did not testify that he was either a friend or a relative. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1175 [unintentional failure by juror to disclose a prior business relationship with victim's husband does not require removal unless it is shown to the satisfaction of the court that the juror was unable to perform his duty].)

In addition, juror Zinn may reasonably have believed that Officer Barclift was a private security person and perhaps did not know whether he was in regular law enforcement or think of him as a police officer. Moreover, she was never asked during her voir dire about anyone in law enforcement whom she knew. Thus, petitioner has not shown that any of her responses were deceptive or misleading or that she was intentionally concealing material information. (See *In re Hitchings* (1993) 6 Cal.4th 97, 123; *People v. Johnson* (1993) 6 Cal.4th 1, 22; *People v. Price* (1991) 1 Cal.4th 324, 400.)

Moreover, petitioner has not shown that juror Zinn was improperly influenced by her prior acquaintanceship with Officer Barclift. (See *In re Hamilton* (1999) 20 Cal.4th 273, 294.) He speculates that juror Zinn would have been more inclined to believe and trust his testimony, but it is just as possible that juror Zinn had an unfavorable impression of Officer Barclift at the time he worked at the casino. Furthermore, the very fact that it was juror Zinn who came forward with this new information supports the conclusion her failure to mention the information earlier was inadvertent and that she was attempting to perform her duties in good faith. (*People v. Ray* (1996) 13 Cal.4th 313, 344.)

Therefore, petitioner has failed to make a prima facie case as to this claim.

Claim 116. The Trial Court Was Partial In Its Treatment Of Potential Jurors During Jury Selection, And The Jury Selected Was Biased In Favor Of The Death Penalty

Petitioner avers that during voir dire, the trial court gave special, favorable treatment to those prospective jurors who appeared biased in favor of the death penalty by assisting in their rehabilitation. (Petn. 407-413.) However, at no time did counsel register any objection to this follow-up questioning by the trial court. Thus, the issue is waived. (*People v. Boyette, supra,* 29 Cal.4th at p. 459; *People v. Fudge, supra,* 7 Cal.4th at pp. 1107-1109; *People v. Wright, supra,* 52 Cal.3d at p. 411.)

What is more, the claim fails on the merits. Petitioner has not demonstrated that the judge officiously usurped the duties of the prosecutor or created the impression he was allying himself with the prosecution. (See *People v. Clark* (1992) 3 Cal.4th 41, 143.) In addition, he has not shown that

the judge's questioning in this regard was so prejudicial that it denied petitioner a fair trial. (See *People v. Snow, supra,* 30 Cal.4th at p. 78.)

Therefore, petitioner has failed to make a prima facie case as to this claim.

Claim 117. Informing The Jury That There Had Been A Previous Trial Violated Petitioner's Right To A Fair Trial

Petitioner avers that his right to a fair trial was compromised as a result of the trial court's having *implied* to the jury that there had been a previous trial. (Petn. 413-417.) The record reveals otherwise. Petitioner has failed to demonstrate that the jury actually knew of the previous trial.

Furthermore, petitioner's failure to object precludes consideration of the claim. (See *People v. Anderson* (1990) 52 Cal.3d 453, 468 [trial court's informing the jury of the prior reversal was unobjected to and thus waived.) Moreover, the claim is devoid of merit. Even if any of the jurors knew or inferred from the trial court's remark that there had been a previous trial, he or she more probably assumed that the retrial was the result of a mistrial following a jury deadlock, which would have actually favored petitioner, instead of deducing that petitioner had been convicted and this Court had reversed the conviction. (See Claim 79, *ante*.)

Therefore, petitioner has failed to make a prima facie case as to this claim.

I. CLAIMS RELATING TO MENTAL DEFENSES

Claim 118. Petitioner Was Mentally Incompetent To Waive Any Of His Rights At The Time Of His Arrest And Confession

Petitioner asserts, as he did on appeal (AOB 83-85, 91-108, 108-110), and on habeas (HCP 44-45), that he was not competent to waive any constitutional rights at the time of his arrest and confession and that he did not knowingly and intelligently waive his rights. (Petn. 417.) The identical underlying claim was rejected by this Court on direct appeal and on habeas. (*Memro*, 11 Cal.4th at pp. 822-835, 846-847; 1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 119. Petitioner Was Mentally Incompetent To Stand Trial

Petitioner avers he was incompetent to stand trial in that in was unable to participate in his defense in a rational manner. (Petn. 417-422.) However, the only evidence he presents in support of this allegation is a report by Dr. George Woods (Exhibit CC) and an assertion that his statement to the jury that they should "return with a verdict of death as the appropriate penalty" demonstrates that he was "suicidal," and therefore, paranoid and mentally ill. (Petn. 418-419.) Neither of these factual allegations are sufficient, however, to overcome the presumption of competence to stand trial. (See *Medina v. California* (1992) 505 U.S. 437 [112 S.Ct. 2572, 120 L.Ed.2d 353]; *People v. McPeters, supra,* 2 Cal.4th at p. 1169; *People v. Medina* (1990) 51 Cal.3d 870, 881-886.)

An apparent preference for death is not sufficient, by itself, to constitute substantial evidence of incompetence. (*People v. Howard* (1992) 1 Cal.4th 1132, 1163-1164; *People v. Harris* (1989) 47 Cal.3d 1047, 1070-1077; *People*

v. Guzman (1988) 45 Cal.3d 915, 963-965.) The trial court's statement that, by asking for the death penalty, petitioner was asking the court to participate in petitioner's "judicial suicide" (RT 2964, 2967), was obviously not a declaration of doubt as to petitioner's competence under Penal Code section 1368 or a finding that he was suicidal. The record simply does not suggest that the trial court ever intended to express any doubt as to petitioner's competence or that it intended to initiate proceedings to determine competence. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 35-36.)

Moreover, petitioner's bare allegation that he was unable to assist his attorneys or participate in his defense (Petn. 417) is unsupported by any citations to the record or by any affidavit from defense counsel. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1064, 1073; *People v. Marshall* (1997) 15 Cal.4th 1, 33; *People v. Medina, supra,* 11 Cal.4th at p. 735.) Petitioner has failed to show substantial evidence of his mental incompetence to stand trial. A defendant is mentally incompetent "if, *as a result of mental disorder or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1167; italics added; see *People v. Frye, supra,* 18 Cal.4th at p. 951; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92.)

Here, the only evidence presented by petitioner is a declaration by a Berkeley forensic psychiatrist who, after examining petitioner in 1998, concluded that 20 years earlier, in 1978, petitioner could not have been able to "rationally" assist in the preparation of his own defense. (Petn. Exh. CC at 4-5, 20-21.) However, this conclusion was reached *without* consulting with trial counsel, and the only basis for this construct was Dr. Woods's diagnosis of petitioner in 1998 as having a borderline personality disorder, and his conjectural extrapolation (from the abstract criteria for Borderline Personality Disorder listed in the DSM-IV) that petitioner presumably must have displayed

some or all of the "signs and symptoms" of this disorder in 1978, and therefore supposedly must have been unable to participate "meaningfully" in his defense. (Petn., Exh. CC at 8.) Thus, Dr. Woods's conclusion about the extent to which petitioner was able to assist his attorneys and participate meaningfully in his defense in 1978 is speculative over-generalization at best, and he does not even render an opinion as to the other prong of mental competence under Penal Code section 1167, to wit, whether petitioner was able to understand the nature of the proceedings.

Nothing in Dr. Woods's declaration even remotely suggests that petitioner was mentally incompetent in 1987 within the meaning of Penal Code section 1167, which requires proof of a mental disorder that renders the defendant unable to understand the nature of the criminal proceedings or to assist counsel (See *People v. Howard*, *supra*, 1 Cal.4th at p. 1163.) Since none of Dr. Wood's findings are based on eyewitness accounts of how petitioner interacted with counsel at the time of the first or second trial, Dr. Woods's conclusionary assumptions that in 1987 petitioner must have experienced and displayed the constellation of symptoms listed in the abstract criteria of a borderline personality disorder do not raise a reasonable doubt as to petitioner's ability to understand the nature of the proceedings or to assist counsel in the conduct of his defense in 1987. (Petn., Exh. CC at 4, 20-21.) Petitioner fails to point to anything in the trial record of either trial that raises a reasonable doubt as to petitioner's ability to understand the nature of the proceedings or to assist counsel in the conduct of his defense. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 952.)

Indeed, at the first trial, the trial court remarked that petitioner had acknowledged having an IQ of around 120, was not mentally incompetent, and had the mental capacity to represent himself. (FRT 928-930, 941-942.) The deputy district attorney pointed out that petitioner was bright and very

inarticulate. (FRT 648.) Defense counsel similarly observed that petitioner was quite intelligent, had an excellent memory, and had no mental defects. (FRT 321, 325-328, 333, 644-646, 816.)

What is more, Dr. Coburn testified on petitioner's behalf at the first trial that petitioner was "above average in his intellectual capacity," was smart enough to know that he could not be subjected to the death penalty for the 1976 killings, but only for the 978 killing, and was "bright enough to have *concocted* a history in keeping with the psychiatric defense." (FRT 833, 839, 842-843; italics added.) Dr. Coburn, the psychiatrist to whom petitioner confessed all three murders (RT 830-865), testified that petitioner was mentally competent, was "not mentally deficient," was "not measurably psychotic," did "not have an organic brain syndrome," was "above average in his intellectual capacity," and easily understood the nature of the proceedings, but merely had "a sexual disorder," a "personality disorder," and an "emotional disorder," manifested by homosexual pedophilia, anger, and explosiveness. (FRT 833, 842-843, 846, 855-856.) In addition, when petitioner testified at the hearing on the motion to suppress evidence at the first trial (FRT 97-122, 130-179, 264-269, 452-474, 479-540, 622-624) and at the second trial (RT 2140-2198), his testimony was extremely lucid and coherent, and petitioner himself testified that there was nothing "wrong with [him] mentally" (FRT 116-117).

In Dr. Woods's opinion, petitioner merely suffered from a "borderline personality disorder." (Petn., Exh. CC at 5.) Even assuming this diagnosis were accurate, petitioner's alleged personality problem and emotional instability could not, standing alone, suggest a mental disorder or developmental disability that would interfere with his ability to understand the nature of the proceedings or assist his defense attorney at trial several years later. (See *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1110.) Without any explanation, Dr. Woods

makes a giant leap from his armchair diagnosis of petitioner to a trial which petitioner fully understood and participated in.

The showing made by petitioner is wholly inadequate. Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 120. Petitioner Was Deprived Of His Right Of Access To, And Assistance Of, Competent Mental Health Experts

Petitioner alleges, as he did on habeas (HCP 38-41), that he was denied access to effective mental health experts to assist in the preparation and presentation of relevant mental state defenses at the guilt phase and mitigating evidence at the penalty phase. (Petn. 422-430.) The identical underlying claim was rejected on the merits by this Court when it denied his prior habeas petition. (1995 habeas denial.)

Moreover, as noted above, petitioner had access to effective mental health experts who assisted him and testified in his behalf at the first trial. (See Claim 119, *ante*.) Dr. Coburn's testimony was so effective, in fact, that it led to the trier of fact's verdict of only second-degree murder on Count I. Therefore, no prima facie case for relief has been stated as to this claim.

J. OTHER CLAIMS

1. GUILT PHASE

Claim 121. Petitioner Was Deprived Of Fair And Accurate Guilt And Penalty Phases Due To Lack Of Available Material Evidence

Petitioner asserts, as he did on appeal (AOB 83-85) and on habeas (HCP 38-41, 41-43, 43-44, 44-45, 45-47, 47-48, 48-50, 50-51), that his constitutional rights were violated as a result of: (a) absence of a complete psychiatric

evaluation of petitioner; (b) absence of evidence of the timing of the alleged lewd and lascivious act; (c) lack of investigation regarding the testimony of Jose Feliciano; (d) absence of readily available evidence that petitioner would not voluntarily consent to the search and provide a statement to the police; (e) absence of evidence that another person or persons other than defendant were responsible for the Bell Gardens killings; (f) lack of evidence or instruction upon which the jury could have considered the voluntariness of the confessions; (g) denial of petitioner's right to a speedy trial; and (h) lack of a timely request for a lingering doubt instruction. (Petn. 430-436.) The identical claims were rejected on the merits by this Court when it decided the appeal (*Memro*, 11 Cal.4th at pp. 822-835, 846-847) and when it denied his prior habeas petition (1995 habeas denial.) Therefore, no prima facie case for relief has been stated as to these claims.

Claim 122. Petitioner Was Deprived Of His Constitutional Rights As A Result Of The Falsification Of Sergeant Carter's Personal Notes Of Petitioner's Confession

Petitioner alleges, as he did on habeas (HCP 9-11), that Sergeant Carter's use of the contemporaneous interrogation notes that he took at the time of petitioner's confession to refresh his recollection when he testified at the second trial violated petitioner's constitutional rights because the notes were prepared sometime after the interrogation of petitioner. (Petn. 436-437.) The identical claim was rejected on the merits by this Court when it denied his habeas petition. (1995 habeas denial; see Claim 85, *ante*; see also Exh. D.) Therefore, no prima facie case for relief has been stated as to this claim.

2. PENALTY PHASE

Claim 123. The Various Flaws Of The Sentencing Procedure Used In This Case Render The Death Sentence Arbitrary, Capricious, And Unconstitutional

Petitioner contends, as he did on appeal, that the California sentencing process suffers from various statutory, procedural and substantive defects. (Petn. 437-441.) The identical claim was rejected on the merits by this Court on appeal. (*Memro*, 11 Cal.4th at pp. 874, 886-888.) Therefore, petitioner has failed to state a prima facie case on the merits as to this claim.

3. APPELLATE CLAIMS

Claim 124. By Failing To Preserve A Complete Record On Appeal, The Trial Court Deprived Petitioner Of His Due Process Rights And State-Created Liberty Interests

Petitioner avers that his constitutional rights were violated by virtue of the trial court's failure to order and prepare a complete and accurate record on appeal. (Petn. 441-448.) He has failed to demonstrate, however, he requested corrections to the record and that the trial court erroneously refused to make the corrections. (See Pen. Code, § 190.8.) More importantly, He has not shown that the record was insufficient to ensure no substantial risk the death sentence has been arbitrarily imposed, and he has failed to prove that the cited transcripts existed and were critical to an understanding and proper resolution of any of the issues raised on appeal. (See *People v. Heard* (2003) 31 Cal.4th 946, 970; *People v. Arias* (1996) 13 Cal.4th 92, 158; *People v. Prado* (1995) 11 Cal.4th 891, 966; *People v. Cummings* (1993) 4 Cal.4th 1233, 1333 fn. 70.)

Therefore, petitioner has failed to make a prima facie case as to this claim.

Claim 125. Petitioner's Rights Were Violated By Erroneous Rulings And Factual Errors By This Court

Petitioner avers that this Court failed to provide him with an adequate and meaningful appeal. He includes a laundry list of asserted errors allegedly made by this Court made when it affirmed his conviction and denied the petition for rehearing. (Petn. 449-450.) He is asking this Court to reconsider its "erroneous rulings and factual errors" with regard to the following appellate issues: double jeopardy (see Claims 3, 10, 12, 13, 77, and 83); voluntariness of the confessions (see Claims 2, 5, 6, 16, 36, 37, 51, 52, 71, 91, and 121); motion for severance (see Claims 31 and 32); sufficiency of the evidence (see Claims 67 and 68); destruction of the police personnel records (see Claims 5 and 18); delay in providing 400 pages of discovery material (see Claims 5 and 19); speedy trial (Claims 24, 93 and 121); retrial on felony-murder theory (see Claims 10, 13, 39, 67, 70, 77, and 83); and denial of the motion to suppress (see Claims 25, 26, 27, 29, 69, 71, 89, and 91).

By definition, then, petitioner cannot make a prima facie showing as to this multi-faceted claim.

Claim 126. Petitioner Was Denied The Right To Due Process In His Appeal As A Result Of This Court's Chief Justice's Political Support For Opposing Counsel In This Case

Petitioner avers a denial of due process when this Court denied his motion for recusal of then-Chief Justice Malcolm Lucas, based on Chief Justice Lucas's having spoken at a public gathering in support of the gubernatorial

candidacy of Attorney General Daniel Lungren. (Petn. 450.) Respondent submits that this Court's denial of the recusal motion was a proper exercise of discretion. A mere conclusory allegation of a violation of a constitutional right, without the presentation of any facts or legal authority to support it, does not establish a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.)

Petitioner's allegations are conclusory and unsupported by any declaration or affidavit. He has not alleged fully and with particularity the specific factual bases for the alleged conflict of interest and has not cited any controlling legal authority. The mere fact that justices of this Court have political views and opinions and express them does not create a conflict of interest or lead to the conclusion that their legal opinions are politically influenced. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1140-1141.)

Therefore, petitioner has not made a prima facie showing for relief as to this claim.

Claim 127. This Court Failed To Conduct A Constitutionally Adequate Review Of Petitioner's Case And Institutionally Does Not Conduct Such Review In Capital Cases

Petitioner contends, as he did on appeal (AOB 225-231), that certain aspects of the death penalty law and appellate review process are unconstitutional, in that specific enumeration of aggravating and mitigating factors is not provided to guide the jury, the language of the special circumstances and sentencing factors is vague and overbroad, no written findings regarding the aggravating factors are required, the prosecution is not required to prove the factors in aggravation beyond a reasonable doubt, there is no unanimity requirement regarding the aggravating factors, and there is no

provision for comparative appellate review. (Petn. 450-451.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 886-888; see also *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Maury* (2003) 30 Cal.4th 342, 439-441; *People v. Slaughter, supra,* 26 Cal.4th at pp. 1224-1225.)

In addition, petitioner lists certain alleged defects in the habeas corpus review process that disadvantaged him, such as this Court's failure to grant him adequate discovery, an evidentiary hearing, or subpoena power, which deprived him of his right to due process. (Petn. 451-452.) But this Court has noted that the appropriate disposition of a habeas corpus petition must be based on the factual allegations already contained within it. (*In re Clark, supra*, 5 Cal.4th at p. 781 and fn. 6.) Furthermore, this Court has held that its review procedures more than adequately satisfy and ensure the requirements of due process in post-conviction applications. (See *id.* at pp. 764-798.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

4. STATUTORY CLAIMS

Claim 128. The 1977 Death Penalty Statute, On Its Face, And As Applied, Is Unconstitutionally Vague, Arbitrary And Capricious

Petitioner contends, as he did on appeal (AOB 182-185), that the 1977 death penalty law is unconstitutionally vague and gives the penalty sentencer unbridled, unguided discretion. (Petn. 452-453.) The identical underlying claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at p. 874; see also *People v. Frierson* (1991) 53 Cal.3d 730, 752; *People v. Robertson* (1989) 48 Cal.3d 18, 63; *People v. Jackson* (1980) 28 Cal.3d 264,

315-317.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 129. Many Features Of The California Capital Sentencing Scheme As Interpreted By The State Courts And Applied At Petitioner's Trial Violate The Federal Constitution

Petitioner contends, as he did on appeal (AOB 182-185, 225-231), that the California capital sentencing scheme violates the Eighth and Fourteenth Amendments in various ways. (Petn. 453-458.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 874, 886-888; see also *People v. Cunningham, supra,* 25 Cal.4th at pp. 1041-1042; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256; *People v. Bradford* (1997) 15 Cal.4th 1229, 1383-1384.) Therefore, no prima facie case for relief has been stated as to this claim.

Claim 130. Failure To Narrow The Class Of Offenders Eligible For The Death Penalty And Imposition Of Death In A Capricious And Arbitrary Manner

Petitioner contends, as he did on appeal (AOB 182-185, 225-231), that the death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits its imposition in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments. (Petn. 458-480.) The identical claim was rejected by this Court on direct appeal. (*Memro*, 11 Cal.4th at pp. 874, 886-888; see also *People v. Snow, supra,* 30 Cal.4th at pp. 125-126; *People v. Barnett, supra,* 17 Cal.4th at p. 1179; *People v. Samayoa* (1997) 15 Cal.4th 795, 863; *People v. Arias, supra,* 13 Cal.4th at p. 187.) Therefore, no prima facie case for relief has been stated as to this claim.

5. EIGHTH AMENDMENT CLAIMS

Claim 131. The Unconstitutional Use Of Lethal Injection Renders Petitioner's Death Sentence Illegal

Petitioner avers that his sentence of death is illegal and unconstitutional because execution by lethal injection, pursuant to Penal Code section 3604, violates the prohibition against cruel and unusual punishment. (Petn. 480-490.) The assertion is devoid of merit. This Court has already decided the issue and need not revisit it. (*People v. Snow, supra,* 30 Cal.4th at pp. 127-128; *People v. Holt, supra,* 15 Cal.4th at p. 702; *People v. Samayoa, supra,* 15 Cal.4th at p. 864; *People v. Bradford, supra,* 14 Cal.4th at pp. 1058-1059; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 680-681.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 132. Execution Of Petitioner After Prolonged Confinement Violates The Eighth Amendment Prohibition Of Cruel And Unusual Punishment

Petitioner avers that his pending execution after his prolonged confinement under a sentence of death would constitute cruel and unusual punishment. He complains that he has been on death row since 1980, and that carrying out his sentence after such an extraordinary delay would be cruel and unusual and would no longer further the twin penological purposes of exacting retribution and deterring other serious offenses. (Petn. 490-494.) The contention is without legal or factual support.

Petitioner cannot fight the carrying out of his death sentence as he has for most of the last 25 years and, at the same time, in effect complain it has not

occurred soon enough. At any point after his automatic appeal was final, petitioner could have chosen to shorten his stay on death row. By continuing to attack his judgment, however, he has himself lengthened that stay. (*People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Ochoa* (2001) 26 Cal.4th 398, 462-464; *People v. Anderson* (2001) 25 Cal.4th 543, 605-606.)

If petitioner's sentence is found to be just, he has only benefitted from the delay of his execution. On the other hand, if his sentence is found to be unjust, there is no conceivable basis on which to claim the delay resulted in prejudice since, obviously, the death sentence has not been carried out and petitioner would have spent the last 17 years serving the very sentence he is in effect now requesting: life in prison without the possibility of parole. (*People v. Hill* (1992) 3 Cal.4th 959, 1015-1016.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

6. INTERNATIONAL LAW CLAIMS

Claim 133. Application Of The Death Penalty Violates International Law Under The United States's Treaty Obligations

Petitioner maintains that the death penalty as imposed in this case constitutes the arbitrary deprivation of life proscribed by the International Covenant on Civil and Political Rights. (Petn. at 494-502.) Not so. Capital punishment, as administered in California, does not violate international law. (*People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 779, 781; see *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337.)

Therefore, petitioner has failed to state a prima facie case as to this claim.

Claim 134. Application Of The Death Penalty Violates Customary International Law

Petitioner maintains that the death penalty as imposed in this case violates "customary" international law, akin to international common law, which, under the Supremacy Clause, trumps state law. (Petn. at 502-505.) Petitioner cannot prevail "because [he] has failed to establish the premise that his trial involved violations of state and federal constitutional law." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) Moreover, if petitioner could show prejudicial error under domestic law, this Court would set aside the judgment on that basis without recourse to international law. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 135. Petitioner's Death Sentence Is Arbitrary Under International Law

Petitioner maintains that the death penalty as imposed in this case is arbitrary[2/] as defined by international law and "under any criteria" because the California statute fails to narrow the scope of death-eligible offenses. (Petn. at 505-507.) But, as noted above, California's death penalty law passes constitutional muster. (*Memro*, 11 Cal.4th at pp. 874, 886-888; see Claim 130.) Moreover, capital punishment, as administered in California, does not violate international law. (*People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v.*

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2. Nothing was, is, or can be, as arbitrary or cruel as petitioner's evil decision to take the tender lives of Scott F., Ralph C., and Carl Jr. merely because they would not willingly and immediately submit to his depraved designs.

Hillhouse, *supra*, 27 Cal.4th at p. 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779, 781; see *Buell v. Mitchell, supra,* 274 F.3d 337.)

Therefore, petitioner has failed to state a prima facie case for relief as to this claim.

Claim 136. Petitioner Has A Right To Be Free From Cruel, Inhuman Or Degrading Treatment

Petitioner maintains that imposing the death sentence in his case would violate Article 7 of the International Covenant on Political and Civil Rights. (Petn. 507-510.) He acknowledges, however, that upon ratifying the treaty, the U.S. Senate declared that the phrase "cruel, inhuman, or degrading treatment or punishment" meant no more than "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution." (Petn. 507.) The claim that the death penalty violates international norms has been rejected by this Court. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 462.)

Thus, petitioner cannot make a prima facie case as to this claim.

Claim 137. Petitioner's Conviction And Sentence Violates His Rights To Due Process

Petitioner maintains that his conviction and sentence violate his due process rights under international law because he was not treated equally by the trial court because he was indigent, the trial court was partial, he was shackled, he was denied counsel of his own choosing, he was denied his right to a speedy trial, he was denied his right to be present during the jury view, he was denied his right to exclude witnesses during testimony, and he was denied his right to have his conviction and sentence reviewed by an adequate, impartial reviewer. He avers that all of the cited errors violated his human rights under international

law. (Petn. 510-513.) The citation to international law is unavailing. (*People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Ghent, supra,* 43 Cal.3d at pp. 779, 781; see *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337.)

Therefore, petitioner has not stated a prima facie case as to this claim.

Claim 138. Petitioner's Right To Be Tried Before Ann Impartial Tribunal Was Violated By Death Qualification Procedures

Petitioner maintains he was denied to a fair, competent, independent, and impartial tribunal, clothed with the presumption of innocence, as required by international law. He avers the trial and appellate proceedings were tainted, in violation of international law, because the trial judge was biased, the jury was not from a representative cross-section of the population, the jury selection process was unfairly skewed toward conviction-prone and death-prone jurors, much of the evidence was irrelevant and inflammatory, and this Court was not impartial. The claim is meritless. (*People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Ghent, supra,* 43 Cal.3d at pp. 779, 781; see *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337.)

Therefore, petitioner has not stated a prima facie case as to this claim.

Claim 139. Petitioner Has A Right To Litigate Violations Of His Rights Before International Tribunals

Petitioner maintains that he has a right to litigate the above-cited violations of international law before United Nations committees and Inter-American Commissions. He acknowledges that the United States does not recognize the jurisdiction of these international bodies, but avers that this refusal is itself a violation of the Constitution, under which treaties constitute

the supreme law of the land. (Petn. 515-517.) The claim is devoid of merit. (*People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Ghent, supra,* 43 Cal.3d at pp. 779, 781; see *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337.)

Therefore, petitioner has not stated a prima facie case for relief as to this claim.

7. CUMULATIVE CLAIMS

Claim 140. Trial Counsel Render Ineffective Assistance

Petitioner insists that trial counsels' failure to raise objections to any of the above-listed claims of error constituted ineffective assistance of counsel. (Petn. 517.) Mere conclusory allegations of defective performance and resulting prejudice are insufficient. Petitioner has not set forth fully and with particularity the facts supporting each claim of deficient performance and resulting prejudice, and has not provided documentary support--in the form of reasonably available affidavits or declarations--for the alleged facts, as well as for his claim that counsel's inaction was not the result of a reasonable tactical decision.

Petitioner has failed to establish a prima facie case for relief as to any individual alleged error, including those that were forfeited by failing to object. In addition, he has failed to demonstrate that defense counsels' omission as to any of the claimed errors fell below an objective standard of reasonable under prevailing profession norms or a reasonable probability that defense counsels' incompetence in not objecting affected the trial's outcome. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 694.) *A fortiori*, petitioner has failed to make a prima facie case from any cumulative effect of errors.

Claim 141. Appellate Counsel Rendered Ineffective Assistance

Petitioner insists that, to the extent any of the above-listed claims were available and could have been raised on appeal, appellate counsel was derelict in not doing so. (Petn. 517-518.) Petitioner has failed to establish a prima facie case as to any of the alleged claims, however. Thus, he cannot show deficient performance on the part of appellate counsel under an objective standard of reasonableness or prejudice under a test of reasonable probability of a different outcome. (*People v. Osband* (1996) 13 Cal.4th 622, 664.)

The primary defect in all aspects of petitioner's claim is the absence of facts, stated fully and with particularity, to establish both deficient performance and prejudice, i.e., a reasonable possibility of a different outcome of the appeal had he presented the claim to this Court on appeal. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) There is no proffered explanation in a declaration from appellate counsel for their omissions and, without a proffered explanation, it is difficult, if not impossible, to determine whether the omissions were attributable to a tactical decision which a reasonably competent appellate criminal defense attorney would make. (See *People v. Williams*, *supra*, 44 Cal.3d at p. 936.) In addition, appellate counsel may have been restrained by the absence of an timely objection at trial.

Petitioner's conclusory allegation of ineffective assistance of appellate counsel does not warrant relief. Petitioner has failed to state a prima facie case on the merits.

Claim 142. Habeas Counsel Rendered Ineffective Assistance

Petitioner insists that, to the extent any of the above-listed claims were available and could have been raised in his first habeas corpus petition, habeas

counsel was deficient in not doing so. (Petn. 518-519.) Petitioner has failed to establish a prima facie case as to any of the alleged claims, however. Thus, he cannot show deficient performance on the part of habeas counsel under an objective standard of reasonableness or prejudice under a test of reasonable probability of a different outcome. (*People v. Osband* (1996) 13 Cal.4th 622, 664.)

The primary defect in all aspects of petitioner's claim is the absence of facts, stated fully and with particularity, to establish both deficient performance and prejudice, i.e., a reasonable possibility of a different outcome of the petition had he presented the claim to this Court on habeas. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) There is no proffered explanation in a declaration from habeas counsel for their omissions, and without a proffered explanation, it is difficult, if not impossible, to determine whether the omissions were attributable to a tactical decision which a reasonably competent habeas criminal defense attorney would make. (See *People v. Williams*, *supra*, 44 Cal.3d at p. 936.) In addition, habeas counsel may have been restrained by the absence of a timely objection at trial.

Petitioner's conclusory allegation of ineffective assistance of habeas counsel does not warrant relief. Petitioner has failed to state a prima facie case on the merits.

Claim 143. Cumulative Constitutional Error Requires A Reversal Of The Convictions And Death Sentence

Petitioner insists that the cumulative effect of the alleged constitutional errors committed at the penalty phase require that the judgments of conviction and death be vacated. All of his claims of error, however, are procedurally defaulted and, in addition, fail on their face for one or more of the reasons stated above and are without merit. Because there were no constitutional errors

which, whether considered individually or cumulatively, deprived petitioner of a fair trial or reliable penalty determination, he is entitled to no relief on this claim. (See *People v. Earp* (1999) 20 Cal.4th 826, 904.)

CONCLUSION

The petition fails to state a prima facie case for relief. Petitioner has failed to allege sufficient material facts to support his claims of error, has failed to demonstrate he was prejudiced by any assumed errors, and has failed to provide reasonably available documentary evidence, including affidavits and declarations, in support of his conclusory allegations of error and prejudice. There are no grounds for issuing an order to show cause as to any claim.

Accordingly, the petition for writ of habeas corpus should be summarily denied without further proceedings.

All claims should be denied on the merits.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), the following claims should be denied because (a) petitioner has not adequately stated when he or his counsel became aware of the legal and factual bases for his claims and the claims appear to be based either on the appellate record or on information that has or should have been long known to petitioner or his present or prior counsel; (b) he has not explained and justified his failure to present them to this Court without substantial delay; and (c) he has not alleged facts with regard to these claims demonstrating the occurrence of a fundamental miscarriage of justice to excuse the procedural default (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3; *In re Clark, supra*, 5 Cal.4th at pp. 782-787, 797-798): Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 989, 99, 100, 101, 102, 13, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125,

126, 127, 128, 129, 130, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), the following claims should be denied because they are repetitious, in that petitioner presented them in a prior habeas petition, and this Court denied them on the merits: Claims 5, 7, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 29, 30, 34, 36, 37, 63, 69, 85, 86, 87, 89, 90, 94, 100, 101, 102, 107, 108, 109, 110, 118, 120, 121, 122, 125, 127, and 140.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), the following claims should be denied because they are successive, and petitioner has not adequately explained and justified his failure to include the claims in a prior habeas corpus petition and has not alleged facts with regard to these claims demonstrating the occurrence of a fundamental miscarriage of justice to excuse the procedural default (*In re Clark*, *supra*, 5 Cal.4th at pp. 774-775): Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 134 135, 136, 137, 138, 139, 140, 141, and 143.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), the following claims should be denied because they were raised and rejected on appeal, and petitioner has not alleged facts with regard to these claims demonstrating any exception to excuse the procedural default (*In re Harris*, *supra*, 5 Cal.4th at pp. 829-842 & fn. 3; *In re Waltreus*, *supra*, 62 Cal.2d at p. 225): Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 15, 16, 17, 18, 19, 24, 27,

28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 77, 80, 81, 83, 93, 94, 96, 98, 112, 113, 121, 125, 126, 128, 129, and 130.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), the following claims should be denied because petitioner has not adequately explained and justified his failure to raise them on appeal and has not alleged facts with regard to these claims demonstrating any exception to excuse the procedural default (*In re Harris*, *supra*, 5 Cal.4th at pp. 829-842 & fn. 3; *In re Dixon*, *supra*, 41 Cal.2d at p. 759): Claims 7, 11, 13, 14, 22, 23, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 72, 74, 75, 76, 78, 79, 82, 84, 85, 88, 89, 90, 92, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 130, 133, 134, 135, 136, 137, 138, 139, 140, and 143.

Separately and independently (see *Harris v. Reed*, *supra*, 489 U.S. at p. 264, fn 10), the following claims should be denied because petitioner failed to object properly at trial (see *In re Seaton*, *supra*, 34 Cal.4th at p. 200; *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590): Claims 13, 14, 22, 23, 42, 43, 50, 51, 52, 54, 64, 69, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 99 (alleging ineffective assistance at first trial), 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 133, 134, 135, 136, 137, 138, and 139.

Dated: May 20, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

JOHN R. GOREY
Deputy Attorney General

ROBERT D. BRETON
Deputy Attorney General

Attorneys for Respondent

RDB:lh
LA2004ZXH0011

CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE TO PETITION FOR uses a 13 point Times New Roman font and contains 29716 words.

Dated: May 20, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT D. BRETON
Deputy Attorney General

Attorneys for Respondent

EXHIBIT A

DECLARATION OF PATRICK L. SCHOONOVER

I, PATRICK L. SCHOONOVER, declare:

1. That on October 22, 1978, I was employed as a police officer for the South Gate Police Department, assigned to the Uniform Patrol Division.

2. That I am currently employed as a police officer for the South Gate Police Department and assigned to the Traffic Division.

3. That I took a Missing Person Juvenile Report (which I have personally read and a copy of which is attached to petitioner's petition for writ of habeas corpus as Exh. C) concerning Carl Carter, Jr., at approximately 9:02 p.m. on October 22, 1978.

4. That the reporting parties were Carl Carter, Sr. and Scott Carter, Carl Carter, Jr.'s brother.

5. That at approximately 9:02 p.m., Scott Carter told me he last saw his brother, Carl, Jr., "a couple of hours ago."

6. That to the best of my recollection, Scott Carter was a few years older than Carl Carter, Jr., or approximately 13 years old.

7. That the time listed as 1900 hours, or 7:00 p.m., on the Missing Person Juvenile Report was only an approximation made by myself of the hour Scott Carter had last seen his brother, Carl Carter, Jr., based on Scott Carter's statement, at 9:02 p.m., to me that he had last seen his brother, Carl Jr., "a couple of hours ago."

8. That under penalty of perjury the foregoing is true and correct.

Executed on 11th day of FEBRUARY, 1982 at SOUTH GATE, California.

Patrick L. Schoonover

PATRICK L. SCHOONOVER

EXHIBIT B

Booking No. 169138

_____ a.m.

Name MEMRO, HAROLD RAY Age 33 Date of arrest 10-27-78 Time 1638 p.m.

Address 2803½ Ohio Ave., City South Gate Date of Birth 5-10-45

Place of arrest Tweedy and South Gate Driver's License No. B520812 Calif

Charge(s) 1. 187PC 2. 207PC 3. 288a PC 4. _____ 5. _____

Complaining Witness SEE DETAILS Address _____ Phone _____

Witness _____ Address _____ Phone _____

Witness _____ Address _____ Phone _____

Evidence: SEE DETAILS

_____

_____ Tag No. _____

History of arrest in detail:

SEE DETAILS

Date of Arraignment _____ Arresting Officer(s) _____

Disposition _____

_____

_____

S.G.P.D. Form #38

LIEUTENANT

Dets and investigators then re-contacted def Memro. He was re-admonished of his Constitutional Rights per Miranda by Det Sims from a South Gate PD Rights WAiver Card in the presence of Det Gluhak, investigators Carter and Green, and he again indicated that he understood his Rights and wished to talk to detectives about the case.

Due to the information gained by Invest Carter he conducted the interview with def Memro. The following will be the contents of the conversation between invest Carter and def Memro.

Susp Harold Memro stated "Carl Carter is a friend of mine and works on my cars. Last Sunday at about 6:45 in the evening I went to the Sizzler to eat and the line was too long. AS I was driving out of the alley I decided to talk to Carl Sr about fixing my Volkswagon and I seen little Carl Jr riding up on his bike. Carl Jr said 'Hi, don't tell my dad I'm home. He'll make me go in.' Carl Jr then stated he wanted to get a soda or something to the effect he was going to get a soda. I said 'Let's go get one.' He said 'O.K.' I was driving my green 68 Plymouth at the time and we went right up to my apartment. I had it in the back of my mind I wanted to take some pictures of him in the nude. That's how I get my sex satisfaction. Taking nude pictures of young boys. We went into my bedroom and I turned on all these real fancy black lights. I was just sitting on the bed watching Carl Jr and was just getting ready to ask him to let me take some more nude pictures when Carl Jr said something to the effect that he had to go home and was looking at the clock. We had only been there five or ten minutes and he hadn't even drank a Coke. As a metter of fact I don;t even believe he asked for one. I guess I got mad all of a sudden, and the next thing I knew I grabbed this piece of clothesline rope I had lying on the nightstand in the bedroom and put it around little Carl Jr's neck and strangled him . He was just standing next to the bed. I think I tied a square knot in the rope. He didn't even scream. You know, I just remembered something. I tied his hands behind his back with some masking tape I had on the nightstand. I can't remember when I tied his hands. Shit, man, I can't remember everything. I just know that I wanted to have sex with him. I took his clothes off and then I took mine off. I didn't take his T-shirt off. I layed him on the bed and I tried to screw him in the ass and I couldn't get a hard on, so I finally just quit. After that I suddenly realized he was dead and what had happened. I got real scared. I think it was about 7:45 byt then. I got dressed and went into the living room and picked up the phone. I was trying to think of an alibi so I called this woman I know by the name of Helen and asked her to give me a ride and she said she was watching a special on TV and couldn't come over until after 1 . It tried to call this friend of mine named James whose a mechanic, but his phone was busy. I still knew I had tp think of an alibi real quick so I called Carl Sr about working on my Volkswagon and he said I could bring it over. I called Helen back but she was still watching the fuckin TV til 10 and she said she would come over at 10 and follow me over to Carl's.

continued . . . . . .

EXHIBIT C

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA)
)
VS)
)
HAROLD RAY NEMRO)

Calif. Supreme Ct
Crim 26409

CASE NO. A445665
ORDER ON POST
JUDGMENT DISCOVERY
AND ON
WRIT OF HABEUS
CORPUS

1. The defendant's request for post judgment discovery is denied. The court adopts the People's reasoning as set forth in its opposition papers and oral argument.

2. By agreement, the court treats the moving papers of the defendant as an Application for Writ of Habeus Corpus.

3. The court denies relief on the Cornejo jail house witness testimony which was received in the hearing on the admissability of the confession on the following ground:

a. The court did not consider or give any weight to the Cornejo testimony in making its decision on the admissability of the confession.

4. The court finds that as to the balance of the matters a prima facie showing has been made to justify a hearing on the merits and therefore allows discovery on this Jail House Witness and Proscutorial misconduct theory. This does not mean to imply that there is any merit to the claim, just that a showing has been made to justify further action.

5. This is not meant as Carte Blanc discovery order. Any and all entities, whether individual, governmental, or private have any and all rights available to them under the criminal discovery procedures of this state.

6. The court reserves jurisdiction to alter or amend this order as justice compels.

John Torribio

NORWALK, CALIFORNIA; MONDAY, MAY 15, 1989; 9:10 A.M.
DEPARTMENT SE H HON. JOHN H. TORRIBIO, JUDGE
APPEARANCES: (AS SHOWN ON TITLE SHEET).

THE COURT: THIS IS THE MATTER OF HAROLD RAY MEMRO, MOTION FOR POST JUDGMENT DISCOVERY, ALSO MOTION FOR RETURN OF PROPERTY, AND MOTION FOR APPOINTMENT OF COUNSEL AND DECLARATION.

WHAT ABOUT RETURN OF PROPERTY? HAS THAT BEEN RESOLVED?

MR. RUGNETTA: YOUR HONOR, COUNSEL JUST WENT DOWN THE HALL. THE BOX OF PHOTOGRAPHS THAT IS SUBJECT TO THE MOTION ARE HERE BEFORE THE COURT.

MR. NOLAN: THOMAS NOLAN OF NOLAN & PARNES ON BEHALF OF MR. MEMRO.

MR. BARRETO: ANTONIO BARRETO, JR AND PATRICIA HORIKAWA ON BEHALF OF THE PEOPLE.

THE COURT: I HAVE INDICATED THAT I HAVE READ ALL THE SUPPLEMENTAL POINTS AND AUTHORITIES FILED AND WOULD INDICATE THAT I WILL RULE, SUBJECT TO THE PEOPLE'S ARGUMENT, THAT THE COURT DOES HAVE JURISDICTION TO ALLOW POST JUDGMENT PRE-FINAL APPEAL DISCOVERY

MR. BARRETO: IN THAT CASE, YOUR HONOR, I'D LIKE TO DIRECT MY ARGUMENT TO THE SUPPLEMENTAL AUTHORITIES THAT MR. NOLAN HAS FILED BECAUSE OF THE TIME CONSTRAINTS PLACED UPON US BECAUSE WE ONLY RECEIVED THEM ACTUALLY ON FRIDAY. I GOT ONE ON THURSDAY, BUT THE ONE HE MAILED WAS RECEIVED FRIDAY. I HAVE NOT HAD AN OPPORTUNITY TO PUT IN WRITING --

COUNSEL STIPULATE THAT WE DIDN'T TALK ABOUT ANYTHING?

MR. NOLAN: I WOULD STIPULATE THAT WHEN WE WENT IN IT WAS DISCOVERED THAT WE SHOULD NOT BE TALKING. WE IMMEDIATELY DIDN'T TALK ABOUT IT, AND THE COURT INDICATED THAT NO RULINGS WERE MADE NOR INDICATED RULES MADE IN CHAMBERS, THAT ALL RULES INDICATED RULINGS WOULD BE MADE IN CHAMBERS.

THE COURT: YOU MEAN IN COURT.

MR. NOLAN: IN COURT ON THE RECORD.

WE DISCUSSED THE FACT THAT I INDICATED THAT I FELT THAT I WAS GOING TO CONCEDE TO THE COURT'S INTERPRETATION OF MY MOTION. THAT WAS ABOUT AS FAR AS WE GOT.

MR. BARRETO: PEOPLE SO STIPULATE.

THE COURT: VERY WELL.

THEN, PROCEDURALLY, AT THIS TIME, THE COURT DENIES ON ITS MERITS, WITHOUT PREJUDICE TO THE MOTION BEING TREATED AS A WRIT OF HABEAS CORPUS, THE MOTION FOR POST JUDGMENT DISCOVERY AS FILED.

NOW, THE COURT WILL TREAT THE SAME MOTION AS A MOTION -- AS AN APPLICATION FOR WRIT OF HABEAS CORPUS AND WILL TREAT THE SUPPORTING PAPERS AS IF UNDER PENALTY OF PERJURY FOR PURPOSES OF THE JURISDICTIONAL ISSUE SINCE WRITS OF HABEAS CORPUS MUST BE UNDER PENALTY OF PERJURY.

THE QUESTION THEN BECOMES WHETHER OR NOT THERE IS A PRIMA FACIE SHOWING OF ENTITLEMENT OF RELIEF.

AS I UNDERSTAND IT -- I WANT TO MAKE SURE I

UNDERSTAND YOUR WRIT APPLICATION CORRECTLY, MR. [redacted] (PHONETIC SPELLING) TESTIFIED IN THE MOTION TO SUPPRESS OR THE MOTION TO EXCLUDE THE CONFESSION OF MR. MEMRO. IS THAT THE BASIS OF YOUR APPLICATION OR ARE THERE ANY OTHER BASIS THAT I HAVE OMITTED?

MR. NOLAN: THERE IS ONE. THERE ARE OTHER BASIS.

THE OTHER BASIS HAVE TO DO WITH OTHER WITNESSES INCLUDING MR. WHITE AND MR. [redacted] (PHONETIC SPELLING).

THE COURT: BUT THEY HAVE TO DO WITH THE JAILHOUSE INFORMANT.

MR. NOLAN: THAT'S CORRECT. I JUST WANT THE RECORD CLEAR. THERE MAY BE OTHER BASIS FOR WRITS [redacted] IN [redacted] PROCESS.

THE COURT: THAT'S CORRECT. EXCUSE ME.

IN FACT, THE RECORD SHOULD REFLECT THAT THE COURT HAS BASICALLY TRIED TO TALK TO COUNSEL INTO ALLOWING THIS TO PROCEED AS WRITS OF HABEAS CORPUS TO ACCOMMODATE COUNSEL THAT ARE HERE, AND THE COURT BELIEVES IT WOULD BE UNFAIR AT THIS POINT TO AT SOME SUBSEQUENT TIME DECIDE THAT ALL OTHER KNOWN OR UNKNOWN OR SHOULD HAVE BEEN KNOWN OR COULD HAVE BEEN KNOWN TYPE MATTERS SHOULD NOT BE INCLUDED OR EVEN CONSIDERED AS HAVING THOUGHT ABOUT AT THIS TIME, THAT REALLY THIS IS AN INFORMANT ISSUE. IT'S THE ONLY ISSUE THAT I BELIEVE THAT COUNSEL FOR MR. MEMRO IS AWARE OF AT THIS TIME THAT WOULD BE THE BASIS OF THE WRITS.

IS THAT A FAIR STATEMENT?

MR. NOLAN: YES.

THERE ARE OTHER MATTERS THAT MAY BE A BASIS OF

THE WRIT THAT MAY BE TOTALLY [redacted] BUT THIS IS WHAT IS BEFORE THE COURT AT THIS TIME THAT IS THE BASIS OF THE WRIT.

THE COURT: OKAY.

MR. NOLAN: AND THE THREATS OF THOSE WITNESSES TESTIFYING IN THE ACTION AS WELL AS THE TESTIMONY ON THE ISSUE OF THE ADMISSIBILITY OF THE CONFESSION, IT'S NOT MERELY THOSE WRITS AS 402 BUT THOSE POTENTIAL WITNESSES OF THE TRIAL, THE DISTRICT ATTORNEY LISTED THOSE AS POTENTIAL WITNESSES.

THE COURT: NONE OF THEM WERE CALLED.

MR. NOLAN: NONE WERE CALLED BEFORE THE JURY.

THE COURT: THE COURT THEN NOW HAVING IT BEFORE IT AS A WRIT OF HABEAS CORPUS WOULD INDICATE AS FOLLOWS:

THAT AS THE TRIER OF FACT ON THE CONFESSION, THIS COURT DID NOT IN ANY WAY, SHAPE, OR FORM CONSIDER THE TESTIMONY OF MR. [redacted] (PHONETIC SPELLING). IN FACT, I COMPLETELY DISREGARDED IT AS TOTALLY UNRELIABLE AND MADE MY DECISION ON THE ADMISSIBILITY OF THE CONFESSION BASED UPON THE TESTIMONY OF THE POLICE OFFICERS AND OF MR. MEMRO.

THEREFORE, INSOFAR AS MR. [redacted] (PHONETIC SPELLING) IS CONCERNED, THE WRIT IS DENIED.

NOW, I'D LIKE TO KNOW HOW OR IN WHAT MANNER THE OTHER WITNESSES WHO WERE PARADED BEFORE THE COURT IN A TRULY -- WELL, I WON'T MAKE ANY COMMENT -- HOW THE FACT THAT OTHER WITNESSES ARE LISTED BUT NOT CALLED BECAUSE THAT'S TRULY THE STATE OF THE RECORD, WOULD ENTITLE MR. MEMRO TO WRIT RELIEF?

EXHIBIT D

DECLARATION OF LLOYD CARTER

I, LLOYD CARTER, declare:

1. That on October 27, 1978, I became involved in the case concerning the disappearance of Carl Carter, Jr. On that date I was employed as a police officer for the City of South Gate, assigned to the Burglary/Assault team as a Burglary/Narcotic Investigator.

2. That I am currently a Traffic Bureau Sergeant in charge of the South Gate Police Department, Traffic Bureau.

3. That I conducted an interview at South Gate Police Department of Harold Ray Memro during the late evening hours on October 27, 1978, and early morning hours on October 28, 1978.

4. That the interview with Harold Ray Memro on October 27, 1978, began at approximately 10:30 p.m. and ended at approximately 12:30 a.m. on October 28, 1978.

5. That Harold Ray Memro confessed to the murders of Carl Carter, Jr., Scott Fowler and Ralph Chavez, Jr., on October 27, 1978, at approximately 11:30 p.m.

6. That I took notes in Harold Ray Memro's presence as Harold Ray Memro spoke at approximately 11:30 p.m. on October 27, 1978. I also took some additional notes of my interview with Memro outside his presence at approximately 12:30 a.m. on October 28, 1978. All of the notes I took totalled approximately 10 pages. To my knowledge, I was the only officer who took any notes,

with the exception of a one-quarter page notation taken by Investigator Dennis Greene, located on page four of the confession notes, which indicated the route to the location of the body of Carl Carter, Jr.

7. That I dictated a police report entitled "Arresting Officer's Report" (which I have personally read and a copy of which is attached to petitioner's petition for writ of habeas corpus and marked Exh. D) on October 28, 1978, at approximately 2 p.m. The "Arresting Officer's Report" was typed on October 29, 1978, at approximately 5:50 a.m. I reviewed the report on October 29, 1978, at approximately 10 a.m. At that time, I felt the report accurately and, in relation to the murders of Carl Carter, Jr., Scott Fowler, and Ralph Chavez, Jr., totally, incorporated the sum and substance of the information recorded in the notes I took at the time of Harold Ray Memro's confession.

8. That the attached notes are a full, true and correct copy of the original notes taken during and after my interview with Harold Ray Memro at 11:30 p.m. on October 27, 1978 and at 12:30 a.m. on October 28, 1978, on file in my office.

9. That under penalty of perjury the foregoing is true and correct.

Executed on 11TH. day of FEBRUARY, 1982 at SOUTH GATE, California.

Lloyd Carter
LLOYD CARTER

DECLARATION OF SERVICE

Case Name: ***In re Reno*** Case No.: **S124660**

I declare:

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

On May 20, 2005, I placed two (2) copies of the attached

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

PETER GIANNINI, ESQ.
GIANNINI & CAMPBELL
12304 SANTA MONICA BLVD. # 105
LOS ANGELES, CA 90025

JAMES S. THOMSON, ESQ
SAOR E. STETLER, ESQ.
THOMSON & STETLER
819 DELAWARE STREET
BERKELEY, CA 94710

HON. JOHN A. CLARKE
EXECUTIVE OFFICER/CLERK
LOS ANGELES SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CA 90012
FOR DELIVERY TO:
Hon. John A. Torribio, Judge

STEVE COOLEY,
DISTRICT ATTORNEY
ATTN: PHILIP MILLETT, DEPUTY
12720 NORWALK BLVD.
NORWALK, CA 90650

In addition, I placed one (1) copy in this Office internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

CALIFORNIA APPELLATE PROJECT
ATTN: MICHAEL MILLMAN
101 SECOND STREET, STE. 600
SAN FRANCISCO, CA 94105-3672

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on May 20, 2005, at Los Angeles, California.

Lily Hood
Declarant

Signature

RDB:lh
LA2004XH0011