IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S151362
STEVEN M. BELL,	**CAPITAL CASE**
On habeas corpus.	Related to Automatic Appeal Case No. S038499
	San Diego Superior Court Case No. CR 133096

PETITIONER'S REPLY TO THE INFORMAL RESPONSE

Miro F. Cizin (Bar No. 171378)
Kevin Bringuel (Bar No. 196279)
Anne D. Gordon (Bar No. 257799)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner Steven M. Bell

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S151362
STEVEN M. BELL,	**CAPITAL CASE**
On habeas corpus.	Related to Automatic Appeal Case No. S038499
	San Diego Superior Court Case No. CR 133096

PETITIONER'S REPLY TO THE INFORMAL RESPONSE

Miro F. Cizin (Bar No. 171378)
Kevin Bringuel (Bar No. 196279)
Anne D. Gordon (Bar No. 257799)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner Steven M. Bell

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INDEX OF EXHIBITS

Volume X

Exhibit	Document Description
129.	Petition for Writ of Mandamus, *Bell v. San Diego County Superior Court*, Case No. D020513, Court of Appeal, Fourth Appellate District, Division One
130.	Declaration of Peter Liss
131.	Declaration of Richard W. Levak, Ph.D.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S151362
STEVEN M. BELL,	**CAPITAL CASE**
On habeas corpus.	Related to Automatic Appeal Case No. S038499
	San Diego Superior Court Case No. CR 133096

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

I. INTRODUCTION

Petitioner, Steven M. Bell, by this verified Reply ("Reply") to respondent's Informal Response ("Response"), hereby incorporates the allegations of his Amended Petition for Writ of Habeas Corpus ("Amended Petition") and the facts contained in the exhibits filed in support of the Amended Petition and this Reply, as if fully set forth herein, and offers the following additional legal authority and factual submissions in support of the issuance of an order to show cause, an evidentiary hearing, and the grant of habeas corpus relief so that he may have the fair trial to which he was entitled in 1993.

As alleged fully and with particularity, Mr. Bell was convicted and sentenced to death as a result of a trial that was marred by multiple constitutional and statutory defects including ineffective assistance of defense counsel, juror misconduct and intimidation, and a biased trial judge who put his own political interests ahead of the interests of justice. Mr.

Bell's trial counsel inadequately investigated and presented their case at both the guilt-innocence phase and the penalty phase, resulting in an unpersuasive defense to the charged offenses and an inaccurate portrayal of the circumstances that shaped Mr. Bell's life. Mr. Bell deserved better; and his constitutional and statutory rights demanded so. Mr. Bell's conviction and sentence are unjust and should be reversed.

II. MR. BELL'S CLAIMS ARE NOT SUBJECT TO DISMISSAL FOR FAILURE TO STATE A PRIMA FACIE CASE FOR RELIEF OR FOR PROCEDURAL REASONS.

A. MR. BELL STATES A PRIMA FACIE CASE FOR RELIEF AS TO EACH OF HIS CLAIMS.

Mr. Bell's burden at this stage in the proceeding is "initially to *plead* sufficient grounds for relief" in a petition for writ of habeas corpus; only after an order to show cause has issued is a petitioner required to "later [] *prove* them." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995) (emphases in original). Although Mr. Bell has the ultimate burden of proving his entitlement to relief, his "initial burden" is limited to "pleading adequate grounds for relief." *Id.* At this pleading stage, Mr. Bell need only state "fully and with particularity" the facts supporting the claims as to which he seeks relief and provide "reasonably available" evidence to support those facts. *Id.* He has clearly has met his initial burden to "alleg[e] facts that, if true, would entitle [him] to relief." *Duvall*, 9 Cal. 4th at 486 n.8. Ignoring this distinction, respondent erroneously and repeatedly refers to Mr. Bell's factual representations as "[c]onclusory and speculative" allegations that fail to support a prima facie case. (Response at 2.) This is incorrect; an allegation of entitlement to relief is "conclusory" only if a petitioner made the legal allegation "without any explanation of the basis for the allegation." *Id.* at 474; *see also* Cal. Penal Code § 1474(2) (West 2010) ("[i]f the

imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists").

In reviewing Mr. Bell's Amended Petition, this Court must assume that Mr. Bell's factual allegations are true and determine whether such allegations establish a prima facie case for relief. *In re Lawler*, 23 Cal. 3d 190, 194 (1979); *Duvall*, 9 Cal. 4th at 474–75. In responding to the Amended Petition through its Response, respondent is charged with assisting the Court in the task of determining the Amended Petition's sufficiency. *In re Romero*, 8 Cal. 4th 728, 742 (1994). Although an informal response "is not a pleading, does not frame or join issues, and does not establish a 'cause' in which a court may grant relief," *id.* at 741, it should serve a screening function by providing "help in acquiring informative official documents," and enabling the Court to resolve demonstrably unmeritorious habeas corpus claims. *Frias v. Superior Court*, 51 Cal. App. 3d 919, 925 (1975).

This Court may deny a petition summarily "without requiring formal pleadings ... or conducting an evidentiary hearing," *In re Romero*, 8 Cal. 4th at 742, only if "by citation of legal authority and by submission of factual materials," respondent can "demonstrate" that the petition lacks merit. *Id.* In this case, respondent has submitted no factual materials at all, let alone factual materials that would demonstrate that the facts as pled lack merit. Because respondent has failed to do so, the Court should proceed "to the next stage," *id.*, by issuing an order to show cause and, if respondent can genuinely dispute the factual allegations, by ordering an evidentiary hearing as to those disputed allegations. Mr. Bell is required to prove his allegations at an evidentiary hearing only if respondent's return raises such material factual disputes; otherwise the Court is required to grant relief without an evidentiary hearing.

B. NONE OF MR. BELL'S CLAIMS IS BARRED FROM HABEAS CORPUS REVIEW BY PROCEDURAL RULES.

Respondent argues that many of Mr. Bell's claims are procedurally barred in whole or part, citing *In re Seaton*, 34 Cal. 4th 193, 200–01 (2004), *In re Harris*, 5 Cal. 4th 813, 829 (1993); *In re Dixon*, 41 Cal. 2d 756, 759 (1953); and *In re Waltreus*, 62 Cal. 2d 218, 225 (1965). This is not the case, as discussed below.

1. None of Mr. Bell's claims is barred for failure to object at the time of trial.

Respondent asserts that numerous claims, including Claims One, Two, Three, Five, and Six are completely or partially barred from habeas corpus review pursuant to *In re Seaton*, 34 Cal. 4th at 200–01, because of trial counsel's failure to object at the time of trial. (*See, e.g.*, Response at 26 (Claim One); 46–48 (Claim Two); 90 (Claim Five); 97, 105, 109, 111 (Claim Six).) Respondent's attempt to apply the procedural rule announced in *Seaton* years after Mr. Bell's trial serves no logical or legitimate state interest.

The *Seaton* rule reasonably could not have been known at the time of Mr. Bell's trial (the time of the perceived default that respondent contends should now limit habeas corpus review). Until the adoption of this rule in *Seaton*, an objection at trial had never been a prerequisite to raising a claim in habeas corpus proceedings. The retroactive application of this procedural bar to Mr. Bell – whose trial began eleven years prior to this Court's decision in *Seaton* – is fundamentally unfair and would violate Mr. Bell's state and federal due process protections and right to meaningful post-conviction review of the merits of his habeas corpus claims. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991) (state may not invoke "a rule unannounced at the time of" a purported default); *People v. Scott*, 9 Cal. 4th

331, 358 (1994) (new waiver rule may not be applied retrospectively where rule effectively changed the circumstances under which claims are litigated and may require substantial practical alterations in the way proceedings are routinely conducted); *People v. Simon*, 25 Cal. 4th 1082, 1108 (2001) (applying newly announced forfeiture rule only prospectively); *People v. Welch*, 5 Cal. 4th 228, 237–38 (1993); *People v. Collins*, 42 Cal. 3d 378, 388 (1986) (retrospective application of waiver rule "would be [changing] the rules after the contest was over. When the contest is as serious as a criminal prosecution, such unfairness would be intolerable."); *People v. Chi Ko Wong*, 18 Cal. 3d 698, 716 (1976) (procedural rule applied only prospectively where "the reported cases provide conflicting directions as to the proper manner in which and time at which a challenge to a [juvenile court] certification order should be asserted"); *Moss v. Superior Court*, 17 Cal. 4th 396, 429–30 (1998) (due process precluded retroactive application of rule regarding contempt sanctions in child support case).

Moreover, to the extent that respondent relies on the pre-*Seaton* contemporaneous objection rule (*see, e.g.*, Response at 46), this "rule" also cannot be used to deny Mr. Bell review of the merits of his claims. The contemporaneous objection rule on which respondent relies has never been clearly articulated and remains subject to discretionary application. *See People v. Frank*, 38 Cal. 3d 711, 729 n.3 (1985); *People v. Easley*, 34 Cal. 3d 858, 863–64 (1983); *People v. Bob*, 29 Cal. 2d 321, 328 (1946); *People v. Williams*, 17 Cal. 4th 148, 161 n.6 (1998). Nor have the courts routinely applied the discretion. California authorities "on the point are not uniform," *Hale v. Morgan*, 22 Cal. 3d 388, 394 (1978), and the formulation of the rule, its exceptions, and the criteria used by the appellate courts to adjudicate issues on appeal that were not raised at trial vary. *Compare, e.g.*, *People v. Ramirez*, 189 Cal. App. 3d 603, 618 n.29 (1987) (rule allows for

consideration of constitutional questions) *with In re S.B. v. S.M.*, 32 Cal. 4th 1287, 1293 (2004) (rule allows for consideration of "an important legal issue").

2. None of Mr. Bell's claims is barred for failure to have been raised on direct appeal or for having been raised and rejected on direct appeal.

Respondent also contends that allegations in Claims One (Response at 25, 27) Two (Response at 47), Three (Response at 75), Five (Response at 85, 90, 93), Six (Response at 97, 100, 101, 105, 107, 109, 110), Seven (Response at 112), Eleven (Response at 121), and Twelve (Response at 123) should be barred from this Court's review under the rule of *In re Dixon*, 41 Cal. 2d 756, 759 (1953), that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal." *See also In re Harris*, 5 Cal. 4th at 829. The *Dixon* rule, as modified in *Harris*, is subject to four exceptions, none of which are addressed by respondent. A petitioner is not precluded from raising an issue that involves fundamental constitutional error, a court's lack of fundamental jurisdiction, a court's action in excess of its jurisdiction, or a change in the law since the direct appeal. *In re Harris*, 5 Cal. 4th at 829–40. As discussed below, Mr. Bell has raised numerous claims that comprise fundamental constitutional error, with material facts to support his claims.

In *Harris*, this Court refined a second procedural bar, which derives from *Waltreus*, and potentially applies to an argument "that was *actually* raised and rejected on appeal." *In re Harris*, 5 Cal. 4th at 829 (emphasis in original). The same exceptions to the *Dixon* procedural bar, discussed above, apply to the *Waltreus* procedural bar. *Id.* at 829–40. In addition, the

Dixon and *Waltreus* rules do not apply to claims where alleged facts "of substance" are outside the record. *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998). Respondent raises the *Waltreus* bar with respect to allegations in Claims One, Two, Three, Six, Nine, and Ten. (Response at 22 (Claim One), 46 (Claim Two), 75 (Claim Three), 97, 98 (Claim Six), 117 (Claim Nine), 119 (Claim Ten).)

The invocation of the *Waltreus* bar is inappropriate as to all of Mr. Bell's claims, because the claims allege substantive facts that are outside the records. Moreover, as requested in the Amended Petition, this Court must consider cumulatively both appellate and habeas corpus claims in determining whether constitutional error occurred and whether the presence of one or more errors was prejudicial. (*See* Amended Petition at 22 n.7.) Although individual errors might not rise to the level of a constitutional violation, when considered cumulatively these errors can amount to the denial of a petitioner's constitutional rights. *See Parle v. Runnels*, 505 F.3d 922, 927–28 (9th Cir. 2007); *Alcala v. Woodford*, 334 F.3d 862, 882–83 (9th Cir. 2003) (quoting and citing prior decisional law). Similarly, constitutional errors that are not prejudicial by themselves may be prejudicial when considered cumulatively. *Alcala*, 334 F.3d at 893–94 (citing *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002)).

For these reasons, and the reasons set forth below in the discussions of the individual claims, none of Mr. Bell's claims for relief is subject to a procedural bar.

III. MR. BELL HAS STATED A PRIMA FACIE CASE FOR RELIEF REGARDING EACH OF HIS CLAIMS.

A. CLAIM ONE: MR. BELL WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY.

Mr. Bell has set forth factual allegations supported by reasonably available documentary evidence that establish a prima facie violation of his constitutional and statutory rights by the prosecutor's discriminatory jury selection practices, systematic exclusion of distinctive groups in the community, improper jury selection processes, and trial counsel's and appellate counsel's failure to properly raise meritorious jury issues at trial or on appeal.

1. Mr. Bell's claim is not procedurally barred.

Mr. Bell's claim that the prosecutor engaged in discriminatory jury selection practices is not procedurally barred on habeas corpus review and the allegations establish a prima facie case for relief. Respondent argues cursorily that Mr. Bell's claim concerning the prosecutor's discriminatory use of peremptory challenges was raised in the automatic appeal and should not be considered again on habeas corpus, citing *In re Waltreus*, 62 Cal. 2d 218 (1965) (Response at 21–22), and *In re Harris*, 5 Cal. 4th 813, 828 (1993) (Response at 24).

Mr. Bell's claim is not barred on habeas corpus by *In re Waltreus* because the claim includes extra-record allegations of a pattern and practice of discrimination in jury selection by prosecutors in the San Diego County District Attorney's Office. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (*Waltreus* bar not applicable if the habeas corpus petition alleges facts of "substance not already in the appellate record"). Moreover, it is appropriate for this Court to consider cumulatively the facts and arguments

raised in both the automatic appeal and this habeas corpus proceeding. *See Miller-El v. Dretke*, 545 U.S. 231, 239–40, 265 (1995) (cumulatively considering record-based and extra-record evidence in finding discrimination). Even if the *Waltreus* rule is applicable to Mr. Bell's claim, as explained earlier, the *Waltreus* rule is subject to four exceptions, none of which are addressed directly by respondent. Most notably, petitioner is not precluded by *Waltreus* from raising an issue that involves fundamental constitutional error. *In re Harris*, 5 Cal. 4th at 834. Mr. Bell's claim of discrimination in the selection of his jury comprises fundamental constitutional error and is therefore exempted from the *Waltreus* bar. *See People v. Snow*, 44 Cal. 3d 216, 226 (1987) ("*Wheeler* error has been deemed reversible per se in light of the fundamental right involved.").

Respondent also asserts that Mr. Bell's allegations evidencing a pattern and practice of discrimination are "forfeited" because his trial counsel did not raise them in the trial court. (Response at 23.) Though respondent does not cite *In re Seaton*, 34 Cal. 4th 193 (2004), respondent presumably is attempting to invoke the *Seaton* rule. Again, the application of a *Seaton* bar would constitute an improper retroactive default to a claim of clear and fundamental constitutional error that is at the heart of the trial process and is based upon material substantive facts that are outside the appellate record. (*See* Section II.B, *infra*.)

Even if the rule announced in *Seaton* is found to apply to this case, Mr. Bell's claim is not barred from review on habeas corpus because it depends "substantially on facts that the defense was unaware of and could not reasonably have known at trial." *In re Seaton*, 34 Cal. 4th at 200. Just as the claim of discriminatory charging in *Seaton* relied on statistics published after trial, Mr. Bell makes his claim of discriminatory use of peremptory challenges using information concerning the pattern and

practice of the San Diego District Attorney's Office and prospective jurors that was unavailable to trial counsel at the time of trial. In the event this Court concludes otherwise and applies the *Seaton* bar, Mr. Bell's counsel was ineffective for failing to raise all aspects of this meritorious claim at the time of trial.

2. The prosecutor's discriminatory use of peremptory challenges violated Mr. Bell's constitutional rights.

Respondent further argues that Mr. Bell failed to make out a prima facie case for relief. (Response at 22.) Mr. Bell alleged that two African-American women, two Filipinos, and two lesbians were unconstitutionally struck by the prosecutor, who used six out of his sixteen peremptory challenges to strike these prospective jurors from the jury. Notwithstanding the trial court's finding that no prima facie case existed and this Court's affirmance on direct appeal, *People v. Bell*, 40 Cal. 4th 582, 594–601 (2007), Mr. Bell's allegations warrant habeas relief.

A prosecutor is constitutionally prohibited from removing potential jurors on the basis of race, gender, or sexual orientation. *Batson v. Kentucky*, 476 U.S. 79 (1986) (employing racial criteria in making peremptory challenges is prohibited); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (exercise of a peremptory challenge based on gender violates equal protection); *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996) (assuming for purposes of decision that sexual orientation falls within the rules of *Batson*). The striking of even a single juror based on race, gender, or orientation violates equal protection and due process principles. *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009); *see also Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Batson*, 476 U.S. at 95–96; *Snyder v. Louisiana*, 552 U.S. 472 (2008). Such discrimination also violates a defendant's right to a jury taken from a representative cross-section of the community under

article I, section 16 of the California Constitution. *People v. Wheeler*, 22 Cal. 3d 258, 276–77 (1978). Invidious discrimination in the exercise of peremptory challenges violates not only the rights of the accused, but also the equal protection and due process rights of the excluded jurors. *See Batson*, 476 U.S. at 87. The harm from discriminatory jury selection affects the "entire community" by undermining "public confidence in the fairness of our system of justice." *Id.*; *see also Powers*, 499 U.S. at 407–08.

A court's review of the use of peremptory strikes under *Batson* entails a three-step process. First, the court determines whether the defendant has shown that the "totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93–94 (citing *Washington v. Davis*, 426 U.S. 229, 239–42 (1976)). Once the defendant has established this prima facie case the burden shifts to the state to provide a non-discriminatory basis for the exclusion. *Id.* at 94. The third and final step is for the court to decide whether the defendant has proved purposeful impermissible discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam).

In the first step of the *Batson* analysis, a defendant need not prove that the challenge was more likely than not based on discrimination:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson v. California, 545 U.S. 162, 170 (2005). Evidence that a prosecutor or his office maintains a pattern and practice of discrimination is

relevant to the first step in the *Batson* process. *Miller-El v. Dretke*, 545 U.S. 231, 239–40, 265 (2005).

At step two, "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20. "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El*, 545 U.S. at 251–52 (internal citations omitted). The "pretextual significance" of a stated reason "does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Id.* at 252. Consequently, in evaluating a *Batson* challenge, the court must "consider both the prosecutor's stated reasons and circumstantial evidence." *Gonzalez*, 585 F.3d at 1207; *see also Miller-El*, 545 U.S. at 240 (noting that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination).

Contrary to respondent's argument (Response at 23–24), the sixteen published and unpublished cases cited by Mr. Bell are apposite because in several of the cases a prima facie showing was arguably made. *See People v. Ayala*, 24 Cal. 4th 243 (2000); *People v. Jurado*, 38 Cal. 4th 72, 102–108 (2006); *People v. Charron*, 193 Cal. App. 3d 981 (1987); *Mitleider v. Hall*, 391 F.3d 1039 (9th Cir. 2004); *People v. Rodriguez*, 2001 WL 1194003. Moreover, since Mr. Bell's Amended Petition was filed, other claims of discrimination by San Diego prosecutors have been alleged. *See People v. Hilton*, Not Reported in Cal. Rptr. 3d, 2009 WL 1847401 (Cal. App. 4

Dist.); *People v. Hill*, Not Reported in Cal. Rptr. 3d, 2009 WL 1263997 (Cal. App. 4 Dist.); *People v. Hamilton*, 45 Cal. 4th 863 (2009); *Corona v. Almager*, 2008 WL 6926574 (S.D. Cal.) (reversed, Slip, 2009 WL 3246452 (S.D. Cal.)). In two of the cases cited by Mr. Bell, the trial judge refused to believe a San Diego prosecutor's purported reasons for striking a juror. *See Corona v. Almager*, 2008 WL 6926574 (S.D. Cal.) (reversed, 2009 WL 3246452 (S.D. Cal.); *People v. Washington*, 234 Cal. Rptr. 204, 210–11 (1987) (review denied and ordered unpublished)). This court should consider the significance of a historical pattern of discrimination, which is evidenced by the cited cases. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Respondent generally relies on its appellate briefing and this Court's decision in *Bell*, 40 Cal. 4th 582, to support its argument that a prima facie case of discrimination has not been established. As to prospective jurors Francene B. and Lynne W., this Court found no "definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such." *Id.* at 599–600. Without this evidence, this Court stated, no prima facie case of discrimination against lesbians as a group can be made. *Id.* (citing *In re Freeman*, 38 Cal. 4th 630, 644–45 (2006) (*Wheeler-Batson* claim failed for insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor)).

As demonstrated by the attached declaration of prospective juror Francene B., she is a lesbian and she felt that the prosecutor struck her from the jury because of it. (Exhibit [hereinafter "Ex."] 121 at 2785) ("As soon as the prosecutor excused me from jury service, I felt sure that I had been excluded because of his perception of my sexual orientation ... It was obvious to me that I was being discriminated against, so I felt like the judge

should have intervened to ensure that I was not excluded based on my sexual orientation"). Mr. Bell alleges, upon information and belief, that prospective juror Lynne W. is also a lesbian.

In Bell, this Court failed to consider the prosecutor's exclusion of all six minority prospective jurors cumulatively when deciding if a prima facie case of discrimination existed. *See People v. Salcido*, 44 Cal. 4th 93, 137 (2008). When examined from this perspective, the prosecutor used 37.5% of his challenges to strike minority jurors. Although the sample size is small, *cf. Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000), it is nonetheless significant. *See Love v. Yates*, 586 F. Supp. 2d 1155, 1177 (N.D. Cal. 2008).

Mr. Bell's additional allegations and arguments establish a prima facie case. The prosecutor's discrimination in the selection of Mr. Bell's jury is a structural error that demands reversal of Mr. Bell's conviction and sentence without further analysis. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (no harmless error analysis where error is structural).

3. The death qualification of Mr. Bell's jurors produced a jury that was predisposed to convict and sentence him to death.

Mr. Bell has alleged a prima facie case that the death-qualification process produces juries that are both more likely to convict and more likely to vote for death, and also disproportionally removes women, members of racial minorities, and religious people from juries; the use of death qualification in Mr. Bell's trial therefore violated his rights to equal protection and due process of law, as well as his right to a reliable death penalty adjudication, in derogation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I of the California Constitution, sections 7, 15, 16, and 17. Respondent asserts

that this claim is procedurally barred and fails to state a prima facie case for relief. (Response at 24–25, 27).

Mr. Bell's claim is not procedurally barred because under *In re Dixon*, Mr. Bell is not precluded from raising an issue that involves fundamental constitutional error. *See In re Harris*, 5 Cal. 4th at 834. Mr. Bell's claim also is not barred by *In re Seaton* because it relies in part on empirical research that was unavailable to trial counsel at the time of trial. *See In re Seaton*, 34 Cal. 4th at 200. If this Court concludes that *Dixon* or *Seaton* applies to this claim, Mr. Bell's trial and appellate counsel were ineffective for failing to raise all aspects of this meritorious claim at the time of trial and on appeal, respectively.

Respondent contends that Mr. Bell's claim fails to state a prima facie case because, despite the wealth of empirical evidence cited by Mr. Bell for the proposition that death qualification does not guarantee jurors who will fairly consider a life sentence or mitigating evidence, Mr. Bell does not show that individual jurors in his case were not impartial. (Response at 25.) Assuming without conceding that this showing is required, Mr. Bell alleged in his Amended Petition that at least one juror, foreman Mark Daniels, was biased against him and the defense and improperly prejudged the case, despite statements to the contrary made during jury selection. (Amended Petition at 194–96.)

Respondent also contends that the United States Supreme Court foreclosed this claim with its decision in *Lockhart v. McCree*, 476 U.S. 162 (1986). (Response at 26.) This is not true for several reasons. First, the question of prosecutorial misuse of death qualification was never addressed in *Lockhart*; in fact, the court expressly declined to consider the prosecutorial motives underlying the death qualification process. *Lockhart*, 476 U.S. at 176 n.16. As Justice Marshall noted in his dissent in *Lockhart*,

and as studies have since shown, this is precisely the risk of just such a process. *Id.* at 185 (Marshall, J., dissenting) ("The State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict."); *see also* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097 n.163 (2000) (showing that prosecutors use death qualification on voir dire to eliminate the segment of the jury pool that is most likely to be critical of police and forensic testimony and the least likely to discount the "beyond a reasonable doubt" standard); *see also* Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times Magazine, July 16, 1995 (quoting various prosecutors explaining the practice of seeking the death penalty in nearly all murder cases to give them a "thumb on the scale" in their jury selection). As alleged in the Amended Petition, the prosecutor in Mr. Bell's case intentionally skewed the jury by striking a prospective juror who declared that he could impose a death sentence but expressed some reservations about the death penalty. (Amended Petition at 29.)

Second, because the factual basis of *Lockhart* is no longer sound, its reasoning does not apply to Mr. Bell's case. The *Lockhart* opinion has long been criticized for its analysis of both the data and the law related to death qualification. *See, e.g.*, Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries*, 18 Sw. U. L. Rev. 493, 528 (1989) (the Court's analyses in *Lockhart* were "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"); William C. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, 13 Law & Human Behavior 185, 202 (1989) (the *Lockhart* opinion is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its

analysis of the legal issue of jury impartiality"); Jane Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries*, 36 Cath. U. L. Rev. 287, 318 (1986) (the opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury").

Scholars also have criticized the handling of the social science data relied upon by the Supreme Court in *Lockhart*. *See generally* Moar, *Death-Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree*, 19 Colum. Hum. Rts. L. Rev. 369, 374 (1988) (detailing criticism of the Court's analysis of the scientific data); *see also* Donald Bersoff & David Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. Chi. L. Sch. Roundtable 279 (1995); J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 Ind. L.J. 137 (1990). As such, this Court should not defer to the general holdings in *Lockhart*. *See United States v. Carolene Products* 304 U.S. 144, 153 (1938). Accordingly, this Court should review the new data and evaluate this issue appropriately.

Lockhart also does not control the issues raised under the California Constitution. As Professor Smith observed: "*Lockhart* lacks both persuasive force and rhetorical validity, and should not serve as a guide for state legislatures and judiciaries examining their own capital jury selection methods. Courts which have chosen to follow the ruling (if not the rationale) of *Lockhart* should adopt appropriate remedial measures to overcome the improper and unfair jury selection methods that the case condones." Smith, *supra*, 18 Sw. U. L. Rev. at 499. The death-

qualification process used in Mr. Bell's case is unconstitutional under the California Constitution.

Respondent also contends that because four of the sixteen jurors were African-American men, and seven jurors were women, Mr. Bell's jury was therefore fair. (Response at 26.) This ignores Mr. Bell's claim that the death-qualification process both disparately and systematically reduced the number of prospective jurors who are members of distinctive groups and unfairly biases the jurors, regardless of their ethnicity or gender, through the qualification process itself. "The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (citing *Gomez v. United States*, 490 U.S. 858, 874 (1989)). As detailed in *Hovey v. Superior Court*, 28 Cal. 3d 1 (1980), death-qualification voir dire persuades jurors to adopt pro-conviction and pro-death views.

Death qualification defeats the purposes of a jury trial. First, "the purpose of a jury is to guard against the exercise of arbitrary power – to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who may tend to question the prosecution, and would thus keep the prosecutor's power in check, are the very people excluded from the jury via death qualification.

Second, death qualification makes the "common sense judgment of the community" unavailable. The evidence shows that a death-qualified jury fails to represent the judgment of the excluded community members.

Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." *Id.* Evidence shows that prosecutors intentionally use the death-qualification process to remove potential jurors so that there is no "hedge" to prevent their overzealousness. *See, e.g.*, Liebman, *supra*, 100 Colum. L. Rev. at 2097 n.163.

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. *Taylor*, 419 U.S. at 530. Death qualification fails to preserve confidence in the system and discourages community participation. *See, e.g.*, Moller, *Death-Qualified Juries Are the "Conscience of the Community"?*, L.A. Daily Journal May 31, 1988, at 4 (noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community"); Smith, *supra*, 18 Sw. U. L. Rev. at 499 ("the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent"); Adam Liptak, *Facing a Jury of (Some of) One's Peers*, N.Y. Times, July 20, 2003.

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." *Taylor*, 419 U.S. at 532. The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Because the death-qualification process undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. *Cf. Lockhart*, 476 U.S. at 175

("We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes of the fair cross-section requirement.")

4. Mr. Bell's trial counsel were prejudicially deficient in their conduct of jury selection.

Mr. Bell has alleged a prima facie case that his trial counsel were prejudicially ineffective for not investigating or seeking discovery from the San Diego County District Attorney's Office or the Jury Commissioner concerning San Diego's policies and procedures for jury selection; for not presenting all available evidence of the District Attorney's discrimination during jury selection (including the pattern and practice of peremptorily challenging jurors on the basis of race, gender, and sexual orientation); and for failing to raise all available arguments against a trial by a death-qualified jury. (Amended Petition at 30–31.)

Respondent maintains that "[Mr.] Bell has not provided this Court with the discovery he alleges should have been obtained or how it would have changed the outcome of his case." (Response at 30.) Respondent further asserts that, "Despite the fact that habeas counsel have been investigating this case for over three years, none of the ... [exhibits] Bell has filed with his amended petition include the discovery he now claims counsel should have obtained." (Response at 31.) Mr. Bell's habeas counsel has tried to obtain the relevant information from the San Diego Superior Court's Jury Commissioner (*see* Ex. 127) and the District Attorney's office (*see* Ex. 128), only to be rebuffed and ignored. Because Mr. Bell has been stonewalled in his efforts, this Court should provide him subpoena power to prove his allegations.

Respondent also complains that Mr. Bell has failed to include declarations from trial counsel, calling such an omission "significant." (Response at 30, 31.) Respondent contends that the omission of

declarations from defense counsel "raises the strong implication that the attorneys would have said nothing helpful to Bell's claim." (Response at 30.) Respondent's argument does not reflect controlling legal principles.[1]

Mr. Bell need not put forth trial counsel's reasons for their acts or omissions, and he is not required either to plead or to prove the absence of strategic decision-making on the part of trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."). Moreover, stated subjective reasons given by trial counsel for his or her conduct have been discounted by this Court as well as the United States Supreme Court and federal circuit courts where circumstances indicate that such conduct was objectively unreasonable. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *In re Lucas*, 33 Cal. 4th 682, 725 (2004); *Karis v. Calderon*, 283 F. 3d 1117, 1136 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002).

This Court must assume that Mr. Bell's factual allegations are true and determine whether such allegations establish a prima facie case for relief in reviewing a habeas petition for sufficiency. *See In re Lawler*, 23 Cal. 3d at 194. "In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of." *People v. Pope*, 23

---

[1] Respondent makes similar meritless arguments about the lack of declarations from trial counsel at other points in its Response. (*See, e.g.*, Response at 37, 59, 60, 61–63, 68, 72, 76, 80, 94.)

Cal. 3d 412, 426 (1979); *see also In re Wilson*, 3 Cal. 4th 945, 955 (1992) (order to show cause issued on claim of ineffective assistance of counsel despite lack of submission by petitioner of a declaration from trial counsel); *In re Valdez*, 49 Cal. 4th 715 (2010) (same).[2] Nevertheless, Mr. Bell submits with this Reply the declaration of trial counsel, Peter Liss. (Ex. 130.) Mr. Bell has submitted detailed allegations and "reasonably available" evidence supporting his claims that he was prejudiced by his trial counsel's constitutionally deficient performance; that is all that is required. *People v. Duvall*, 9 Cal. 4th 464, 474 (1995).

To the extent that this Court concludes that any of the meritorious allegations in this claim should have been presented on appeal, the failure of Mr. Bell's appellate counsel deprived him of his constitutional right to effective assistance of counsel. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (due process requires the effective assistance of counsel on appeal).

5. Conclusion

Mr. Bell has established a prima facie case to warrant an evidentiary hearing and relief based on the alleged structural constitutional errors that mandate automatic reversal. As to his claims of ineffective assistance of counsel, Mr. Bell has established that trial counsel was deficient in his failure to raise these meritorious issues at trial. Because the errors raised are structural, prejudice to Mr. Bell is presumed. *See McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998). Alternatively, Mr. Bell can demonstrate

---

[2] To further support his position, Mr. Bell hereby requests that this Court take judicial notice of the court records *In re Wilson*, California Supreme Court Case No. S027645 and *In re Valdez*, California Supreme Court Case No. S107508. Mr. Bell makes this request for judicial notice to avoid duplication of the voluminous court records in those cases. *See* Cal. Evid. Code §§ 452(d), 459 (West 2010). The Attorney General represented the State in these cases.

prejudice as a result of his counsel's unreasonable and unprofessional failure to challenge the jury selection process.

B. CLAIM TWO: MR. BELL WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL TRIBUNAL.

Throughout the trial, Judge Richard Murphy was entertaining a run for Congress. This created a bias in the judge that not only caused him to be more favorable toward the prosecution during the course of the trial, but also made it extremely unlikely that he would consider or act upon the defense's motion to overturn the jury's verdict and thus risk being viewed as "soft on crime." Judge Murphy's political aspirations colored his view of the entire trial, from scheduling concerns pretrial to post-trial motions. As such, Mr. Bell was denied his right to be tried before an impartial tribunal.

1. Mr. Bell's claim is not procedurally barred.

Respondent argues that Mr. Bell's claim is barred because appellate counsel could have but did not raise this claim of judicial bias on direct appeal. (Response at 47, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953)). All of respondent's assertions regarding procedural bars are addressed more fully *supra* in Section II.B. Here, however, it must be noted that the *Dixon* bar is inapplicable because the claim establishes clear and fundamental constitutional error and includes substantial extrarecord facts. *See In re Harris*, 5 Cal. 4th 813, 834 (1993); *In re Robbins*, 18 Cal. 4th 770, 814–15 n.34 (1998).

Respondent also asserts that Mr. Bell's allegations concerning Judge Murphy's disparaging remarks about defense counsel during trial are barred from consideration by *In re Waltreus* and the failure to object at trial.

(Response at 46.) This is incorrect because of the exception for fundamental constitutional error and because these allegations can appropriately be considered in combination with the related extrarecord facts in Mr. Bell's habeas claim. *See In re Robbins*, 18 Cal. 4th at 814 n.34; *In re Seaton*, 34 Cal. 4th 193, 200 (2004) (habeas claim not barred when it depends "substantially on facts that the defense was unaware of and could not reasonably have known at trial"). Furthermore, trial counsel did move to voir dire Judge Murphy to determine his intentions to run for office; after this motion was denied counsel filed a writ of mandate (Ex. 129), which was also denied (8 CT 1708).[3] If this Court concludes that any portion of Mr. Bell's claim is procedurally barred because of the acts or omissions of trial or appellate counsel, Mr. Bell's allegations should be reviewed for ineffective assistance of counsel.

2. Mr. Bell has stated a prima facie case of judicial bias and misconduct.

Judicial bias in favor of the prosecution or against the defendant constitutes a violation of the due process right to a fair trial by an impartial tribunal. *See Bracy v. Gramley*, 520 U.S. 899 (1997); *In re Murchison*, 349 U.S. 133, 136 (1955); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009); *United States v. Holland*, 655 F.2d 44, 46–47 (5th Cir. 1981); *People v. Freeman*, 47 Cal. 4th 993, 1000–01 (2010); *People v. Guerra*, 37 Cal. 4th 1067, 1111 (2006). Impermissible bias is not limited to actual bias; the "appearance of advocacy or partiality" may violate a defendant's right to an impartial tribunal. *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986) (quoting *Shad v. Dean Witter Reynolds, Inc.*,

---

[3] "CT" refers to the Clerk's Transcript on appeal, and "RT" refers to the Reporter's Transcript on appeal.

799 F.2d 525 (9th Cir. 1986)); *see also Freeman*, 47 Cal. 4th at 1001. "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 129 S. Ct. at 2262; *see also Franklin v. McCaughtry*, 398 F.3d 955, 960–61 (7th Cir. 2005) ("the Supreme Court has decided that both actual bias and the appearance of bias violate due process principles").

A single incident exhibiting bias can warrant reversal, as can a pattern of conduct that infects the entire trial. *See People v. Fatone*, 165 Cal. App. 3d 1164, 1175–76 (1985) (pattern and practice of misconduct warrants reversal); *People v. Williams*, 55 Cal. App. 2d 696, 702–03 (1942) (rape conviction reversed when prosecutor referred to one defendant as "the gentleman on the right," and the judge said "I think the word 'gentlemen' is not only unnecessary, but inappropriate to those men ... I can think of a better one for them"). Legal error may amount to judicial misconduct when there is evidence of bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty. *See Oberholzer v. Comm'n on Judicial Performance*, 20 Cal. 4th 371, 398 (1999).

This Court has stated that "[t]he trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." *Webber v. Webber*, 33 Cal. 2d 153, 155 (1948) (quoting *Pratt v. Pratt*, 141 Cal. 247, 252 (1903)); *see also* Cal. Civ. Proc. Code § 170.1(a)(6)(iii) (West 2010). The denial of a fair and impartial tribunal constitutes structural error that defies analysis by "harmless-error" standards. *Arizona v. Fulminante*, 499 U.S. 279, 309–310 (1991); *see also Edwards v. Balisok*, 520 U.S. 641, 647 (1997).

Both anecdotal experience and quantitative studies have shown that judges are not immune from the pressure that elections bring to bear on their decision-making on the bench, particularly given pressure to appear "tough on crime" and the politicization of criminal trials. *See* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. Rev. 1101 (2006) (citing Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 Am. J. Pol. Sci. 247, 251 (2004) (study showing that judges, even the most punitive, increase their sentences as reelection nears, even controlling for such factors as the biographical features of the judge (age, conservatism, prosecution experience) and the defendant (race, gender), and for the conservatism of the district in which the judge sat)).

Affirmance rates for the death penalty in state supreme courts are correlated with the methods of judicial selection in those states. *See* Gerald F. Uelmen, *Elected Judiciary*, in Encyclopedia of the American Constitution 170, 171 (Leonard W. Levy et al. eds., Supp. I 1992) (examining death penalty affirmance rates nationwide between 1977 and 1987). State supreme courts with judges elected by the legislature or in contested voter elections affirmed death penalty sentences in more than 62% of the cases. *Id.* In contrast, state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3% of the cases. *Id.* A 1995 study found evidence that elected state supreme court justices are more likely to affirm jury verdicts imposing the death penalty in the two years before the end of their terms than at other times. *See* Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 Am. Pol. Q. 485, 485, 496 (1995) (describing study

of impact of electoral conditions on state supreme court justices' judgments on death sentence appeals).

A related 1997 study found that Democratic judges in states with short term lengths were more likely to affirm death sentences than Democratic judges in states with long term lengths. Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. Pol. 1206, 1219–21 (1997) (finding links between electoral politics and judges' voting in death penalty cases). Other studies have found a statistically significant correlation between judicial override of death sentences and judicial election years. *See, e.g.*, Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L. J. 239, 256 (1994); *see also* Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1036–37 (1999) (arguing that jury override statutes violate due process in states with judicial elections).

In Mr. Bell's case, Judge Murphy's political aspirations colored his rulings throughout the trial; he was biased against the defense and infected the jury with this attitude: His political aspirations included both running for Congress and retaining his seat on the San Diego County Superior Court. Respondent argues that because Mr. Bell's counsel did not assert that Judge Murphy was biased either during trial (i.e., before the penalty verdict was returned on December 17, 1993) or on appeal, Mr. Bell has forfeited his claim, citing *In re Dixon*, 41 Cal. 2d at 759 and *People v. Wright*, 52 Cal. 3d 311, 467 (1990). (Response at 39–40.) Respondent's complaint that trial counsel raised the issue of Judge Murphy's political aspirations only after the verdict was returned is specious. Trial counsel were not aware of Judge Murphy's consideration of a run for Congress

before it was reported in the newspaper on December 21, 1993. (Ex. 130 at 2873; 59 RT 4589, 4594–95.) Obviously Judge Murphy knew his intent during trial (and even talked about with other judges (59 RT 4589–90)), but Judge Murphy never told Mr. Bell or his counsel about it, and Judge Murphy would not even address his intentions after trial counsel raised the issue. (*See* 56 RT 4531, 4536; 57 RT 4552; *see also* 7 CT 1653.) Thus, Mr. Bell's trial counsel raised the issue of Judge Murphy's bias at the earliest opportunity.

Respondent asserts that Mr. Bell's allegations concerning Judge Murphy's run for mayor of San Diego six years after Mr. Bell's trial do not support his claim of bias because the allegations are speculative. (Response at 45.) Mr. Bell's allegations are not "sheer speculation"; rather, they substantiate that Judge Murphy (who was a politician before his time on the San Diego bench) was scheming his next political move while on the bench and was influenced by his political experience and ambitions. Judge Terry O'Rourke, the judge assigned to hear the motion for a new trial, acknowledged that Judge Murphy had openly discussed the possibility of his run for Congress with other judges, and "all sorts of other people" while Mr. Bell's case was pending. (59 RT 4603; *see also* 59 RT 4589 ("He discussed it with me; I heard other judges talk about it.").) Judge O'Rourke also stated that "there is no doubt, absolutely no doubt in my mind, that Judge Murphy thought about running for Congress." (59 RT 4594.)

Contrary to respondent's characterization, Judge Murphy's gratuitous comment at Mr. Bell's sentencing about "murderers stalking our children" and "stop[ping] this madness" (61 RT 4657) was not "mere expressions of opinion based on ... evidence" and a display of "support of the law" (Response at 44–45). This trial was not about "murderers stalking children;" Judge Murphy was grandstanding for the media by exploiting a

public concern that was prominent in the media at that time. (Ex. 130 at 2873–74.) The statement succeeded in garnering favorable press attention and earning Judge Murphy a mention in the local papers. (*See* Ex. 95 at 2114.) Indeed, Judge Murphy eventually used Mr. Bell's trial in his campaign for mayor, emphasizing that he was used to making "what are literally life-and-death decisions" while on the bench. (Ex. 130 at 2874; Ex. 95 at 2118.) This was clearly a reference to Mr. Bell's death sentence. (Ex. 130 at 2874.)

Judge Murphy's "tough on crime" position and his political calculations and aspirations likely served him well in his eventual run for election as mayor of San Diego, and were the reason that he should have been disqualified from hearing Mr. Bell's case in the first place. *See, e.g.*, John Paul Stevens, Assoc. Justice, U.S. Supreme Court, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida* (Aug. 3, 1996), *in* 12 St. John's J. Legal Comment, 21, 30–31 (1996) (discussing need to improve quality of judges and espousing belief that judges should not be elected); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 787 (1995) (detailing accounts of incumbent judges using capital cases to advance their chances of reelection or retention).

The Supreme Court has recognized that there are circumstances in which the probability of actual bias on the part of the judge or decision maker is "too high to be constitutionally tolerable." *Caperton*, 129 S. Ct. at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The American Bar Association Model Code of Judicial Conduct echoes this sentiment by stating that "A judge shall avoid impropriety and the appearance of impropriety." ABA Annotated Model Code of Judicial Conduct, Canon 2

(2004). The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Model Code Canon 2A cmt.

Under both due process and judicial conduct standards, Judge Murphy should have recused himself from Mr. Bell's case, as he was influenced by his political and judicial career and aspirations, which created an actual bias, a probability of or potential for bias, and an appearance of partiality. Moreover, he prejudicially and improperly failed to disclose anything about his political considerations and aspirations to Mr. Bell or his trial counsel.

When viewed in their totality, Mr. Bell's allegations establish a prima facie case that he was deprived of a fair and impartial tribunal and that this violation of his constitutional rights had a substantial and injurious effect or influence on the jury's determination of Mr. Bell's guilt, death eligibility, and sentence.

C. CLAIM THREE: TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE DURING THE GUILT PHASE OF MR. BELL'S TRIAL DEPRIVED HIM OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT.

The Amended Petition presents a prima facie case, supported by detailed evidence, of trial counsel's deficient performance prior to and during the guilt phase of Mr. Bell's trial. (Amended Petition at 39–85.) Trial counsel failed to abide by the governing standard of care, and their decisions were non-strategic and unreasonable. Their failures were pervasive, affecting every aspect of the investigation, preparation, and presentation of the defense.

These errors were not harmless. Each instance of trial counsel's deficient performance prejudiced Mr. Bell. When considered cumulatively, however, the harm is even more manifest. Had Mr. Bell's trial counsel performed adequately, there is a reasonable possibility that the outcome of the proceedings would have been different.

In responding to the detailed claims in the Amended Petition, respondent has produced no contrary evidence. Instead, respondent misrepresents Mr. Bell's factual presentation by either selectively citing to facts or simply ignoring them altogether. Regardless, to the extent that there are any factual disputes, the proper remedy would be for this Court to order respondent to show cause as to why Mr. Bell is not entitled to relief, and to remand for a determination of the facts supporting this claim. *See People v. Duvall*, 9 Cal. 4th 464, 474–75 (1995).

1. Legal standard for ineffective assistance of counsel.

The right to the assistance of counsel "entitles the defendant not to some bare assistance but rather to *effective* assistance. Specifically, it entitles [a defendant] to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987) (quoting *United States v. De Coster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973)) (other citations omitted) (emphasis in original).

The standard for a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *In re Lucas*, 33 Cal. 4th 682, 721 (2004). Deficient performance is established when a defendant shows that "counsel's representation fell below an objective standard of reasonableness .... The proper measure of attorney performance remains simply reasonableness

under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. At a minimum, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (quoting *Strickland*, 466 U.S. at 691).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. "[B]efore counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal. 4th 584, 602 (1992); *see also Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (counsel's failure to conduct a complete investigation was unreasonable in that it resulted from "inattention, not reasoned strategic judgment").

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") are "standards to which [the United States Supreme Court] long ha[s] referred as 'guides to determining what is reasonable.'" *Wiggins*, 539 U.S. at 524; *see also Strickland*, 466 U.S. at 688; *Lucas*, 33 Cal. 4th at 723. The 1989 ABA Guidelines specifically provide that "[c]ounsel should conduct independent investigations relating to the guilt-innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued

expeditiously." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, (1989) § 11.4.1.A [hereinafter 1989 ABA Guidelines]; *see also* 2003 ABA Guidelines § 10.7(A), reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) ("[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty"); *Rompilla*, 545 U.S. at 387 ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.") (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). Moreover, "[t]he investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt," 1989 ABA Guidelines § 11.4.1(B). Further, representation is a dynamic process: "As the investigations mandated by Guideline 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases." 1989 ABA Guidelines § 11.7.1(A); *see also* 2003 ABA Guidelines § 10.7(A), 10.10.1.

A defendant is prejudiced by his counsel's deficient performance if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Marquez*, 1 Cal. 4th at 603. "It is clear ... that [a defendant] *need not* show that [trial counsel's] deficient conduct more likely than not altered the outcome in the case. This 'preponderance' standard was explicitly rejected in *Strickland*." *Sanders v.*

Ratelle, 21 F.3d 1446, 1461 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 693) (emphasis in original). In assessing prejudice, the court considers the totality of the evidence presented by the habeas petitioner and the evidence presented at trial. *Williams v. Taylor*, 529 U.S. 362, 397–99 (2000); *Silva v. Woodford*, 279 F.3d 825, 834 (9th Cir. 2002) ("cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel"); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995) (holding cumulative impact of multiple deficiencies in counsel's performance prejudiced defendant). In addition, the prejudice from trial counsel's deficiencies must be considered cumulatively with the prejudice resulting from errors committed by the prosecutor and the trial court. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (cumulating *Strickland* errors with trial court error in excluding evidence and instructional error); *see also Killian v. Poole*, 282 F.3d 1204, 1211 (2002) (cumulating a failure to disclose information, a witness's perjury, and improper prosecutorial comment on privileged conduct). Any deficient performance identified by this Court as not prejudicial with respect to the guilt phase verdicts also must be considered for its prejudicial impact on the jury's death verdict. *See Mak*, 970 F.2d at 622.

Mr. Bell has pled facts sufficient to demonstrate that counsel's representation "fell below an objective standard of reasonableness," to his prejudice. *Strickland*, 466 U.S. at 688. Assessed alone or cumulatively, trial counsel's failures were prejudicial. But for the instances of counsel's deficient performance throughout the pretrial period and guilt-phase proceedings, there is a "reasonable probability" that Mr. Bell would not have been convicted of the crimes and special circumstance as charged. *Williams*, 529 U.S. at 394.

2. Trial counsel lacked adequate training, experience, and resources, and failed to timely and adequately investigate and prepare a defense.

The Amended Petition presented substantial evidence that Mr. Bell's trial counsel lacked sufficient experience, training, and resources to effectively handle Mr. Bell's case, and that they failed to timely investigate and prepare a defense. (Amended Petition at 41–45.) Respondent has not responded to this claim. Instead, respondent attempts to refashion the claim as a complaint that trial counsel simply had other clients in addition to Mr. Bell. (Response at 50.)

Mr. Bell's trial counsel lacked sufficient experience. The governing standard of care in capital cases required two attorneys who, inter alia, had practiced in the field of criminal defense for not less than five years, had demonstrated knowledge of the specialized nature of capital cases, had within the year prior to their appointment successfully completed a training or education or training program focused on the trial of capital cases, and who were dedicated to quality legal representation in capital cases. *See, e.g.*, 1989 ABA Guidelines §§ 3.1, 5.1. One of Mr. Bell's counsel had only been at the Public Defender's Office for four-and-a-half years, prior to which he had worked at the Legal Aid Society where he mostly worked on civil cases but also handled a "small number" of criminal cases. (Ex. 130 at 2867.) Additionally, this counsel had never handled a special-circumstance murder, let alone a capital one, and had never attended capital defense training seminars offered by outside organizations. (Ex. 130 at 2867.)

Additionally, the governing standard of care required that capital defense counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. *See* 1989 ABA Guidelines § 6.1.

Trial counsel's workloads were excessive and interfered with their ability to render minimally adequate representation, as demonstrated in the Amended Petition. (Amended Petition at 41–45.) The problem of excessive workloads extended to trial counsel's investigator, and, indeed, to the San Diego County Public Defender's Office generally. Trial counsel thus lacked the resources necessary to marshal an adequate defense. This alone violated Mr. Bell's fundamental constitutional rights. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Smith v. McCormick*, 914 F. 2d 1153, 1159 (9th Cir. 1990); *Moore v. Kemp*, 809 F.2d 702, 711–12 (11th Cir. 1987) (en banc).

Trial counsel failed to conduct a timely and adequate investigation, and thus failed to prepare and present a minimally adequate defense. (Amended Petition at 41–44.) Trial counsel's failures in this regard were contrary to the prevailing standard of care. The necessity of a timely, coherent, and unified approach to investigating, developing, and presenting both phases of a capital case was known to capital defense counsel for many years before Mr. Bell's trial. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 334 (1983); *see also Libberton v. Ryan*, 583 F.3d 1147, 1166 (9th Cir. 2009) (recognizing that deficiencies prejudicing the outcome of the penalty phase may occur in either or both phases of trial).

Reasonably competent counsel at the time of Mr. Bell's trial would have recognized that an adequate investigation required a timely investigation of the evidence and witnesses in conjunction with the consultation of appropriate experts, as well as a coherent guilt-phase strategy that encompassed penalty-phase considerations. In this and many other ways detailed in the Amended Petition and herein, Mr. Bell's counsel failed to conform to the prevailing standard of care.

Respondent argues that counsel must have been prepared because when they asked for a continuance, the trial court gave them "almost all the time they wanted." (Response at 51.) Respondent's argument ignores the relevant issue – not whether trial counsel got all or "almost all" the time they initially requested, but whether they were actually adequately prepared. One consideration respondent ignores is that the trial court ultimately stated that it would not grant a further extension. (9 RT 9–10.) Thus, although trial counsel may have thought they should not request a further continuance even if one was needed for them to be adequately prepared for trial, such a belief would have been incorrect. To force unprepared counsel to proceed to trial regardless of the reason for the lack of preparedness results in a violation of the defendant's right to effective assistance of counsel. *White v. Ragen*, 324 U.S. 760, 764 (1945); *Powell v. Alabama*, 287 U.S. 45, 58 (1932); *Hughes v. Superior Court*, 106 Cal. App. 3d 1, 5 (1980). Minimally competent trial counsel had at their disposal California-specific death penalty defense training materials that would have enabled them to ground a motion for continuance in these and other governing constitutional principles.

Most importantly, respondent disputes none of the facts establishing that, at the time Mr. Bell's counsel requested the continuance, they had already violated the governing standard of care. Respondent does not dispute that trial counsel were unable to work substantially on Mr. Bell's case for the first year of their appointment. After having had the case for ten months and with the original trial date looming, they confessed that their guilt-phase investigation was incomplete and their penalty-phase investigation had barely started. (1 CT 108; 9 RT 3, 5.) The governing standard of care required that independent guilt- and penalty-phase investigations be pursued expeditiously beginning immediately upon

counsel's appointment to the case, even prior to the prosecution's official statement that death will be sought. *See* 1989 ABA Guidelines §§ 11.3, 11.4.1, 11.8.3; California Attorneys for Criminal Justice & California Public Defenders Association, *California Death Penalty Defense Manual*, Vol. 1, at A-13 *et seq.* (1986) (investigation must begin immediately upon appointment to the case, and must not be put off on possibility that death penalty will not be sought), citing, inter alia, *Leo v. Superior Court*, 179 Cal. App. 3d 274, 283–84 (1986) (prosecution not barred from seeking death despite defense's months-long reliance on prosecution's previous decision to forego seeking death). Mr. Bell's trial counsel failed to do this, a fact that respondent does not dispute.

Trial counsel unreasonably delayed in retaining experts on even the most important aspects of the case. The ensuing rushed preparations were inadequate, significantly hampering the defense's presentation. And even though the overwhelming majority of the witnesses resided out-of-state, trial counsel conducted only two investigation trips. The first occurred ten months after counsel were appointed, and the second occurred less than two months prior to the start of trial. (Ex. 130 at 2871.)

Moreover, respondent does not dispute that, even after the trial was continued, trial counsel failed to timely file necessary motions due to time constraints caused by their respective workloads. (Amended Petition at 43.) Nor does respondent dispute that trial counsel failed to seek and obtain minimally adequate resources. (Amended Petition at 44–45.)

In sum, Mr. Bell has presented detailed evidence regarding trial counsel's prejudicial lack of experience and training and their failure to conduct a timely investigation backed by adequate resources. Mr. Bell's prima facie evidence presented in the Amended Petition and in this Reply is unrebutted. To the extent that there are nonetheless any factual disputes,

the proper remedy would be for this Court to issue an order to show cause as to why Mr. Bell is not entitled to relief based on this claim, and remand for a proper determination of the facts supporting this claim. *See Duvall*, 9 Cal. 4th at 474–75.

3. Trial counsel failed to adequately investigate, research, prepare, and argue the motion to preclude the prosecution's use of Mr. Bell's post-arrest statements.

The Amended Petition presented a prima facie case that Mr. Bell's trial counsel failed to adequately investigate, research, prepare, and argue their motion to preclude the prosecution's use of Mr. Bell's post-arrest statements. (Amended Petition at 45–50.) Had counsel presented all of the evidence available to them by adequate investigation, Mr. Bell's statements would have been suppressed because his purported *Miranda* waiver was involuntary, as were the statements themselves.

The prosecution must establish that a defendant's statements were voluntary. *See Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991); *United States v. Connelly*, 479 U.S. 157, 168 (1986). Involuntary statements are barred from use at trial, even if the prosecution can establish that the statements are true. *Mincey v. Arizona*, 437 U.S. 385, 397–98 (1978); *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

Similarly, the prosecution must demonstrate that any purported waiver of *Miranda* rights was voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167–68 (1986). The same factors used to determine voluntariness of post-arrest statements are used to determine whether a waiver of *Miranda* rights was voluntary. *Colorado v. Spring*, 479 U.S. 564, 573 (1987).

The mental state of the defendant is relevant to the determination of voluntariness. *Blackburn v. Alabama*, 361 U.S. 199, 207–08 (1960); *Fikes v. Alabama*, 352 U.S. 191, 197–98 (1957). So is the defendant's

intoxication on drugs or alcohol. *Beecher v. Alabama*, 408 U.S. 234, 237 (1972); *United States v. Montoya-Arrubla*, 749 F.2d 700, 701 (11th Cir. 1985); *United States v. Guaydacan*, 470 F.2d 1173, 1173 (9th Cir. 1972). Also relevant is a defendant's severe emotional distress. *Sample v. Eyman*, 469 F.2d 819, 821 (9th Cir. 1972). Psychological coercion is also a relevant factor, including the intensity and length of interrogation. *Rock v. Pate*, 367 U.S. 433, 440–42 (1961).

Respondent does not assert that the conditions of Mr. Bell's interrogation were not coercive, especially considering Mr. Bell's condition and functioning. Respondent only asserts that Mr. Bell's purported *Miranda* waiver was knowing and intelligent because he was familiar with his rights, and that the officers testified that Mr. Bell did not seem intoxicated to them. (Response at 56–57.)

Nor does respondent dispute that Mr. Bell's trial counsel called no witnesses and introduced no evidence, and that counsel failed to renew the motion when further evidence was obtained and/or available. (Amended Petition at 48–49.) Trial counsel committed these failures despite a wealth of relevant information that they either possessed or which an adequate investigation would have discovered. This readily available information included evidence of Mr. Bell's sleep deprivation, extraordinary level of cocaine intoxication, and emotional distress, as well as of his significant neurocognitive, psychiatric, and psychological impairments and history of brain injury. (Amended Petition at 48–49.)

Respondent concedes that the available evidence shows that Mr. Bell "smoked crack cocaine and that he suffered from longstanding organic brain damage, post-traumatic stress disorder, pre- and post-natal abuse, and other severe mental or emotional impairments, which were exacerbated by substance abuse and addiction." (Response at 55.) Respondent asserts that,

in other cases, statements and *Miranda* waivers were held to be voluntary despite the defendants in those cases having some subjective vulnerabilities. This ignores the point that in this case Mr. Bell's subjective vulnerabilities combined with the interrogation tactics utilized rendered involuntary his purported *Miranda* waivers and post-arrest statements.

Mr. Bell has presented a prima facie case that his cocaine intoxication, brain injury, and neuropsychiatric deficits and dysfunctions, coupled with his shock, anxiety, emotional distress, remorse, and the psychologically coercive conditions of his arrests and interrogations all operated to render him susceptible to the external and internal stimuli to which he was predisposed. This made his purported *Miranda* waiver and his statements incomplete, unreliable, and involuntary.

4. Trial counsel failed to adequately oppose the prosecution's motion to conduct a mental examination of Mr. Bell.

Mr. Bell has presented a prima facie case that trial counsel prejudicially failed to adequately oppose the prosecution's motion to conduct a mental examination of Mr. Bell. (Amended Petition at 50–54.) Trial counsel opposed the motion, but failed to do so on the ground that mental examinations of defendants by prosecution experts pursuant to court order were a form of discovery not authorized by the discovery statutes. This argument was readily available to trial counsel at the time of trial. *See Verdin v. Superior Court*, 43 Cal. 4th 1096, 1103–15 (2008). Trial counsel had no strategic reason for this failure. (Ex. 130 at 2872–73.)

Respondent argues that *Verdin* effected a change in the law, and thus trial counsel was not ineffective because the legal argument in question was not available to them. (Response at 58.) This is not so. Prior to Mr. Bell's trial, several published decisions had occasion to note the scope of

Proposition 115 and the discovery statute it implemented, noting that the statute preserved the right against self-incrimination. In *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), this Court invalidated a provision of Proposition 115 that would have amended article I, section 24 of the California Constitution to provide that several rights, including the right against self-incrimination, were not to be interpreted as broader than their analogous rights in the federal Constitution. *Raven*, 52 Cal. 3d at 355–56. The Court found that provision to be severable from the balance of Proposition 115 – including the new criminal discovery statute – because they were essentially unrelated to it.

The following year, two Court of Appeal decisions held that the then-new discovery statute did not violate the Fifth Amendment, predominantly because the statutory provisions did not compel disclosure of the defendant's personal statements. *See Hobbs v. Municipal Court*, 233 Cal. App. 3d 670, 684–86 (1991); *Meeks v. Superior Court*, 281 Cal. Rptr. 796, 803 (1991) (noting that the discovery statute does not compel disclosure of statements of the defendant).

Also in 1991, two years before Mr. Bell's trial, this Court decided *Izazaga v. Superior Court*; 54 Cal. 3d 356 (1991), in which it agreed with the decisions in *Hobbs* and *Meeks*. This Court observed that the statutorily-required discovery was narrow and limited, and that it did not compel personal statements of the defendant, which would be constitutionally prohibited. *Izazaga*, 54 Cal. 3d at 367–68.

Two years later, this Court decided *In re Littlefield*, 5 Cal. 4th 122, 129 (1993). In *Littlefield*, this Court held that, "all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115." *Id. Littlefield* was published on May 20, 1993, a month prior to the prosecution's motion to

compel the mental examination in Mr. Bell's case, several months prior to trial counsel's filing of their opposition, and nearly six months prior to the trial court's granting of the prosecution's motion. (Amended Petition at 52.) As this Court observed in *Verdin*, California courts and the Legislature had long considered that a mental examination could be a form of discovery. *See Verdin*, 43 Cal. 4th at 1104, citing *Ballard v. Superior Court*, 64 Cal. 2d 159 (1966) and Cal. Code of Civil Proc. § 2032.020(a) (West 2010).

Respondent contends that, had Mr. Bell's trial counsel made the proper citation to Penal Code section 1054.1, the trial court still would have been compelled to grant the prosecution's motion under existing precedent. (Response at 58, citing *People v. Danis*, 31 Cal. App. 3d 782 (1973) and *People v. McPeters*, 2 Cal. 4th 1148 (1992)). This is not so, because both *Danis* and *McPeters* addressed non-statutory discovery as it existed prior to the passage of Proposition 115 in 1990. *Danis* was published in 1973, and although *McPeters* was published in 1992, it addressed the law at the time of the trial in that case, which pre-dated Proposition 115 by several years.

In *McPeters*, this Court held that the trial court's mental examination order did not violate the defendant's constitutional rights. *McPeters*, 2 Cal. 4th at 1190. It addressed no questions of statutory discovery, because the criminal discovery statute did not exist at the time of the trial in question. Similarly, *Danis* did not address statutory discovery. There, the court stated that the trial court's authority to order the mental examination was based on its "inherent power to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of truth." *Danis*, 31 Cal. App. 3d at 786. Of course, one of the principal aims of Proposition 115 was to reform the law as it had been theretofore been interpreted by the judiciary. *See Raven*, 52 Cal. 3d at 348.

Thus, neither *Danis* nor *McPeters* would have controlled interpretation of discovery procedure under the new statute. As noted above, in Mr. Bell's case all of the operative events surrounding the prosecution's motion (the motion, opposition, and ruling) all occurred after this Court's explanation in *Littlefield* that the new statute barred all discovery except that which it expressly provided. Trial counsel were clearly aware of *Littlefield* because, in opposition to a previous discovery motion, they cited it for the very proposition relevant here – that all court-ordered discovery was governed exclusively by the new criminal discovery statute. (5 CT 977; Amended Petition at 54.) The trial judge was also aware of the relevant case law because he, too, had discussed it. (Amended Petition at 54.) Reasonable and competent counsel could have and would have cited the statute and this Court's interpretation of it in *Littlefield.*

Respondent argues that any error was harmless because Mr. Bell declined the interview and the jury was instructed that Mr. Bell had the right to refuse it. (Response at 58.) Respondent fails to respond to the substantial evidence of prejudice. Respondent ignores the fact that a copy of the court's order was marked as an exhibit and presented to the prosecution's retained expert witness, Dr. Mills, in open court. (37 RT 3050–52.) Although the order itself was not received into evidence, the prosecution was permitted to have Dr. Mills testify in detail about the court's order, his trip to the jail, meeting with Mr. Bell, and Mr. Bell's statement that he did not want to be interviewed. (37 RT 3051–53.) Three different jurors submitted notes asking questions about Mr. Bell's having declined the interview. (Amended Petition at 53.)

Mr. Bell's trial counsel submitted a proposed instruction regarding Mr. Bell having declined the mental examination, but they failed to propose a no-adverse-inferences component. (38 RT 3191–92.) The trial court

instructed the jury, "You have heard evidence that the court authorized the prosecution to have their psychiatrist examine Mr. Bell, and that Mr. Bell declined to submit to the evaluation. You are advised that Mr. Bell was entitled to decline to submit to the psychiatric evaluation." (39 RT 3272.) The jurors were thus instructed that Mr. Bell had exercised his rights, but the court failed to instruct them that they were not permitted to draw negative inferences from that fact. The prosecutor was permitted to urge the jury to draw negatives inferences, which of course he did. (Amended Petition at 53.)

This violated Mr. Bell's constitutional rights. Under the "unconstitutional conditions doctrine," "the government may not do indirectly what it cannot do directly." *United States v. Oliveras*, 905 F.2d 623, 627–28 n.7 (2d Cir. 1990). The doctrine keeps the prosecution from "trench[ing] on [a] defendant's constitutional rights and privileges." *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990). "The prosecution cannot use the defendant's exercise of specific fundamental constitutional guarantees against him at trial." *Burns v. Gammon*, 260 F.3d 892, 896 (8th Cir. 2001). For that reason, a statute cannot disallow the death penalty for those who plead guilty but allow it for those who exercise their right to a trial. *United States v. Jackson*, 390 U.S. 570, 581 (1968). By the same token, a state's death penalty scheme cannot allow the jury to draw an adverse inference from constitutionally protected conduct. For instance, if the government invites the jury to find the existence of an aggravating factor based on "inferences from conduct that is constitutionally protected ... due process of law would require that the jury's decision to impose death be set aside." *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *see also United States v. Whitten*, 610 F.3d 168, 194–96 (2d Cir. 2010).

It is settled law that prosecutors may not comment adversely on a defendant's invocation of his Fifth Amendment privilege. *Griffin v. California*, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). To secure these protections, "the Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so." *Carter v. Kentucky*, 450 U.S. 288, 300 (1981). A prosecutor's adverse comment on a defendant's silence is one way in which an impermissible cost can be ascribed to the assertion of a constitutionally guaranteed right, but "the penalty can be just as severe when there is no comment and the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." *Id.* at 301.

This is exactly what happened in Mr. Bell's case, making plain the prejudice that arose from trial counsel's failure to raise the available, meritorious statutory basis for relief and failure to insist upon a no-adverse-inferences instruction. The same is true for the prosecution's misconduct in urging the jury to draw negative inferences from Mr. Bell's silence, as well as the trial court's failure to give the no-adverse-inferences instruction. In addition, the trial court's violation of the discovery statute deprived Mr. Bell of his state-created liberty interest in the correct, non-arbitrary application of state law. This, in turn, violated Mr. Bell's federal due process rights and affected the reliability of the guilt and penalty verdicts in violation of the Eighth Amendment.

5. Trial counsel failed to adequately investigate, prepare for, and engage in plea negotiations.

Mr. Bell has presented a prima facie case that his trial counsel prejudicially failed to adequately investigate and prepare for plea negotiations. (Amended Petition at 54.)

Mr. Bell was willing to plead guilty in exchange for a sentence of life without the possibility of parole. (Ex. 126; Ex. 130 at 2868.) In late December 1992, trial counsel extended that offer to the prosecutor assigned to the case. (Ex. 126; Ex. 130 at 2868.) The prosecutor replied that he wanted to speak with the victim in Mr. Bell's 1981 prior offense. On March 11, 1993, the prosecutor informed Mr. Bell's trial counsel that his office was rejecting Mr. Bell's plea offer. (Ex. 130 at 2868.) Mr. Bell's trial counsel requested to meet personally with the county District Attorney himself, a meeting that occurred on March 25, 1993. (Ex. 126; Ex. 130 at 2868; 7 RT 4.) Ultimately, the plea offer was rejected, and the prosecution informed the trial court on April 12, 1993 that the prosecution would proceed with seeking the death penalty. (Ex. 130 at 2868; 9 RT 2–3.)

Trial counsel's final meeting with the prosecution regarding Mr. Bell's plea offer occurred on March 25, 1993. Obviously, trial counsel could present to the prosecution only the evidence they had gathered by that date. The day before that meeting, on March 24, 1993, trial counsel submitted a motion to continue the trial date in which they averred that they had "not yet completed" their guilt phase investigation and that they had "barely started" their penalty phase investigation. (1 CT 108.) Two weeks later, in the very same chambers conference in which the trial court was informed that the prosecution would indeed be seeking death, Mr. Bell's trial counsel again insisted to the court that they were unprepared because their investigation had been "slow going." (9 RT 3, 5.)

Thus, there is no question that, at the time they engaged in plea negotiations, Mr. Bell's trial counsel had failed to conduct a thorough investigation that would have enabled them to present to the prosecution all the relevant evidence supporting the merits of the defense's case, including the crucial and plentiful mitigating evidence in Mr. Bell's social history supporting a negotiated disposition for a sentence of life without the possibility of parole.

Trial counsel's failures violated the governing standard of care. As noted above, at the time of Mr. Bell's trial, minimally effective capital counsel were expected to expeditiously pursue independent guilt- and penalty-phase investigations beginning immediately upon counsel's appointment to the case, even prior to the prosecution's official statement that death will be sought. *See* 1989 ABA Guidelines §§ 11.3, 11.4.1, 11.8.3; *Leo v. Superior Court*, 179 Cal. App. at 283–84 (prosecution not barred from seeking death despite defense's months-long reliance on prosecution's previous decision to forego seeking death).

The governing standard of care at the time of Mr. Bell's trial also maintained that trial counsel must expend great effort in preparing for plea negotiations, and pursue settlement vigorously. *See* 1989 ABA Guidelines § 11.6.1 cmt. (advising that plea bargains must be "pursued and won" because where prosecution elects to seek death, its inclination to offer a plea bargain is probably small); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 368–71 (1993) (capital trial counsel must, *inter alia*, respectfully attempt contact with victim's family, educate prosecution as to merits of the defense case as well as any severe mental problems defendant may have, and must thoroughly investigate to win the client's trust).

Mr. Bell's trial counsel failed utterly to abide by the standard of care in preparing for plea negotiations and pursuing favorable settlement of the case. These failures prejudiced Mr. Bell, because substantial mitigating and other favorable witnesses and evidence were never developed or presented to the prosecution to substantiate the merits and equities of Mr. Bell's plea offer.

6. Trial counsel failed to adequately investigate and prepare for pretrial proceedings and the guilt-innocence phase of Mr. Bell's case.

Mr. Bell has presented a prima facie case that his trial counsel provided ineffective assistance in failing adequately to prepare for pretrial proceedings as well as the guilt phase of his case. (Amended Petition at 54–60.)

Trial counsel unreasonably delayed their investigation until plea negotiations were complete, which negatively impacted their preparation of a defense. (Amended Petition at 55–56.) As discussed above, trial counsel's obligation was to commence guilt- and penalty-phase investigation in earnest immediately upon being assigned to the case. 1989 ABA Guidelines §§ 11.4.3, 11.4.1. This they did not do. It was only after Mr. Bell's plea offer had been rejected that trial counsel focused on their investigation, particularly with regard to the penalty phase. (Amended Petition at 55–56.)

Respondent attempts to re-cast Mr. Bell's claim as a meritless complaint that trial counsel "spent too long on plea negotiations." (Response at 60.) This is not so. Mr. Bell's claims state clearly that counsel did not truly commence their investigation until plea negotiations were complete, contrary to the governing standard of care.

Counsel's unreasonable delay prejudiced the plea negotiations because they were necessarily based on a paucity of available evidence favorable to Mr. Bell, and concomitantly prejudiced counsel's preparation for trial and pre-trial proceedings because nearly a year passed before the investigation truly commenced. Nowhere does respondent even attempt to assert that trial counsel's actions in this regard abided by the governing standard of care. They did not, and such conduct constitutes ineffective assistance of counsel. *See Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds in Schell v. Witek*, 218 F.3d 1017 (2000) (even if counsel were justified in believing that a plea bargain was the best alternative, his bargaining position could only have been enhanced by investigation of guilt and penalty evidence).

Trial counsel also unreasonably and prejudicially failed to seek a continuance of the trial. (Amended Petition at 56–58.) Respondent argues that any request for further continuance would have been futile because the trial court had made clear that it would deny such a request. (Response at 61.) Trial counsel never even discussed with each other seeking a continuance. (Ex. 130 at 2872.) A court's refusal to grant a needed continuance, however, does not excuse ineffective assistance of counsel, although of course it can be a contributing factor. *See Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005) (trial counsel's ineffectiveness was partially the result of trial court's refusal to grant a continuance and a shortage of time); *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998) (the limited time between appointment of one of counsel and the penalty phase, "far from excusing [counsel's] lack of preparation before the penalty phase, made that early preparation all the more crucial"). Here, trial counsel never even discussed with each other seeking a continuance once the October trial date was set. (Ex. 130 at 2872.) If trial counsel had not

squandered their first year on the case, they could have been adequately prepared. Their lack of preparation, not a lack of time, left them incapable of providing effective assistance to Mr. Bell.

Once the October trial date approached and counsel still were not prepared, trial counsel had a legal and ethical duty to Mr. Bell to seek sufficient time for preparation, as well as a duty of candor to the court to make a record regarding their lack of preparedness. Above all, however, trial counsel were required to conduct a timely and adequate investigation and, ultimately, to be adequately prepared for pre-trial and trial proceedings. They were not.

Trial counsel unreasonably and prejudicially failed to investigate the facts surrounding the charges against Mr. Bell and the evidence supporting possible defenses. (Amended Petition at 58–59.) This violates the governing standard of care and constitutes ineffective assistance of counsel. *Bunnell*, 144 F.3d at 1217–18; *Harris ex rel. Ramseyer v. Wood*, 64 F.3d at 1438–39 (counsel rendered deficient performance in failing to investigate the facts surrounding the charge and possible defenses or to investigate petitioner's mental and emotional status). Trial counsel cannot reasonably rely on the investigative work of the state, basing his own pretrial work on assumptions derived from a review of discovery provided by the prosecution. *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003). In *Anderson*, trial counsel were held to be deficient for failing to interview one of only two eyewitnesses to the charged crimes and for relying exclusively on the investigative work of the state. The court noted that, given the gravity of the charges and the fact that there were only two adult eyewitnesses to the crime, a reasonable lawyer would have made some effort to investigate the eyewitness testimony. *Id.*; *see also Cargle v.*

Mullin, 317 F.3d 1196, 1212–14 (10th Cir. 2003) (counsel prejudicially ineffective for, inter alia, failure to interview obvious potential witnesses).

The facts of Mr. Bell's case were similar in that the number of eyewitnesses was extremely small – Susan Forney and her son Eric, Leon Rivers, the Bookers (Bertha, Winifred, and Freddrick), and Jose Castaneda. (Amended Petition at 58.) Respondent misses the point entirely, arguing that trial counsel was not ineffective for failing to interview these eyewitnesses because "[s]ome of these witnesses in fact testified at Bell's trial." (Response at 62.) The fact that the prosecution called the witnesses to testify increases the prejudice to Mr. Bell and highlights the fact that trial counsel's failure was objectively unreasonable. All of these witnesses were listed on the prosecution's witness list. (*See* 5 CT 971.) In a capital case with only seven eyewitnesses, trial counsel cannot be judged adequate when they fail to interview any of them, especially when given advance notice that the prosecution intends to call them.

Such a failure is unreasonable and cannot be deemed strategic. *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991), *amended*, 939 F.2d 586 (1991) (counsel has a duty "to investigate all witnesses who allegedly possessed knowledge concerning the defendant's guilt or innocence").

Thus, Mr. Bell has presented a prima facie case that his trial counsel provided ineffective assistance in failing adequately to prepare for pretrial proceedings as well as the guilt phase of his case. Counsel's failures were not the result of deliberate strategic choices, and were objectively unreasonable. As a result, Mr. Bell was prejudiced by his counsel's ineffective representation.

7. Trial counsel unreasonably introduced unduly prejudicial evidence regarding Mr. Bell's juvenile offense.

Trial counsel unreasonably and prejudicially introduced evidence of Mr. Bell's prior juvenile offense, which the trial court had excluded as unduly prejudicial. (Amended Petition at 60–64.) This unreasonable decision was coupled with a failure to maintain at least the exclusion of the unduly prejudicial sexual component of the prior offense (sodomy). Trial counsel further compounded the prejudice they caused by failing to mitigate the harmful effect of the evidence with the wealth of available evidence that explained the full context and origins of the juvenile offense. Trial counsel not only neglected to introduce the mitigating evidence they possessed, but also failed to discover and introduce further material evidence that was readily available and that trial counsel would have obtained had they conducted an adequate investigation. (Amended Petition at 60–64.)

Respondent argues that trial counsel made a strategic decision to introduce evidence of Mr. Bell's prior juvenile offense, and concludes that therefore counsel's actions cannot be deemed ineffective. (Response at 64, citing *People v. Dennis*, 17 Cal. 4th 468, 540 (1998).) To the contrary, counsel's actions – whether professed to be an overt "strategic decision" or not – must meet "an objective standard of reasonableness … considering all of the circumstances … under prevailing professional norms." *Strickland*, 466 U.S. at 688.

First and foremost, counsel's decisions must be informed. "Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories." *Sargent*, 926 F.2d at 711. This has been a component of the governing standard of care since well before the

time of Mr. Bell's trial. *See* Goodpaster, *supra*, at 344 ("If counsel has not been competent in investigation and preparation, he cannot be competent at trial, as he cannot intelligently assess conflicting options."). Thus, any trial "strategy" that flows "from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

It follows that a reasonable "strategy" cannot be based on counsel's misunderstanding of relevant trial procedures or the failure to conduct basic legal research. *See Kimmelman*, 477 U.S. at 385; *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir. 1998); *Loyd v. Whitley*, 977 F.2d 149, 157 n.16 (5th Cir. 1992); *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987).

Nor can counsel be deemed to have acted reasonably when they failed to pursue and introduce evidence that would have supported their purported "strategy." Such failure is objectively unreasonable. *See, e.g.*, *Chambers v. Armontrout*, 907 F.2d 825, 832 (8th Cir. 1990) (en banc); *Deutscher v. Whitley*, 884 F.2d 1152, 1159–60 (9th Cir. 1989), *vacated on other grounds*, *Angelone v. Deutscher*, 500 U.S. 901 (1992), *reaffirmed*, *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987).

Here, trial counsel's decision to introduce the prejudicial evidence of Mr. Bell's 1981 offense was objectively unreasonable. At the time of Mr. Bell's trial, the governing standard of care required making all attempts to suppress evidence of a prior conviction. Decades prior to Mr. Bell's trial, it was acknowledged that, "evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty." *People v. McClellan*, 71 Cal. 2d 793, 804 n.2 (1969). This was widely recognized in capital defense training materials.

The Amended Petition details the substantial evidence establishing that trial counsel were clearly aware of the prejudice caused by evidence of the 1981 offense. In opposing the prosecution's motion to admit the evidence, trial counsel argued that, "[n]o limiting instruction could effectively prevent the undue prejudicial effect that the admission of such evidence is certain to have on the jury." (Amended Petition at 60–61; 3 CT 545–46.) Counsel argued that, at the very least, the trial court should exclude the sodomy aspect of the prior crime because of its lack of probative value and its extraordinarily prejudicial nature. (Amended Petition at 61; 3 CT 546.) Trial counsel were also acutely aware of the problems inherent in raising the 1981 offense and its impact on their effectiveness and Mr. Bell's fair-trial rights. (Amended Petition at 61; 6 CT 1323.)

The trial court agreed, excluding the evidence in the prosecution's case-in-chief based on Evidence Code section 352, finding that the probative value of the evidence was outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (13 RT 267; Cal. Evid. Code § 352 (West 2010).) The trial court noted that there was a chance of the evidence being admissible on cross-examination and/or in the prosecution's rebuttal case, but stated that chance was slim. The judge admonished the prosecutor, "I don't want you holding your breath on that." (13 RT 267.)

Despite succeeding in excluding the overwhelmingly prejudicial evidence, trial counsel introduced it during the direct examination of one of their expert witnesses, Dr. David Smith. (Amended Petition at 61; 32 RT 2557.) At a subsequent sidebar conference, the trial court noted its surprise at trial counsel's actions. Trial counsel stated that they made a "strategic

decision to introduce the prior episode because we think it confirms the diagnosis of borderline personality disorder," and commented that "we think it properly focuses on our claims of intent, or lack thereof." (Amended Petition at 62; 32 RT 2561–62.)

Thus, trial counsel's stated purpose in introducing the evidence was to corroborate their theory of defense with evidence that Mr. Bell had experienced similar transient dissociative episodes previously in his life. (32 RT 2561–62.) Counsel's decision to introduce the evidence of the 1981 prior offense was unreasonable because it was not informed by an adequate investigation. It is understandable that counsel would consider the possibility of corroborating their theory of the current offense with similar prior episodes. But because their investigation was inadequate, the 1981 offense was the only evidence they had of prior dissociative episodes. Reasonably available information, however, would have revealed to them ample evidence of other such episodes beginning in Mr. Bell's childhood – ones that did not involve concurrent crimes. (Amended Petition at 62–64; Ex. 113; Ex. 89 at 1645–46; Ex. 131 at 2884–86.)

Even if additional evidence had not been readily available, however, trial counsel's course of action was still unreasonable. If trial counsel's goal was corroboration of the defense theory by example of a prior transient psychotic/dissociative episode, then the relevant aspects of the 1981 incident were psychological, not criminal. Trial counsel could have introduced the documented facts of Mr. Bell's dissociation during the 1981 episode without also introducing the overwhelmingly prejudicial crime to which it was related. The 1981 psychological evaluation of Mr. Bell by Dr. John Train amply evidenced a dissociative episode apart from the criminal conduct that it precipitated. Even if the 1981 dissociation was relevant, the 1981 crime was not. It is commonplace under Evidence Code section 352

to limit evidence to its relevant and probative aspects while excluding unduly prejudicial factors. *See People v. Cole*, 31 Cal. 3d 568, 680 (1982).

And even if somehow the assaultive aspect of the 1981 dissociative episode were in fact reasonably necessary for corroboration, the sodomy certainly was not. In such a situation, reasonable trial counsel would have sought in advance to exclude reference to the sodomy even if they "opened the door" to introduction of the assault. Quite the contrary, Mr. Bell's trial counsel themselves introduced the evidence of sodomy. This was inexplicable given counsel's avowed knowledge of the evidence's powerful prejudicial effect. The prejudice was amplified by the fact that the sodomy evidence invited the jury to conclude that there was a sexual aspect to the current offense, even though there was none.

Trial counsel compounded their error by unreasonably failing to mitigate the damaging evidence they introduced. Even under circumstances in which it would have been reasonable to introduce such evidence, competent counsel would have taken all available steps to mitigate the damage. Here, this would have been done by placing Mr. Bell's prior offense in the full explanatory context of his family and social history, including the full substantial evidence of Mr. Bell's chronic traumatic abuse and neglect, psychological dysfunctions, neurocognitive deficits, and the environmental stressors that precipitated the event.

It has been observed that, "[f]ew aspects of representation can be more critical than understanding the client's criminal history." *Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir. 1994). Here, Mr. Bell's trial counsel failed in this critical area. Trial counsel's failure to adequately investigate Mr. Bell's social history created their concomitant failure to introduce all the available evidence that would have mitigated the 1981 offense. (Amended Petition at 62–64; Ex. 131 at 2884–87.) *See also*

Moore v. Johnson, 194 F.3d 586, 619–20 (5th Cir. 1999) (counsel ineffective for, inter alia, failure to investigate and respond to prior offenses).

Trial counsel's introduction of Mr. Bell's 1981 prior offense was also prejudicial in that it had harmful collateral effects. Because trial counsel unreasonably introduced the evidence of the 1981 offense, the prosecution was permitted in its rebuttal case to introduce the video recording of Mr. Bell's 1981 post-arrest statements. During his rebuttal case, the prosecutor asked for a sidebar conference, in which he announced his intention to play the video recording. (37 RT 3069.) Trial counsel objected, claiming they had not "opened the door" to the video recording. (37 RT 3069–78.) They insisted that they were "unaware that the People were going to play this tape today" and complained that the prosecutor had never informed "the court or counsel of his intent to play that video tape today – or, frankly, any other day." (37 RT 3074–75.) The prosecutor replied that, "If they didn't see it coming, they weren't paying attention." (37 RT 3075.) He noted that, based on trial counsel's eliciting such complete evidence of the 1981 offense from Dr. Smith, "[t]he door couldn't be open wider." (37 RT 3078.)

The trial court was befuddled by trial counsel's course of action. It stated, "I just don't understand this objection. I'm sorry, these objections just don't make sense to me. I need to have a time out and – tell me, haven't you waived this completely? Didn't you say on the record you waived it?" (37 RT 3077.)

Trial counsel responded by explaining their legally untenable belief that they were permitted to select the scope of the waiver incited by their introduction of the evidence. (37 RT 3077.) They protested that, at the sidebar conference held after they elicited the evidence from their expert

(Dr. Smith), they had informed the trial court that they had only "waived cross-examination on the issue." (37 RT 3077.) By this, they had apparently meant that they "did not object" to the prosecution cross-examining Dr. Smith on his opinions about the 1981 offense, but they "didn't make a waiver as to any other issues." (37 RT 3077.)

The trial court noted that not only had trial counsel elicited from Dr. Smith the events in 1981, but also that Dr. Smith had relied on the video recording of Mr. Bell's post-arrest statements in forming the opinions about which he had testified. (37 RT 3078.) Thus, the trial court agreed with the prosecution that "the door ... couldn't be open wider on this whole issue." (37 RT 3078.) After making a *Miranda* and voluntariness ruling, the trial court permitted the prosecution to play the video recording, which it did. (37 RT 3085–05.) In closing argument, the prosecution focused on Mr. Bell's statements in the video recording, telling the jury that they need not view those statements with caution. (38 RT 3283.)

It is readily evident that trial counsel's inept failure to grasp the controlling legal concepts lead them to grossly misjudge the collateral consequences that would inhere in their "strategy" to introduce Mr. Bell's 1981 prior offense. Such failure is objectively unreasonable, and cannot be strategic. *See Kimmelman*, 477 U.S. at 385; *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001) (trial counsel ineffective where counsel's "startling ignorance of the law" resulted in fundamentally flawed trial "strategy"); *Flores v. Demskie*, 215 F.3d 293, 304 (2d Cir. 2000) (trial counsel ineffective where his misunderstanding of law led to unreasonable waiver of favorable issue); *Dobbs*, 142 F.3d at 1388; *Loyd*, 977 F.2d at 157 n.16; *Hyman*, 824 F.2d at 1416.

Mr. Bell has presented a prima facie case that trial counsel's decision to introduce Mr. Bell's 1981 prior offense involving assault and sodomy

was unreasonable in that it was based on inadequate investigation and because equally effective but substantially less harmful alternatives were readily available to them. Trial counsel's actions failed to conform to the governing standard of care, and were extremely prejudicial to Mr. Bell's defense.

8. Trial counsel failed to adequately investigate, research, prepare, and present all available toxicology evidence, which was central to the guilt-phase defense strategy.

Trial counsel unreasonably and prejudicially failed to investigate and prepare the toxicological evidence and related aspects of Mr. Bell's case. (Amended Petition at 58–60, 64–78.) Such failure constitutes ineffective assistance of counsel. *See Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997). In *Bloom*, trial counsel was found to have been prejudicially ineffective for failure to obtain an essential expert until days before trial, and for failing to investigate, discover, and provide to the expert witness material evidence supporting the defense. Counsel's failures resulted in an ill-prepared expert whom the prosecution was able to use to undermine the defense rather than further it. *Id.*

Mr. Bell's trial counsel exhibited the same such failures and many more. Here, as this Court has observed, the defense at the guilt phase was focused on establishing that there was no connection between the thefts and the killing. *See People v. Bell*, 40 Cal. 4th 582, 588 (2007). Trial counsel sought to establish this with evidence that the offense occurred while Mr. Bell was in a transient psychotic break caused by his underlying mental illness in combination with extreme cocaine intoxication. (Ex. 130 at 2868–71; *Bell*, 40 Cal. 4th at 588.) Thus, a cornerstone of the defense was to be lay-witness testimony, documentary evidence, and related expert testimony supporting the conclusion that Mr. Bell's level of cocaine

intoxication was extraordinarily high. Indeed, in rebuttal the prosecution had two experts testify specifically for the purpose of trying to establish that Mr. Bell's level of cocaine intoxication was not extraordinary. *See Bell*, 40 Cal. 4th at 590. And in his closing argument, the prosecutor told the jury, "[i]t's a significant part of this case that three experts came in." (40 RT 3358.)

Despite the importance of the toxicology evidence, trial counsel failed to conduct a minimally adequate investigation into the toxicological aspects of the case. Such an investigation was required by the governing standard of care. *See, e.g.*, 1989 ABA Guidelines § 11.4.1, subd. D.1.5. (Investigation, Physical Evidence) (counsel should make prompt request for any physical evidence or expert reports relevant to the offense of sentencing). Such investigation would have produced readily available evidence that would have supported counsel's theory of defense. (Amended Petition at 58–59.)

Trial counsel unreasonably delayed in obtaining an expert to review the available evidence, leaving them to rush through their preparations on this key aspect of the case. As noted in *Bloom*, *supra*, such delay is ineffective and can cause a devastating ripple effect in lack of preparation. *Bloom*, 132 F.3d at 1271, 1277–78; *see also Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005) (trial counsel prejudicially ineffective for, inter alia, unreasonable delay in seeking expert assistance).

Trial counsel were aware that the blood and urine samples in Mr. Bell's case were not analyzed until five-and-a-half months after the police obtained them, and counsel were also aware of the degradation of the samples caused by that testing delay. The question of sample degradation due to testing delay was third among the four reference questions they initially posed to their expert witness. (Ex. 130 at 2870.) Their expert, Dr.

Sevanian, confirmed that samples degrade over time, and noted that it is not proper scientific practice to delay analyzing biological samples. (Ex. 130 at 2871.)

Degradation was a significant issue, because it meant that the levels of cocaine and cocaine metabolite reflected in the samples (particularly the blood sample) at the time they were tested were only a fraction of the levels that existed when they were obtained. (Ex. 109.) The prosecution's own toxicologist, Dr. Baselt, published a paper shortly before trial finding that the level of degradation of cocaine in a blood sample would be 96% after six months if the sample were properly preserved under laboratory conditions. (Ex. 114; Ex. 109.) Here, Mr. Bell has produced detailed evidence indicating that the samples were not properly preserved throughout their lengthy period of storage. Thus, the level of degradation was even greater. (Amended Petition at 64–70, 183–85; Ex. 109.) Despite the fact that this evidence was readily available to trial counsel and supported their defense theory, they failed to develop and present it at trial. (Amended Petition at 70, 75–76.)

Respondent contends that degradation was not a significant issue, alleging that the prosecution expert's study stated, "that while cocaine itself degraded over time, ethanol and benzoglecgonine [sic], which are cocaine metabolites, did not." (Response at 68, referencing Ex. 114 at 2563–64.) Respondent's ignorance of the relevant science equals that of Mr. Bell's trial counsel. As cocaine in a blood sample degrades, it does not just disappear. The cocaine level is reduced because the cocaine breaks down into other chemical compounds called metabolites, such as benzoylecgonine. Benzoylecgonine itself also degrades over time, but at a slower rate than does cocaine. Thus, as the cocaine in the sample degrades, the benzoylecgonine level rises. However, this does not occur in a linear

(one-to-one) ratio with the reduction in the cocaine level, because not all of the cocaine metabolizes in benzoylecgonine. The benzoylecgonine level rises at first, but eventually it will fall. At a given point in time, the benzoylecgonine level may be close to what it was originally, but that correlation masks the fact that the original benzoylecgonine has decayed only to be replaced with new metabolite from the degrading cocaine. This process is explained in detail in the evidence supporting the Amended Petition. (Ex. 109 at 2418–19.)

Because of the degradation issue, trial counsel's toxicologist, Dr. Sevanian, suggested that counsel should obtain all available information regarding the storage of the samples, including chain of custody information. (Ex. 130 at 2871.) There was a wealth of evidence indicating that the samples were not properly stored prior to being analyzed. (Amended Petition at 69–70; Ex. 109.) Nevertheless, trial counsel failed to investigate, acquire, and present at trial all readily available evidence establishing this point. (Ex. 130 at 2871; Amended Petition at 69–70, 75–78.)

Trial counsel were also aware that toxicological science could not verify a particular chronology of Mr. Bell's cocaine use. The science simply does not allow for that level of precision regarding cocaine, especially in a multi-use scenario – where the cocaine is ingested at several points over a period of time. (Ex. 109.) Trial counsel's own expert, Dr. Sevanian, told them this. (Ex. 130 at 2871.) Yet they still attempted to have Dr. Sevanian make a chronology of drug use at trial, an effort that, predictably, failed. Errors in Dr. Sevanian's testimony were not only revealed by the prosecution's rebuttal experts, they were noted by the judge and by at least one juror. (Amended Petition at 71–75.) This damaged not only Dr. Sevanian's credibility, but trial counsel's as well. Significantly,

the fallout from these errors was not confined to the defense's presentation regarding the toxicology evidence. It also tainted the other cornerstone of the defense, the psychological evidence, because Dr. Smith's and Dr. Levak's opinions both relied in part on consideration of Mr. Bell's cocaine intoxication. This was readily apparent in closing argument, when the prosecutor seized upon the fundamental errors in the defense's presentation of the toxicology evidence to discredit not only Dr. Sevanian, but Dr. Smith and Dr. Levak as well. (40 RT 3356–59.) In part, he stated:

> Dr. Sevanian, the toxicologist from the University of Southern California was a gentleman. He testified honestly and he set the stage for Dr. Smith and Dr. Levak. And he was wrong. He was just flat out wrong.

(40 RT 3356.)

Such failure to adequately prepare and present expert testimony constitutes deficient performance. *See Bean v. Calderon*, 163 F.3d 1073, 1080–81 (9th Cir. 1998) ("the experts' lack of preparation and the limited informational foundation for their conclusions severely undercut their utility" to trial counsel's intended defense); *see also Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (counsel ineffective for failure to ascertain that expert's testimony would substantially undercut the defense theory, bolster the state's case, and make the defense explanation of events seem less likely).

Trial counsel also failed to investigate and present evidence regarding the hair samples that police obtained from Mr. Bell after his arrest. (Amended Petition at 76–77.) Respondent asserts that Mr. Bell has failed to explain the relevance of the hair sample. (Response at 68.) And yet, respondent certainly does know the significance of Mr. Bell's abstinence from cocaine prior to the offense because respondent cites it in trying to establish that counsel introduced sufficient evidence of Mr. Bell's cocaine

intoxication. (Response at 70.) The Amended Petition makes it quite clear – testing of the hair sample could and would have corroborated Mr. Bell's statement that, prior to the offense, he had not used cocaine in several months. This, in turn, was material because the period of abstention heightened the intoxicating effects of the cocaine that Mr. Bell ingested prior to the offense. (Amended Petition at 77; 32 RT 2519, 2523–25; Ex. 89 at 1647; Ex. 109 at 2413–18.) As noted above, the level of Mr. Bell's cocaine intoxication was central to the defense. Thus, establishing conclusively the period of abstention would have materially furthered the defense. *See Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999) (trial counsel ineffective for failure to investigate and introduce evidence to corroborate unsupported exculpatory testimony).

Respondent references a "lack of specificity" in Mr. Bell's claims regarding the available evidence that an adequate investigation would have uncovered and that adequately prepared counsel would have adduced. (Response at 63.) The Amended Petition lays out this evidence in detail, specifying the myriad ways in which trial counsel's investigation into the toxicological aspects of the case was inadequate. It also chronicles their concomitant failure to educate themselves in the relevant science and to prepare and present the readily available evidence, which would have bolstered their theory of defense. (Amended Petition at 64–78.)

Counsel's multiple failures were unreasonable and prejudicial. *See Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (trial counsel ineffective for failure to adequately inform himself about specific serology tests performed or the conclusions one could logically draw from laboratory results on serology evidence); *see also Harris v. Cotton*, 365 F.3d 552, 555–56 (7th Cir. 2004) (counsel ineffective for failure to request and present toxicology report showing victim's intoxication, where such evidence

corroborated defense); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) (petitioner prejudiced by counsel's failure to investigate and present evidence demonstrating petitioner's mental condition that would have played a significant role in establishing element of the defense).

Mr. Bell has presented a prima facie case that trial counsel failed to adequately investigate, prepare, and present at trial the readily available toxicology evidence in the case, all of which supported their theory of defense. Mr. Bell's prima facie evidence presented in the Amended Petition and in this Reply is unrebutted. To the extent that there are nonetheless any factual disputes, the proper remedy would be for this Court to issue an order to show cause as to why Mr. Bell is not entitled to relief based on this claim, and remand for a proper determination of the facts supporting this claim. *See Duvall*, 9 Cal. 4th at 474–75.

9. Trial counsel failed to adequately investigate and present evidence of Mr. Bell's personal and multigenerational family history of mental, psychological, neuro-psychological, emotional, cognitive, social, and adaptive functioning deficits, as they related to the offense.

Mr. Bell has presented detailed prima facie evidence of trial counsel's failure to adequately investigate and present evidence of Mr. Bell's life-long history of mental, psychological, neuropsychological, emotional, cognitive, social, and adaptive functioning deficits as they related to the offense. (Amended Petition at 78–83.)

At the time of Mr. Bell's trial, the governing standard of care required trial counsel to provide the jury with a full and complete picture of the defendant's life. *Skipper v. North Carolina*, 476 U.S. 1 (1986); *Lockett v. Ohio*, 438 U.S. 586 (1978); *People v. Brown*, 40 Cal. 3d 512, 542 (1985); 1989 ABA Guidelines §§ 11.4.1, 11.8.3, 11.8.6 (counsel should present all reasonably available evidence in mitigation, including medical history,

family history, and social history). It further required that trial counsel compose a coherent guilt- and penalty-phase strategy. The necessity of a timely, coherent, and unified approach to investigating, developing, and presenting both phases of a capital case was known to capital defense counsel for many years before Mr. Bell's trial. *See* Goodpaster, *supra*, at 324–25, 334 (observing that, "to fulfill the constitutional obligation to ensure a meaningful penalty trial and a reliable sentencing decision in a capital case, defense counsel should integrate the guilt phase defense and the penalty phase case for life, constructing and presenting the guilt phase of the case as a foundation for the mitigating case at the penalty trial"); *see also Libberton*, 583 F.3d at 1166–67 (recognizing that deficiencies prejudicing the outcome of the penalty phase may occur in either or both phases of trial).

As an initial matter, respondent objects on grounds of hearsay to certain portions of declarations presented in the Amended Petition. (Response at 71.) Although respondent's objections are meritless, they are, more importantly, irrelevant at this stage of the proceedings. In habeas proceedings, the petitioner must "specify the facts on which he bases his claim that the restraint is unlawful" in his petition, *see In re Lawler*, 23 Cal. 3d 190, 194 (1979), and the exhibits accompanying pleading-stage briefs simply supplement those allegations. Only at an evidentiary hearing, if any, are such exhibits subject to admission into evidence in accordance with generally applicable rules of evidence. *In re Rosenkrantz*, 29 Cal. 4th 616, 675 (2002).

Mr. Bell's trial counsel failed to utilize evidence they possessed regarding Mr. Bell's neuropsychological deficits and brain injury. (Amended Petition at 78–81.) Trial counsel retained Dr. Lorraine Camenzuli to conduct neuropsychological testing of Mr. Bell, and her

testing and analysis revealed cognitive deficits and brain injury. (Amended Petition at 78–81.) Nonetheless, trial counsel failed to call Dr. Camnezuli as a witness or otherwise use her or similar such evidence of Mr. Bell's neuropsychological deficits and brain injury. (Amended Petition at 81.)

Respondent argues that the Court must presume there was a sound tactical basis for trial counsel's decision not to call Dr. Camenzuli as a witness. (Response at 72.) As previously discussed, this is not so. The overriding question is whether trial counsel's actions were objectively reasonable. Here, even if counsel decided not to use Dr. Camenzuli herself as a witness, they were on notice from her report of Mr. Bell's neuropsychological deficits and should have introduced such materially favorable evidence through another expert witness. (Amended Petition at 81.) It is no surprise that an expert of one technical discipline can develop evidence and provide insights that expert another cannot. *See Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (neurologist and/or psychiatrist could develop different evidence than psychologist). Dr. Smith, who testified at trial, avers that such evidence would have been quite useful to him and would have tied directly into the core elements of trial counsel's chosen defense strategy. (Amended Petition at 81–83; Ex. 89 at 1646–47.) Similarly, Dr. Levak would have utilized it as well. (Ex. 131 at 2882–88.)

Respondent argues that the evidence of Mr. Bell's neuropsychological deficits and brain injury was "virtually useless" because Dr. Camenzuli allegedly "did not consider anything regarding the charged offense..." (Response at 73.) To the contrary, Dr. Camenzuli states that she was provided "background documents regarding Mr. Bell *and his case*" and that she relied on those records in formulating her opinions. (Ex. 88 at 1635, emphasis added.)

Trial counsel also unreasonably failed to obtain and to provide to their testifying experts Mr. Bell's complete biopsychosocial history, which would have been readily available to them if they had conducted an adequate investigation of the case. (Amended Petition at 81–82.) Respondent argues that it was the experts' responsibility to determine what information they needed to reach their conclusions. (Response at 73.) However, Dr. Smith and Dr. Levak did request such information, and trial counsel did supply some of it. Trial counsel's failure was in their inadequate investigation, which failed to produce a wealth of readily available evidence – evidence that their experts would have relied on, and which reasonably effective counsel would have obtained and provided to such experts.

Trial counsel's failure was prejudicial, because the complete evidence of Mr. Bell's biopsychosocial history and impairments would have been material to the testimony the defense's medical and psychological expert witnesses, Dr. Smith and Dr. Levak. (Amended Petition at 82–83; Ex. 89 at 1643–48; Ex. 131 at 2882–88.)

Respondent argues that trial counsel were not ineffective because they presented *some* evidence of Mr. Bell's social history and neuropsychological deficits. (Response at 74.) As previously discussed, the reasonableness of counsel's actions is based on the totality of the circumstances and the governing standard of care. Mr. Bell's claim is not that trial counsel introduced *no* such evidence, but rather that the evidence trial counsel obtained and presented was materially incomplete, leaving the jury with an inaccurate picture of Mr. Bell's history and deficits and how they specifically related to key elements of the guilt-phase defense (and, of course, to the penalty-phase defense as well). Failure to investigate

evidence that would have supported counsel's strategy was objectively unreasonable. *See, e.g.*, *Deutscher*, 884 F.2d at 1160.

Mr. Bell has presented a prima facie case that trial counsel's failures fell below the governing standard of care, were unreasonable, and constitute ineffective assistance. Clearly, failure to develop evidence of brain injury can constitute ineffective assistance of counsel. *See, e.g.*, *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (ineffective assistance for failure to investigate and present evidence of petitioner's brain damage due to neurotoxins). So, too, is failure to investigate and present evidence of head injuries and functional brain impairment. *See Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), *supplemented on denial of reh'g*, 348 F.3d 174 (2003) (ineffective assistance for failure to investigate and present evidence of petitioner's brain impairment, where counsel were aware of his head injury).

To the extent that there are nonetheless any factual disputes, the proper remedy would be for this Court to issue an order to show cause as to why Mr. Bell is not entitled to relief based on this claim, and remand for a proper determination of the facts supporting this claim. *Duvall*, 9 Cal. 4th at 474–75.

10. Trial counsel failed to object and to test the prosecution's case through meaningful cross-examination.

Mr. Bell has presented a prima facie case that trial counsel unreasonably failed to object to numerous instances of prosecutorial misconduct, and failed to meaningfully test the prosecution's evidence through cross-examination. (Amended Petition at 83–84.) Mr. Bell's trial counsel failed to object to the numerous instances of prosecutorial misconduct, as detailed in Claim Five, *infra.* (Amended Petition at 83, 183–89.)

When a prosecutor commits misconduct, "there is little a defendant can do other than rely on his or her attorney to lodge an appropriate and timely objection. A failure to make such an objection can have devastating consequences for an individual defendant." *Hodge v. Hurley*, 426 F.3d 368, 377 (6th Cir. 2005). Consequently, such failure can constitute ineffective assistance. *See, e.g.*, *Burns v. Gammon*, 260 F.3d 892, 896–97 (8th Cir. 2001); *Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir. 2000); *Gravley v. Mills*, 87 F.3d 779, 785–86 (6th Cir. 1996).

Trial counsel's failures were objectively unreasonable. But for trial counsel's deficient performance, the result of the trial would have been more favorable to Mr. Bell.

11. Trial counsel failed to comprehend the legal elements of the charged offenses and failed to obtain complete and accurate jury instructions on the most crucial and determinative aspects of the guilt phase.

Mr. Bell has presented a prima facie case that trial counsel failed to ascertain the legal elements of the charged offenses. As a result, trial counsel unreasonably failed to object to erroneous instructions and failed to request complete and accurate jury instructions on the most crucial and determinative aspects of the case. (Amended Petition at 84–85.)

Mr. Bell's actions were not in dispute, only his mental state was. The prosecution alleged that Mr. Bell was guilty of robbery and first-degree felony murder. The defense contended that Mr. Bell was guilty of theft and second-degree murder. Thus, the guilt phase turned entirely on the question of Mr. Bell's mental state at the time of certain actions. It was agreed that the requisite intent was the intent to steal (to permanently deprive the owner of their property), and that such intent had to exist concurrently with the

actus reus of robbery. It was the technical definition of that actus reus that was in question, although trial counsel clearly did not realize it.

The defense accurately argued to the jury that Mr. Bell was not guilty of robbery if, at the time he killed the victim, he did not have the intent to steal. The jury instructions did not say this, however. The instructions said that the only specific intent required for robbery was the intent at the time of the taking to permanently deprive the owner of the property. The prosecution seized on this, emphasizing that Mr. Bell intended to permanently deprive the owner at the time of the taking, referencing the jury instructions.

This error struck at what was essentially the only issue in the guilt phase – the purpose, if any, of the killing. While the defense theory was legally accurate and supported by substantial evidence, it found no foothold in the erroneous jury instructions. As detailed below, trial counsel's failures clearly constituted deficient performance and prejudiced Mr. Bell.

a. Robbery requires the use of force or fear motivated by the specific intent to steal.

Robbery is larceny aggravated by the use of force or fear to accomplish the taking. *People v. Green*, 27 Cal. 3d 1, 54 (1980); *People v. Miles*, 43 Cal. 4th 1074, 1085 (2008). Therefore, to understand the elements of robbery it is helpful to first understand the elements of larceny.

Larceny is the taking of another's property, with the intent to steal, take, carry, lead, or drive it away. *People v. Davis*, 19 Cal. 4th 301, 305 (1998); Cal. Penal Code § 484 (West 2010). The "stealing" component requires the intent to deprive the owner of the property either permanently or for an unreasonable time. *People v. Avery*, 27 Cal. 4th 49, 57 (2002). "Taking" has two aspects: (1) achieving possession of the property, known as "caption," and (2) carrying the property away, known as "asportation."

People v. Gomez, 43 Cal. 4th 249, 255 (2008). Asportation commences at the slightest movement of the property and continues until the perpetrator has reached a place of temporary safety. *Id.* The specific intent to steal must exist at the time of the taking. *Green*, 27 Cal. 3d at 54.

Robbery incorporates the above-listed elements of larcency, and adds two more: (1) the taking must be from the victim's presence, and (2) the taking must be accomplished by force or fear. *Gomez*, 43 Cal. 4th at 255. The force or fear can occur with regard to either the caption or asportation aspect of taking. Thus, where the property is acquired through consent but is retained through force, robbery applies. *See, e.g.*, *People v. Anderson*, 64 Cal. 2d 633, 638 (1966). Similarly, an intended theft transforms into robbery if the perpetrator uses force or fear to retain or escape with the property, such as when caught in the act. *See, e.g.*, *Gomez*, 43 Cal. 4th 249 at 256; *Miller v. Superior Court*, 115 Cal. App. 4th 216, 222–24 (2004); *People v. Winkler*, 178 Cal. App. 3d 750, 756 (1986); *People v. Estes*, 147 Cal. App. 3d 23, 26–28 (1983). And although pickpocketing is not generally robbery (due to lack of force or fear), it does constitute robbery where the pickpocket uses force to distract the victim in order to enable the unnoticed, stealthy taking. *People v. Jackson*, 128 Cal. App. 4th 1326 (2005). Where, however, the victim is killed for reasons unconnected to the taking, there would be no robbery. *See People v. Kelley*, 220 Cal. App. 3d 1358, 1371 (1990) (noting that such scenario would entail theft instead of robbery, but only where supported by the facts of the case). Trial counsel was clearly aware of *Kelley*, because they cited it in support of their proposed special circumstance instruction. (38 RT 3146.)

The requirement that the taking be accomplished by force or fear also implicates the mental state required for robbery. It is a "fundamental doctrine of criminal law that in every crime there must be a concurrence of

act and intent." *Green*, 27 Cal. 3d at 53. This is expressly required under the Penal Code, which provides that "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Cal. Penal Code § 20 (West 2010).

"So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." *People v. Vogel*, 46 Cal. 2d 798, 801 (1956); *see also Green*, 27 Cal. 3d at 53. The element of joint operation of act and intent requires that any specific intent or mental state required by a penal statute concur with the actus reus of the crime. Therefore, "[n]o crime is committed unless the mental fault concurs with the act or omission, in the sense that *the mental state actuates the act or omission.*" *People v. Martinez*, 150 Cal. App. 3d 579, 602 (1984) (emphasis in original) (citing LaFave & Scott, *Criminal Law* § 34 (1972)); *see also People v. Hernandez*, 61 Cal. 2d 529, 532 (1964).

In robbery, the requisite act is a taking accomplished by force or fear, and the requisite intent is to steal (permanently deprive). *Green*, 27 Cal. 3d at 54. Thus, "like the nonviolent taking in larceny, the act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal." *Id.*; *see also*, *People v. Marshall*, 15 Cal. 4th 1, 34–35 (1997) (robbery conviction reversed where evidence supported that defendant killed victim and took letter from her, but not that purpose of killing was to take letter). Consequently, if the larcenous purpose does not exist at the time force is used against the victim, then "there is no 'joint operation of act and intent' necessary to constitute robbery." *Id.* This is often referred to as the doctrine of after-acquired (or after-formed) intent. It is important to note that it contains both a temporal requirement (intent exists concurrent with act, not after) as well as a related requirement that the act to which the intent relates be precisely defined. As discussed above, the

acts that elevate larceny to robbery are taking from the presence of the owner and taking by use of force or fear. In Mr. Bell's case, only the latter act was at issue.

At the time of Mr. Bell's trial, the California Jury Instructions Criminal (CALJIC) instruction for robbery was incorrect. After essentially quoting the robbery statute, it digested it into required elements, as follows:

> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person had possession of property of some value however slight,
>
> 2. Such property was taken from such person or from [his] [her] immediate presence,
>
> 3. Such property was taken against the will of such person,
>
> 4. The taking was accomplished either by force, violence, fear or intimidation, and
>
> 5. Such property was taken with the specific intent to deprive such person of the property.

CALJIC 9.40 (5th ed. 1988). When the trial court proposed to give this instruction unmodified, trial counsel said nothing. (38 RT 3173.) Consequently, this instruction was given unmodified. (6 CT 1231; 39 RT 3250.)

There were two significant errors in this instruction that affected Mr. Bell's case. First, the instruction failed to instruct the jury regarding the prohibition on after-acquired intent. As discussed above, the intent to steal must exist at the time the force or fear is used to accomplish the taking. *See, e.g.*, *Green*, 27 Cal. 3d at 53–54.

The second error was that the instruction misstated the act to which the specific intent must relate. As discussed above, the requisite act in *larceny* (theft) is "taking," but the requisite act in *robbery* is "taking accomplished by force or fear." *Gomez*, 43 Cal. 4th at 255; *Green*, 27 Cal.

3d at 53–54. This matters, because as detailed above, a planned theft can transform to robbery only by a close examination of the facts related to the use of force or fear, not those related to "taking" generally. *See, e.g.*, *Gomez*, 43 Cal. 4th at 256; *Miller*, 115 Cal. App. 4th at 222–24; *Winkler*, 178 Cal. App. 3d at 756; *Estes*, 147 Cal. App. 3d at 26–28. Thus, in order to properly communicate the requisite "union, or joint operation" of act and intent, the instruction must state that when the defendant uses force or fear to take the property, he must have the specific intent to steal (permanently or unreasonably deprive the owner). *See, e.g.*, *Gomez*, 43 Cal. 4th at 255; *Green*, 27 Cal. 3d at 53–54; Cal. Penal Code § 20 (West 2010).

At the time of Mr. Bell's trial, the CALJIC instruction's Comment section contained a note regarding after-acquired intent and the correct scope of the requisite act. It stated:

> Robbery requires a showing of *an intent to steal before or during the application of force*, rather than merely after the application of force. If defendant drives away with victim's purse in his car without knowing that the purse is in the car, he is not guilty of robbery. *Rodriguez v. Superior Court*, 159 Cal. App. 3d 821, 825 (1984).

CALJIC 9.40 (5th ed. 1988 cmt.) (emphasis added). As the emphasized language indicates, the act to which the specific intent must relate is the application of force or fear, not the "taking," and that intent must exist at the time of that act. Despite this comment in the pattern instructions, trial counsel still failed to request that the jury be completely and correctly instructed regarding robbery.[4]

---

[4] Since Mr. Bell's trial, the CALJIC robbery instructions have changed, but the errors have only been partially rectified. As of 1996, there is a separate instruction regarding after-acquired intent, but it incorrectly states that the intent to steal must be in concurrence with "the act of taking the property," omitting the requisite "by force or fear" component of the act.

No such problems have existed in the Judicial Council of California's Criminal Jury Instructions (CALCRIM). Since their inception, these instructions have properly required:

> 4. The defendant used force or fear to take the property or to prevent the person from resisting; and
>
> 5. When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently ...
>
> The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

CALCRIM No. 1600 (2006).

The errors in the robbery instruction were compounded by an incomplete instruction regarding the requirement of the concurrence of act and intent. The trial court used the corresponding CALJIC instruction, which provided the option of either listing the specific acts and intents for each charged offense and allegation, or simply referring the jurors to the other instructions to discover the requisite specific intent and the act to which it must relate. CALJIC 3.31 (1992 ed.). The trial court proposed to omit the express statements regarding the requisite acts and intents, and to simply refer the jurors to the other instructions. (38 RT 3176.) Trial counsel failed to object or make any contrary proposal. (38 RT 3176.) Thus, the trial court instructed the jury that:

CALJIC 9.40.2 (6th ed. 1996). And as of the Fall 2008 edition, the fourth element of robbery has been amended to read, "[t]he taking or carrying away was accomplished either by force or fear to gain possession or to maintain possession." CALJIC 9.40 (Fall 2008 ed.). This correctly states that the force or fear must be motivated by the intent to take. *Green*, 27 Cal. 3d at 53–54.

> In the crimes charged in counts one and two, namely, murder and robbery, in addition, the allegation of intentional infliction of great bodily harm, and the lesser offenses of grand theft and petty theft, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exists the crime to which it relates is not committed.
>
> The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions, which I have already read to you.

(6 CT 1244; 39 RT 3256.)

In sum, Mr. Bell's trial counsel failed utterly to ascertain, comprehend, and request complete and accurate instructions regarding the essential elements of robbery.

b. The same errors affected the robbery felony-murder and robbery special-circumstance instructions.

Like robbery, felony-murder has its own doctrine of after-acquired intent. In felony murder, for the killing to be considered to have occurred "during the commission" of the felony, the law requires that the intent to commit the felony must arise before or during the killing. Thus, in robbery felony-murder, if the intent to rob arises only after the killing has occurred, then robbery felony-murder does not apply. *Green*, 27 Cal. 3d at 55 n.44 (referencing the "settled rule" that "when the force used against the victim results in death, the defendant's intent to rob will not support a conviction of felony murder if it arose after the infliction of the fatal wound."); *People v. Sanchez*, 30 Cal. 2d 560, 569 (1947) (to constitute felony murder, "the killer must at the time of the killing, have had the purpose to rob (although not necessarily the purpose to kill)"); *see also People v. Lewis*, 43 Cal. 4th 415, 464 (2008); *People v. Davis*, 36 Cal. 4th 510, 564–65 (2005).

In Mr. Bell's case, jury instructions regarding the intent necessary for felony murder informed the jurors that the unlawful killing of a person during the commission of the crime of robbery "is also murder of the first degree when the perpetrator had the specific intent to commit such crime." (6 CT 1214; 39 RT 3242; CALJIC 8.21 (5th ed. 1988).) Consequently, the jury had to find the specific intent to commit "such crime" before it could find Mr. Bell guilty of robbery felony-murder. But the instruction did not expressly state whether "such crime" was robbery or first-degree murder (this instruction immediately followed the trial court's instruction on premeditated first-degree murder). (39 RT 3940–42.) The felony-murder instruction next stated, however, that "the specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (6 CT 1214; CALJIC 8.21 (5th ed. 1988.).)

The felony-murder instruction thus referred the jurors (in a confusing manner) to the robbery instruction in order to determine the requisite specific intent for felony murder. By incorporating the robbery instruction, the felony-murder instruction adopted the same flaws as the robbery instruction detailed above.

The robbery special-circumstance instruction also incorporated the flaws because it required a finding of a robbery. (6 CT 1227; 39 RT 3247–48; CALJIC 8.81.17 (1991 rev.).) Similarly, the trial court's instruction regarding the use of circumstantial evidence to determine the specific intent necessary for the special circumstance was flawed because it just referred to "specific intent" and did not correctly define the intent or the act to which it must relate. (6 CT 1229; 39 RT 3249; CALJIC 8.83.1 (5th ed. 1988).)

It was also clear that trial counsel's failure to ascertain the correct legal elements of robbery led them to misunderstand the robbery special-circumstance instruction. The CALJIC instruction on the special

circumstance (8.81.17) contained multiple parts, and there was disagreement as to which were mandatory and which optional given the facts of the case. Part 1a of the instruction repeated the statutory language that the "murder was committed while the defendant was engaged in the commission of a robbery," and part 1b pertained to murder committed during immediate flight after the commission of a robbery. The instruction provided that part 1a "[or] [and]" part 1b would be given, as appropriate. Part 2 required the jury to find that the murder was committed in order to carry out or advance the commission of the robbery, or to facilitate escape therefrom, or to avoid detection, and stated that "in other words, the special circumstance ... is not established if the robbery was merely incidental to the commission of the murder." CALJIC 8.81.17 (1991 rev.).

Part 2 was intended to convey the requirement expressed by this Court in *Green*, that there must be an independent felonious purpose for the felony. 27 Cal. 3d at 61. This Court has held that this is not an "element" of the special circumstance in all cases, and the jury only needs to be instructed on it where the evidence supports a reasonable inference that murder was the predominant intent and there was no independent intent to commit the felony; where murder and the felony were equal intents or where the felony was the predominant intent, such an instruction is not required. *People v. Monterroso*, 34 Cal. 4th 743, 766–67 (2005); *People v. Navarette*, 30 Cal. 4th 458, 505 (2003); *People v. Clark*, 50 Cal. 3d 583, 609 (1990); *People v. Kimble*, 44 Cal. 3d 480, 501 (1988); *People v. Prieto*, 30 Cal. 4th 226, 257 (2003); *People v. Harden*, 110 Cal. App. 4th 848, 866–867 (2003).

Despite the existing case law, in Mr. Bell's case there was disagreement as to whether part 2 of the instruction was mandatory in all cases or only as required by the facts. During one of the jury instruction

conferences, the prosecutor argued that part 2 was not required and that the prosecution did not have to prove that the murder was committed to carry out the robbery. (38 RT 3166–70.) The trial judge stated this was incorrect, admonishing him to the contrary, noting, "That's what's at the heart of the case ... [Y]ou're denying what the law requires, which is that the killing be done for a robbery motive, to further the commission of that robbery." (38 RT 3167–68.) The judge invited the prosecutor to provide any authority supporting his contrary position (38 RT 3170), but the prosecutor never produced any. In concluding the discussion, the judge reiterated that the special circumstance's "independent felonious purpose" requirement "is a critical element in the whole case. The case turns on this instruction, so it's not one to be lightly bypassed." (38 RT 3170.) The trial court included part 2 in its instructions. (6 CT 1227; 39 RT 3247–48.)

As noted above, clear authority of this Court holds that the instruction need only be given when implicated by substantial evidence. Thus, the trial just was incorrect that the instruction must always be given, and the prosecutor was incorrect that it need not be given in Mr. Bell's case. Part 2 of the instruction was necessary because the defense contended and produced evidence that the force (killing) occurred absent an intent to steal, which made the subsequent taking theft instead of robbery. Thus, according to the facts asserted by the defense, at the time of the killing murder was the predominant intent and there was no other independent felonious intent. Consequently, the instruction was required. *See, e.g.*, *Monterroso*, 34 Cal. 4th at 766–67.

The special circumstance's requirement of an independent felonious intent for the felony is different than the prohibition on after-acquired intent in the contexts of robbery and felony murder. In other words, there can be robbery but no robbery special circumstance. In *Green*, the defendant

asserted that his intent to steal arose after application of any force or fear, but this Court found that the intent was not after-acquired, and thus the robbery conviction was sustained. 27 Cal. 3d at 51–52. However, on the same facts, the robbery special circumstance was reversed for failure to have established that the robbery had a felonious intent independent of the killing. *Id.* at 61–62. Thus, in *Green* there existed the required concurrent intent for robbery (intent to steal concurrent with the use of force or fear) but there was not the required independent felonious intent necessary for the special circumstance. This illustrates that the intent-act relationship necessary for robbery is not coextensive with that required for the robbery special circumstance, although certainly the two can be related.

Further evidence of the distinction between the two is found in this Court's holding in *Green* that the "independent felonious purpose" requirement of the robbery special circumstance is a constitutional imperative, intended to fulfill the Eighth Amendment requirement that the statute narrow the class of death-eligible murders. *Green*, 27 Cal. 3d at 48–50, 59–62, citing *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Furman v. Georgia*, 408 U.S. 238 (1972). This Court observed:

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court ....

Green, 27 Cal. 3d at 61–62. Indeed, where the independent felonious purpose requirement is implicated by substantial evidence in the case, it is "not mere state law nicety," but is an essential element of the charge without which the special circumstance "would run afoul of the requirements of the Eighth Amendment." *Williams v. Calderon*, 52 F.3d

1465, 1476 (9th Cir. 1995). Certainly, the same cannot and has not been said for the doctrine of after-acquired intent.

c. Trial counsel's failures affected the single most important factual and legal issue in the guilt phase.

In its opinion deciding Mr. Bell's case on direct appeal, this Court observed that, "[t]he central factual issue litigated in the guilt phase trial was whether, as the prosecutor alleged, defendant killed the victim to facilitate his thefts or, as the defense maintained, the thefts and killing were separate in their origins and purposes." *People v. Bell*, 40 Cal. 4th 582, 606 (2007). This analysis is correct. Essentially the only fact at issue in the guilt phase was what purpose, if any, Mr. Bell had in killing Joey Anderson.

At the time of trial, the trial court and the parties were certainly aware that the purpose of the killing was the overriding question. In limiting the defense experts from testifying as to Mr. Bell's statements to them regarding his mental state, the trial court observed that, "[w]hat's central to the case is what was in Mr. Bell's mind at or around the time that he stabbed Joey." (32 RT 2637.) Later, when limiting defense experts from testifying as to "ultimate legal question" of Mr. Bell's mental state pursuant to Penal Code section 25, the trial court admonished Mr. Bell's expert that he was precluded "from giving an ultimate legal opinion on the defendant's mental state ... That is whether or not he had specific intent, whether or not he intended to rob." (33 RT 2678.)

While the trial court, the prosecution, and the defense were all aware throughout the trial that the purpose of the killing, if any, was the central fact in the case, it turned out that they did not agree as to why, legally, that was so – they had different views of the operative legal elements of the charged offenses regarding specific intent and mental state. It might be reasonable to expect such a dispute to be revealed and resolved pretrial, or

at the very latest during the jury instruction conference. Here, that did not occur. As detailed below, Mr. Bell's trial counsel failed to propose any jury instruction that contained the mental state element that was the lynchpin of their guilt-phase defense. Moreover, they failed to object at all to the trial court's instructions that erroneously omitted that element. As a result, even if the jury agreed with trial counsel's theory of defense, the jury instructions dictated that it be rejected.

Many of the facts were not in dispute. The prosecution and defense agreed that Mr. Bell entered the home with the intent to remove items from it, but at that time he had no intent to commit robbery because he believed that the home was unoccupied. (*See, e.g.*, 35 RT 1835; 39 RT 3280–81; 40 RT 3320, 3324.) The parties disagreed regarding what Mr. Bell was thinking after that point, but they agreed on what he did – Mr. Bell killed Joey, took the television and radio from the house, sold them on the street, and used the proceeds to buy crack cocaine. (39 RT 3281; 40 RT 3320.)

Given the broad agreement as to Mr. Bell's actions, the jury's task was not so much to determine what happened, but why it happened; they needed to determine Mr. Bell's mental state. In such a circumstance, the jury instructions that referenced intent and mental state were especially crucial. Such instructions prescribed for the jury exactly what they did and did not need to determine.

The requisite intent elements, however, proved to be another point of disagreement between the prosecution and defense. At the outset of the trial, the prosecution told the jury that the relevant question was whether Mr. Bell had the specific intent to steal – to permanently deprive the owner (Ms. Mitchell) of her property. In his opening statement, the prosecutor displayed to the jury a demonstrative exhibit he had prepared titled "DEFENDANT'S MENTAL STATE." It contained a column labeled

"SPECIFIC INTENT TO STEAL" and summarized the prosecution's view of what the evidence would show to establish it. (27 RT 1834; *see also* 26 RT 1814–16.) The prosecution maintained this focus on the intent to steal in its closing arguments. (*See, e.g.*, 39 RT 3284, 3294, 3349.)

In contrast, trial counsel's opening statement made no reference to any elements of the offenses. Trial counsel stated that the evidence would show that Mr. Bell did not kill Joey in the commission of a robbery, but they failed to focus the jury's attention on why, legally, that would be so. (*See* 27 RT 1839–48.) During closing argument, however, it became clear that trial counsel disagreed with the prosecution regarding the operative elements. Trial counsel agreed that an essential element of robbery is the intent to permanently deprive the owner of their property. (40 RT 3310.) But trial counsel argued that robbery had a second mental state element as well. They urged that robbery required not just the application of force or fear, but the specific intent to use the force or fear for the purpose of taking the property. (40 RT 3311; 3337.) Counsel's statements on this point included the argument that "the force element which could only be the killing here, would have had to have been for the purpose of taking the property. If it's not for that purpose, then you're not using and specifically intending to use force, and you're not specifically intending a robbery." (40 RT 3311.)

Because they failed to object to the erroneous instructions and request complete and accurate ones, Mr. Bell's trial counsel were unable to point the jury to any instructions that supported the defense. As a result, they floundered. They did not refer the jury to any instruction that supported their defense to the robbery charge. With regard to felony murder and the special circumstance, they strangely argued that the two were the same, and that the elements of felony murder were "implicit" but were made explicit

in the special circumstance instruction. Mr. Bell's secondary trial counsel erroneously told the jury that the second paragraph of the special circumstance instruction (requiring proof that the felony was not "incidental" to the killing) applied to both the special circumstance and felony-murder: "Steven Bell didn't kill Joey Anderson for a tv set. He didn't kill Joey for cocaine. For that reason he is not guilty of the felony murder of robbery murder, and for that reason the special circumstance is not true." (40 RT 3301–02.) Counsel reiterated the point several times. Later, he stated, "What is the special circumstance? It's really the same thing as felony murder, but it's stated in a slightly different way. And frankly, the [special circumstance] instruction is better and it's clearer." (40 RT 3311–12.)

At one point, trial counsel correctly told the jury that, if they determined that robbery felony-murder did not exist, then legally they could not find the robbery special circumstance to be true. (40 RT 3312.) Unfortunately, counsel immediately followed this statement with the erroneous and confusing conclusion that, "The two go hand in hand." (40 RT 3312.) This overstatement falsely communicated to the jury that the converse was also true – that if they found the felony-murder, then legally they had to find the special circumstance to be true.[5]

Trial counsel also seized upon the importance of the language in the special-circumstance instruction requiring that the killing have occurred for the purpose of advancing the robbery. He admonished the jurors that it was "the most important instruction you should look at in this case outside of reasonable doubt." (40 RT 3312.) In the course of emphasizing that the special circumstance required that the killing be for the purpose of

---

[5] This was exactly what the prosecutor had already falsely told them several times. (*See infra* Claim Five.)

advancing the robbery, however, trial counsel again falsely equated it with felony murder, stating, "That requirement is implicit in felony murder. But it is spelled out directly here [in the special circumstance instruction]." (40 RT 3313.) Echoing the erroneous theme of her co-counsel, Mr. Bell's lead counsel told the jury, "It's not a felony murder. He did not kill Joey for the purpose of getting the tv set." (40 RT 3337.) As explained in detail above, trial counsel were correct that Mr. Bell's lack of intent to steal at the time of the killing was pivotal to the case, but they were completely confused as to why, legally, that was so, and they made an argument to the jury that was confusing, erroneous, and unsupported by the jury instructions.

In his rebuttal closing, the prosecutor seized upon this. He focused again on the only specific intent listed in the robbery instruction, the intent at the time of the taking to permanently deprive the owner of the property. (40 RT 3347.) At one point, he specifically referred to the defense's argument that Mr. Bell never intended to use force to take the television, and he rebutted it by stating that the evidence of the *existence* of force or fear was unquestionable. (40 RT 3347–48.) He further commented that the only relevant facts the defense discussed were regarding the intent to permanently deprive the owner – whether Mr. Bell intended to sell or pawn the items that he took. (40 RT 3348.) He recited what he saw as the evidence that Mr. Bell had an original intent to steal, and that such intent was never interrupted by a break from reality. (40 RT 3349–54.)

As detailed above, Mr. Bell's trial counsel was correct in their statement of the law – robbery does require that, at the moment the perpetrator applies force or fear, he concurrently have the intent to do so for the purpose of accomplishing a taking. Unfortunately for Mr. Bell, however, the jury instructions did not say this. Instead, they said what the

prosecutor argued – that the only specific intent required for robbery was the intent to permanently deprive the owner of the property.

d. Trial counsel's failure to comprehend the law and to request complete and accurate jury instructions was unreasonable and constituted deficient performance.

Trial counsel had a duty to ascertain the legal elements of the charged offenses, and to seek complete and accurate jury instructions regarding those elements. *See* 1989 ABA Guidelines § 11.4.1.D.1.A. (counsel should investigate the elements of the charged offenses, including the elements alleged to make the death penalty applicable). Once trial counsel has ascertained the applicable legal elements and principles, counsel has a duty to request all instructions necessary to explain all legal theories upon which the defense rests. *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996); *In re Cordero*, 46 Cal. 3d 161, 189 (1988) (Mosk, J., concurring); *People v. Sedeno*, 10 Cal. 3d 703, 717 n.7 (1974); 1989 ABA Guidelines § 11.4.1.D.1.A.

Trial counsel's failure to understand the controlling law constitutes deficient performance. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986); *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir. 1998); *Loyd v. Whitley*, 977 F.2d 149, 157 & n.16 (5th Cir. 1992); *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987). Similarly, trial counsel's failure to comprehend that jury instructions are inaccurate or potentially misleading constitutes deficient performance. *Luchenburg v. Smith*, 79 F.3d 388 (4th Cir. 1996). In *Luchenburg*, trial counsel failed to comprehend that the jury instruction was potentially misleading, and counsel did not request an expanded instruction to make the elements clear. Under applicable state law, the court would have been required to give the instruction if counsel requested it, but he did not. Counsel was thus deemed ineffective. *Id.* at

392; *see also United States v. Alferahin*, 433 F.3d 1005, 1161 (9th Cir. 2005) (trial counsel ineffective for failure to ascertain correct elements of the charged offense).

If Mr. Bell's trial counsel had requested complete and accurate instructions, the trial court would have been compelled to grant them. A pinpoint instruction on after-acquired intent is required upon request where supported by the facts. *People v. Bradford*, 14 Cal. 4th 1005, 1055–57 (1997); *People v. Webster*, 54 Cal. 3d 411, 443 (1991). Similarly, trial counsel were entitled upon request to have the trial court delineate the specific intent and actus reus in the instruction regarding the concurrence of act and intent. *See People v. Cleaves*, 229 Cal. 3d 367, 379–81 (1991). Trial counsel would also have been entitled to receive a pinpoint instruction on after-acquired intent necessary for felony murder. *People v. Hudson*, 45 Cal. 2d 121 (1955); *People v. Carnine*, 41 Cal. 2d 384, 387–92 (1953) (reversible error to refuse such instruction); *see also People v. Jeter*, 60 Cal. 2d 671 (1964).

Moreover, trial counsel were entitled to receive, upon request, an instruction pinpointing the theory of defense. *People v. Saille*, 54 Cal. 3d 1103, 1120 (1991); *People v. Wharton*, 53 Cal. 3d 522, 570 (1991). Trial counsel were clearly aware of this, because they submitted four sets of detailed, factually tailored instructions for the penalty phase. (6 CT 1396–1442; 7 CT 1442–74, 1481–1500, 1501–09.) And even if the trial court had erroneously refused to give such requested instructions itself, competent trial counsel would have sought to read the applicable law to the jury during argument. *See People v. Sudduth*, 65 Cal. 2d 543, 548 (1966); *People v. Linden*, 52 Cal. 2d 1, 29 (1959); *People v. Anderson*, 44 Cal. 65, 70–71 (1872); *In re Wagner*, 119 Cal. App. 3d 90, 113–14 (1981); 5 Witkin, Cal. Crim. Law 3d § 602 (2000).

e. Trial counsel's failures were prejudicial.

As detailed above, Mr. Bell's trial counsel failed to object to instructions that were erroneous, misleading, and incomplete. Trial counsel also failed to request complete and accurate instructions, including a theory of defense instruction. These failures affected the single most important element in the entire guilt phase of the case. While the defense theory was firmly rooted in the law and supported by substantial evidence, it was not reflected anywhere in the instructions.

The trial judge directed the jury, "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (39 RT 3239.) Thus, even if the jurors agreed with the defense regarding the facts, they had no basis in the instructions to issue the defense verdicts of theft and second-degree murder. Clearly, the jury was confused by the gap between the defense theory and the instructions. Shortly into deliberations, the jury foreman submitted a note stating, "Question relates to element four of the robbery definition. Would it be possible to provide a more clear definition as to what is meant by accomplished by?" (40 RT 3372; 5 CT 1188.) The trial judge asked the attorneys for their thoughts on how to respond. The prosecutor said he did not see how they could respond, because "it's just clear, simple English language." (40 RT 3372.)

The significance of the question clearly escaped trial counsel. When asked if they had any comments, trial counsel initially stated, "No." (40 RT 3372.) Counsel then stated that they had "thoughts on how you can interpret it but the problem is then it really then becomes an issue of whether you're advocating a position." (40 RT 3373.) Apparently not wanting to advocate a position, trial counsel suggested that the judge "not even run the risk of commenting on it, just say the instructions are the

instructions, refer to them, and maybe any others that give you guidance on this one." (40 RT 3373.) Trial counsel did not suggest any other instructions that would give guidance. The trial court suggested responding by saying, "We cannot further define accomplished by. State law states element four without further definition of accomplished by." (40 RT 3373.) The judge stated he was aware of no case that defined it. (40 RT 3374.) Trial counsel agreed with the trial court's analysis and proposed instruction. (40 RT 3373–74.) The trial judge instructed the jury per his proposed answer that no further definition existed, and then added, "So, what can I say? We're obligated to follow the law as stated by the state legislature and the Supreme Court. That's it." (40 RT 3375.)

For the reasons detailed above, this was incorrect. Case law detailed the requirements that a taking "accomplished by force or fear" meant that the force or fear was motivated by the specific intent to permanently deprive the owner of the property. The trial court's answer to the jury's question – to which trial counsel so readily assented – made things even worse, because it told the jury that state law provided no definition of the force or fear element. This had two negative effects. First, it told them that the instruction on the concurrence of act and intent had no relevance to the question, effectively eradicating any assistance it may have provided. Second, it reinforced the notion that the defense theory was not only ungrounded in the letter of the instructions, and further communicated that it was not grounded in the law either.

The jury was initially deadlocked, with one juror favoring the defense on the very issue of whether the taking was accomplished by force or fear. They submitted a note stating, "We have not been able to arrive at a verdict. Specifically, we have one jury member who cannot find the taking was accomplished either by force, violence, fear or intimidation." (40 RT 3378;

5 CT 1189.) The trial judge stated he was certain that the note referred to the "fourth element" of the robbery instruction. (40 RT 3378.) Ultimately, the "holdout" juror was replaced, the verdicts followed shortly thereafter.

Trial counsel's errors prejudiced Mr. Bell. Their error struck at the heart of the defense and affected the instructions on the central issue in the guilt phase. The defense's closing arguments were premised entirely on a theory that had no foothold in the instructions. The prosecution, in contrast, pointed repeatedly and confidently to the instructions. The case was close, and the disputed question related to a technical area of the mental state requirements for robbery that no layperson could be expected to understand without instruction. In deliberations, the jury directly asked a question directed at understanding whether the defense theory was supported by the law. Despite receiving no guidance, they initially deadlocked. Given these facts, it is clear that, had Mr. Bell's trial counsel performed adequately, there is a reasonable possibility that the outcome of the proceedings would have been different.

Additionally, the erroneous instructions removed and/or materially mis-instructed the jury regarding essential elements of the charged offenses that were necessary to establish not only guilt but also Mr. Bell's eligibility for the death penalty. Thus, the instructional errors violated Mr. Bell's constitutional rights to trial by jury and due process. *See Green*, 27 Cal. 3d at 53; *Morissette v. United States*, 342 U.S. 246, 250–51 (1952); Cal. Penal Code § 20 (West 2010). Such absence of a jury finding on an essential fact necessary to prove the charge and/or elevate the penalty is fundamental constitutional error in violation of Mr. Bell's right to due process and trial by jury. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Beck v. Alabama*, 447 U.S. 625, 633–38 (1980); *Cunningham v. California*, 549 U.S. 270 (2007). Such a violation requires

reversal unless, at a minimum, respondent established that the error was harmless beyond a reasonable doubt. *See People v. Hayes*, 52 Cal. 3d 577, 628 (1990) (because jury was misinstructed on element of robbery, reversal required unless error was harmless beyond a reasonable doubt); *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996).

In sum, Mr. Bell has presented detailed prima facie evidence regarding trial counsel's prejudicial failure to ascertain the correct legal elements, object to erroneous instructions, and request complete and accurate instructions. To the extent that there are nonetheless any factual disputes, the proper remedy would be for this Court to issue an order to show cause as to why Mr. Bell is not entitled to relief based on this claim, and remand for a proper determination of the facts supporting this claim. *See People v. Duvall*, 9 Cal. 4th 464, 474–75 (1995).

12. Trial counsel failed to object to the unconstitutional variance between the offenses in the charging document and those defined in the jury instructions and verdicts.

Trial counsel failed to object to the jury being instructed regarding, and Mr. Bell being convicted of, an offense that was not charged in the Information. Count one of the Information charged Mr. Bell with the crime of "Murder" in violation of Penal Code section 187(a). (1 CT 15.) Section 187(a) provides that, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Penal Code § 187(a) (West 2010).

At trial, the prosecution accused Mr. Bell of having committed felony murder. Prosecution's sole theory was felony murder. (35 RT 2910–12.) The prosecutor's opening statement and closing arguments addressed only felony murder. (*See, e.g.*, 27 RT 1831; 39 RT 3286, 3354–55.) The jury was only instructed on premeditation and deliberated first-degree murder at

the request of the defense. (38 RT 3151.) Although the Information charged Mr. Bell under a statute that expressly required malice aforethought, the jury was instructed that they could convict Mr. Bell of felony murder and that no malice or mens rea of any kind was required. (6 CT 1211, 1214.) The jury's verdict stated that it convicted Mr. Bell of Murder in violation of Penal Code section 187(a) as stated in count one of the Information. (5 CT 1196).

In *People v. Witt*, 170 Cal. 104, 107–08 (1915), this Court declared that, "it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case." In *People v. Dillon*, 34 Cal. 3d 441 (1983), this Court held that Penal Code section 187 was *not* "the statute defining" first-degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." *Dillon*, 34 Cal. 3d at 472 (emphasis added).

Section 189 is the only statute that purports to define premeditated murder or murder during the commission of a felony. Cal. Penal Code § 189 (West 2010). Therefore, there is a single statutory offense of first-degree murder, and it is the offense defined by Penal Code section 189. Based on the jury instructions, Mr. Bell was convicted of felony murder, but that is not the crime with which he was charged. Malice – alleged in the Information – is an element of the second-degree murder of which Mr. Bell's trial counsel conceded he was guilty, just as it is an element of the first-degree premeditated murder of which the prosecution expressly did not accuse him. But it is not an element of felony murder, defined in a separate statute, which is the crime of which he was convicted.

This was fundamental constitutional error violating Mr. Bell's due process and jury trial rights under the Fourteenth and Sixth Amendments, as well as his right to a fair and reliable capital trial under the Eight and Fourteenth Amendments. *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Beck v. Alabama*, 447 U.S. 625, 633–38 (1980); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937).

Trial counsel's failure to object to this error constituted deficient performance and was unreasonable and prejudicial. But for trial counsel's unreasonable failures in this regard, the outcome of the proceedings would have been different.

13. Trial counsel's failures prejudiced Mr. Bell.

By virtue of defense counsel's pervasive deficient performance, Mr. Bell was denied the effective assistance of counsel and his right to a fair and reliable determination of guilt. Trial counsel's failings, individually and cumulatively, had a substantial and injurious influence and effect on the determination of the jury's verdicts at the guilt phase of Mr. Bell's trial, and unfairly deprived him of a rational and reliable determination of guilt. But for any or all of counsel's failings, the jury would have reached a more favorable result at the guilt and penalty phases of Mr. Bell's trial. (Amended Petition at 84–85.)

14. Conclusion

In sum, Mr. Bell has alleged a prima facie case of prejudicial ineffective assistance of counsel related to the guilt-innocence phase of his trial. An order to show cause should issue, and habeas corpus relief vacating the judgment of conviction and sentence of death ultimately should be granted.

D. CLAIM FOUR: TRIAL COUNSEL'S SENTENCING REPRESENTATION WAS PREJUDICIALLY DEFICIENT.

Mr. Bell's jury was asked to decide whether he should live or die based on an incomplete, truncated, and inaccurate presentation of his psychosocial history. Although Mr. Bell's lawyers were on notice of reasonably available information in Mr. Bell's background and family history that would have been highly mitigating evidence during his penalty phase, they failed to investigate and present such evidence to the jury. Such evidence, set forth in the Amended Petition and this Reply, included powerful mitigating information about Mr. Bell's childhood, particularly the longstanding and horrifying abuse perpetrated on him by his stepfather George; the utter and complete emotional abandonment by his mother that led to attachment disorder and other damaging psychological effects; his marked organic brain damage and other abnormal neurological functioning; his poly-substance use and abuse; and his genetic predisposition to medical, mental, and substance abuse vulnerabilities. Trial counsel further failed to make reasonable use of experts at trial to explain how the readily-available evidence bore on Mr. Bell's psychosocial development and his emotional, mental, and neurocognitive functioning and behavior. Trial counsel also failed to present Mr. Bell's offer to plead guilty as mitigation evidence and as evidence that Mr. Bell was remorseful.

The unexplored and unexploited information set forth in Mr. Bell's Amended Petition and this Reply comprises core mitigation evidence that the jurors charged with deciding Mr. Bell's penalty deserved to hear. However, from the outset, Mr. Bell's trial counsel failed to investigate and pursue reasonably available mitigating evidence, and failed to develop and provide this type of powerful mitigation to retained experts, thereby making

fully informed decisions with respect to both the guilt and sentencing strategies impossible.

Respondent repeatedly contends that because Mr. Bell's lawyers presented some information as to Mr. Bell's background, additional information of the type found in his Amended Petition would have been useless. (Response at 81–84.) To the extent that trial counsel presented evidence that relates to the evidence presented by Mr. Bell in his Amended Petition and herein, trial counsel's actions demonstrate that they had no strategic reason for failing to pursue the additional reasonably available information suggested by their own investigation and for ultimately failing to present the additional evidence that could have supported their defense at trial. Similarly, the fact that trial counsel consulted with and presented testimony from mental health experts without first doing a full background investigation into Mr. Bell's psychosocial history is further evidence that trial counsel did not have any strategic purpose in failing to conduct such an investigation to further their defense. This and other disputes regarding Mr. Bell's factual allegations do not undercut the force of Mr. Bell's claim of ineffective assistance of counsel. Instead, these disputes require at least the issuance of an order to show cause and an evidentiary hearing because Mr. Bell's allegations state a prima facie case for relief and, if true, justify granting him a new penalty trial. *See In re Romero*, 8 Cal. 4th 728, 742 (1994).

1. Legal standard for ineffective assistance of counsel.

The legal standard for determining constitutionally ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution is well-established. Under *Strickland v. Washington*, 466 U.S. 668, 668 (1984), a petitioner establishes counsel's deficiency by showing that the

"representation fell below an objective standard of reasonableness" in light of "prevailing professional norms" at the time of pretrial preparation and trial. A constitutionally effective investigation includes an investigation into a defendant's mental health and timely provision of the information gathered to consulting and testifying experts. *See id.* at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Decisions made about what evidence to present at trial without undertaking an adequate investigation to inform those decisions are considered unreasonable. *See Wiggins v. Smith*, 539 U.S. 510, 527–28 (2003) (counsel "chose to abandon their [penalty phase] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible"). In determining whether trial counsel's decisions were reasonable, "it is inappropriate for a reviewing court to speculate about the tactical bases for counsel's conduct at trial." *People v. Lewis*, 25 Cal. 4th 610, 674–75 (2001).

"It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). Although counsel must coordinate and integrate the guilt phase presentation with the potential penalty phase defense, (*see* Ex. 119 at 2766–69); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 334 (1983); *see also Libberton v. Ryan*, 583 F.3d 1147, 1166–67 (9th Cir. 2009) (recognizing that deficiencies prejudicing the outcome of the penalty phase may occur in either or both phases of trial), the emphasis of the sentencing phase of trial is different than that of the guilt phase. *See Caro*, 165 F.3d at 1227 ("The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the

establishment of hard facts."); *see also Wallace v. Stewart*, 184 F.3d 1112, 1117 n.5 (9th Cir. 1999) (an attorney may have a different burden in guilt than on sentencing). Even where the sentencer is aware of facts underlying the defendant's mitigation case, trial counsel may not necessarily rest on these facts when presenting a penalty-phase defense. *See Caro*, 165 F.3d at 1227. As even the prosecutor told Mr. Bell's jury in closing argument, "You must know everything" about Mr. Bell's life. (52 RT 4417.)

To determine whether a capital defendant was prejudiced by trial counsel's failure to investigate and present mitigating evidence, a reviewing court must consider the totality of the mitigating evidence presented both at trial and the additional evidence presented in the habeas corpus proceeding and decide whether there is a reasonable probability that the outcome of the penalty proceeding would have been different. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 397–99 (2000). The court must consider new evidence presented by a habeas corpus petitioner as mitigating so long as the evidence meets the "low threshold" of whether that evidence might serve as a basis for a sentence less than death. *See Tennard v. Dretke*, 542 U.S. 274, 283–85 (2004).

2. Mr. Bell's trial counsel unreasonably failed to investigate and present available mitigating evidence, resulting in prejudice to Mr. Bell.

As alleged in the Amended Petition and expounded in this Reply, Mr. Bell's trial counsel unreasonably and prejudicially failed to develop all reasonably available multigenerational psychosocial history evidence, supply the relevant social history information to their medical and psychological experts, and then present the available and compelling mitigating evidence to the jury. Reasonably competent counsel would have developed and supplied to their retained experts and presented to the jury

through lay witnesses, documentary evidence, and qualified experts (including an expert prepared and capable of assessing and testifying about Mr. Bell's psychosocial history) all the facts, allegations, and exhibits included in Mr. Bell's Amended Petition and this Reply. (*See* Ex. 119 at 2773.)

Respondent contends that the background of any of the defendant's family is "irrelevant" in the penalty phase of a capital case, citing *People v. Rowland*, 4 Cal. 4th 238 (1992), and such information must be "linked to an expert opinion stating that Bell inherited a mental disorder." (Response at 79–80.) Respondent's argument is contrary to precedent and misapprehends the nature of the multigenerational life history information presented in this case and the effect and relevance of the multigenerational patterns of dysfunction on Mr. Bell's biology, development, and behavior. *Rowland* itself instructs that "the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself." *Rowland*, 4 Cal. 4th at 278. A wealth of other cases has recognized that evidence pertaining to multigenerational mental illness and abuse is relevant to a defendant's case. *See, e.g.*, *Earp v. Ornoski*, 431 F.3d 1158, 1176 (9th Cir. 2005) (finding relevant that defendant had both a personal and a family history of substance abuse and that his family had a history of alcoholism, mental illness, suicide, and physical and emotional abuse); *Caro v. Woodford*, 280 F.3d 1247, 1250 (9th Cir. 2002) (remarking that "Caro's family has a multi-generational history of physical abuse, alcoholism, and neglect"); *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (issuing an order to show cause on whether trial counsel "failed adequately to investigate and present considerable evidence regarding petitioner's psychological *and* family history.") (emphasis added).

Among other relevant multigenerational dysfunction, Mr. Bell's family history includes several generations of alcoholics and substance abusers, many of whom were present in Mr. Bell's life and had an impact on Mr. Bell's own upbringing. (*See, e.g.*, Ex. 124 at 2808; Ex. 113 at 2540–41, 2554–55.) The evidence establishes that Mr. Bell was regularly exposed to family members who were high, withdrawing from drugs, or seeking drugs; that he was frequently babysat by drug addicts; and that drinking and drug abuse were commonplace in Mr. Bell's childhood home. (*See, e.g.*, Ex. 72 at 1458.) The psychosocial histories of Mr. Bell's parents and extended maternal and paternal families – including their histories of depression – establish Mr. Bell's genetic legacy and the impact on Mr. Bell's own behavioral dysfunction. (*See, e.g.*, Ex. 113 at 2540–50; Ex. 131 at 2882–83.)

As alleged in the Amended Petition and explained in the declarations of Mr. Bell's experts, Mr. Bell's family history bears directly on Mr. Bell's own history of mental illness, substance abuse, and cognitive deficits. (*See, e.g.*, Ex. 113 at 2540–50, 2561–62; Ex. 131 at 2882–83.) Moreover, as set forth in the expert declarations submitted by Mr. Bell, the multigenerational background evidence presented is of the type and kind relied upon by reputable professionals in providing an accurate and reliable psychosocial and psychodiagnostic assessment and a forensic neuropsychological evaluation. (*See* Ex. 89 at 1643–44; Ex. 113 at 2540–44; Ex. 131 at 2877.) Such information would have provided the link between Mr. Bell and his family's multigenerational pattern of mental illness, substance abuse, physical abuse, sexual abuse, trauma, and other behavioral and cognitive dysfunctions. (*See* Ex. 113 at 2540–44; Ex. 131 at 2882–83.) Thus, far from being "utterly irrelevant" (Response at 80), the readily available

evidence was critically important and should have been presented to the jury.

Respondent also notes that Mr. Bell did not submit a declaration from trial counsel with his Amended Petition. A declaration from defense counsel is not necessary to establish a prima facie claim of ineffective assistance of counsel. *See People v. Pope*, 23 Cal. 3d 412, 426 (1979) ("In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of"); *see also In re Wilson*, 3 Cal. 4th 945, 955 (1992) (order to show cause issued on claim of ineffective assistance of counsel despite lack of submission by petitioner of a declaration from trial counsel); *In re Valdez*, 49 Cal. 4th 715 (2010) (same). This principle notwithstanding, Mr. Bell submits with this Reply the declaration of trial counsel Peter Liss in which, among other things, he describes investigation that was undertaken and how the defense limited its focus to Mr. Bell's immediate history without consideration of a broader investigation into any multigenerational patterns and histories that were directly relevant to Mr. Bell and would have resulted in additional powerful mitigating evidence. (Ex. 130 at 2869.)

Mr. Bell alleged with particularity that, as of late March 1993, six months prior to the commencement of jury selection in Mr. Bell's trial, counsel had "barely started" to conduct any investigation in preparation for the penalty phase, and the only case investigator was "completely tied up" with another case for six months after she was assigned to Mr. Bell's case. (1 CT 99, 108; *see also* Amended Petition at 86–89.) Trial counsel's acts and omissions are counter to the prevailing practice of defense attorneys at the time of Mr. Bell's trial, as well as the 1989 ABA Guidelines, which state that counsel should begin to conduct investigation relating to the

penalty phase of a capital trial "immediately upon counsel's entry into the case and should be pursued expeditiously." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* § 11.4.1 (1989) [hereinafter 1989 ABA Guidelines]. Both the Ninth Circuit and the Supreme Court have recognized the ABA guidelines as a useful tool in defining the obligations of criminal defense attorneys in conducting an investigation. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Williams*, 529 U.S. at 396; *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008).

Mr. Bell alleged that trial counsel conducted only a limited investigation that, for no legitimate reason, failed to include interviews with identified persons who possessed compelling mitigating information and also failed to include the collection of reasonably available relevant social history records. (Amended Petition at 89–94.) "At the heart of effective representation is the duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); *see also Daniels v. Woodford*, 428 F.3d 1181, 1203 (9th Cir. 2005) (pretrial investigation and preparation are "keys to effective representation") (quoting *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983)). "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll*, 539 F.3d at 949. "This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal. 4th 584, 602 (1992). Counsel cannot, consistent with the Sixth Amendment, settle on a strategy before conducting "any investigation that might have led to a reasoned tactical choice." *Jennings*, 290 F.3d at 1016 (failure to investigate mental defenses before eschewing presentation of such defenses is not a strategic decision); *In re Gay*, 19 Cal. 4th 771, 807 (1998) (defendant "can ...

reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation") (quoting *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987)). In this case, trial counsel failed to fulfill their duty to adequately investigate Mr. Bell's background for relevant mitigating evidence. *See Wiggins*, 539 U.S. at 527 (reasonableness of an attorney's investigation dependent on "not only the quantum of evidence already known to counsel, but also whether known evidence would lead a reasonable attorney to investigate further").

Respondent next contends that if "there was more information about [Mr. Bell's] background that trial counsel could have investigated and/or obtained for trial, he should have mentioned it at that time." (Response at 80.) This assertion is disingenuous. Nowhere in this Court's jurisprudence is a requirement that the defendant review and appraise the investigation of his appointed counsel and inform counsel of undiscovered or overlooked potentially mitigating information to pursue. The case cited by respondent to support its contention does not counsel otherwise. (Response at 80, citing *In re Andrews*, 28 Cal. 4th 1234, 1254 (2002) (discussing the obligation to investigate over a client's objections).) A requirement that the defendant guide his counsel's mitigation investigation would turn the assistance of counsel on its head and contravene Sixth Amendment jurisprudence. *See Williams*, 529 U.S. at 396 (counsel has an "obligation to conduct a thorough investigation of the defendant's background"); *see also Pinholster v. Ayers*, 590 F.3d 651, 674 (9th Cir. 2009) (investigation required regardless of any help, or lack thereof, from the defendant), *cert. granted, Cullen v. Pinholster*, 130 S. Ct. 3410 (2010). Respondent's proposal attempts to shift the duty of adequate investigation and preparation of a case for trial from defense counsel to the client who, in a death penalty

trial, is always incarcerated, and who, like Mr. Bell, suffers from marked mental deficiencies, has little or no knowledge of the life history of his immediate or extended family members, and who has no understanding of the relevant law or experience investigating and presenting a case in mitigation. Mr. Bell was fully cooperative and enabled his counsel's investigation in every way he possibly could. (Ex. 130 at 2868.) He provided trial counsel with names and in some cases addresses of family members, teachers, employers, friends, doctors, counselors, and others who had relevant mitigating evidence. (Ex. 130 at 2868.) Despite this, counsel unreasonably failed wholly or adequately to interview these witnesses. (Ex. 130 at 2869.)

Respondent further notes that Mr. Bell's trial counsel's strategy was to educate the jury about Mr. Bell's positive contributions to society, and they presented multiple witnesses to that effect. (Response at 83.) Respondent asserts that therefore any further information from family history witnesses "would have made no difference." (Response at 83.) This assertion is incorrect. Reasonably available life history witnesses and documents obtained by habeas counsel would have been able to exhibit in great detail the origins and nature of Mr. Bell's compromised functioning, and would have provided credible evidence of familial psychopathology extant for generations on both sides of Mr. Bell's family, such as substance abuse, marital conflict, physical abuse, sexual abuse, criminality, psychological and behavioral disturbance, child neglect and maltreatment, poverty, and community isolation. (*See* Ex. 113 at 2540–2544; Ex. 131 at 2882–83.) This would have directly undercut the prosecution's argument to the jury that Mr. Bell's background as presented at trial was of no mitigating value and that his childhood was "not unlike a lot of childhoods where the child does not grow up to be a child murderer." (52 RT 4428.)

Respondent also attempts to excuse trial counsel's deficient performance by pinpointing instances where the defense attempted to show the jury "the difficulties [Mr.] Bell faced as a child." (Response at 81–83.) The defense's anemic presentation at trial, however, does not begin to describe the "excruciating life history" that Mr. Bell actually experienced. *See Wiggins*, 539 U.S. at 537. (*See also* Ex. 131 at 2886.) In *Stankewitz v. Woodford*, 365 F.3d 706, 717 (9th Cir. 2004), trial counsel presented some evidence of Stankewitz's life history, including evidence that he had been in several foster homes; that he suffered deprivation generally growing up on an Indian reservation; that he suffered severe beatings as a child; and that he moved from one state institution to the next. The appellate court found prejudice, however, because the evidence offered at trial was presented "in a cursory manner that was not particularly useful or compelling." *Id.* at 724 (internal citations and quotations omitted). The available but unpresented evidence included graphic and detailed descriptions of the petitioner's home life, physical and sexual abuse, drug abuse, mental illness, and his time in state institutions. *Id.* at 717–718. The court concluded that the jury "heard only general comments about the pervasive influence of drugs and alcohol on Indian reservations and a cursory sketch of Stankewitz's life history." *Id.* at 725.

Similarly, though some evidence of Mr. Bell's life history was presented, the defense case only scratched the surface of the true abuse and privation Mr. Bell experienced and did not provide the multigenerational psychosocial context for Mr. Bell's life history. The jury should have heard, among other compelling mitigation, the details of how Mr. Bell's parents and stepfather were ill-equipped to provide even the most basic of protective qualities for him; that he endured intense ongoing abuse throughout his childhood; that he tried to report this abuse but was

subjected to further beatings in reprisal; that he suffered from a debilitating stutter that his mother would not make the effort to bridge; and that he sustained numerous head injuries and suffered from impaired neurocognitive functioning. (*See, e.g.*, Ex. 113 at 2561–62; Ex. 88 at 1636–38; Ex. 89 at 1643–49; Ex. 122 at 2788–94; Ex. 123 at 2799–803; Ex. 131 at 2882–83.) Counsel should have presented to their experts and the jury evidence of the risk factors and lack of sufficient supports that stunted Mr. Bell's early development, resulted in the formation of a very negative self-image, impaired his ability to regulate his behavior and emotions, and ultimately debilitated his psychological, cognitive, and social functioning throughout his life and including at the time of his crime. (*See* Ex. 131 at 2886–87.)

Respondent contends that Mr. Bell's sister Lisa "gave extensive testimony about their mother's indifference, their natural father's drug abuse, and their stepfather's physical and sexual abuse." (Response at 83.) This "extensive testimony" cited by respondent, however, was largely comprised of general information about topics such as genealogy, geography, timelines, family composition, and layout of the Bell family apartment. (49 RT 4105–19.) Defense counsel did not solicit details concerning Mr. Bell's and Lisa's mother's own history of sexual abuse (and her opinion that "this stuff happens and people just don't talk about it"); their mother's neglect of her children while she drank and did drugs, sometimes leaving them in the care of family members who were high and/or executing drug deals; the vivid descriptions of the beatings that their stepfather, George Blanding, inflicted on Mr. Bell after he had forced him to strip naked; and the sexual abuse inflicted on Lisa by multiple members of her family, including George, who used to give her marijuana as early as age eleven in order to calm her down before he began having sex with her –

and he later told her that she had "wanted it [the abuse]." (Ex. 72 at 1457, 1459, 1467–70, 1477.) The jury never heard that Mr. Bell's mother would drop her children off at a friend's house for entire weekends without so much as a goodbye, explaining, "I don't do that mothering crap." (Ex. 122 at 2789.) The extensive information presented in this habeas corpus proceeding would have given the jury a much more detailed, complete and accurate picture of the horrific conditions that surrounded and shaped Mr. Bell during his childhood and early adulthood. The defense team, however, never emphasized the importance of this information to Lisa, who declared that she did not feel "completely clear on the purpose of their interviews of me and my testimony, and was not given the opportunity to fully describe in court all of our family's painful history or the horrible physical and sexual abuse Mr. Bell and I suffered during our lives." (Ex. 72 at 1478.)

Finally, respondent argues that the fact that this crime involved the stabbing of a child renders deficient representation, like that found in Mr. Bell's case, harmless. (Response at 84.) This contention does not comport with Supreme Court and other case law. *See, e.g.*, *Pinholster*, 590 F.3d at 684 (citing *Wiggins*, 539 U.S. at 537; *Williams*, 529 U.S. at 395); *Douglas v. Woodford*, 316 F.3d 1079, 1091 (9th Cir. 2003); *Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002). On the contrary, where allegedly "heinous" circumstances about the crime constitute the majority of the aggravating evidence, counsel's deficiencies are more likely to be prejudicial. *See Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006).

Trial counsel's penalty-phase presentation prejudiced Mr. Bell in that the jury "saw only glimmers of [Mr. Bell's] history, and received no evidence about its significance vis-a-vis mitigating circumstances." *See Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (alterations and quotation marks omitted); *Stankewitz*, 365 F.3d at 724 (counsel's failings

resulted in false impression that defendant lived in a suitable foster home); *Wallace*, 184 F.3d at 1115; *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000) (post-conviction expert's report presented "a very different picture" from what the jury "was allowed to consider"); *Bean v. Calderon*, 163 F.3d 1073, 1081 (9th Cir. 1998) (family portrait painted in habeas proceedings "far different from the unfocused snapshot" given to jury). As noted above, trial counsel's deficiencies enabled Mr. Bell's prosecutor to characterize the defense penalty-phase presentation – and Mr. Bell's life – as devoid of mitigation, particularly as it related to mental impairments. (*See, e.g.*, 52 RT 4423–24 ("he knew exactly what he was doing when he did it").) Counsel's errors thus "afforded the prosecutor a very effective argument." *Karis v. Calderon*, 283 F.3d 1117, 1139, 1140 (9th Cir. 2002) (allowing prosecutor to stress absence of mitigation); *Stankewitz*, 365 F.3d at 724 (a more detailed examination of defendant's life "would have foreclosed" the prosecutor's argument downplaying defendant's experiences and cognitive deficits).

Had the jury heard the details of Mr. Bell's psychosocial life history instead of the cursory glance that was presented by trial counsel, there can be little doubt of a "reasonable probability that at least one juror would have struck a different balance" and returned a sentence of life instead of death. *See Wiggins*, 539 U.S. at 537. Trial counsel had no reasonable or strategic reason for their failure to present the evidence set forth in the Amended Petition and this Reply. The available, undeveloped, and unpresented evidence would have evoked the sympathy of least one of Mr. Bell's jurors. *See, e.g.*, *Douglas*, 316 F.3d at 1091. (*See also* Ex. 110 at 2424 (juror "was left with the impression that ... [Mr. Bell] did not have a mental illness separate from the drugs"); Ex. 112 at 2431 (juror stated, "For me, the

evidence the defense put on to show that [Mr. Bell] was out of his mind was not convincing.").)

3. Mr. Bell's trial counsel failed to adequately prepare and utilize consulting experts, resulting in a prejudicially deficient presentation at the penalty phase.

Trial counsel's unreasonably deficient investigation of Mr. Bell's psychosocial history left them without substantial portions of the available mitigating evidence. Of the evidence they did possess, they provided only some to their expert witnesses. Moreover, the one psychological expert trial counsel called in the penalty phase was the one whom they had prepared the least, having first contacted him five days prior. As a result, the jury received a fractured, disjointed, and incomplete glimmer of Mr. Bell's extraordinary combination of mitigating risk factors, deficits, and dysfunctions.

a. Trial counsel unreasonably failed to call experts familiar with Mr. Bell's social history and neurological functioning.

Mr. Bell has established that trial counsel prejudicially failed to conduct an adequate investigation into Mr. Bell's multigenerational psychosocial history and then utilize and present the fruits of that investigation to the jury as mitigating evidence. Trial counsel's errors were further compounded by counsel's inadequate and unreasonable use (and misuse) of experts in preparation for and during the presentation of the defense case. In addition to failing to call experts who could have presented critical mitigating evidence to the jury, including evidence of organic brain damage, trial counsel did not effectively prepare or question the one psychological expert they did choose to call at the penalty phase, leaving the jury with an incomplete picture of Mr. Bell's

neuropsychological functioning and overall psychosocial history. (Ex. 119 at 2773; Ex. 120 at 2783–84; Ex. 131 at 2881–82.) This was ineffective assistance of counsel according to defense community standards at the time of trial. *See Caro v. Woodford*, 280 F.3d at 1254 ("counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health"); *Pinholster*, 590 F.3d at 671 (counsel "failed to provide [the expert] with materials that were necessary for him to make an informed determination"); *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) (counsel's failure to adequately prepare his expert and then present him as a trial witness was constitutionally deficient performance).

Respondent appears to contend that because trial counsel called Drs. Smith and Levak during the guilt phase, the need to present effective experts during the penalty phase was alleviated. (Response at 84.) This is untrue. Trial counsel bears a different burden in the penalty phase than they do in the guilt phase; even though the jury may be aware of certain facts from the guilt phase that could pertain to sentencing, trial counsel may not simply rest on those facts. *See Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010); *Caro v. Calderon*, 165 F.3d at 1227.

This is particularly true in Mr. Bell's case, because (as detailed *supra* in Claim Three) trial counsel unreasonably truncated the presentation of social history and psychological evidence at the guilt phase and failed to prepare their guilt-phase experts for any broader penalty-phase presentation. The defense's guilt-phase expert, Dr. Levak, interviewed Mr. Bell several times, read various social history documents, and administered the Minnesota Multiphasic Personality Inventory (MMPI) exam. (32 RT 2659.) Trial counsel failed, however, to explain the unique features of a capital case to Dr. Levak, leaving him with the impression that it was "not … too

much different" from working on a non-capital case. (Ex. 131 at 2878.) Counsel were aware that Dr. Levak had not previously worked on a capital case, yet they did not educate him as to the unique aspects of a capital penalty phase. Dr. Levak thus remained unaware that Mr. Bell's complete social history could be relevant at a penalty phase regardless of its connection to the charged offenses. Consequently, Dr. Levak was unable to aid in the preparation of the penalty phase of the case, and he was unable to use fully the social history he did know to inform his guilt-phase testimony. (Ex. 131 at 2878.)

Ultimately, Dr. Levak testified only in the guilt phase of the trial, focusing his testimony toward supporting his conclusions about Mr. Bell's MMPI exam, and how it related to Mr. Bell's mental state at the time of the crime. (Ex. 131 at 2879.) The usefulness of this testimony in the penalty phase is limited, both because Dr. Levak never testified in the penalty phase, and because the guilt phase testimony left out many additional relevant events in Mr. Bell's social history and psychosocial development. (*See* Amended Petition at 100–104; Claim Three, *supra*; Ex. 131 at 2879.)

Notwithstanding trial counsel's inadequate investigation overall, the jury never got the chance to hear even the additional mitigating evidence that Dr. Levak and trial counsel did have, because in the penalty phase he was replaced by Dr. Caldwell, who was provided fewer social history documents than Dr. Levak, who had never met Mr. Bell, and whose testimony was aimed only at bolstering Dr. Levak's MMPI conclusions from the guilt phase and did not introduce or explain the significance of additional and relevant mitigation evidence. (47 RT 3874, 3897; Ex. 130 at 2873; Ex. 131 at 2882.)

Trial counsel also unreasonably failed to call any experts with knowledge of or insight into Mr. Bell's organic brain damage and impaired

neuropsychological functioning. Trial counsel consulted with Dr. Lorraine Camenzuli, a clinical psychologist, to perform a neuropsychological assessment of Mr. Bell. (Ex. 88 at 1635.) Dr. Camenzuli concluded that Mr. Bell had suffered multiple significant head traumas that may have caused him to experience significant impairments in neurological functioning. (Ex. 88 at 1635, 1638–39.) Dr. Camenzuli found impairment in three specific areas of functioning including attention, spatial abilities, and visuospatial problem-solving, concluding that these deficits "could significantly impact cognitive executive functions such as goal-setting, planning, problem-solving, insight, and judgment." (Ex. 88 at 1638.)

The failure to introduce such evidence of cognitive and neuropsychological deficits and dysfunctions was unreasonable, not based on any sound strategy determination, and prejudicial to the jury's determination of Mr. Bell's sentence. *See Porter v. McCollum*, 130 S. Ct. 447, 451 (2009) (prejudice established upon finding that penalty-phase sentencer may have been influenced by post-conviction expert's neuropsychological conclusion that defendant suffered from brain damage that could manifest in impulsive, violent behavior, and despite state's insistence about problems with test administration and conclusions); *Williams*, 529 U.S. 370 (counsel was prejudicially ineffective for failing to investigate and present available mitigating evidence, including that defendant might have mental impairments organic in origin); *Summerlin v. Schriro*, 427 F.3d 623, 630–31 (9th Cir. 2005) (citing *Stankewitz*, 365 F.3d at 723 (as of the early 1980s counsel's "critically important" duty to investigate defendant's background includes duty to examine the defendant's "physical health history, particularly for evidence of potential organic brain damage and other disorders")); *Caro v. Woodford*, 280 F.3d at 1254–56 (counsel ineffective for failing to investigate effects of long term

exposure to neurotoxins); *Wallace*, 184 F.3d at 1115 (counsel ineffective for failing to investigate dysfunctional family background, drug history, and evidence of organic brain damage); *Douglas*, 316 F.3d at 1090 ("evidence of serious mental health problems, including organic brain damage, is 'precisely the type of evidence that we have found critical for a jury to consider when deciding whether to impose a death sentence'"); *Pinholster*, 590 F.3d at 677 ("The very existence of organic neurological problems may serve as mitigating evidence at sentencing by eliciting sympathy or, at the very least, some degree of understanding from the sentence"); *Silva*, 279 F.3d at 847 n.17 (finding penalty phase representation prejudicially deficient where counsel failed to present mitigating evidence relating to defendant's childhood, mental illnesses, organic brain disorders, and substance abuse, as supported by expert testimony in habeas proceedings that defendant "may suffer from organic brain disorders"); *Bean*, 163 F.3d at 1079–80.

Trial counsel also were ineffective for failing to present evidence they possessed (and evidence that was reasonably available) concerning Mr. Bell's dissociative episodes and tendencies beyond what was introduced at the guilt phase, and for failing to demonstrate how his pre-existing psychological trauma and substance use would increase the likelihood that he dissociated on the day of the crime. (*See* Ex. 123 at 2801; Ex. 131 at 2882–86; Amended Petition at 59, 63, 82, 94–95, 106–08, 146, 149, 153 158–63, 174–75, 180–82, 236–38, 245–47.) Regardless of counsel's strategic decisionmaking at the guilt phase of the trial, there is no reasonable explanation for the failure to present this information at the penalty phase. *See Stanley*, 598 F.3d at 626 (trial counsel ineffective for penalty-phase failure to show evidence of a dissociative disorder, which could have explained how the defendant could have been so intentional

about concealing his wrongdoing after the killing, yet not have been intentional about the killing itself; also such information would have supported a finding that defendant could not "conform his conduct to the requirements of the law.") This failure is particularly notable given the prosecution's assertion that "the evidence in this case indicated that he knew exactly what he was doing when he [killed]." (52 RT 4423).

b. Trial counsel supplied their experts with inadequate social history, neuropsychological, and mental health evidence.

Trial counsel's incomplete presentation to their expert witnesses left gaping holes in the penalty phase presentation. Trial counsel's unreasonably deficient investigation of Mr. Bell's psychosocial history led to a deficient expert presentation in the penalty phase of Mr. Bell's trial, and amounted to a denial of his Sixth Amendment right to counsel.

Even where counsel investigates mitigation and presents a relatively large number of witnesses, a death sentence still may be vacated if counsel does not adequately prepare mental health experts. For example in *Hovey v. Ayers*, defense counsel presented eighteen witnesses at the penalty phase, including a psychiatric expert who testified that the defendant's mental illness affected his actions in connection with the murder. *Hovey*, 458 F.3d at 924–25. Nonetheless, the court vacated the death sentence because defense counsel's "egregiously deficient performance in preparing [the expert] substantially weakened the doctor's testimony and enabled the prosecution to destroy his credibility on cross-examination." *Id.* at 931.

Counsel should have developed additional reasonably available information regarding Mr. Bell's and his family's substance abuse history and other multigenerational psychosocial history (*see, e.g.*, Amended Petition Claim Four) that would have informed Dr. Caldwell's expert

opinion (and that of Drs. Levak and Smith or any qualified social historian or psychological expert) and provided powerful mitigation evidence for the jury. *See* Cal. Evid. Code § 801 (West 2010) (materials relied upon by experts). Additional information would have "substantially affected [Dr. Levak's] testimony at Mr. Bell's trial" (Ex. 131 at 2877) and prevented critical flaws in Dr. Levak's testimony, such as his description of Mr. Bell's childhood as merely "difficult," his testimony that Mr. Bell's mother was "diligent" as a parent, and how the abuse Mr. Bell suffered as a child was in part his own fault. (Ex. 131 at 2886.) Trial counsel also unreasonably failed to provide the neuropsychological evidence that they possessed to other medical and psychological expert witnesses, including the experts they called at both the guilt phase and the penalty phase. This relevant and mitigating evidence would have further informed the opinions of the defense experts, bolstered their testimony, and precluded the presentation of inaccurate and unreliable information about, among other things, Mr. Bell's intellectual functioning. (*See* Ex. 89 at 1646–47; Ex. 131 at 2886–88.)

Respondent claims that trial counsel's strategy "to persuade the jury that Bell had much to offer society and whose life was therefore worth sparing" was a "comprehensive and coherent defense strategy which had a sound tactical basis." (Response at 81, 84.) This assertion is unpersuasive given trial counsel's failure to conduct a reasonable investigation necessary to make an informed decision about how best to present a compelling case in mitigation. As discussed above, "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll*, 539 F.3d at 949. Respondent further argues that because Mr. Bell's counsel presented a number of witnesses who "sung Bell's praises," additional information obtained by habeas counsel "would have made no difference" in Bell's sentencing. Trial counsel's deficient performance has been found

prejudicial, however, where the jury heard similar or even substantially more mitigating evidence than did Mr. Bell's jury. *See Hovey*, 458 F.3d at 924–25 (counsel presented eighteen witnesses, including a psychiatrist); *Mayfield v. Woodford*, 270 F.3d 915, 928 (9th Cir. 2001) (psychologist testified about family and childhood background, health history, psychiatric profile, work history, and substance abuse); *Caro v. Calderon*, 165 F.3d at 1227 (jury heard evidence of abuse, head injuries, toxin exposure, and other mitigation); *Boyde v. Brown*, 404 F.3d 1159, 1179 (9th Cir. 2005) (prejudice found despite extensive mitigation); *Douglas*, 316 F.3d at 1088–89 (some social history information presented and counsel performed some investigation, but the information obtained revealed the "need to dig deeper"). Furthermore, respondent misstates the mitigating nature of a history of abuse, brain damage, and other disabilities. Although defense counsel presented many witnesses to speak to Mr. Bell's character, there was little by way of comprehensive explanation of the myriad factors that affected Mr. Bell's psychosocial development and his emotional, mental, and neurocognitive functioning and behavior overall and at that time of his crimes. It is reasonably probable that the jury would have reached a different result in this case if they had heard the readily available and powerful mitigating evidence from Mr. Bell's psychosocial history set in its appropriate and compelling psychological context by qualified experts. *See Ainsworth*, 268 F.3d at 876 ("the introduction of expert testimony would also have been important" to explain the effects that "'serious physical and psychological abuse and neglect as a child'" had on the defendant).

4. Trial counsel failed to provide Mr. Bell's offer to plead guilty as mitigation evidence.

In late 1992, Mr. Bell offered to plead guilty. (Ex. 126; Ex. 130 at 2868; 7 RT 4; 9 RT 2–3.) He offered to admit to each of the charges and

allegations in the Information, including the special circumstance. (Ex. 126.) The District Attorney rejected this offer. (Ex. 126; Ex. 130 at 2868; 9 RT 2–3.) Trial counsel should have introduced Mr. Bell's offer to plead guilty as evidence of his acceptance of responsibility and of his remorse for the crime. Counsel's failure to do so constituted ineffective assistance of counsel, in that they deprived Mr. Bell of concrete evidence in mitigation that would have undermined the prosecutor's arguments of a lack of remorse and resulted in a sentence of life in prison.

Five years before Mr. Bell's trial, this Court expressly stated that California's death penalty law does not prevent "a defendant from offering in mitigation his expressed willingness to plead guilty – when that expressed willingness does in fact tend to show remorse." *People v. Williams*, 45 Cal. 3d 1268, 1332 n.9 (1988). While "acceptance of responsibility" and "remorse" are distinct concepts, this Court has repeatedly recognized that they are intimately related, and that they constitute mitigating evidence. *See People v. Alfaro*, 41 Cal. 4th 1277, 1306 (2007) (declining to differentiate between conditional and unconditional offers to plead guilty for the purpose of showing remorse); *People v. Rowland*, 4 Cal. 4th 238, 255 (1992); *People v. Wharton*, 53 Cal. 3d 522, 592–93 (1991) ("by eliciting evidence that defendant had accepted responsibility ... defendant presented evidence from which the jury could infer that his moral culpability for that crime was somewhat reduced"); *People v. Williams*, 45 Cal. 3d at 1333 n.9; *People v. Ghent*, 43 Cal. 3d 739, 771 (1987) ("the presence or absence of remorse is a factor relevant to the jury's penalty decision"); *see also People v. Bustamante*, 7 Cal. App. 4th 722, 724 (1992); *In re Arafiles*, 6 Cal. App. 4th 1467, 1476 (1992); *United States v. Fell*, 372 F. Supp. 2d 773, 784 (D. Vt. 2005) (plea offer for life without the possibility of parole "is relevant to the mitigating factor of

acceptance of responsibility"). Indeed, this Court has expressly recognized that a showing of acceptance of responsibility is evidence of remorse. *See Broadman v. Comm'n on Judicial Performance*, 18 Cal. 4th 1079, 1111 (1998); *see also Hipolito v. State Bar of Calif.*, 48 Cal. 3d 621, 627 (1989); *People v. Wrest*, 3 Cal. 4th 1088, 1115 (1992) (recognizing that a guilty plea might serve as a demonstration of appellant's honesty and candor that would elicit jury sympathy); *People v. Fairbank*, 16 Cal. 4th 1223, 1243–44 (1997) (by pleading guilty, defendant could try to cast himself in a sympathetic light to the jury).

Trial counsel never considered attempting to introduce to the jury Mr. Bell's desire to plead guilty and the mitigation nature of this information. (Ex. 130 at 2868.) Counsel's failure occurred even though the prosecutor made Mr. Bell's lack of remorse a critical component of his penalty phase, in part saying: "the evidence indicates no remorse, not through his actions, not through his witnesses, not through his contact with the police and statements to the police. Nowhere can you find remorse." (52 RT 4425.) Prosecution witnesses Detective Doucette (28 RT 2124) and Detective Almos (28 RT 2095–2104) also offered testimony at the guilt phase that Mr. Bell showed no remorse.

Trial counsel's omission constitutes ineffective assistance of counsel. There is no sound tactical reason for declining to introduce at the penalty trial concrete evidence of the universally recognized mitigating circumstance of remorse in the form of Mr. Bell's willingness to plead guilty to the charges. He had already been convicted; thus, an admission of culpability could not have hurt his case. Moreover, he had not testified in the guilt phase, and thus, would not have been seen as manipulative for offering to plead guilty, then testifying in his own defense.

Because trial counsel failed to introduce evidence of Mr. Bell's offer to plead guilty, evidence that would have rebutted the prosecution's arguments and significantly bolstered his penalty phase defense, Mr. Bell's constitutional right to the effective assistance of counsel was violated and his death penalty must be reversed.

5. Conclusion

Even after hearing an incomplete and truncated account of Mr. Bell's life history in the face of the prosecution's aggravation, the jury reached its death verdict only after more than seventeen hours of deliberations over four days. (8 CT 1865.) Mr. Bell's allegations, supported by expert opinions, establish a prima facie case of trial counsel's deficient performance as related to the penalty phase of Mr. Bell's trial. Mr. Bell also has established that he was prejudiced by showing there was a reasonable probability that, but for counsel's unprofessional errors, the result of his sentencing would have been different. *See Strickland*, 466 U.S. at 694; *Marquez*, 1 Cal. 4th at 603. Particularly when considered cumulatively with all of the errors in this case, Mr. Bell is entitled to the issuance of an order to show cause, an evidentiary hearing, and ultimately relief from his unconstitutional sentence of death. *See Alcala v. Woodford*, 334 F.3d 862, 882–83, 893–94 (9th Cir. 2003); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (balkanized, issue-by-issue harmless error review less preferable than analyzing the overall effect of all errors); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *People v. Duvall*, 9 Cal. 4th 464, 474–75 (1995).

E. CLAIM FIVE: THE PROSECUTION'S PERVASIVE MISCONDUCT DENIED MR. BELL A FAIR TRIAL.

In his Amended Petition, Mr. Bell presented a prima facie case for relief based on detailed allegations of misconduct by state officials throughout the investigation and prosecution of the case. (Amended Petition at 183–89.)

Respondent argues that Mr. Bell's claim is procedurally barred, that part of it is not cognizable in habeas corpus proceedings, and that Mr. Bell has not stated a prima facie case for relief. (Response at 85.) Respondent is incorrect in each regard.

1. Mr. Bell's claim is not procedurally barred.

Respondent asserts that Mr. Bell's claim is procedurally barred because he could have raised it on direct appeal but did not. (Response at 85, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953).) This is not so. A full discussion addressing respondent's allegations of procedural bars is set forth in Section II.B, *supra.* Here, the *Dixon* bar is inapplicable to this claim because the claim relies substantially on facts outside the appellate record, involves issues of trial counsel's ineffectiveness, and addresses fundamental constitutional failure that can never be procedurally barred. *See, e.g., In re Robbins*, 18 Cal. 4th at 814; *People v. Tatlis*, 230 Cal. App. 3d 1266 (1991). The Amended Petition details elements of the prosecution's misconduct that were neither developed nor presented to the jury at trial in part due to trial counsel's unreasonable and prejudicial failures. (*See* Amended Petition at 183–89.) To the extent such issues could and should have been fully presented in the direct appeal, the failure to do so constitutes prejudicial ineffective assistance of appellate counsel. *See* Claim Eight.

Respondent also asserts that selected aspects of Mr. Bell's claim are barred for failure to raise them in the court below. (Response at 88, 90.) Again, this issue is addressed fully in Section II.B, *supra*. Regarding this claim, respondent in one instance cites to *People v. Davis*, 46 Cal. 4th 539, 613 (2009), which in turn cites *People v. Montiel*, 5 Cal. 4th 877, 914 (1993). (Response at 88.) Both cases are direct appeals, not habeas proceedings, and so have no application to the instant case. It is possible respondent intended to rely on *In re Seaton*, 34 Cal. 4th 193, 200–01 (2004), which respondent later cites with regard to the same issue (Response at 90). As discussed fully in Section II.B, *supra*, Mr. Bell's case pre-dated the newly established rule in *Seaton* by over a decade. In California, the no contemporaneous-objection "rule" has been clearly articulated and remains subject to discretionary application. For all these reasons, Mr. Bell's claim is not barred.

2. The prosecution lost and destroyed material favorable evidence.

Mr. Bell has presented prima facie evidence that the prosecution lost and destroyed material favorable evidence. (Amended Petition at 184–85.) Respondent misstates the governing legal standard, and claims that Mr. Bell has not stated a prima facie case. (Response at 86.) The facts are to the contrary.

The Fifth and Fourteenth Amendments to the U.S. Constitution safeguard a defendant's "constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). This protection "delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *California v. Trombetta*, 467 U.S. 479, 484 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)

(denying a defendant the right to present relevant evidence presents "serious problems under the due process clause"). The Due Process Clause of the Fourteenth Amendment thus imposes a duty on law enforcement to preserve evidence "that might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488; *see also Arizona v. Youngblood*, 488 U.S. 51, 57 (1988); *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989) (holding that defendants may claim a due-process violation if the police fail to collect potentially exculpatory evidence in bad faith).

For the failure to preserve potentially useful evidence to constitute a denial of due process, a criminal defendant must first prove that the evidence was material. *See Trombetta*, 467 U.S. at 488–89; *People v. Beeler*, 9 Cal. 4th 953, 976 (1995). In determining whether evidence is material, courts will consider whether the evidence (1) possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) is such that the defendant would be unable to obtain comparable evidence by other reasonable means. *Id.* Constitutional materiality requires more than "[t]he possibility that the [destroyed evidence] could have exculpated [the defendant]." *Youngblood*, 488 U.S. at 56 n.*. In considering the materiality question, the *Youngblood* court considered both the probability of exculpation in light of other evidence presented at trial, and whether "'alternative means of demonstrating [his] innocence'" were available to the defendant. *Id.* at 56 (citing *Trombetta*, 467 U.S. at 490).

Under *Trombetta* and *Youngblood*, evidence falls into two categories: evidence that had apparent exculpatory value and evidence that had to undergo tests in order to discover its exculpatory value. The first category requires only a showing that the evidence was destroyed in order to find a due-process violation; no bad faith finding is required. *See Youngblood*, 488 U.S. at 57.

For the second *Youngblood* category, where the state failed to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," a criminal defendant must show bad faith on the part of the police. *Youngblood*, 488 U.S. at 58–59; *Holdren v. Legursky*, 16 F.3d 57, 60 (4th Cir. 1994). "The presence or absence of bad faith by the police ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S at 56 n.*. The court will therefore look to the police officers' assessment of the evidence when they found it and when they destroyed it. They will also note whether the failure to preserve evidence is in conformance with normal office policy. *See Killian v. United States*, 368 U.S. 231, 308 (1961); *Trombetta*, 467 U.S. at 488. Bad faith is proven where the government actors knew of the potentially exculpatory value of the evidence when they destroyed it. *See United States v. Vera*, 231 F. Supp. 2d 997, 1000 (D. Or. 2001).

Here, law enforcement and the prosecution destroyed the chemical evidence establishing the extraordinary level of Mr. Bell's cocaine intoxication at the time of the charged offense. This evidence, in the form of cocaine and cocaine metabolite (benzoylecgonine), was present in Mr. Bell's blood and urine samples that the police obtained upon his arrest. The blood and urine samples were not analyzed for five-and-a-half months, during which time they degraded. The prosecution's own toxicologist published a paper shortly before trial finding that the level of degradation of cocaine in a blood sample would be 96% after six months if the sample were properly preserved under laboratory conditions. Here, Mr. Bell has produced detailed evidence indicating that the samples were not properly preserved throughout their lengthy period of storage. Thus, the level of

degradation was even greater. (Amended Petition at 64–70, 183–85; Ex. 109.)

This evidence was unquestionably material, as the prosecution team well knew. As this Court has acknowledged, the defense at the guilt phase was focused on establishing that there was no connection between the thefts and the killing. This was to be done through expert testimony regarding Mr. Bell's mental health and his drug use, which would establish that the killing was the result of a psychotic break and was unrelated to taking anything from the residence. *See People v. Bell*, 40 Cal. 4th 582, 588 (2007). Thus, a cornerstone of the defense was that Mr. Bell's level of cocaine intoxication was extraordinarily high. Indeed, in rebuttal the prosecution had not one but two experts opine regarding the defense's toxicology evidence. *Id.* at 590.

Respondent asserts that there is no evidence of bad faith, and points to the fact that the private laboratory that analyzed the samples did so as soon as law enforcement requested it. (Response at 86.) Respondent's argument ignores both the law and the facts. As discussed above, bad faith can be determined by law enforcement's knowledge and assessment of the evidence. *Youngblood*, 488 U.S at 56 n.*. Here, prior to obtaining the blood and urine samples from Mr. Bell, police were aware of his extraordinary level of cocaine intoxication – the police were aware that Mr. Bell had "a serious drug problem," and Mr. Bell provided three separate officers the details regarding his cocaine usage. (Amended Petition at 46–48, 64–66.) They obtained the blood and urine samples immediately after his arrest. (*Id.*)

Law enforcement's bad faith can therefore be discerned from their failure to properly preserve the samples. Respondent claims there is no evidence of failure to properly preserve the samples. (Response at 86.) To

the contrary, as detailed in the Amended Petition, the evidence indicates that the samples were stored at the police station, not the crime laboratory, and at some point were stored in the narcotics vault, which is not typically a refrigerated storage area. (Amended Petition at 69–70; Ex. 109.) This failure to properly store the samples exacerbated the degradation caused by the extraordinary five-and-a-half month delay in analyzing them. (*Id.; see also* Ex. 114.)

Additionally, Mr. Bell has stated a prima facie case with regard to the destruction of trial exhibits. (Amended Petition at 185.) This is addressed in Claim Seven, and incorporated herein.

Thus, there is no question that Mr. Bell has presented a prima facie case that law enforcement and the prosecution destroyed material evidence. To the extent that evidence of bad faith is required, it is amply demonstrated by the unrebutted evidence laid out in the Amended Petition.

3. The prosecution presented false, misleading, and unreliable evidence.

Mr. Bell has presented prima facie evidence that law enforcement and the prosecution presented false, misleading, and unreliable evidence, prejudicing the outcome of Mr. Bell's trial. (Amended Petition at 185–87.) Respondent argues that Mr. Bell's claim is procedurally barred and that it fails to state a prima facie case. (Response at 88.) These arguments are unavailing.

"One of the bedrock principles of our democracy, 'implicit in any concept of ordered liberty,' is that the State may not use false evidence to obtain a criminal conviction." *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Such conduct by the state is "inconsistent with the rudimentary demands of justice" and violates the Due Process Clause. *See Mooney v. Holohan*, 294 U.S. 103,

112 (1935); *see also Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Napue*, 360 U.S. at 269 ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."). The state also "violates a criminal defendant's right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears." *Hayes*, 399 F.3d at 978 (citing *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Pyle*, 317 U.S. at 216.)

This Court has clearly articulated that, "[u]nder well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." *People v. Seaton*, 26 Cal. 4th 598, 647 (2001); *see also Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue*, 360 U.S. at 269; *People v. Marshall*, 13 Cal. 4th 799, 829–30 (1996).

Contrary to respondent's assertion (Response at 89), the prosecution's duty to avoid and to correct false testimony is not limited to situations where the prosecution directly and affirmatively knows the testimony is false. It includes testimony that the prosecution should know is false or misleading because its false or misleading character "would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution, and applies even if the false or misleading testimony goes only to witness credibility." *People v. Morrison*, 34 Cal. 4th 698, 716–17 (2004) (citations omitted); *In re Jackson*, 3 Cal. 4th 578, 595 (1992); *People v. Kasim*, 56 Cal. App. 4th 1360, 1386 (1997).

"Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic.'" *Hayes*,

399 F.3d at 978 (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). "If a prosecutor knowingly uses perjured testimony or knowingly fails to disclose that testimony is false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict." *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999) (quoting *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998)); *see also Hayes*, 399 F.3d at 984–85.

Under California Penal Code section 1473, subdivision (b)(1), a writ of habeas corpus may be granted if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration ...." *See also In re Roberts*, 29 Cal. 4th 726, 741–42 (2003). False evidence is substantially material or probative if there is a "reasonable probability" that, had it not been introduced, the result would have been different. *In re Sassounian*, 9 Cal. 4th 535, 544 (1995). The requisite "reasonable probability" is a chance great enough, under the totality of the circumstances, to undermine confidence in the outcome. *Id.* Under section 1473, a petitioner is not required to show that the prosecution knew or should have known that the testimony was false, or that the false testimony was perjurious. Cal. Penal Code § 1473(c) (West 2010); *People v. Marshall*, 13 Cal. 4th 799, 830 (1996) ("Under the current rule, a showing that the false testimony was perjurious, or that the prosecution knew of its falsity, is no longer necessary."). This statute is consistent with federal constitutional principles. *See Hall v. Director of Corrections*, 343 F.3d 976, 981–85 (9th Cir. 2003); *United States v. Young*, 17 F.3d 1201, 1203–04 (9th Cir. 1994). Therefore, upon a showing that material false evidence was introduced, Mr. Bell is entitled to relief.

As a matter of law, the prosecutor's misconduct in presenting and relying on materially false and misleading evidence is not excused either by the defense's access to accurate information or defense counsel's ineffectiveness in failing to present it:

> Whether defense counsel is aware of the falsity of the statement is beside the point. The state overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." Therefore, regardless of whether defense counsel should have known that a state witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' requires [him] to act when put on notice of the real possibility of false testimony."

Belmontes v. Brown, 414 F.3d 1094, 1115 (9th Cir. 2005) (citations omitted), *reversed on other grounds in Ayers v. Belmontes*, 549 U.S. 7 (2006).[6]

The need for heightened reliability in capital proceedings, as protected by the Due Process Clause requirement of fundamental fairness and the Eighth Amendment guarantee against cruel and unusual punishment, also mandates reversal of a conviction and death sentence obtained on the basis of false and unreliable evidence. *See Johnson v. Mississippi*, 486 U.S. 578 (1988) (Eighth Amendment requires reversal of death sentence based in part upon felony conviction subsequently set aside); *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Simmons v. South Carolina*, 512

---

[6] If this Court concludes that any or all of the instances of false evidence raised by Mr. Bell are not cognizable because defense counsel could have challenged the prosecution's false/misleading evidence and argument at trial, Mr. Bell alternatively has demonstrated by his allegations in this claim and Claims Three and Four that his trial counsel rendered prejudicially ineffective assistance of counsel.

U.S. 154 (1994) (Due Process Clause requires that a defendant be permitted to inform the jury of parole ineligibility to correct the misimpression created by the state's argument that he will present danger to community if not sentenced to death); *Gardner v. Florida*, 430 U.S. 349 (1977) (Due Process Clause violated where death sentence based in part upon false information contained in probation report that defendant had no opportunity to rebut); *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993) (defendant has due process right not to be sentenced on basis of materially incorrect information).

As noted above, the duty to avoid presentation of false testimony also requires the prosecution to investigate suspected perjury by its witnesses. *See, e.g.*, *Commonwealth v. Bowie*, 243 F.3d 1109 (9th Cir. 2001); *Morris v. Ylst*, 447 F.3d 735 (9th Cir. 2006). The prosecution cannot adhere "to an approach unlikely to uncover the [false or misleading] information." *Kasim*, 56 Cal. App. 4th at 1386. "A prosecutor cannot adopt a practice of see-no-evil and hear-no-evil ... The prosecution has an affirmative duty and cannot–by looking the other way–shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury." *Id.*

The prosecutor's failure to disclose information "that would give the lie to perjurious testimony" is the functional equivalent of knowing use of perjurious testimony. *Mastracchio v. Vose*, 274 F.3d 590, 601 (1st Cir. 2002). Thus, the prosecution must also disclose information tending to support that its witnesses' information is false or misleading. *See id.*; *see also Bowie*, 243 F.3d at 1117. This includes evidence regarding the coaching or rehearsal of witnesses. *See In re Soderstan*, 146 Cal. App. 4th 1163, 1211–12, 1229–32 (2007).

Respondent argues that the prosecution did not introduce false or misleading testimony regarding Mr. Bell's emotional reactions during

interrogation by police. (Response at 89.) Mr. Bell broke down and cried while being interviewed by the police department's polygraph examiner, Paul Redden. (Amended Petition at 186.) Thus, the prosecution well knew that Mr. Bell demonstrated remorse. However, at trial the prosecution deliberately elicited testimony to the contrary from Detectives Doucette and Almos, and argued to the jury that Mr. Bell never demonstrated remorse. (Amended Petition at 186.) Respondent argues that the testimony that the prosecutor elicited from Detectives Almos and Doucette was not technically false, because the questions were worded carefully so as to address remorse that occurred in their presence rather than the remorse that was readily apparent in an interview by other police personnel that occurred immediately thereafter. (Response at 89.) Even if true, this argument would be unavailing, since it would underscore the semantic lengths the prosecution went to in order to mislead the jury. To the contrary, however, the prosecution used that testimony to falsely tell the jury that there was no remorse at all. (*See, e.g.*, 52 RT 4420, 4425.) The facts are simple and not in dispute: Mr. Bell broke down and cried when discussing the killing, but he did not do so when discussing other events. Yet the prosecution went to great lengths to mislead the jury into believing otherwise.

Respondent argues that any false and/or misleading evidence regarding purported lack of remorse was not material. (Response at 89.) To the contrary, this Court has already held that the evidence was "probative on the central factual issue of the case" in the guilt phase. *People v. Bell*, 40 Cal. 4th 582, 607 (2007). And in the penalty phase, lack of remorse was one of the prosecution's key aggravating factors. (*See, e.g.*, 52 RT 4420.) The problem for the prosecution was that the known facts undermined their theory. Instead of honestly admitting to the jury that Mr. Bell broke down and cried while discussing the killing with police, the

prosecution engaged in a charade that harped on Mr. Bell's purported lack of remorse.

Similarly, respondent argues that Mr. Bell lacks factual support for his claim that the prosecution presented false, misleading, and unreliable testimony and evidence regarding the toxicological analyses of Mr. Bell's blood and urine samples. (Response at 90.) Respondent asserts that Mr. Bell's claim is based on a difference of opinion by experts. (*Id.*) This is not so. To the contrary, Mr. Bell's claim is supported by undisputed evidence.

Respondent fails to apprehend the relevant evidence and testimony. It is undisputed that Mr. Bell's blood and urine samples were not analyzed for five and a half months. It is undisputed that, even if the samples were properly preserved, cocaine in the blood sample would substantially degrade (by as much as 96%) during that time. It is undisputed that the prosecution's expert was aware that even properly-preserved samples degrade (he said so at trial and three months earlier had published a paper on the exact subject), but that the opinions he gave at trial did not account for degradation of Mr. Bell's samples because in formulating them he was not made aware of the extraordinary delay that occurred in this case. Moreover, it appears that Mr. Bell's biological samples were not, in fact, properly preserved. (Amended Petition at 64–70, 184–87; Ex. 109.)

All of those facts are derived from discovery documents and sworn trial testimony. None of those facts are based on the opinion of the expert retained by Mr. Bell's habeas counsel, Judith Stewart. Respondent has failed to offer conflicting evidence, because there is none. Mr. Bell's prima facie claim of prejudicial misconduct remains unrebutted.

4. The prosecution engaged in false, inflammatory, misleading, and improper argument to the jury.

As explained in Claim Three, section 11, *supra*, the robbery special circumstance allegation required the prosecution to prove additional facts beyond those required for robbery and for robbery felony murder. The special circumstance required proof of the additional fact that the killing occurred to carry out or advance the commission of the robbery – that the robbery was not merely incidental to the killing. Under the facts of Mr. Bell's case, this is what the law required and what the jury instructions were intended to convey.

However, the prosecution deliberately misled the jury into believing that the requirements for robbery felony-murder and the robbery special circumstance were identical. Multiple times, he directly told the jury that if they found robbery felony-murder, they had to find the robbery special circumstance as well. He bolstered this erroneous claim by repeatedly taking the language from the jury instructions that described the additional proof required for the special circumstance and equating it with felony-murder.

The misconduct was knowing and deliberate. During the jury instruction conference, the trial judge directly admonished the prosecutor that the prosecution had to prove the additional components of the special circumstance, noting that they were "a critical element" and "at the heart of the whole case." (38 RT 3167–68.) This Court has observed that they were "[t]he central factual issue litigated in the guilt phase...." *People v. Bell*, 40 Cal. 4th 582, 606 (2007). Moreover, the establishment of these facts was a constitutional imperative, because the special circumstance must serve the requisite function of narrowing the class of crimes eligible for the death penalty.

Mr. Bell has presented a prima facie case regarding this claim. (Amended Petition at 187–88.) Respondent argues that Mr. Bell's claim is procedurally barred (Response at 90), an assertion that is repudiated in Section 1 of this claim above as well as in Section II.B, *supra*. Respondent further argues that Mr. Bell fails to state a prima facie case for relief. (Response at 91.) To the contrary, Mr. Bell has plead and adduced evidence regarding every element of the claim.

a. The legal standard.

A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use legitimate means to bring a just one." *Viereck v. United States*, 318 U.S. 236, 248 (1942). Thus, prosecutors have an obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." *Berger v. United States*, 295 U.S. 78, 88 (1935).

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." *People v. Tafoya*, 42 Cal. 4th 147, 176 (2007) (quotations and citations omitted); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair [nonetheless] is prosecutorial misconduct under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." *Tafoya*, 42 Cal. 4th at 176 (quotations and citation omitted). "While counsel is accorded great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence, counsel may not

assume or state facts not in evidence or mischaracterize the evidence." *Id.* at 181 (quotations and citation omitted).

b. Robbery felony-murder and the robbery special circumstance do not have identical requirements.

The prosecutor deliberately and repeatedly misled the jury by falsely telling them that robbery felony-murder and the robbery special circumstance were identical. Respondent concedes, as he must, that the prosecution made the arguments in question. (Response at 92.) Respondent asserts, however, that the prosecutor's argument was not false or misleading, but that it is a correct statement of the law. (Response at 92.) Under the facts of Mr. Bell's case, it most certainly is not. This is readily demonstrated by a long history of case law, including the exact cases to which respondent cites, *People v. Lewis*, 43 Cal. 4th 415, 464 (2008) and *People v. Davis*, 36 Cal. 4th 510, 564–65 (2005).

The prosecution proceeded on a theory of first-degree murder by means of felony-murder during the commission of a robbery, under Penal Code section 189. (*See* 39 RT 3286, "First degree felony murder, that's what we're talking about here.") The prosecution further alleged the special circumstance of murder while engaged in the commission of a robbery, pursuant to Penal Code section 190.2(a)(17)(A). *See People v. Bell*, 40 Cal. 4th 582, 593 (2007).

The robbery felony-murder statute and the robbery special circumstance statute contain similar language. The felony-murder statute encompasses murder "committed *in the perpetration of*" robbery, Cal. Penal Code § 189 (West 2010), and the special circumstance applies to murder "committed *while engaged in*" robbery. Cal. Penal Code § 190.2(a)(17)(A) (West 2010) (emphases added). Read on their own in isolation from case law, the difference between the two provisions may not be readily apparent.

Their scopes are indeed different, however. They share some features, such as a killing, a robbery (or attempted robbery), and a nexus between the two. But each can apply in circumstances where the other does not.

Generally speaking, robbery special circumstance is narrower than robbery felony-murder. However, there is at least (and perhaps only) one circumstance in which the robbery special circumstance is broader, where it can apply but robbery felony-murder cannot. This is where the killing is held to be first-degree murder under the provocative act doctrine – wherein the death is effected by a third party (not the defendant or a co-perpetrator) in response to a "provocative act" above and beyond the felony itself. *People v. Kainzrants*, 45 Cal. App. 4th 1068 (1996). The court in *Kainzrants* noted that this Court had long before established that felony-murder does not include a killing committed by a person other than a perpetrator of the underlying felony. *Kainzrants*, 45 Cal. App. 4th at 1080, citing *People v. Washington*, 62 Cal. 2d 777 (1965). This Court's decision in *Washington* was based on the fact that the felony-murder statute requires that the murder be committed "in the *perpetration* of" the felony, which was construed as a requirement that the murder be committed in order "to perpetrate the felony," and therefore that it must be committed by a perpetrator of the felony. *Washington*, 62 Cal. 2d at 780–81; Cal. Penal Code § 189 (West 2010). In *Kainzrants*, the death was caused by a victim of the robbery; although the defendant could not be charged with felony-murder, he was convicted of the robbery, first-degree murder under the provocative-act doctrine, and the robbery special circumstance. The defendant argued that this was error because the special circumstance required a conviction of robbery felony-murder specifically, not other first-degree murder. The court disagreed because the special circumstance requires that the murder be committed "while *engaged* in" robbery, which it

found did not contain the "perpetrator" limitation of felony-murder. *Kainzrants*, 45 Cal. App. 4th at 1080–81.

In other circumstances, felony-murder does apply but the murder-while-engaged-in-a-felony special circumstance does not. At least where the facts of the case raise the issue, the robbery special circumstance requires proof that the killing occurred for the purpose of carrying out or advancing the commission of the robbery (or to facilitate escape therefrom) – that the robbery was not merely incidental to the killing. *People v. Green*, 27 Cal. 3d 1, 61–62 (1980), (concluding that, "when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder" "such a crime is not a murder committed 'during the commission of a robbery' within the meaning of the statute."); *see also Lewis*, 43 Cal. 4th at 464–65 (robbery special circumstance requires that the killing be committed "in order to advance the independent felonious purpose" of robbery).

This "independent felonious purpose" requirement of the special circumstance was reflected in the pattern jury instruction used in Mr. Bell's trial. The jury was instructed that the robbery special circumstance required the prosecution to prove, "one, that the murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; and two, the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection." (39 RT 3247–48; CALJIC 8.81.17 (5th ed. 1992 rev.).) The instruction continued, "In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." (39 RT 3248; 6 CT 1227; CALJIC 8.81.17 (5th ed. 1992 rev).)

In contrast, robbery felony-murder does not require any independent mens rea for the killing. As this Court observed a decade prior to Mr.

Bell's trial, felony-murder "includes not only [premeditated murder], but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." *People v. Dillon*, 34 Cal. 3d 441, 477 (1983). Consequently, Mr. Bell's jury was not instructed that felony-murder required that the killing have occurred to carry out or advance the purpose of the robbery; pursuant to the pattern instruction, they were instructed only that, "the unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime." (39 RT 3242; 6 CT 1214; CALJIC 8.21 (5th ed. 1988).)

As discussed *supra* in section 11 of Claim Three, the "independent felonious purpose" requirement of the special circumstance should not be confused with the doctrine of after-acquired intent, which is relevant to both robbery as well as felony-murder. Nor should it be confused with the requirement (discussed in the same section of Claim Three, *supra*) that there be a union of act and intent, as relevant in Mr. Bell's case to the robbery allegation.

c. The additional facts required to prove the robbery special circumstance were critical issues under the facts of Mr. Bell's case.

As discussed *supra* in section 11 of Claim Three, the purpose of the killing, if any, was the central issue in the guilt phase of the case; *see also Bell*, 40 Cal. 4th at 606 ("The central factual issue litigated in the guilt phase trial was whether, as the prosecutor alleged, defendant killed the

victim to facilitate his thefts or, as the defense maintained, the thefts and killing were separate in their origins and purposes....") As discussed, above, even if robbery and robbery felony-murder were established, the special circumstance only applied if the prosecution proved additionally that the killing occurred in order to carry out or advance the commission of the robbery. As such, the "independent purpose" requirement was among the most significant legal provisions in the guilt phase of Mr. Bell's trial, because it made him eligible for the death penalty.

As noted in Claim Three, *supra*, the prosecutor was equally aware of the importance of the "independent felonious purpose" requirement under the facts of Mr. Bell's case because it was directly discussed in the jury instruction conference. The prosecutor argued that the special circumstance did not require the prosecution to prove that the killing occurred to carry out or advance the purpose the robbery. (38 RT 3166–70.) But the trial judge admonished him to the contrary, noting, "That's what's at the heart of the case ... [Y]ou're denying what the law requires, which is that the killing be done for a robbery motive, to further the commission of that robbery." (38 RT 3168.) The judge invited the prosecutor to provide any authority supporting his contrary position (38 RT 3170), but he never produced any. In concluding the discussion, the judge reiterated that the special circumstance's "purpose" requirement "is a critical element in whole case. The case turns on this instruction, so it is not one to be lightly bypassed." (38 RT 3170.)

d. The prosecution deliberately misled the jury into believing that finding robbery felony-murder necessarily required finding the robbery special circumstance to be true.

Despite the judge's admonition, the prosecutor bypassed the special circumstance's additional requirements, and boldly so. He deliberately and repeatedly misled the jury by telling them that robbery felony-murder and the robbery special circumstance were identical. He did so from the outset of the case. In his guilt-phase opening statement, he told the jury, "[I]f you believe at the conclusion of the case that the evidence has proven an intentional, an unintentional, or even an accidental killing during the commission of a robbery, you are finding first degree murder, and you are finding first degree murder with a special circumstance." (27 RT 1832.)

He repeated this false and misleading line of argument during his guilt-phase closing arguments. During his initial argument, the prosecutor at first correctly explained to the jury the concept of robbery felony-murder, noting that it was a killing that occurred during the commission of a robbery, regardless of whether the killing was intentional or accidental. (39 RT 3286.)

Turning next to discuss the special circumstance, the prosecutor stated, "The special circumstance in this case is the murder during the commission of a robbery." (39 RT 3287.) The phrase he used – "during the commission" of a robbery – was from the felony-murder instruction, not the special circumstance instruction. (39 RT 3242, 3248.) The special circumstance instruction uses the phrase "engaged in the commission" of a robbery instead. (39 RT 3248.) The difference was not merely technical, because the prosecutor's purpose to equate the two provisions was clear in that he proceeded to tell the jury, "Once you find the felony murder, you find the special circumstance to be true. That instruction [the special

circumstance] tells you the special circumstance is murder committed in the commission of a robbery." (39 RT 3287.) The prosecutor could not have been more direct in again telling the jury that finding felony murder required finding the special circumstance to be true. Also, here he again equated the special circumstance with felony murder by linking them with the "in the commission" phrase taken from the felony-murder instruction.

Respondent argues that Mr. Bell has taken the prosecutor's words out of context, because after making these statements, the prosecutor quoted a portion of the special-circumstance instruction regarding the necessity to find that the murder was committed to carry out the robbery. (Response at 92, citing 39 RT 3287.)

The prosecutor concluded his initial closing argument in the same vein, equating the special circumstance with felony murder. He stated, "[T]his was an unlawful killing during the commission of a robbery. First degree felony murder. First degree felony murder with a special circumstance of it occurring during that robbery." (39 RT 3297.)

In his rebuttal argument, this misconduct continued. Again and again the prosecutor incorrectly equated felony murder and the special circumstance, and argued that the term "incidental" in the special circumstance was the same as felony murder's prohibition against after-acquired intent. (40 RT 3353–54, 3359–60.) He stated, "We don't want to get caught up in this concept of felony murder. That means first degree murder. That means a special circumstance." (40 RT 3354.) Immediately thereafter, the prosecutor addressed the defense's argument that the purpose of the murder was not to advance the robbery. He sarcastically argued about a hypothetical in which a robber tells himself to not think about stealing anything until after he has killed a store clerk, so as to avoid liability for felony murder. (40 RT 3354.) He stated:

> The argument was made that the defendant didn't kill for the purpose of getting the tv. That is pure theory. The fact is that immediately after killing Joey, he gathered up the tv, he gathered up the radio, took them away and sold them. To think otherwise is like having an armed robber appear in front of a liquor store and think to himself, well, there is the guy inside that I'm going to have to go in and kill this guy, but I don't want to think about robbing right now or stealing anything from in there, because if I think about it now and go in there with that kind of a state of mind, then I am going to get caught up in this felony murder deal. So I am going to go in there and kill him, and then I'm going to think, well, I'm here, he's dead, let's take the cash and run. Maybe that will keep me out of this felony murder concept.

(40 RT 3354.) This argument was preposterous, because it described a willful, deliberate, and premeditated killing with express malice aforethought, which constitutes first-degree murder in its own right even absent felony murder. The argument was also improperly inflammatory in disparaging Mr. Bell's defense as being ludicrous under the law when it was in fact legally proper and supported by substantial evidence. *See People v. Hill*, 17 Cal. 4th 800, 832–33 (1998); *United States v. Sanchez*, 176 F.3d 1214, 1219–25 (9th Cir. 1999). And once more, the argument was deliberately false and misleading because it continued the prosecution's attempt to trick the jury into believing that the "independent felonious purpose" requirement in the special circumstances instruction was simply a restatement of the intent requirement in the felony-murder instruction. The jury was thus falsely led to believe that the special circumstance was proved if the intent to rob preceded the killing, and thus that a finding of felony-murder ineluctably required finding the special circumstance to be true.

Respondent argues that the prosecutor's misconduct was harmless because the jurors were instructed to disregard statements by the attorneys that conflicted with the jury instructions. (Response at 92.) The judge

instructed, "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (39 RT 3239.) As discussed *supra* in section 11 of Claim Three, this instruction made worse trial counsel's failure to obtain complete and accurate instructions, because the defense theory had no foothold in the jury instructions and the trial court here instructed the jury to abide by the instructions only. With regard to the prosecutor's misconduct, however, this instruction had no effect. It did not cure the prosecutor's misconduct, because his deliberately false and misleading argument did not "conflict" with the wording of the jury instructions. He told the jury repeatedly that two separate instructions meant the same thing, when in fact they did not. His argument contradicted the substance of applicable law that the jury instructions were intending to communicate, but they did not conflict with the letter of the instructions. The jury, having no knowledge of the underlying law, saw no conflict. Thus, the court's instruction did not cure the prosecution's misconduct or alleviate the misunderstanding the prosecution deliberately elicited in the jurors' minds.

Nor did Mr. Bell's trial counsel cure the prosecution's misleading argument. As discussed *supra* in section 11 of Claim Three, trial counsel compounded the error by making similar erroneous arguments.

The prosecution's misconduct was clearly prejudicial. It confused and misled the jury on a critical question – whether Mr. Bell was eligible for the death penalty – and impacted the outcome of Mr. Bell's trial to his detriment. This violated a host of Mr. Bell's constitutional rights (Amended Petition at 187–88), including the requirement that California's death penalty scheme meaningfully narrow the class of death-eligible crimes. *Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995); *People*

v. Green, 27 Cal. 3d 1, 48–50, 59–62 (1980); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984); *see also Gregg v. Georgia*, 428 U.S. 153, 204 (1976); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Zant v. Stephens*, 462 U.S. 862 (1983). This principle requires a state to provide a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." *Lewis v. Jeffers*, 497 U.S. 764, 775 (1990).

Moreover, capital cases require a heightened degree of accuracy and reliability. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). From the above principles it follows that the jury must fully and accurately understand the required death-eligibility instructions. *See United States v. Gaudin*, 515 U.S. 506, 511–13 (1995) (jury's constitutional responsibility not merely to determine the facts, but to apply the law to those facts); *see also Estelle v. McGuire*, 502 U.S. 62, 67–72 (1991) (due process may be implicated if the jury did not understand the instructions); *McDowell v. Calderon*, 130 F3d 833, 839 (9th Cir. 1997) (due process requires that the judge assure the jury's proper conduct and determination of issues involving constitutional requirements).

Additionally, the United States Supreme Court has made it clear that full constitutional protections under the Fifth, Sixth, and Fourteenth Amendments apply to all factual determinations upon which death eligibility is predicated. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999).

5. The prosecution suppressed material favorable evidence.

Mr. Bell presented prima facie evidence that the prosecution suppressed material favorable evidence. (Amended Petition at 188.) Respondent argues that Mr. Bell's claim is procedurally barred and that he fails to state a prima facie case for relief. (Response at 93–94.)

Respondent's assertion that the claim is procedurally barred is refuted above.

Respondent's assertion that Mr. Bell fails to state a prima facie case for relief is similarly erroneous. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, the prosecution has a constitutional duty to disclose to the defense all favorable evidence material to guilt or punishment. *Id.* at 87. Nondisclosure of this evidence violates due process by "depriving a defendant of liberty through a deliberate deception of court and jury ... [which is] as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.* at 86 (citation omitted); *see also Strickler v. Greene*, 527 U.S. 263 (1999); *In re Ferguson*, 5 Cal. 3d 525, 531–32 (1971).

The failure to disclose favorable, material evidence requires relief — regardless of whether the failure was intentional, negligent, or inadvertent. *See, e.g.*, *Brady*, 373 U.S. at 87; *Ferguson*, 5 Cal. 3d at 532. The prosecution is constitutionally obligated to disclose favorable material in a timely fashion so that it can be of effective use at trial. *See United States v. Anderson*, 371 F.3d 606, 610 (9th Cir. 2004). Furthermore, the prosecutor's actual knowledge of the withheld evidence is not required for the defendant to obtain relief; the prosecutor is charged with knowledge of those investigating the case. *In re Brown*, 17 Cal. 4th 873, 879, *cert. denied*, 525 U.S. 978 (1998) ("The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf ....") (internal quotations omitted) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Favorable evidence includes evidence that impeaches the credibility of a witness as well as that which is exculpatory of the defendant. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*].") (internal quotations omitted); *see also Brady*, 373 U.S. at 91 (affirming retrial on punishment, where suppressed confession of a co-defendant, inculpating co-defendant as the triggerman, arguably could have led a jury to a sentence other than death); *United States v. Bagley*, 473 U.S. 667, 675–77 (1985) ("This Court has rejected any ... distinction between impeachment evidence and exculpatory evidence" in the context of finding error); *People v. Rutherford*, 14 Cal. 3d 399, 408 (1975), *overruled on other grounds in In re Sassounian*, 9 Cal. 4th 535 (1995) (suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment).

Favorable evidence is material if there is "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S at 682; *People v. Earp*, 20 Cal. 4th 826, 866 (1999).

The Amended Petition details several material favorable items that the prosecution suppressed. (Amended Petition at 188.) Respondent does not deny that the prosecution possessed the items, that they were material and favorable, and that they were suppressed. (Response at 94–95.) Instead, respondent asserts that Mr. Bell failed to claim prejudice. (*Id.*) To the contrary, the petition clearly states the prejudice to Mr. Bell that occurred as a result of the prosecution's misconduct. (Amended Petition at

189.) If that is not clear enough for respondent, then it will be repeated here: Mr. Bell specifically alleges that he was prejudiced by the prosecution's suppression of material favorable evidence. The misconduct detailed in the Amended Petition occurred with regard to the toxicology evidence, which as previously noted was a cornerstone of the defense. *See Bell*, 40 Cal. 4th at 588.

6. The prosecution's misconduct prejudiced Mr. Bell.

Mr. Bell was prejudiced by the multiple instances of state misconduct. Law enforcement and the prosecution willfully failed to investigate; suppressed material favorable evidence; lost or destroyed material favorable evidence; presented materially false, misleading, and unreliable evidence; and made improper, misleading, and inflammatory argument to the jury. Individually and cumulatively, these acts and omissions created false, misleading, and unreliable evidence of guilt, special circumstances, and moral culpability, and precluded the jury from giving due consideration and full effect to all evidence in mitigation.

These instances of misconduct must be evaluated cumulatively and against the record as a whole in determining whether constitutional error occurred and if the prejudicial effect of the misconduct warrants relief. *See Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995); *People v. Hill*, 17 Cal. 4th 800, 844 (1998) ("[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error."); *United States v. Sanchez*, 176 F.3d 1214, 1219–25 (9th Cir. 1999) (holding that the cumulative effect of multiple instances of misconduct, when viewed in the context of the entire trial, compelled reversal); *Alcala v. Woodford*, 334 F.3d 862, 882–83, 893–94 (9th Cir. 2003).

For all of the reasons set forth above, Mr. Bell is entitled to the issuance of an Order to Show Cause and, if respondent alleged facts that create a genuine and material dispute, an evidentiary hearing. *People v. Duvall*, 9 Cal. 4th 464, 474–75 (1995).

F. CLAIM SIX: PREJUDICIAL MISCONDUCT BY MEMBERS OF THE JURY VIOLATED MR. BELL'S CONSTITUTIONAL RIGHTS.

Mr. Bell has set forth specific factual allegations demonstrating that jurors engaged in multiple instances of prejudicial misconduct during his capital trial. (*See* Amended Petition at 189–201.) As explained below, respondent fails to rebut the strong presumption of prejudice raised by these acts of misconduct.

1. Mr. Bell has established a prima facie case that prejudicial juror misconduct occurred during his trial.

Mr. Bell's constitutional right to a jury trial guarantees him a fair trial by a panel of impartial, indifferent jurors. *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (the Sixth Amendment guarantees the right to trial by impartial jury and to confrontation of witnesses); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (same). The United States Supreme Court has defined "an impartial trier of fact" as "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Bias or prejudice of even one juror violates a defendant's right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). The evidence against a defendant must come solely from the witness stand, *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965), and a jury's decision must be based upon the evidence presented at trial and the legal instructions

given by the court. *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000). In capital cases, the existence of a biased juror independently violates the Eighth Amendment requirement of heightened reliability and the right to a conviction and sentence based on the evidence in the record. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 300–05 (1976); *Turner*, 379 U.S. at 472–73.

Juror misconduct raises a presumption of prejudice that respondent bears a heavy burden to rebut. *See Remmer v. United States*, 347 U.S. 227, 229 (1954). The presumption of prejudice is particularly strong in capital cases. *In re Stankewitz*, 40 Cal. 3d 391, 397 (1985). The presumption of prejudice can only be rebutted by showing that the allegations are false, or by showing that there is no substantial likelihood that the misconduct influenced the vote of one or more jurors. *People v. Marshall*, 50 Cal. 3d 907, 950–51 (1990). The "substantial likelihood" test applies an objective standard by which the Court examines the misconduct and determines whether it is "inherently" likely to have influenced any juror. Error caused by the presence of a biased juror cannot be harmless. A new trial is required regardless of a showing of actual prejudice. *Id.* at 951; *see also Harrington v. California*, 395 U.S. 250, 254 (1969) (recognizing that "we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's [inadmissible] confessions and who otherwise would have remained in doubt and unconvinced"); *Fields v. Woodford*, 309 F.3d 1095, 1103 (9th Cir. 2002), *amended on other grounds by* 315 F.3d 1062 (9th Cir. 2002); *Dyer*, 151 F.3d at 973 n.2.

Mr. Bell has set forth specific factual allegations that several instances of misconduct occurred and that there is a substantial likelihood that at least one juror was impermissibly influenced, requiring this Court to grant relief.

2. The trial court improperly denied the defense's request to voir dire jurors.

The trial court improperly denied the defense's request to voir dire jurors after it became clear that deliberations had become marked by an impasse, intimidation, and the appearance of juror misconduct.

Respondent contends that this issue was raised and rejected on appeal and is thus barred from review by this Court, citing *In re Waltreus*, 62 Cal. 2d 218, 225 (1965). (Response at 97.) The invocation of the *Waltreus* bar is inappropriate because Mr. Bell's claim here alleges facts of "substance not already in the appellate record." *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (noting bars not applicable if the habeas corpus petition alleges facts of "substance not already in the appellate record"); *In re Bower*, 38 Cal. 3d 865, 872 (1985) ("It is equally well established, however, that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required."). Even if *Waltreus* is invoked to preclude review of a habeas corpus claim, the exception for clear and fundamental constitutional error is applicable. *See In re Robbins*, 18 Cal. 4th at 814 n.34; *In re Harris*, 5 Cal. 4th 813, 834 (1993).

Mr. Bell's claim for relief includes material substantive facts that are outside the appellate record, in the form of declarations from jurors Hall and Roberts. (*See* Ex. 110; Ex. 111.) These declarations establish that there was a long and bitter conflict between juror Gladney and juror Daniels (Ex. 110 at 2424; Ex. 111 at 2429), making jurors at the penalty phase reticent to argue for and maintain their positions for a life verdict (Ex. 110 at 2425, 2426). This relevant information further supported juror Gladney's assertion at trial that she endured "psychological pain," emotional battering, and intimidation from two jurors. (5 CT 1190–90.1; 8 CT 1831; *see also* 40

RT 3385–95.) Respondent's contention that these declarations are inadmissible is incorrect. Evidence Code section 1150, subdivision (a), expressly allows proof of "statements made, or conduct, conditions, or events occurring, either within or without the jury room of such a character as is likely to have influenced the verdict improperly." Any overt event or act open to corroboration by the senses such as sight or hearing is admissible under the terms of the statute. *See In re Hamilton*, 20 Cal. 4th 273, 294 (1999). "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with non-jurors, or shares improper information with other jurors, the event is called juror misconduct." *Id.* Moreover, this Court has recognized that due to "constitutional considerations" the evidence rules "must yield when the defendant presents a substantial claim that his constitutional right to a fair trial may have been violated by jury misconduct." *In re Stankewitz*, 40 Cal. 3d at 398 n.2 (citing *Durr v. Cook*, 589 F.2d 891, 893 (5th Cir. 1979)).

The trial court should have inquired into the coercive environment in the jury room, and permitted the defense to voir dire the jurors on the subject. Based on the additional allegations and arguments set forth in the Amended Petition and this Reply, and as requested in the Amended Petition at 248–50, this Court must consider cumulatively both appellate and habeas corpus allegations and find that a prima facie case of constitutional error occurred and affected the outcome of Mr. Bell's trial.

3. Mr. Bell's jurors failed to deliberate appropriately at the guilt-innocence phase of the trial.

Mr. Bell alleged the jurors failed to honor their constitutional obligations to base their guilt-innocence decisions on the evidence

presented in the case, not to prejudge the case before hearing all of the evidence, and to otherwise follow and decide the case in accordance with the court's instructions. Mr. Bell's jurors did this by exerting undue pressure on the holdout juror. The reconstituted jury returned its guilt phase verdict less than two hours after juror Gladney was replaced by juror Martin, who joined a jury that was marred by intimidation and coercion. (Amended Petition at 194.) Mr. Bell has established a prima facie case for relief.

Respondent asserts that this claim is barred because Mr. Bell could have raised this claim on appeal but did not, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953). (Response at 100.) Respondent does not cite any portion of the trial record to support its argument that Mr. Bell's claim was preserved for appellate review. *See People v. Jenkins*, 22 Cal. 4th 900, 1047 (2000) (claim of jury misconduct may be forfeited for failure to object). Nevertheless, the *Dixon* bar is inapplicable because this claim for relief is supported by material substantive facts that are outside the appellate record, including the declarations of jurors Roberts and Hall. (*See* Ex. 110 at 2424; Ex. 111 at 2429.)

The juror declarations submitted with the Amended Petition establish that jurors Daniels and Spring committed serious and prejudicial misconduct by using coercive tactics to pressure holdout juror Gladney and creating a coercive and non-deliberative environment in which jurors were not free to openly discuss the case and decide Mr. Bell's guilt (and later his penalty) based on the facts and law. This information was not available at the time of trial, and was outside the appellate record. Therefore the claim is not barred. *See, e.g.*, *In re Bower*, 38 Cal. 3d at 872 (resort to habeas corpus petition required where matters outside the record are necessary to establish prejudicial violation). In the event this Court determines that trial

or appellate counsel should have raised any portion of this claim at trial or on appeal, respectively, this Court should find counsel's failure amounts to ineffective assistance of counsel.

In the context of this case, the actions of jurors Spring and Daniels constituted coercion of juror Gladney. With the added pressure of her fellow jurors, who were already "antsy and tired of going over the evidence" (Ex. 111 at 2429; *see also* Ex. 110 at 2424), Gladney ultimately succumbed to the unbearable pressure and toxic environment in which the jurors had to agree with their most vocal and biased fellow jurors or face the same kind of insults and profanity-laced personal attacks that juror Gladney endured. (*See, e.g.*, 42 RT 3475 (jurors made such comments as: "I can't believe the waste of time. This has got to be costing a lot of money. This is really fucked up;" and "I can't believe this is happening. This should have been over by now.").) Mr. Bell has demonstrated a prima facie case of juror misconduct and was denied his constitutional right to the unbiased individual opinion of each juror. The prejudice from such misconduct is manifest. The heavy burden is on respondent to refute the presumption of prejudice; respondent failed to do so.

4. At least one juror on Mr. Bell's case was biased.

Mr. Bell's right to a fair trial and his other constitutional rights set forth above were violated by the presence of juror Daniels on the jury. Juror Daniels's behavior during the trial demonstrated his actual or implied bias against Mr. Bell and the defense and juror Daniels's prejudgment of the case, and the presence of juror Daniels on Mr. Bell's jury deprived Mr. Bell of his right to a jury that impartially and indifferently adjudicated his guilt, death eligibility, and penalty. (*See* Amended Petition at 194–96.)

First, respondent contends that Mr. Bell's claim is barred by *Dixon* because it could have been raised on direct appeal. (Response at 101.) To the extent this Court determines that appellate counsel could have raised any preserved, record-based arguments related to the bias of juror Daniels, appellate counsel was ineffective for failing to do so. Trial counsel were particularly struck by the hostility of juror Daniels to the defense, which was obvious in his mannerisms, including glaring at the defense, smirking at counsel, and refusing to look at defense witnesses and other evidence presented. (48 RT 3947–53.) Trial counsel told the court that the situation was "intolerable," and that it was the first time counsel had ever had to complain about a juror during trial. (48 RT 3952–53; *see also* 50 RT 4257.) Still, the court denied defense requests to: voir dire juror Daniels on the subject; have the trial court admonish him to abide by his responsibilities as a juror; and excuse him if he did not behave in accord with his duties as a juror. (48 RT 3948–49, 3951.) The court again refused defense requests to voir dire or admonish juror Daniels two days later when defense counsel again saw juror Daniels shaking his head in disgust and talking to other jurors. (50 RT 4257–59.) The trial court erred in its handling of the defense requests and appellate counsel was ineffective for failing to raise this meritorious argument on appeal.

Furthermore, Mr. Bell's claim for relief includes material substantive facts that are outside the appellate record that corroborate and augment the above-described record evidence. (*See* Ex. 110 at 2422, 2426; Ex. 111 at 2429.) The additional information concerning juror Daniels's bias was not available at the time of trial, and the constitutional error alleged is fundamental in its nature. Therefore the claim is not barred by *Dixon*. *See, e.g.*, *In re Robbins*, 18 Cal. 4th at 814 n.34; *In re Harris*, 5 Cal. 4th at 834; *In re Bower*, 38 Cal. 3d at 872 (resort to habeas corpus petition required

where matters outside the record are necessary to establish prejudicial violation).

The new information from the juror declarations proves what defense counsel attempted to prove at trial, that is, juror Daniels was biased against the defense. The appellate record and the declarations demonstrate that Daniels breached his obligations as a juror by improperly prejudging the case prior to the conclusion of the evidence at both the guilt-innocence phase and the penalty phase, failed to properly deliberate over or consider the evidence presented at both phases, and intimidated other jurors during the deliberations. This bias, and the conduct that resulted from that bias, requires a reversal of his verdict. *See People v. Brown*, 61 Cal. App. 3d 476, 480 (1976) (finding unconstitutional prejudice from a juror's misconduct in prejudging the case where the juror decided the case early in the proceedings independent of the evidence and law); *see also Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990) ("The sixth amendment right to a jury trial 'guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors.'" (quoting *Irvin*, 366 U.S. at 722)); *People v. Cleveland*, 25 Cal. 4th 466, 485 (2001) (explaining that a juror's "unwillingness to engage in the deliberative process" is misconduct and constitutes grounds for their removal).

5. Mr. Bell's jurors discussed the case outside the deliberation room.

Mr. Bell has presented a prima facie case that at least two jurors, Kabban and Hall, committed prejudicial misconduct by discussing the case with third parties. (*See* Amended Petition at 196–97.) Juror Kabban discussed the case with his priest, and juror Hall discussed the case with her husband. (Amended Petition at 196–97.) By discussing the case with non-jurors during deliberations, these jurors violated the trial court's explicit

instructions not to discuss the case with others, and not to deliberate out of the presence of the other jurors. In addition, these jurors exposed themselves to the extraneous views of third parties. This misconduct resulted in an unfair and biased jury determination that violated Mr. Bell's right to an impartial jury and a conviction and sentence based only on record evidence.

Because a defendant charged with a crime has a right to the unanimous verdict of twelve impartial jurors, a conviction cannot stand if even a single juror has been improperly influenced. *People v. Pierce*, 24 Cal. 3d 199, 208 (1979); s*ee also Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988). No matter how inadvertent, a juror's receipt of information not presented in court is juror misconduct. "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer*, 347 U.S. at 229. The burden rests heavily upon the state to establish that the contact with the juror was harmless to the defendant. *Id.*

Respondent's arguments fail to address the unequivocal legal standard described above, instead focusing on inapplicable procedural and evidentiary bars. Respondent first argues that this claim could have been, but was not, raised on appeal, citing *In re Dixon*, 41 Cal. 2d at 759. (Response at 105.) This is not so, because all the requisite facts were not in the record on appeal, but have now been presented in the Amended Petition. Mr. Bell's claim substantially depends upon evidence outside of the appellate record because the evidentiary basis for the claim arises primarily from the declarations of jurors Kabban and Roberts. (*See* Ex. 110 at 2426; Ex. 112 at 2432.)

Mr. Bell's appellate counsel's duties in this case did not include conducting an investigation into juror misconduct. *See* Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, Policy 3, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions, pt. 1, Timeliness Standards, std. 1-1; *In re Robbins*, 18 Cal. 4th at 791–93 (discussing duties of appellate and habeas corpus counsel). Although jury misconduct during deliberations can be raised by a motion for a new trial and subsequent appeal, it may also be alleged as a ground for habeas corpus relief. *See In re Stankewitz*, 40 Cal. 3d at 397; *see also In re Bower*, 38 Cal. 3d at 872 (resort to habeas corpus petition required where matters outside the record are necessary to establish prejudicial violation).

Respondent also argues that this claim is barred from habeas corpus review because of trial counsel's failure to object at the time of trial, citing *In re Seaton*, 34 Cal. 4th 193, 199–200 (2004). (Response at 105.) Respondent does not cite any authority for its extreme proposition that trial counsel's failure to conduct a post-trial jury investigation that ferrets out potential misconduct for a new trial motion forfeits any and all later-discovered juror misconduct claims. Respondent's position is contrary to this Court's precedent. *See In re Stankewitz*, 40 Cal. 3d at 397. Nevertheless, as discussed earlier in this Reply, the application of a *Seaton* bar generally would constitute an improper retroactive default to a claim of clear and fundamental constitutional error that is at the heart of the trial process and is based upon material substantive facts that are outside the appellate record. *See* Section II.B, *supra*.

Respondent also argues that evidence of jurors' discussions with others is inadmissible under Evidence Code section 1150, subdivision (a), because it relates to the mental processes of jurors. (Response at 106.) This

is also mistaken. That section states: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." Cal. Evid. Code § 1150(a) (West 2010). A discussion is an overt act seen and heard by the jurors and not excluded as mental processes under section 1105(a). *See In re Hamilton*, 20 Cal. 4th at 294. Thus, evidence of the discussions of both juror Kabban and juror Hall is admissible. Furthermore, with regard to juror Hall, because her statement (recounted by juror Roberts) contains juror Roberts's admission that she considered the extraneous evidence of the conversation between juror Hall and her husband, the statement is admissible. *See* Cal. Evid. Code § 1150(a) (West 2010); *In re Stankewitz*, 40 Cal. 3d at 398 (expressly allowing consideration of statements when the "very making of the statement" itself amounts to juror misconduct).

It is undisputed that juror Kabban committed misconduct by discussing Mr. Bell's case with his priest, a non-juror, during the trial. This was clearly prejudicial, because it allowed juror Kabban to substitute religious authority for California law. Several California and United States Supreme Court precedents have established that prejudicial misconduct exists where a jury receives information that diminishes its sense of responsibility for its death sentence. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985). "The primary vice in referring to the Bible and other religious authority is that such argument may diminish the jury's sense of responsibility for its verdict" and substitute religious law for a careful consideration of aggravating and mitigating factors. *People v. Hughes*, 27 Cal. 4th 825A, 27 Cal. 4th 287, 389 (2002) (internal quotation marks omitted); *see also People v. Sandoval*, 4 Cal. 4th 155, 193–94 (1992)

("What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority.").

The conversation gives rise to a presumption of prejudice. *See People v. Nesler*, 16 Cal. 4th 561, 579 (1997); *In re Hamilton*, 20 Cal. 4th at 294–95. Respondent attempts to rebut the prejudice by asserting that the priest did not order juror Kabban to vote one way or another on his verdict. (Response at 106.) This is not required, however. The influence of the pastor's advice on juror Kabban's vote is determinative. Juror Kabban sought out the advice of his priest, telling him that he did not know what to do. (Ex. 112 at 2432.) His priest told him that "God would not judge [him] if [he] sentenced [Mr. Bell] to death." (Ex. 112 at 2432.) Kabban states that "After that, I felt that I could vote for death as the appropriate punishment." (Ex. 112 at 2432.)

Juror Hall also committed misconduct by discussing the case with her husband. Even more than juror Kabban, this conversation was prejudicial because juror Hall's husband advised her to change her vote. (Ex. 110 at 2426); *cf. People v. Danks*, 32 Cal. 4th 269, 304 (2004) (no misconduct where juror did not discuss the case or deliberations with her husband, only the stress she was feeling); *Pierce*, 24 Cal. 3d at 207. Juror Hall said that she did not want to change her vote, but she was tired of the pressure from the other jurors to get the deliberations over with. (Ex. 110 at 2426.) Respondent, without submitting any information contrary to Mr. Bell's allegations, baldly argues that the "presumption of prejudice has been rebutted." (Response at 106.) Respondent's assertion is mistaken and although juror Hall now does not remember talking to her husband, any

genuinely disputed factual issue presented by this situation should be resolved by way of an evidentiary hearing.

Respondent's final assertion is that Mr. Bell's claim is "conclusory, speculative, and unsupported by facts." (Response at 106.) Based on the declarations obtained by habeas counsel and the aforementioned case law confirming the presumption of prejudice, however, this is not the case. Furthermore, Mr. Bell is obliged only to "state fully and with particularity the facts on which relief is sought" and to provide "reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations" to meet his "initial burden of pleading adequate grounds for relief." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). Mr. Bell has met his burden of producing evidence sufficient to establish facts that, if proved true, entitle him to relief, *Duvall*, 9 Cal. 4th at 474–75 (citing *In re Clark*, 5 Cal. 4th 750, 769 n.9 (1993)), while respondent has made no effort to present any evidence equally available to the state. Mr. Bell is entitled to an order to show cause and an evidentiary hearing on his jury misconduct allegations. *See People v. Hedgecock*, 51 Cal. 3d 395, 415 (1990).

6. Mr. Bell's jurors were improperly influenced by the existence of juror Rankin's impending vacation and the bias and intimidation that burdened the jury.

Mr. Bell's jurors committed serious misconduct in rushing to judgment at penalty phase to accommodate juror Rankin's scheduled vacation and to avoid further intimidation and accusations from fellow jurors. (Amended Petition at 197–99.) Respondent again attempts to argue that the *Dixon* and *Seaton* bars apply to this claim. (Response at 107.) As explained above, these bars are inapplicable. First, *Dixon* does not apply because all the requisite facts were not in the record on appeal. *See In re*

Robbins, 18 Cal. 4th at 814 n.34. Mr. Bell's claim substantially depends upon evidence outside of the appellate record because the evidentiary basis for the claim arises primarily from the declaration of juror Roberts. (*See* Ex. 110 at 2425.) *In re Seaton*, 34 Cal. 4th at 199–200, also does not apply because trial counsel did not and could not have known of the juror misconduct occurring during the deliberations and there is no authority mandating that such misconduct be raised in a new trial motion. Moreover, the *Seaton* bar cannot be applied retroactively and neither *Dixon* nor *Seaton* can be applied to a claim of clear and fundamental constitutional error and is based upon material substantive facts that are outside the appellate record. *See* Section II.B, *supra*.

Respondent also argues that the vacation's effect on the jurors' deliberations cannot be considered pursuant to Evidence Code section 1150 and *People v. Steele*, 27 Cal. 4th 1230, 1261 (2002). (Response at 108.) Respondent's argument fails in light of Evidence Code section 1150, subdivision (a), which expressly allows consideration of statements when the "very making of the statement" itself amounts to juror misconduct. *In re Stankewitz*, 40 Cal. 3d at 398. Because juror Rankin's statement and juror Hall's statement, submitted by juror Roberts, contains Rankin's admission that she considered the extraneous evidence of her vacation and juror Hall's statement about talking to her husband and changing her vote, these statements are admissible. (*See* Ex. 110 at 2425 ("the female juror in the wheelchair told all of us she had a big vacation coming up, something like a cruise, and was concerned that the trial would last so long that she would miss her vacation. When we got to the penalty phase deliberations, we were all aware that she was anxious and wanted to leave ... [n]o one wanted her to miss her vacation[.]".)

Moreover, respondent's argument ignores the evidence before this Court that jurors rushed to reach a verdict in order to accommodate juror Rankin's schedule and to avoid the need to substitute an alternate for juror Rankin. (Ex. 110); *see also United States v. McFarland*, 34 F.3d 1508, 1512 (9th Cir. 1994) (recognizing the risk of an "ill-considered verdict" when a juror had impending vacation plans); *United States v. Ahmad*, 974 F.2d 1163 (9th Cir. 1992) (same). Juror Rankin's discussion of her plans with the other jurors went directly against her promise to the court not to do so. (*See* 48 RT 4083–84; 7 CT 1528.) The fact that the penalty phase verdict was reached on the very day that juror Rankin would have had to be excused (*see* 54 RT 4501–02; 7 CT 1526; 8 CT 1865) is no coincidence; it was the reason that the jury reached its conclusion when it did. (Ex. 110 at 2425); *compare State v. Rasmussen*, 621 A.2d 728, 744 (Conn. 1993) (claim denied because there was no record evidence that a juror's vacation influenced the jury's deliberations). This deprived Mr. Bell of his constitutional right to a decision free from outside influence and pressure.

7. Mr. Bell's jurors injected their own untested specialized knowledge into the deliberation process.

Mr. Bell presented a prima facie case that juror Kabban worked at Donovan State Prison, and in this capacity, presented himself as an expert to other members of the jury. (Amended Petition at 199–20.) As set forth in the declaration of juror Roberts, "Because of his job at the prison, [juror Kabban] knew much more about the workings of prison life than the rest of us did, and he gave us some input about prison and his job, and he used special terms to talk about prison that I was not familiar with. I was surprised to find out from him and other jurors that it was possible for inmates to get drugs in prison … that was one of the factors that led [other jurors] to vote for death." (Ex. 110 at 2424–25.)

A juror's consideration of extraneous evidence denies the defendant due process of law because "the death sentence [is] imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). A jury's decision must be based solely upon the evidence presented at trial and the legal instructions given by the court. *Sandoval*, 241 F.3d at 776. By injecting his or her specialized knowledge of a matter into deliberations, a juror violates the defendant's Sixth Amendment right to confront and cross-examine witnesses by becoming essentially an unsworn witness whose testimony the defendant has no opportunity to confront or refute. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998); *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997); *In re Stankewitz*, 40 Cal. 3d at 397 (when extraneous information enters a jury room – i.e., a statement of law not given to the jury in the instructions of the court – the defendant is denied his constitutional right to a fair trial unless the state can prove that no actual prejudice resulted). Even a single juror's improperly influenced vote is sufficient to undermine a defendant's right to an impartial jury. *See Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988) ("If only one juror was unduly biased or improperly influenced, Dickson was deprived of his Sixth Amendment right to an impartial panel.").

Respondent again attempts to assert a *Dixon* bar to this claim (Response at 109); this bar does not apply because all the requisite facts were not in the record on appeal. *See In re Robbins*, 18 Cal. 4th at 814 n.34. Mr. Bell's claim substantially depends upon evidence outside of the appellate record because the evidentiary basis for the claim arises primarily from the declaration of juror Roberts. (*See* Ex. 110 at 2424–25.) Respondent also asserts that it is permissible for jurors to use their

experience to analyze and form opinions about the evidence. (Response at 110.) This proposition, however, is inapposite to what occurred at Mr. Bell's trial. Juror Kabban did not use his background to analyze or form opinions about evidence adduced at trial; instead he introduced extraneous evidence, which he imparted to the other jurors, in the capacity of a prison expert. Respondent does not dispute that juror Kabban told other jurors about his specialized knowledge of the inner workings of the prison system. (Response at 109–10; Amended Petition at 200.) By injecting specialized knowledge of a matter into deliberations, this juror violated Mr. Bell's Sixth Amendment right to confront and cross-examine witnesses and essentially became an unsworn witness at Mr. Bell's trial. *See, e.g.*, *Mach*, 137 F.3d at 633–34; *Jeffries*, 114 F.3d at 1490.

8. Two jurors failed to inform the court of the fact that they were victims of crime during the trial.

Two jurors had their automobiles stolen during Mr. Bell's trial. (Ex. 111 at 2428–29.) Neither juror reported this fact to the trial court. The trial court had earlier asked each juror during jury selection about whether they had been a victim of a crime (*see* 5 CT 964) and each juror had an ongoing obligation to inform the trial court of their status as crime victims so that the court could make an assessment of any potential bias or impartiality occurring as a result.

Respondent's attempts to assert a *Dixon* bar to this claim (see Response at 110–11) again fail because all the requisite facts were not in the record on appeal. *See In re Robbins*, 18 Cal. 4th at 814 n.34. And for the reasons discussed above, the *Seaton* bar also does not apply to this claim. Respondent further claims that Mr. Bell fails to present a prima facie case of prejudice. (Response at 111.) Respondent misunderstands the pleading requirements applicable in habeas corpus proceedings. *See*

Duvall, 9 Cal. 4th at 474 (a petitioner is obliged only to "state fully and with particularity the facts on which relief is sought" and to provide "reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations" to meet his "initial burden of pleading adequate grounds for relief"). Mr. Bell has met his burden of producing evidence sufficient to establish facts that, if proved true, entitle him to relief. *Duvall*, 9 Cal. 4th at 474–75.

9. Mr. Bell was prejudiced by the jurors' misconduct.

As pled in the Amended Petition and discussed above, several instances of misconduct pertained to key issues in the case, and directly led the jury to convict Mr. Bell and sentence him to death. The several forms of misconduct committed by the jurors included failure to properly deliberate, consideration of extraneous evidence, bias, discussing the case with non-jurors during the deliberations, and considering the untested and specialized knowledge of a juror. These numerous instances of misconduct, considered singly or cumulatively, had a substantial and injurious effect on the jury's determination of the penalty.

As detailed in the Amended Petition, each of the instances of juror misconduct alone would create a presumption of prejudice that the state cannot rebut. (Amended Petition at 201.) Together, the multiple instances of juror misconduct completely eradicated Mr. Bell's fundamental right to a fair trial before a fair and impartial trier of fact. The sheer volume of instances of juror misconduct in this case, coupled with the surrounding circumstances and the specific type and degree of misconduct, raises an irrefutable presumption of prejudice requiring a grant of habeas corpus relief. At the very least, this Court should order an evidentiary hearing.

G. CLAIM SEVEN: THE DESTRUCTION OF THE TRIAL EXHIBITS AND FAILURE TO PRESERVE A COMPLETE, ACCURATE, AND RELIABLE RECORD OF THE PROCEEDINGS DEPRIVED MR. BELL OF HIS CONSTITUTIONAL RIGHTS.

In the Amended Petition, Mr. Bell has presented prima facie evidence that the superior court failed to maintain an accurate, reliable, and complete record of the case by destroying all of the exhibits from Mr. Bell's trial, resulting in a prejudicial violation of Mr. Bell's rights. (Amended Petition at 201–06.) Respondent argues that Mr. Bell's claim is procedurally barred and that it fails to state a prima facie case. (Response at 112.)

1. Mr. Bell's claim is not procedurally barred.

Respondent argues that Mr. Bell's claim is procedurally barred because it could have been raised on direct appeal, but was not. (Response at 112, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953).) As discussed in greater detail in Section II.B, *supra*, *Dixon* is inapplicable because Mr. Bell's claim involves fundamental constitutional error, and the failure to raise it on direct appeal constitutes ineffective assistance of appellate counsel. *See In re Harris*, 5 Cal. 4th 813, 829–40 (1993).

2. Mr. Bell has presented a prima facie case.

Respondent does not dispute any of the facts. (Response at 112–113.) The trial court destroyed the trial exhibits without giving either party notice, resulting in the permanent loss of eleven key exhibits, all of which were unique physical evidence. (Amended Petition at 202–03; Response at 112–13.) As detailed in the Amended Petition, the destruction of these exhibits prevents Mr. Bell from pursuing meaningful relief. (Amended Petition at 205–06.)

The record in a criminal case, particularly in a capital case, must be accurate and complete. *Chessman v. Tests*, 354 U.S. 156 (1957); *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994). The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). It also has stressed "the importance of reviewing capital sentences on a complete record." *Dobbs v. Zant*, 506 U.S 357, 358 (1993) (citing *Gardner v. Florida*, 430 U.S. 349, 361 (1977) and *Gregg v. Georgia*, 428 U.S. 153, 167, 198 (1976)). This Court has concurred. In recognizing "the critical role of a proper and complete record in facilitating meaningful appellate review," this Court stated, "[w]e cannot urge too strongly that trial judges assiduously preserve a detailed account of all proceedings regardless of their perceived significance, particularly in capital cases...." *People v. Hawthorne*, 4 Cal. 4th 43, 63 (1992).

This right is codified in California Penal Code section 190.7, which provides that the record in a capital case must include the record as prescribed by the California Rules of Court as well as all other papers or records filed or lodged with the trial court. Cal. Penal Code § 190.7 (West 2010). The Rules of Court require that the record include all exhibits admitted in evidence, refused, or lodged. Cal. Rules of Court, Rule 8.320(e) (formerly Rule 4.5).

Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk that the death sentence has been arbitrarily imposed. *Stephens v. Zant*, 631 F.2d 397, 402–04, *modified*, 648 F.2d 446 (5th Cir. 1980), *rev'd on other grounds*, 462 U.S. 862 (1983). The right to a complete and accurate record is of particular importance in capital cases, given the constitutional function of postconviction review in such cases, the

Eighth Amendment requirement of heightened reliability in capital cases, and the state's independent interest in the reliability of its death judgments. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *People v. Chadd*, 28 Cal. 3d 739, 751–52 (1981); *People v. Stanworth*, 71 Cal. 2d 820, 830–34 (1969).

Due process requires that the record must be sufficient to permit adequate and effective appellate review. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); *Draper v. Washington*, 372 U.S. 487, 496–99; *Hicks v. Oklahoma*, 447 U.S. 343 (1980). The due process implications of a state court's failure to record portions of a criminal trial are set forth in *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir. 1989). There, the Ninth Circuit adopted and applied the criteria set forth in *Britt v. North Carolina*, 404 U.S. 226 (1971), regarding the standards governing a state's duty to provide indigents with a complete and accurate trial record. The criteria are (1) the value of the record to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions. *Madera*, 885 F.2d at 648.

As to the first criterion, the value of the record to the defendant, the Court in *Britt* held that the defendant was not required to make a showing of need tailored to the facts of the specific case. *Britt*, 404 U.S. at 228 & n.3. Thus, in *Madera* the court ruled that the defendant's contention that he needed a record "to see whether or not he suffered appealable error" satisfied the first standard, since he had identified a tenable theory as to what that error might have involved. *Madera*, 885 F.2d at 648. Through the Amended Petition and this Reply, Mr. Bell has satisfied this standard.

As to the second criterion, alternatives to the missing trial records are permissible if they are equivalent. *Id.* at 649; *see also Draper v. Washington*, 372 U.S. at 495; *People v. Holloway*, 50 Cal. 3d 1098, 1116

(1990), *overruled on other grounds in People v. Stansbury*, 9 Cal. 4th 824, 830 n.1 (1995) (settled statement in lieu of transcript must not affect "the ability of the reviewing court to conduct meaningful review and the ability of the defendant to properly perfect his appeal").

Here, it indisputable that Penal Code section 190.9 was violated and that the trial record is incomplete. Key trial exhibits are missing, and no equivalents exist. This makes it impossible for Mr. Bell to adequately brief or even raise many issues. Given the heightened reliability that is constitutionally required in capital cases, the error should result in reversal per se.

It is simply unfair to require a petitioner to bear the burden of showing how portions of a record that do not exist prevent him from raising issues about which he is forced to speculate. Under these circumstances, to condition relief upon a specific showing of how the omissions harm the petitioner would render illusory the petitioner's right to relief based on errors and defects that would have been revealed by the missing exhibits. *See United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir. 1977). Errors implicating rights that are so essential necessarily render a proceeding fundamentally unfair. No showing of prejudice is required with these errors because they are structural. *See, e.g.*, *Payne v. Arkansas*, 356 U.S. 560, 78 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 83 (1963) (right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge).

However, even if an automatic reversal standard were not applicable to the error in this case, reversal would be required due to the prejudice caused by the destruction of critical exhibits given that equivalent substitutes do not exist. The Eighth Amendment requires reversal when deficiencies in the record create a substantial risk that the death penalty is

being imposed in an arbitrary and capricious manner. *People* v. *Rogers*, 39 Cal. 4th 826, 857–58 (2006). This Court requires an appellant challenging the adequacy of the record to show that the lack of record materially affects the resolution of issues on appeal. *People v. Pinholster*, 1 Cal. 4th 865, 929 (1992).

Here, the missing exhibits impact critical issues pertinent to both the guilt and penalty phases of Mr. Bell's trial. Respondent argues that Mr. Bell has not explained how the destruction of any of the exhibits hampers his ability to obtain review of his conviction. (Response at 113.) To the contrary, the Amended Petition explains in detail why the destruction of the exhibits prevents meaningful review. (Amended Petition at 204–05.) As noted there, the prosecution introduced testimony regarding the exhibits, including purported blood transfer stains, from which they offered conclusions regarding the only real issues in the guilt phase – (1) the level of Mr. Bell's cocaine intoxication, based on toxicological analysis of the exhibits composed of Mr. Bell's blood and urine samples; and (2) whether the killing and theft were separate in their origins and purposes. *See People v. Bell*, 40 Cal. 4th 582, 606 (2007) (observing that the latter was the central factual issue litigated in the guilt phase). These issues were also central to the penalty-phase presentations of both the prosecution and the defense.

Mr. Bell has amply demonstrated that the record is inadequate to permit meaningful review, and that there is a substantial risk that the death penalty was imposed on him in an arbitrary and capricious manner.

Moreover, the prosecution's failure to prevent the destruction of the physical evidence amounts to misconduct and interference with Mr. Bell's right to meaningful review of his conviction. To the extent Mr. Bell's appellate counsel and/or trial counsel were required or permitted to challenged the incomplete and inadequate record, counsel were

prejudicially ineffective in failing to do so, as their acts and omissions fell below the prevailing standard of care and were without strategic purpose. Respondent disagrees, but has adduced no conflicting evidence.

For the above reasons, Mr. Bell has demonstrated a prima facie case that the destruction of the exhibits and the absence of a complete and accurate record have substantially and prejudicially deprived Mr. Bell of all the rights detailed in the Amended Petition. (Amended Petition at 201–02, 206.) Consequently, Mr. Bell's conviction and sentence must be reversed, or an evidentiary hearing held so he may present testimony and evidence to prove his allegations.

H. CLAIM EIGHT: MR. BELL WAS DEPRIVED OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

Mr. Bell has alleged that appellate counsel's representation fell below minimally acceptable standards of competence, and that he suffered prejudice from that defective performance by appellate counsel. (Amended Petition at 206–15.)

Respondent contends that the present claim fails because the claims that Mr. Bell asserts appellate counsel should have raised on appeal lack merit. (Response at 116–17.) To the contrary, Mr. Bell has presented a prima facie case that appellate counsel's performance was deficient and prejudicial. Had appellate counsel acted in accordance with the prevailing standard of care and properly presented all meritorious claims that were preserved for appellate review or otherwise exempted from preservation requirements, this Court would have reversed Mr. Bell's convictions and sentences. *See generally Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985); *Miller v. Keeney*, 882 F.2d 1428, 1433–34 (9th Cir. 1989).

In response to Mr. Bell's claim that the trial court disparately and inappropriately questioned prospective jurors about their views on the death penalty in a non-sequestered setting, respondent simply states that a defendant "has no right to individual sequestered voir dire." (Response at 116.) Respondent ignores both the factual basis and legal substance of Mr. Bell's claim, i.e., that the trial court engaged in uneven questioning of prospective jurors that both influenced the jurors and impaired trial counsel's ability to effectively voir dire the jurors, and the trial court failed to ameliorate its error by permitting sequestered questioning of the jurors. (Amended Petition at 208–09.) The trial court's conduct was improper and prejudicial under state and federal law. *See, e.g.*, *People v. Alfaro*, 41 Cal. 4th 1277, 1316 (2007) ("a trial court should be evenhanded in questioning prospective jurors during death-penalty qualification and should inquire into the jurors' attitudes both in favor of and against the death penalty") (citing *People v. Champion*, 9 Cal. 4th 879, 908–09 (1995)); *see also Morgan v. Illinois*, 504 U.S. 719, 731–32 (1992); *Gray v. Mississippi*, 481 U.S. 648, 666 (1987); *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968).

As for Mr. Bell's claim that the trial court erred when, over objection by defense counsel, it ordered Mr. Bell to submit to a psychiatric evaluation by the prosecution's expert without counsel present and then allowed the jury to be told that Mr. Bell refused the examination (*see* Amended Petition at 209–12), this Court recently noted that "the use of evidence from an undesired psychiatric examination to convict a criminal defendant may have constitutional implications." *See Verdin v. Superior Court*, 43 Cal. 4th 1096, 1102 (2008) (citing *Estelle v. Smith*, 451 U.S. 454 (1981) (Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel)); *see also Buchanan v. Kentucky*, 483 U.S. 402 (1987) (same). *Estelle* and *Buchanan* articulate only limited holdings to the effect

that the prosecution may utilize only defense or court-initiated mental examinations when the defendant proffers a mental defense. *See Estelle*, 451 U.S. at 466; *Buchanan*, 483 U.S. at 421–25. Respondent's contention that Mr. Bell was not prejudiced by the trial court's rulings because "the jury was instructed not to consider the refusal" (Response at 116) is incorrect. As specifically alleged in the Amended Petition (*see* Amended Petition at 211–12), the trial court instructed the jury only that "Mr. Bell was entitled to decline to submit to the psychiatric evaluation" (39 RT 3272), not that the jury should not consider the refusal. Based on the facts and arguments made by defense counsel at trial, and notwithstanding this Court's prior decisions in *People v. Carpenter*, 15 Cal. 4th 312, 412–13 (1997) and *People v. McPeters*, 2 Cal. 4th 1148, 1190 (1992) – which are both factually and legally dissimilar to Mr. Bell's case – appellate counsel performed deficiently and prejudicially when he failed to raise all of the meritorious arguments asserted at trial on this issue.[7]

While the reasonable doubt instruction used in Mr. Bell's case, standing alone, has been found to be constitutional, *see Victor v. Nebraska*, 511 U.S. 1, 13–17 (1994), this instruction, when considered in combination with the circumstantial evidence instructions (i.e., CALJIC Nos. 2.02 (6 CT 1255), 8.83 (6 CT 1228), and 8.83.1 (6 CT 1229)) – which discussed the interrelationship between the reasonable doubt requirement and circumstantial evidence – and other instructions given (i.e., CALJIC Nos. 1.00 (6 CT 1208), 2.03 (6 CT 1256), 2.06 (6 CT 2.06), 2.21.1 (6 CT 1263), 2.21.2 (6 CT 1264), 2.22 (6 CT 1265), 2.27 (6 CT 1266), 2.50 (6 CT 1267), 2.50.1 (6 CT 1268), 2.50.2 (6 CT 1269), and 2.51 (6 CT 1270)), undermined the reasonable doubt requirement by permitting the jury to find

---

[7] Mr. Bell incorporates by reference the related allegations and arguments on this issue in Claim III, *supra*.

Mr. Bell guilty if he reasonably appeared to be guilty, in violation of Mr. Bell's rights to due process, trial by jury, and a reliable capital trial. *See generally In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 433 U.S. 307, 315 (1979); *Francis v. Franklin*, 471 U.S. 307, 314 (1985); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

As for his claim that appellate counsel failed to raise the trial court's erroneous rejection of numerous defense-proposed jury instructions (Amended Petition at 213–14), Mr. Bell submits that he was entitled to have the jury instructed on pertinent aspects of his penalty phase defense that were not adequately addressed by the standard jury instructions, and to have clear instructions that ensured the jury would consider and give effect to all relevant mitigation and reliably determine the appropriate penalty. *See generally Penry v. Johnson*, 532 U.S. 782, 797 (2001) ("it is only when the jury is given a vehicle for expressing its reasoned moral response to [mitigating] evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence") (internal quotations, citations, and brackets omitted).

Appellate counsel also should have raised the issue of the impropriety of the kind of victim impact testimony found in the penalty phase of Mr. Bell's trial. The trial court allowed victim impact testimony from Debra Mitchell, Joseph Fuller, and Christopher Cap. (43 RT 3579–82.) It did so based on its reading of *Payne v. Tennessee*, 501 U.S. 808 (1991), which held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." 501 U.S. at 827. This is not a blanket allowance for any kind of testimony that could be labeled as "victim impact," however. *Payne* itself authorized only a limited class of victim

impact evidence, warning that due process could be violated with evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair." 501 U.S. at 825. The United States Supreme Court has never approved of victim impact testimony that goes beyond the impact on the victim's family members who were personally present during the crime itself. (*Cf. Payne,* 501 U.S. at 816.)

Because of the prejudicial impact that such testimony can have, courts across the country have limited such testimony to evidence from family members who were personally present during or immediately following the crime, *see, e.g.*, *Smith v. State*, 919 S.W.2d 96, 102 (Tex. 1996), to impact that could have been foreseeable to the defendant at the time of the crime, *see, e.g.*, *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998), to testimony that is necessary to the development of the case, *see, e.g.*, *Berry v. State*, 703 So.2d 269, 275 (Miss. 1997), and to brief glimpses of a victim's life, *see, e.g.*, *United States v. Glover*, 43 F. Supp. 2d 1217, 1235–36 (D. Kan. 1999). Other courts have limited victim impact evidence to the testimony of a single witness, *see, e.g.*, *People v. Hope*, 702 N.E.2d 1282 (Ill. 1998), or have refused to allow photographs of the victim while he or she was still alive, *see, e.g.*, *Short v. State*, 980 P.2d 1081, 1100 (Okla. Crim. App. 1999). Furthermore, a number of courts have refused to allow the kind of testimony that was presented by Christopher Cap, who testified about Mr. Bell's prior offense and its impact on his life. *See, e.g.*, *People v. Hope*, 702 N.E.2d 1282 (Ill. 1998) ("evidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible"); *see also Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998); *Nesbit*, 978 S.W.2d at n.11; *State v. White*, 709 N.E.2d 140, 154 (Ohio 1999); *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997).

Because *Payne* does not authorize victim impact evidence that goes beyond the limited purpose of "explaining the loss to the family and society that resulted from the victim's death," *see People v. Robinson*, 37 Cal. 4th 592, 657–58 (2005), such evidence presented in Mr. Bell's trial was improper and should have been raised on appeal.

Appellate counsel also should have pleaded that the trial court erred in failing to issue a curative instruction after the prosecution improperly argued Mr. Bell's supposed lack of remorse as an aggravating factor in the penalty phase of the trial. Evidence of post-crime remorselessness is not an aggravating factor under the California Penal Code. Cal. Penal Code § 190.3 (West 2010); *People v. Pollock*, 32 Cal. 4th 1153, 1184 (2004); *People v. Boyd*, 38 Cal. 3d 762, 775–76 (1985) ("[Penal Code section 190.3] factor (k) refers to circumstances which extenuate the gravity of the crime, not to circumstances which enhance it."). Therefore, such evidence was properly used only to rebut the defense's mitigation evidence. Nevertheless, the prosecution used such evidence to suggest an additional, unconstitutional aggravating factor. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (aggravating circumstances the jury is permitted to consider may not be unconstitutionally vague); *Sawyer v. Whitley*, 505 U.S. 333, 341 (1992) ("Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence"); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (violation of state law implicating the federal due process clause of the Fourteenth Amendment to the United States Constitution). After the prosecution's closing statement, trial counsel objected and requested a curative instruction (*see* 52 RT 4438–39), but this request was denied (*see* 53 RT 4453). This was judicial error, and should have been raised by appellate counsel.

Additionally, Mr. Bell has demonstrated that the trial court should have granted Mr. Bell's motion to voir dire the trial judge on his political aspirations. *See* Claim Two, *supra*. Appellate counsel should have raised this issue in his appeal.

Finally, Mr. Bell's appellate unreasonably failed to raise the errors in the guilt-phase jury instructions that are discussed in detail *supra* in section 11 of Claim Three. For the reasons detailed there, these errors affected fundamental and substantial rights. Appellate counsel should have raised these issues as fundamental trial-court error that did not require an objection at trial to permit appellate review. *See* Cal. Penal Code § 1259 (West 2010). Similarly, appellate counsel unreasonably failed to raise the fundamental error discussed *supra* in section 12 of Claim Three, regarding the fatal variance between the charging document and the evidence and verdicts. Appellate counsel's actions constituted deficient performance. But for these unreasonable failures, the outcome of the proceedings would have been different.

Mr. Bell has demonstrated prima facie that he is entitled to relief on his claim of ineffective assistance of appellate counsel, or at the very least, that he is entitled to an evidentiary hearing at which he may present testimony and evidence to prove his allegations.

I. CLAIM NINE: CALIFORNIA UNCONSTITUTIONALLY FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY.

In his Amended Petition, Mr. Bell set forth a prima facie case that the jury's death-eligibility finding and death sentence are unconstitutional because the California death penalty statute fails to narrow the class of

offenders eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner. (Amended Petition at 215–28.)

Respondent argues that the claim is procedurally barred because it could have been raised on appeal and the claim should be denied because this Court has rejected similar claims. (Response at 117.) To the contrary, Mr. Bell's claim is not barred, as is evident from this Court's having uniformly considered the merits of this and other challenges to the California death penalty statute. Moreover, Mr. Bell must prevail on this claim, or at least be granted a hearing, given his prima facie evidence supporting this claim for relief.

1. Mr. Bell's claim is not procedurally barred.

Respondent contends that the claim is barred because it was not raised on appeal. (Response at 117.) This argument lacks merit. Mr. Bell's claim that he was sentenced under an unconstitutional statute is the quintessential claim exempt from such a procedural bar. As this Court explained in *In re Harris*, 5 Cal. 4th 813, 834 (1993), additional judicial review is justified where, as here, the petitioner raises a claim of constitutional error that is "clear and fundamental, and strikes at the heart of the trial process."

In addition, the facts necessary for resolving this challenge require the development and presentation of evidence, which could not have been done in the direct appeal. *See, e.g., In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (bar inapplicable when extra-record material has information "of substance not already in appellate record"). In fact, resort to habeas is required where – as here – the claim can be resolved only by reference to non-record facts regarding the historical development and breadth of California's death penalty statute. *See In re Bower*, 38 Cal. 3d 865, 872

(1985); *People v. Westmoreland*, 58 Cal. App. 3d 32, 36 (1976). Accordingly, the claim is not barred and is appropriately raised in habeas proceedings.

2. California's death penalty statute unconstitutionally fails to narrow the class of offenders eligible for the death penalty.

Respondent asserts that this Court has repeatedly rejected Mr. Bell's claim. (Response at 118–19.) However, the cases respondent cites do not indicate what, if any, evidence supporting appellant's argument was raised and considered. In his Amended Petition, Mr. Bell alleged numerous deficiencies in California's death penalty scheme and submitted detailed supporting evidence. He submits with this Reply further evidence in support of his claim that California's death penalty scheme is unconstitutional. (Ex. 115; Ex. 116; Ex. 117; Ex. 118; Ex. 125.) Mr. Bell urges this Court to reconsider its precedent in light of the allegations and evidence presented in this case.[8]

A death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty, *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion); *see also Furman v. Georgia*, 408

---

[8] The question of whether this state's capital sentencing scheme genuinely and constitutionally narrows the class of death eligible offenders is currently in litigation in federal court. *See, e.g.*, *Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. filed Feb. 17, 1993); *Riel v. Ayers*, No. 2:01-cv-00507-LKK-KJM (E.D. Cal. filed Mar. 14, 2001); *Frye v. Ayers*, No. 2:99-cv-00628-LKK-KJM (E.D. Cal. Mar. 29, 1999). Moreover, at least one judge on the Ninth Circuit Court of Appeals has held that the California death penalty scheme does not survive Eighth Amendment scrutiny because it fails to narrow sufficiently the class of people eligible for the death penalty. *See Morales v. Woodford*, 388 F.3d 1159, 1188–89 (9th Cir. 2004) (McKeown, J., concurring in part and dissenting in part).

U.S. 238 (1972), and cannot wantonly and freakishly choose a few persons for the ultimate sanction from among the thousands of prosecuted murderers. *See Furman*, 408 U.S. at 309–10.

California's death-eligibility or special circumstances statute was never designed to perform the constitutionally required narrowing. In fact, the avowed objective of the drafters of Proposition 7 (enacted in 1978 and known as the "Briggs Initiative") was to make the death penalty law as broad and inclusive as possible. (*See* Ex. 115 at 2566–67; *see also* Ex. 117 at 2594–2601.) Moreover, both legislative amendments and this Court's interpretations of the statute have expanded the statute's reach since 1977. (*See* Ex. 117 at 2601–16.)

Empirical evidence shows that the California death penalty scheme fails to genuinely narrow the class of death eligible offenders. A study performed by David C. Baldus, a Professor at the University of Iowa College of Law, of thousands of convictions in California for first-degree murder, second-degree murder, or voluntary manslaughter with an offense date between January 1, 1978 and June 30, 2002, demonstrates conclusively that the special circumstances enumerated in Penal Code section 190.2 fail to perform the narrowing function required by the Eighth and Fourteenth Amendments. (Ex. 118.)

Among persons convicted of first-degree murder between January 1978 and June 2002, 95% would have been eligible for the death penalty based on the facts of the offense under California law in place as of 2008. (Ex. 118 at 2647–49.) When the 95% death-eligibility rate under the law in place in 2008 is compared with the 100% of first-degree murders who were death eligible under pre-*Furman* Georgia law, the resulting 5% narrowing rate illustrates that California law fails to limit death eligibility as required by *Furman* and its progeny. (Ex. 118 at 2649–51.)

Among persons convicted of first-degree murder, second-degree murder, and voluntary manslaughter between January 1978 and June 2002, 59% would have been eligible for the death penalty based on the facts of the offense under California law in place as of 2008. (Ex. 118 at 2647–49.) A comparison of this 59% death-eligibility rate under 2008 law with the rate under pre-*Furman* Georgia law provides a narrowing rate of 35%. (Ex. 118 at 2649–51.) Professor Baldus's study establishes that California's death sentencing rate, or the rate at which persons who were factually eligible for the death penalty actually received a death sentence, is 4.4%. (Ex. 118 at 2661–69.)

Consistent with these conclusions, two studies conducted by Steven F. Shatz, a Professor at the University of San Francisco School of Law, show that the overwhelming majority of murders in California could be charged as capital murders and in virtually all of them, at least one special circumstance could be proved. (Ex. 125 at 2817–18; Ex. 90 at 1689–95.) The results of Professor Shatz's statewide study show only 9.6% of convicted first-degree murderers were being sentenced to death, giving California a death-sentence rate of approximately 11% (this is a conservative estimation) (Ex. 90 at 1690–91), and a death-eligibility rate of 84% (which is 91.4% under 2008 law). The percentage of non-death first-degree murders that were death eligible under the 2008 law was: 87.5% for studied published cases from the First District Court of Appeal; 92.4% for all studied published cases; and 89.4% for studied published cases from the First District Court of Appeal.

The results of Professor Shatz's Alameda County study reveal a death-sentence rate for convicted first-degree murderers who were eligible for the death penalty of 12.6%, and a death-eligibility rate of 88.9% (which is 91.5% under 2008 law). The higher death-sentence rate is likely

attributable to Alameda County's status as a "high death" county and, as above, it likely overstates the actual death-sentence rate. (Ex. 90 at 1692–93.) The percentage of first-degree murder convictions that resulted from guilty pleas in this study is 9.9% and the death-eligibility rate for these plea cases is 90.7%.

The death-sentence rate for defendants convicted of first-degree murder who were factually death-eligible pursuant to a special circumstance involving robbery or burglary is less than 2%. (Ex. 125 at 2828–29.)

California's death penalty scheme is broader than that of any other state by several different measures. The rate of death eligibility among California homicides is the highest among death penalty jurisdictions. (Ex. 118 at 2649–61, 2669; Ex. 125 at 2824–25.) In fact, California's death-eligibility rate is so much higher than any other death penalty jurisdiction that it can be described as a statistical outlier. (Ex. 118 at 2658–61, 2669; Ex. 116 at 2570–72.) California's narrowing rate, or the rate at which California's death penalty statute narrows death eligibility from pre-*Furman* Georgia law to 2008 California law, is lower than similar rates for other states. (Ex. 118 at 2655, 2669–70.)

Mr. Bell has demonstrated prima facie that California's death penalty scheme is unconstitutional or, at least, that an evidentiary hearing should be held so he may present testimony and evidence to prove his allegations.

J. CLAIM TEN: MR. BELL'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW.

Mr. Bell's conviction and sentence of death are proscribed by international law as established by multilateral treaties and customary international law and *jus cogens*. Mr. Bell may not be executed because his conviction and death sentence violate numerous treaty provisions and

customary law principles of international law. These include prohibitions on the prosecution of mentally disordered and incompetent individuals, and the deprivation of the rights to competent counsel and a fair trial.

Respondent contends that Mr. Bell's claim is barred on procedural grounds because his allegations were purportedly raised and rejected on appeal. (Response at 119.) However, the claim differs vastly in its factual and legal foundation from that presented in the direct appeal. Respondent has failed to address Mr. Bell's specific allegations that the investigation and prosecution of the case against him was infected with state misconduct; that his particular psychological, medical, and neurological impairments render him ineligible for the death penalty under international treaties and customary international law; and that prejudicial deprivations of international, federal, and state rights at all stages of the proceedings against him preclude his execution.

1. Mr. Bell's claim is not procedurally defaulted.

Respondent asserts that Mr. Bell's claims are waived because they were raised on appeal. (Response at 119, citing this Court's opinion in *People v. Bell*, 40 Cal. 4th 582, 621 (2007) and the procedural bar discussed in *In re Waltreus*, 62 Cal. 2d 218, 225 (1965).) This is not so. In its opinion, this Court rejected the claim raised in the direct appeal that "the use of capital punishment 'as *regular punishment* for substantial numbers of crimes' violates international norms of human decency and hence the Eighth Amendment to the United States Constitution." *Bell*, 40 Cal. 4th at 621. Respondent fails to apprehend that the claim in question from the Amended Petition, unlike the direct appeal, does not posit that California's death penalty per se violates international law. Rather, the claim sets forth prima facie facts and supporting law demonstrating that Mr. Bell's

conviction and sentence violate international law given Mr. Bell's psychological and medical condition as well as the specific facts and circumstances of his prosecution. (Amended Petition at 228–38.)

The specific international law claims raised in the Amended Petition are cognizable by way of a petition for writ of habeas corpus and/or are not subject to waiver and may be raised at any time. *See, e.g.*, *In re Harris*, 5 Cal. 4th 813, 829–41 (1993); *In re Clark*, 5 Cal. 4th 750, 797–98 (1993). As set forth in the Amended Petition, the details of Mr. Bell's cognitive, psychological, and psychiatric impairments that support his international law claims were neither developed nor presented to the jury at trial because trial counsel unreasonably and prejudicially failed to investigate and present them. *Waltreus* thus does not apply to Mr. Bell's claims because they involve issues of trial counsel's effectiveness. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) ("We do not apply those bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record.").

Furthermore, Mr. Bell's claim that the death penalty may not be imposed upon him pursuant to international law because he is mentally disordered is a claim that is not subject to waiver and may be raised at any time. *See, e.g.*, *LaGrand Case (Germany v. United States of America)*, 2001 ICJ 104 (Judgment of June 27), ¶¶ 90–91 (International Court of Justice holding that procedural default rules cannot bar review of a petitioner's claim); *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128, ¶¶ 110–13, 153 (Judgment of March 31) (same).

Finally, the *Waltreus* bar is inapplicable to claims that depend substantially on information that is not in the appellate record. *See, e.g.*, *In re Robbins*, 18 Cal. 4th at 814 n.34 (bar inapplicable when extra-record

material has information "of substance not already in appellate record"); *People v. Tatlis*, 230 Cal. App. 3d 1266 (1991) (habeas corpus petition was necessary to show prejudice from trial court error appearing on face of appellate record).

2. This Court is bound by international law principles and is required to consider international law in evaluating Mr. Bell's claims.

International human rights law has now become an established, essential and universally accepted part of the international community. Louis Henkin, The International Bill of Rights: The Covenant on Civil and Political Rights 1 (Louis Henkin ed., 1981). Individuals, including United States citizens, possess remediable rights based on international law. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 875, 877–78 (2d Cir. 1980); *see also Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (discussing foreign and international law prohibiting the execution of juvenile offenders); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing decisions of the European Court of Human Rights in analysis of Due Process Clause requirements as indicative of relevant "values we share with a wider civilization"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (court expressly considers the opinion of the "world community" in concluding that the execution of mentally retarded offenders violates the Eighth Amendment); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540–41 (N.D. Cal. 1987); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984).

Under the Supremacy Clause, customary law trumps state law. *See, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920). Under the Articles of Confederation, the states applied international law as

common law. But with the signing of the United States Constitution, "the law of nations became preeminently a federal concern." *Filartiga*, 630 F.2d at 877–78. "[I]t is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution." Louis Henkin, et al., International Law, Cases and Materials 164 (3d ed. 1993); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (finding international law to be federal law).

There is no "precise formula" or fixed length of time for determining how widespread a practice must exist before a court can find that an international norm has ripened into customary international law. Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. b (1989). However, courts have found that conventions with as few as 95 members could be conclusive evidence of a customary international law. *See Filartiga*, 630 F.2d at 882.

Customary international law is the "customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Before it is customary international law, an international norm must (1) be adhered to in practice by most countries, and (2) those countries must follow the norm because they feel obligated to do so by a sense of legal duty or "*opinio juris*." *See, e.g.*, Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 Harv. L. Rev. 1269, 1273 (1991); *see also* Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right*, 11 Harv. BlackLetter L.J. 37, 39–43 (1994).

The prohibition on imposing the death penalty on the mentally disordered meets both prongs of this test, and qualifies as an international

norm or legally binding international law. Nations throughout the world have adopted the norm that the execution of mentally disordered individuals is morally intolerable. At least 139 countries presently prohibit the execution of the mentally disordered. Amnesty International, *Death Penalty Facts* (Aug. 2010).

This norm has been unanimously attested to by the bodies and agencies of the United Nations competent to make such determinations. In 1984, the United Nations Economic and Social Council (ECOSOC), adopted standards relating to the death penalty that state, *inter alia*, "nor shall the death sentence be carried out on pregnant women, or on new mothers, *or on persons who have become insane*." ECOSOC, *Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50 U.N. Doc. E/1984/84 (May 15, 1984) (emphasis added). Those safeguards were endorsed by the United Nations General Assembly that same year. *See* G.A. Res. 39/118 ¶¶ 2, 5, U.N. Doc. A/39/51 (December 14, 1984). In 1989, the ECOSOC expanded these standards and recommended the following, "Member States take steps to implement the safeguards ... where applicable by: eliminating the death penalty for persons suffering from mental retardation or *extremely limited mental competence, whether at the state of sentence or execution.*" ECOSOC, *Implementation of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 1(d), ECOSOC Res. 1989/64, U.N. Doc. E/1989/91 (May 24, 1989) (emphasis added).

Various international bodies around the world have endorsed this norm through resolutions and protocols. In 1982, the Council of Europe adopted Protocol Six to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, providing for the total abolition of the death penalty in

peacetime.[9] Currently, the Protocol has been ratified by forty-six countries. Amnesty International, *Death Penalty: Ratification of International Treaties*.[10] The Russian Federation has signed, but not ratified, the treaty. *Id.*

On June 25, 2001, the Parliamentary Assembly of the Council of Europe adopted a resolution condemning the execution of mentally disordered persons, "[The Council] is particularly disturbed about executions carried out in Observer states which have committed themselves to respect human rights. The Assembly condemns the execution of juvenile offenders, *of offenders suffering from mental illness or retardation*, and the lack of a mandatory appeal system for death penalty cases." Eur. Consult. Ass., *Abolition of the Death Penalty in Council of Europe Observer States*, Resolution 1253 (2001)[11] (emphasis added).

In February 2002, the Council of Europe adopted Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 187 (2002).[12] Forty-two countries have ratified and three others have signed the protocol.

---

[9] The Council of Europe is comprised of forty-seven countries from the European continent. The United States is one of five countries currently enjoying observer status on the council. *See* http://www.coe.int/aboutCoe/index.asp?page=leSaviezVous#observateurs (last visited Sept. 23, 2010).

[10] Available at: http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties (last visited Sept. 23, 2010).

[11] Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta01/ERES1253.htm (last visited Sept. 23, 2010).

[12] Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/187.htm (last visited September 22, 2010).

Amnesty International, *Death Penalty: Ratification of International Treaties*.[13]

At its twentieth regular session in 1990, the General Assembly of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which provides for the total abolition of the death penalty during peacetime. Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[14] To date, eleven countries are parties to the Protocol. *Id.*

The United Nations Commission on Human Rights has officially held that the continued use of the death penalty against mentally disordered individuals in the United States is a violation of international law. From 1999 until it was replaced by the Human Rights Council in 2006, the United Nations Commission on Human Rights specifically urged "all States that still maintain the death penalty ... not to impose the death penalty on a person suffering from any forms of mental disorder or to execute any such person." *See* U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 61st Sess., Res. 2005/59, U.N. Doc. E/CN.4/ 2005/59 (2005); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 60th Sess., Res. 2004/67, U.N. Doc. E/CN.4/RES 2004/67 (2004); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 59th Sess., Res. 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 58th Sess., Res. 2002/77, U.N. Doc. E/CN.4/2002/77 (2002); *The Question of the Death Penalty*, 57th Sess., Res. 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Hum. Rts. Comm., *The Question*

---

[13] Available at: http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties (last visited September 22, 2010).

[14] Available at: http://www.oas.org/Juridico/english/treaties/a-53.html (last visited September 22, 2010).

of the Death Penalty, 56th Sess., Res. 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Hum. Rts. Comm., *The Question of the Death Penalty*, 55th Sess., Res. 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999).

Beginning in 2007, the United Nations General Assembly called for a moratorium on the execution of all persons because of its concerns about consistency with international law. *See Moratorium on the Use of the Death Penalty*, G.A. Assembly, 62d Sess., Res. 62/149, U.N. Doc. A/RES/62/149 (2007).

Controlling domestic law holds that the determination of the scope of basic rights set forth in the state and federal constitutions must be informed by international norms and consensus. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (in determining that a "national consensus" has developed against the execution of the mentally retarded, and holding such execution unconstitutional under the Eighth Amendment, the United States Supreme Court explained that it was influenced by the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *see also Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (recognizing as important support for its decision that a Texas law criminalizing sodomy violated the due process clause of the Fourteenth Amendment the opinions expressed by European nations and by the European Court of Human Rights opposing the criminalization of sodomy); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (concurring opinion of Justice Ginsburg, citing the International Convention on the Elimination of All Forms of Racial Discrimination as support for permitting the use of affirmative action in law schools). All allegations of constitutional error set forth in Mr. Bell's Amended Petition must therefore be informed by international consensus on these matters.

As alleged in the Amended Petition, international law, international agreements made by the United States, and customary international human rights law are laws of the United States that are supreme over the laws of the several states and must be applied by state courts. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."). This Court is therefore bound to consider the evidence Mr. Bell has presented in his Amended Petition in support of his allegations that the prosecution of the charges against him as well as his unique personal characteristics render him ineligible for the death penalty in the context of the United State's international law obligations, and to grant him an evidentiary hearing to prove his allegations.

3. International law prohibits the imposition of the death penalty against Mr. Bell.

State and federal procedural laws, rules, or practices may not be applied to deprive Mr. Bell of his international rights. As demonstrated by treaties, official pronouncements, and practices described *supra* and in the Amended Petition, the prohibition on the execution of the mentally disordered has become as widespread and clear as the prohibition of slavery, torture, or genocide. Contrary to the policy and practice of the United States, the world consensus is absolute: the execution of mentally disordered persons is a violation of binding international law. Mr. Bell's death sentence therefore violates binding customary international law and *jus cogens* and is unlawful.

Virtually every major mental health association in the United States has published a policy statement advocating either an outright ban on

executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. The organizations that take positions against the execution of mentally ill offenders include, but are not limited to, the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the National Mental Health Association.

Mr. Bell's diagnosed and documented mental disorders place him under the protection of international law. As set forth in the Amended Petition and this Reply, Mr. Bell's impairments make it medically clear that at the time of the charged offense as well as at the time of his arrest and interrogation, and at all stages of his trial, Mr. Bell functioned without the ability to appreciate or control his actions or to competently function.

As detailed in the Amended Petition, Mr. Bell serious mental disabilities include cognitive and neuropsychological deficits affecting a broad array of neurocognitive domains. He suffered early-onset addictive disease and other co-occurring mental disorders. Moreover, Mr. Bell's biopsychosocial history is replete with multiple severe risk factors that affected his emotional, relational, cognitive, and neuropsychological development and functioning. His history is marked by multigenerational substance abuse, mental illness, sexual abuse, and poverty. (Amended Petition at 236–38; Ex. 113; Ex. 131 at 2880–83, 2888.) Mr. Bell's biopsychosocial history of impairments and dysfunctions substantially impaired his ability to exercise judgment, reasoning, volition, and impulse control throughout his life, at the time of the offense, and throughout his trial. Furthermore, state actors purposefully exploited Mr. Bell's vulnerabilities in interrogating him.

Additionally, the Supreme Court's prohibition against the execution of mentally retarded individuals should apply equally to Mr. Bell, who

suffers from debilitating mental illness and was as a result unable to conform his conduct to the requirements of the law. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) ("all persons similarly situated should be treated alike"). Mr. Bell's moral culpability was substantially diminished by the severity of his mental illness, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crime. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976) (a sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment).

Imposition of the death penalty under these circumstance violates the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) (Articles 1, 2, 11, and 16); the International Covenant on Civil and Political Rights (Articles 2, 4, 6, 7, 14, and 26); and the Universal Declaration of Human Rights (Articles 1, 2, 3, 5, 7, and 11).

Mr. Bell is thus entitled to issuance of an order to show cause and, if necessary, an evidentiary hearing to prove the allegations of his Amended Petition, after which his conviction and death sentence must be set aside.

K. CLAIM ELEVEN: EXECUTION FOLLOWING A LONG PERIOD OF CONFINEMENT UNDER A SENTENCE OF DEATH WOULD VIOLATE MR. BELL'S RIGHT TO BE FREE FROM CRUEL, TORTUROUS, AND UNUSUAL PUNISHMENT.

In his Amended Petition, Mr. Bell presented a prima facie case that California's death penalty postconviction procedures fail to provide him with a constitutionally full, fair, and timely review of his conviction and sentence. (Amended Petition at 239–43.) Respondent argues that the claim is procedurally barred and dismisses it as having been "repeatedly rejected"

by this Court. (Response at 120–21.) Respondent fails, however, to dispute or rebut any of Mr. Bell's specific allegations.

1. Mr. Bell's clam is not procedurally barred.

Respondent contends that Mr. Bell's claim is procedurally barred because it could have been raised on direct appeal, but was not. (Response at 120–21, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953).) As with respondent's similar assertions regarding other of Mr. Bell's claims, this is not so. The *Dixon* rule is subject to four exceptions: a petitioner is not precluded from raising an issue that involves fundamental constitutional error, a court's lack of fundamental jurisdiction, a court's action in excess of its jurisdiction, or a change in the law since the direct appeal. *In re Harris*, 5 Cal. 4th 813, 829–40 (1993).

The facts pertaining to the length of Mr. Bell's long period of confinement were not extant at the time of trial, and thus were not in the record on appeal. The *Dixon* bar is inapplicable to claims that depend substantially on information that is not in the appellate record. *See, e.g.*, *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (bar inapplicable when extra-record material has information "of substance not already in appellate record"); *People v. Tatlis*, 230 Cal. App. 3d 1266 (1991) (habeas corpus petition was necessary to show prejudice from trial court error appearing on face of appellate record). Respondent offers no facts or explanation for its assertion that the claim as presented in the Amended Petition could have been raised on appeal based on the facts in the record. Mr. Bell's claim is founded on detailed facts that do not appear in the record. (*See* Amended Petition at 239–43.) Thus, the claim is not barred.

2. Mr. Bell has stated a prima facie case for relief.

Mr. Bell's extended confinement since the imposition of his sentence in 1993 has been caused by factors over which he has had no control and which are overwhelmingly attributable to California's legal system. Mr. Bell's appeal from the judgment was automatic. Cal. Penal Code § 1239(b) (West 2010); *People v. Sheldon*, 7 Cal. 4th 1136, 1139 (1994) (finding "no authority to allow [a] defendant to waive the [automatic] appeal.") Moreover, full, fair, and meaningful review of the judgment, as required by federal and state law, necessitates a complete record, *Chessman v. Teets*, 354 U.S. 156 (1957); Cal. Penal Code § 190.7 (West 2010), and effective appellate representation. *People v. Barton*, 21 Cal. 3d 513, 518–19 (1978); *Evitts v. Lucey*, 469 U.S. 387 (1985).

More than four and one-half years passed before this Court appointed counsel to represent Mr. Bell on appeal and in habeas corpus proceedings. Eight years after that, Mr. Bell's counsel withdrew as habeas counsel for personal reasons, and this Court appointed instant habeas counsel. Mr. Bell's automatic appeal was decided nearly thirteen years after he was sentenced to death. *People v. Bell*, 40 Cal. 4th 582, 594 (2007). The delay in Mr. Bell's case exceeds the average delay experienced by defendants in California's death penalty appeals process. *See* Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 708 (2007) (between 1987 and 2005, the average delay for those inmates whose judgments of guilt and/or sentences were vacated by the California Supreme Court on automatic appeal was 7.6 years). The delay in securing representation for Mr. Bell has prejudiced his ability to seek relief from his unconstitutional conviction and sentence in that significant supporting materials have been lost or destroyed and witnesses have died or are no longer able to recall matters of critical significance to his Amended Petition.

Mr. Bell did not exercise any discretion or have control over the appellate process. *Cf. McKenzie v. Day*, 57 F.3d 1461, 1466–67 (9th Cir. 1995) (claim rejected because delay caused by petitioner "avail[ing] himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances"). The delays in Mr. Bell's case have been caused by "negligence or deliberate action by the State." *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

It is well established that "the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (footnote omitted). Further, "the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

Almost forty years ago, this Court expressed a sentiment that is no less true today:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

People v. Anderson, 6 Cal. 3d 628, 649 (1972) (footnotes omitted). The international community also recognizes that prolonged confinement like

that suffered by Mr. Bell is cruel and degrading and violates international law. *See Pratt v. Attorney General for Jamaica*, 4 All. E.R. 769 (1993), 3 W.L.R. 995 (1995) (U.K. Privy Council); *Soering v. United Kingdom*, 11 E.C.H.R. 439, 440–41 (1989) (Eur. Ct. of Human Rights); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

To take a man who has been told that he is no longer fit to live, then cage him up in a concrete and steel box, under the constant gaze of armed guards, unable to enter a room without a loud declaration to all present that a condemned man has arrived, leave him for years without the assistance of counsel and, when counsel are appointed, subject him to the indignity of a full body cavity search after every legal visit, watching other inmates go to their deaths, living in an environment which underscores the fact that the state intends to do the same thing to him at some extremely remote, indefinite time, violates Eighth Amendment protections against cruel and unusual punishment and international human rights law, and should not have the sanction of this Court.

At the time of this filing, Mr. Bell is over forty-five years old. He has conformed his conduct to the rules and regulations of his confinement and has a long history of remaining free of infractions. In many ways he is not the same man he was when he arrived at San Quentin in 1993. *Cf. State v. Richmond*, 886 P.2d 1329, 1336–38 (Ariz. 1994) (reducing a death sentence to imprisonment because defendant's character had changed for the better during his excessively long confinement on death row).

Mr. Bell has demonstrated prima facie that California's death penalty scheme is unconstitutional or, at least, that an evidentiary hearing should be held so he may present testimony and evidence to prove his allegations.

L. CLAIM TWELVE: MR. BELL IS INELIGIBLE FOR A DEATH SENTENCE UNDER THE LAWS OF THE UNITED STATES AND INTERNATIONAL LAW.

In his Amended Petition, Mr. Bell alleged that the imposition of the death penalty on offenders like him who suffer mental deficits and vulnerabilities that render them unable to modulate or control their behavior offends a longstanding collective judgment of the American people as expressed in laws and sentencing practices, is grossly disproportionate to such offenders' moral culpability, serves no permissible purpose, and carries an enhanced risk of error. (Amended Petition at 243–48.) Mr. Bell set forth a prima facie case for relief.

Respondent argues that this claim is procedurally barred and that, regardless, Mr. Bell has failed to state a prima facie case for relief. (Response at 123–24.) Respondent is incorrect. Moreover, respondent fails to address any of Mr. Bell's specific allegations demonstrating that his death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, the California Constitution, and international law.

1. Mr. Bell's claim is not barred.

Respondent claims that Mr. Bell's claim is procedurally barred because he could have raised it on direct appeal, but did not. (Response at 123, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953).) While Mr. Bell's claim was not raised on direct appeal, he is not barred under *Dixon* from raising it in his habeas petition. The *Dixon* rule is subject to four exceptions: a petitioner is not precluded from raising an issue that involves fundamental constitutional error, a court's lack of fundamental jurisdiction, a court's action in excess of its jurisdiction, or a change in the law since the direct appeal. *In re Harris*, 5 Cal. 4th 813, 829–41 (1993).

As set forth in the Amended Petition and this Reply, the details of Mr. Bell's cognitive, psychological, and psychiatric impairments that support his claim were neither developed nor presented to the jury at trial because trial counsel unreasonably and prejudicially failed to investigate and present them. *Dixon* thus does not apply to Mr. Bell's claims because they involve issues of trial counsel's effectiveness. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) ("We do not apply those bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record.").

Moreover, the *Dixon* bar is inapplicable to claims that depend substantially on information that is not in the appellate record. *See, e.g., In re Robbins*, 18 Cal. 4th at 814 n.34 (bar inapplicable when extra-record material has information "of substance not already in appellate record"); *People v. Tatlis*, 230 Cal. App. 3d 1266 (1991) (habeas corpus petition was necessary to show prejudice from trial court error appearing on face of appellate record). Respondent offers no facts or explanation for its assertion that the claim as presented in the Amended Petition could have been raised on appeal based on the facts in the record. Mr. Bell's claim is founded on detailed facts that trial counsel failed to obtain or present to the jury, and which therefore do not appear in the record. (*See* Amended Petition at 243–48.) Thus, the claim is not barred.

2. Mr. Bell is ineligible for the death penalty.

Mr. Bell's neurocognitive and mental impairments render him morally less culpable for his crimes. His death sentence is not justified by either reason for imposition of the death penalty, retribution, or deterrence. Mr. Bell's death sentence also is unreliable because the capital prosecution of offenders like him, who suffer from mental deficits and vulnerabilities,

carries a heightened risk of unjustified executions. (Amended Petition at 243–48.)

Respondent asserts that Mr. Bell has failed to state a prima facie case for relief because execution of a capital defendant who is mentally impaired, but not mentally retarded, is not cruel and unusual punishment. (Response at 123.) To the contrary, evolving standards of decency and international norms prohibit the execution of a person for conduct he was unable to avoid or control. *Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002). Mr. Bell's sentence is disproportionate to his personal moral culpability because impaired individuals such as Mr. Bell are so lacking in moral blameworthiness as to be ineligible for the penalty of death. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ) (a sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment). The execution of criminal defendants whose cognitive and mental deficits render them incapable of modulating their conduct does not contribute measurably to the goals of deterrence or retribution, and thereby involves the needless infliction of pain and suffering.

Neither retribution nor deterrence is served by the execution of neurocognitively and mentally impaired persons. When addressing the issue of retribution, the Supreme Court in *Atkins* found that if the culpability of the average murderer can be insufficient to justify imposition of a death sentence, *see Godfrey v. Georgia*, 446 U.S. 420, 433 (1980), the lesser culpability of the mentally retarded offender does not merit that form of retribution. *Atkins*, 536 U.S. at 319; *see also Roper v. Simmons*, 543 U.S. 551, 571 (2005) (prohibiting execution of juveniles). As to deterrence, the Supreme Court explained:

> [T]he same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses…also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320; *see also Roper*, 543 U.S. at 571–72. The high court also found that mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will falsely confess to crimes; their lesser ability to give their counsel meaningful assistance; and the facts that they are typically poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crimes. *Atkins*, 536 U.S. at 320–21.

The United States Supreme Court's reasoning applies equally to individuals with serious neurocognitive and mental impairments such as Mr. Bell. His mental deficits impaired his functioning at the time of the crime. They prevented him from meaningfully confronting the procedures and evidence unique to capital cases; distorted his demeanor and reaction to events during trial; and resulted in convictions and a penalty that are unreliable. (*See generally* Ex. 88 at 1638; Ex. 89 at 1643–48; Ex. 113 at 2540–62; Ex. 131 at 2888.)

Additionally, international law, international agreements made by the United States, customary international human rights law, and jus cogens are the law of the United States and must be applied by state courts. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) ("Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants."). Relevant sources of international law governing Mr. Bell's claim include, but are not

limited to: the International Covenant on Civil and Political Rights ("ICCPR"), Arts. 2, 4, 6, 7, 14, 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), adopted December 16, 1966, art. 6; 999 U.N.T.S. 171 (entered into force March 23, 1976); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 1, 2, 11, 16, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); and the Universal Declaration of Human Rights ("UDHR"), Art. 1, 2, 3, 5, 7, 11, G.A. Res. 217, U.N. Doc. A/810 (1948). This Court is bound to consider the evidence Mr. Bell has presented in support of his allegations that his personal characteristics render him ineligible for the death penalty in the context of the United States' international law obligations.

Mr. Bell has presented substantial, uncontradicted evidence that he suffers from mental deficits, including cognitive brain dysfunction with damage in the right fronto-parieto-temporal regions of his brain, particularly the frontal lobe. Additionally, Mr. Bell has adduced substantial evidence that he suffered early-onset mental disorders, co-occurring addictive disease, and severe psychological trauma and abuse. Mr. Bell's biopsychosocial history is replete with multiple severe risk factors that affected his emotional, relational, cognitive, and neuropsychological development and functioning. Moreover, his history is marked by multigenerational substance abuse, mental illness, sexual abuse, and poverty. (Amended Petition at 243–48; Ex. 113; Ex. 131 at 2880–83, 2888.)

Mr. Bell's significantly impaired functioning at the time of the alleged crimes negates any purported moral justification for imposing the death penalty. As a result of the combined effects of Mr. Bell's brain dysfunction and mental vulnerabilities, the existence of which are supported

by data from mental health professionals and anecdotal information from informants about Mr. Bell's life history, Mr. Bell, at the time of the charged crime, lacked the ability to modulate the behaviors for which he was sentenced to death.

Trial counsel's failure to raise the challenges contained in this claim prejudicially violated Mr. Bell's constitutional right to the effective assistance of counsel. Trial counsel did not have any legitimate strategic reason for failing to raise the above challenges to the prosecution of Mr. Bell for capital murder. (*See also* Claims Three and Four of the Amended Petition and *supra*.)

To the extent appellate counsel was required or permitted to raise the above challenge to Mr. Bell's conviction and sentence of death on any of the foregoing grounds, appellate counsel was constitutionally ineffective for failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. (*See also* Claim Eight of the Amended Petition and *supra*.)

For the above reasons, Mr. Bell has made a prima facie showing that his execution would be unconstitutional in light of his impairments, which existed at the time of the alleged crimes, throughout the investigation and prosecution of his case, at sentencing, and which continue to exist now. This Court should therefore grant him habeas relief, or at a minimum, issue an order to show cause as to why relief should not be granted.

M. CLAIM THIRTEEN: THE CUMULATIVE EFFECT OF THE ERRORS IN THE PROCEEDINGS AGAINST MR. BELL REQUIRES THE GRANTING OF HABEAS CORPUS RELIEF.

Mr. Bell has presented facts to this Court in his Amended Petition and this Reply which, considered individually and in the aggregate, constitute a prima facie case for relief from his conviction and sentence. Respondent answers with a perfunctory assertion that this Court should not grant habeas relief predicated on cumulative error because "there is no error to accumulate, as all of Mr. Bell's claims are meritless, and some are procedurally barred." (Response at 124–25.) This conclusory statement is unsupported by the facts and law.

As this Court has recognized, in death penalty cases, Penal Code section 1239, subdivision (b), "imposes a duty *upon this court* to make an examination of the complete record of the proceedings ... to the end that it be ascertained whether defendant was given a fair trial." *People v. Easley*, 34 Cal. 3d 858, 863 (1983) (emphasis in original, internal quotations omitted) (quoting *People v. Stanworth*, 71 Cal. 2d 820, 833 (1969), and citing *People v. Bob*, 29 Cal. 2d 321, 328 (1946), *People v. Perry*, 14 Cal. 2d 387, 392 (1939), *People v. Figueroa*, 160 Cal. 80, 81 (1911)); Cal. Penal Code § 1239(b) (West 2010).

As set forth in the Amended Petition and this Reply, manifold infringements on Mr. Bell's constitutional protections prevented a fair adjudication of the charges against him and a just and reliable assessment of his sentence. Each of these errors individually constituted reversible prejudice. When these infringements are considered together, however, the harm is even more manifest.

Such cumulative review is necessary, because prejudice is judged by analyzing the overall effect of all the errors in the context of all the

evidence. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also Alcala v. Woodford*, 334 F.3d 862, 882–83, 893–94 (9th Cir. 2003) (holding that combined prejudice of multiple errors deprived defendant of fundamentally fair trial and constitutes a separate and independent basis for relief); *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (holding that even where no single error is prejudicial, the cumulative effect of non-prejudicial errors may itself be prejudicial and require reversal) (citation omitted); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (noting that prejudice may result from the cumulative impact of multiple deficiencies). As recognized in *Mak* and *Alcala*, in assessing whether the existence and effect of cumulative constitutional error produced a fundamentally unfair trial, the court may combine different species of error, such as trial court error along with the deficiencies of counsel. *Alcala*, 334 F.3d at 1381; *Mak*, 970 F.2d at 622.

The Ninth Circuit Court of Appeals maintains the logical position that the whole is greater than the sum of its parts, and that errors which may be deemed non-prejudicial when considered in isolation can cumulatively have a substantial, injurious effect on the jury's verdict. Thus, multiple deficiencies merit a collective or cumulative assessment of the existence of constitutional error and prejudice; errors that do not require a judgment be set aside when viewed alone may require relief in the aggregate. *Alcala*, 334 F.3d at 883, 893; *Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir. 2001) (recognizing the importance of considering cumulative error and of not conducting a "balkanized, issue-by-issue harmless error review") (citations omitted); *see also Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002) (noting that the "cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error" and that "[a] cumulative-error analysis merely

aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.") (citations omitted). State law is in accord. (Amended Petition at 248–49.) *See also People v. Kronemyer*, 189 Cal. App. 3d 314, 349 (1987) (stating that cumulative error doctrine "always applies").

At each stage of his capital trial Mr. Bell was subjected to numerous constitutional violations at the hands of his counsel, the prosecutor, state officials, the trial judge, and the jurors who voted that Mr. Bell be convicted and sentenced to death. Considered cumulatively, these errors, as set forth in detail in the Amended Petition and this Reply, had a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), and require the grant of relief.

//

//

//

//

//

//

IV. CONCLUSION

For reasons set forth in the Amended Petition and above, Mr. Bell has stated a prima facie case and is entitled to the issuance of an Order to Show Cause, an evidentiary hearing, and a reversal of his conviction and sentence.

Dated: September 28, 2010 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____
Miro F. Cizin

By: _____
Kevin Bringuel

By: _____
Anne D. Gordon

Attorneys for Petitioner Steven M. Bell

VERIFICATION

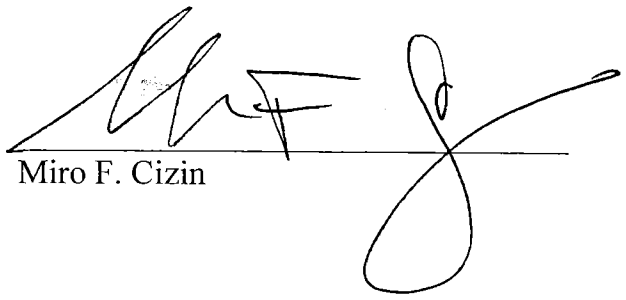
Miro F. Cizin declares as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner Steven M. Bell herein, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this Reply to the Informal Response on Mr. Bell's behalf. I make this verification because Mr. Bell is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than Mr. Bell's.

I have read the Reply and know the contents of it to be true.

Executed under penalty of perjury on September 28, 2010, at San Francisco, California.



Miro F. Cizin

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to this action or cause; my current business address is 303 Second Street, Suite 400 South, San Francisco, California, 94107.

On September 28, 2010, I served a true copy of the following documents:

- **PETITIONER'S REPLY TO THE INFORMAL RESPONSE**
- **VOLUME X OF EXHIBITS IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITIONER'S REPLY TO THE INFORMAL RESPONSE**

on the following by placing a true copy thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Attorney General - San Diego Office
Lynne G. McGinnis, Deputy Attorney General
P.O. Box 85266
San Diego, CA 92101

As permitted by Policy 4 of the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death, service on Petitioner will be completed by hand-delivering a copy to him within thirty calendar days, and counsel will notify the Court in writing once service is complete.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 28, 2010 at San Francisco, California.

Carl Gibbs