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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHAEL LAMONT JONES, Petitioner, v. MICHAEL MARTEL, Warden, California State Prison at San Quentin, Respondent.	NO. CV 04-2748-ODW **DEATH PENALTY CASE** REDACTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS; EXHIBITS 1 TO 190

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I.

INTRODUCTION

1. "Your honor, I didn't kill him. I did not kill him. I didn't kill him. Andre killed him." Those were the words exclaimed by Jones after a jury sentenced him to death following his conviction for shooting Shane Weeks. Jones's declaration of innocence was not a new revelation. He repeatedly informed his trial counsel and the police of the true identity of Weeks's killer long before his trial began. And Jones's protestations were not hollow words. Indeed, lying on a stretcher following the shooting, Weeks declared that the shooter wore a diamond earring. Jones never had an earring. Instead, as Jones had tried to explain from the beginning, Andre Davis, who did have an earring at the time, walked into the Domino's Pizza while Jones remained outside, carried out the robbery and shot Weeks on his way out. The state courts were presented with this, and other additional evidence, demonstrating that Jones could not have shot Weeks, yet the state declined to even grant itself jurisdiction to order additional fact-finding on Jones's claims, denying his habeas petitions at the most preliminary stage.

2. The unreasonableness of the state court's refusal to find that Jones presented even a *prima facie* case for habeas relief is demonstrated by the sheer volume of constitutional error infecting Jones's trial proceedings. Ultimately, a fair and accurate determination of guilt and punishment, along with the truth of who shot Weeks, was hidden beneath a constellation of constitutional violations that occurred before, during, and after Jones's capital trial. For example, prior to Jones's trial, the Riverside County law enforcement prioritized targeting Jones rather than identifying the true culprit as shown by the improper suggestions made to the main testifying eyewitness to the Domino's homicide, Christina Kane, that Jones was the man she should identify.

3. The Riverside County Prosecutor, who according to one source once remarked that "good prosecutors win their cases, but it takes a great prosecutor to put an innocent man in prison," engaged in brazen misconduct to secure Jones's conviction. Dearmond, Trone & Arballo, Jr., *Profile: Rod Pacheco - Riverside County District Attorney*, The Press Enterprise, Section A (Jan. 6, 2008). From failing to disclose a plea agreement and other benefits offered to Jones's co-defendants while affirmatively denying to the jury that evidence of such agreements existed at all, to misstating the law and personally vouching for the credibility of witnesses, the prosecutor abandoned his role as an arbiter of justice sought the conviction of Michael Jones at all costs. The prosecutor's misconduct continued after the guilt phase of the trial, and he aggressively fought to secure a death sentence. To do so, the prosecutor introduced gang evidence to the jury despite a court order, inaccurately posited that Jones would be a danger in prison, and continued his practice of vouching for witnesses.

4. The prosecutor's abandonment of prosecutorial ethics was matched only by the wholly incompetent representation of Jones's trial counsel. Instead of adequately or even minimally subjecting the state's evidence against Jones to cross-examination, trial counsel failed to impeach the state's witnesses who were riddled with credibility issues. Trial counsel similarly failed to present the glaring evidence that Andre Davis was responsible for the shooting, instead waiting until Jones desperately exclaimed his innocence in the courtroom to file a motion for a new trial alleging that Andre Davis was the actual shooter. Trial counsel's performance did not improve during the penalty phase of Jones's trial. Counsel again failed to present mitigating evidence that established that Jones was severely impaired at the time of the capital offense and suffered from organic brain damage, alcoholism and substance abuse. Trial counsel's abysmal performance was not surprising given the lack of

preparation and investigation conducted on Jones's behalf. Such conduct fell far short of the standard of care in Riverside County at the time of Jones's trial, and effectively deprived Jones of constitutionally adequate counsel.

5. The result of the constitutional violations permeating Jones's trial, both individually and cumulatively, was a proceeding infected with bias, and a breakdown of the constitutional adversarial system upon which our criminal justice system relies. Such constitutional guarantees are clearly established by the United States Supreme Court, and require that Jones be granted a writ of habeas corpus overturning his convictions and sentence of death.

Petitioner, Michael L. Jones, by and through his counsel, hereby petitions this Court for a writ of habeas corpus. As set forth herein, Jones is being held under convictions and sentences in violation of the United States Constitution and laws of the United States.

II.

PROCEDURAL HISTORY AND JURISDICTIONAL ALLEGATIONS[1]

1. Petitioner, Michael Jones, has been sentenced to death for the January 21, 1989, robbery homicide of Herman Weeks in Riverside, California. The fatal shooting of Herman Shane Weeks,[2] occurring during a Domino's Pizza robbery, was

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[1] Central District of California Local Rule 83-17.3(b) states: "Petitions shall be filed on a form supplied by the Clerk of the Court, and shall be filled in by printing or typewriting. In the alternative, the petition may be in a legible typewritten or written form which contains all of the information required by that form." Since the space provided in this Court's standard form is inadequate, Jones sets forth the jurisdictional allegations, procedural history, and claims for relief in a manner equivalent to the standard form.

[2] Herman Shane Weeks was referred to at the trial as "Shane" and will be referred to hereinafter as Shane Weeks.

the second of three incidents presented at the time of trial. Evidence was presented in the guilt phase regarding an armed robbery at the Mad Greek Restaurant on December 19, 1988; and an incident occurring at an isolated area called the "Flats" in Moreno Valley on October 31, 1989. Injuries were sustained during the Mad Greek and Flats incidents, but only the Domino's incident resulted in a death. On July 31, 1991, during jury selection for trial on all three incidents, Jones pled guilty to the charges arising from the Flats incident. As a result, trial proceeded in the guilt phase solely on the Domino's and Mad Greek incidents, with a presentation of the Flats incident during the penalty phase.

2. Jones was arrested on November 1, 1989. (CT 79, RT 87.)[3] He was arraigned on November 3, 1989 (CT 25) and charged as follows: Count I, attempted murder of Brian Walker (Cal. Penal Code §§ 664/187), with further allegations of personal use of a shotgun (Cal. Penal Code §§ 12022.5 and 1192.7, subd. (c)(8)), and infliction of great bodily injury (Cal. Penal Code § 12022.7); Count II, attempted murder of Chris Swan (Cal. Penal Code §§ 664/187), with further allegations of personal use of a shotgun (Cal. Penal Code §§ 12022.5 and 1192.7, subd. (c)(8)), and infliction of great bodily injury (Cal. Penal Code § 12022.7); Count III, attempted murder of Larry Nave (Cal. Penal Code §§ 664/187), with further allegations of personal use of a handgun (Cal. Penal Code §§ 12022.5 and 1192.7, subd. (c)(8)), and infliction of great bodily injury (Cal. Penal Code § 12022.7); and Count IV, robbery of Larry Nave (Cal. Penal Code § 211), with personal use of a shotgun during the

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[3] Hereinafter, Jones will cite to the Reporter's Transcript as "RT" and will cite to the Clerk's Transcripts in the following manner: "CT" [volumes I-V] (the "regular" CT), "Supp.1 CT" [volumes 1- 9] (juror questionnaires), and "Supp.2 CT" [volumes 1-2] (attorney billing statements). The Reporter's Transcripts taken at the preliminary hearing will be cited to hereinafter as "PHRT." Exhibits will be referred to in an abbreviated manner as "Ex."

commission of the robbery (Cal. Penal Code §§ 12022.5 and 1192.7, subd. (c)(8)). In Count V, co-defendants Alan Murfitt and Patrick Hunt were charged with knowledge of the attempted murders committed by Jones and concealing and aiding Jones with the intent to avoid arrest and prosecution. Cal. Penal Code § 32. (CT 13-15.)

3. On November 3, 1989, the Riverside County Public Defender was appointed to represent Jones in Municipal Court. (CT 25.) Riverside County deputy public defender James Spring represented Jones throughout proceedings during the preliminary hearing. (CT 17-24.)

4. On May 3, 1990, Frank Peasley was appointed to represent Jones. (CT 54.) On September 19, 1990, the Court ordered that second counsel be appointed to assist lead counsel. (CT 85.) David Gunn was hired to assist Peasley; Gunn participated mostly in the penalty phase. (CT 182.)

5. In a second amended information filed on March 14, 1991, in the Superior Court of the State of California for the County of Riverside, Case No. 35410, the Riverside County District Attorney charged Jones as follows: Count I, participation in a criminal street gang (Cal. Penal Code § 186.22); Count II, murder of Herman Shane Weeks (Cal. Penal Code § 187), with further allegations that the murder was committed during the commission of a robbery (Cal. Penal Code § 190.2, subd. (a)(17)(i)), during the commission of a burglary (Cal. Penal Code § 190.2, subd. (1)(17)(vii)), and with Jones having personally used a handgun (Cal. Penal Code § 12022.5 and 1192.7, subd. (c)(8)); Count III, robbery of Herman Shane Weeks (Cal. Penal Code § 211), with personal use of a handgun during the commission of the robbery (Cal. Penal Code §§ 12022.5 and 1192.7, subd. (c)(8)); Count IV, burglary (Cal. Penal Code § 459), with personal use of a handgun (Cal. Penal Code §§ 12022.5 and 1192.7, subd.(c)(8)); Count V, robbery of Maria Zuniga and Javier Sierra (Cal. Penal Code § 211), with personal use of a handgun during the robbery (Cal. Penal

Code §§ 12022.5 and 1192.7, subd. (c)(8)); Count VI, attempted murder of Thomas Chegwidden (Cal. Penal Code § 664/187), with personal use of a handgun (Cal. Penal Code §§ 12022.5 and 1197, subd. (c)(8)), and infliction of great bodily injury (Cal. Penal Code § 12022.7); Count VII, attempted robbery of Lola Marie Hall (Cal. Penal Code § 664, 211), with personal use of a handgun (Cal. Penal Code §§ 12022.5, 1192.7, subd. (c)(8)); Count VIII, attempted murder of Lola Marie Hall (Cal. Penal Code §§ 664/187), with personal use of a handgun; Count IX, attempted murder of Maria Zuniga, with personal use of a handgun; Count X, attempted robbery of Larry Nave, Brian Wagner and Chris Swan (Cal. Penal Code §§ 664/211), with personal use of a shotgun (Cal. Penal Code §§ 12022.5, 1192.7, subd. (c)(8)), and while armed with a handgun, Count XI, attempted murder of Brian Wagner, with personal use of a shotgun, and infliction of great bodily injury; Count XII, attempted murder of Chris Swan, with personal use of a shotgun and infliction of great bodily injury; Count XIII, attempted murder of Larry Nave, with personal use of a shotgun and infliction of great bodily injury; and further that, during the commission of the offenses charged, Jones participated in a criminal street gang within the meaning of California Penal Code Section 186.22, subd. (b)(2). (CT 37-45.)

6. On July 31, 1991, Jones changed his plea to guilty to Counts I, X, XI, XII, and XIII, admitted the special allegations alleged under those counts, and further admitted the "gang" allegation as to all counts. (CT 587-615; RT 3462-3463.)[4]

7. Jury selection began on July 15, 1991, and concluded on August 1, 1991, (CT 579, 616.) On August 5, 1991, the prosecution began its case-in-chief. (CT 619.) On August 28, 1991, the jury began deliberations. (CT 665; RT 3194.) On

[4] At the penalty phase, the parties stipulated to Jones's guilty plea on Counts X, XI, and XII being read into the record. Count XIII was not brought in because Jones had not personally shot Larry Nave.

September 3, 1991, the jury found Jones guilty of all charges and found the robbery, burglary, and special circumstance allegations to be true, and also found that Jones personally used a firearm during the commission of the charged offenses. (CT 780-783; RT 3205-3214.)

8. On September 5, 1991, the penalty phase of the trial began. (CT 826.) It lasted for six days. (CT 826-829, 832-834, 851.) This phase of the trial was conducted by Gunn, rather than lead counsel, Peasley, who tried the guilt phase. (CT 826; RT 3250.) On September 16, 1991, the jury began deliberations on the penalty verdict. (CT 880.) On September 18, the jury returned a verdict of death for the murder of Herman Shane Weeks. (CT 884-85.) On December 13, 1991, Jones's Motions for New Trial and to Modify the Verdict were denied, and the death judgment was imposed. (CT 985-988.) Jones did not testify in his own behalf at either phase of the trial.

9. On December 30, 1991, Jones filed a notice of automatic appeal from the judgment of death. On November 15, 1995, William Flenniken was appointed to represent Jones on his direct appeal and any related habeas proceedings. Kent Russell was appointed as associate counsel. On September 21, 1998, Jones's Opening Brief was filed in the California Supreme Court. On May 20, 1999, Respondent's Brief was filed. Jones's Reply Brief was filed on January 29, 2001. In summary, the grounds raised in Jones's automatic appeal included: (1) Jones was denied his constitutional right to present a defense; (2) Jones was denied his constitutional right to a trial by a fair cross section of the community; (3) prejudicial gang evidence was erroneously admitted at trial; (4) trial counsel was ineffective in the guilt phase; (5) the prosecutor committed misconduct by failing to produce *Brady* material to the defense before the preliminary hearing; (6) cumulative prejudice in the guilt phase; (7) the prosecutor committed prejudicial misconduct by repeatedly

eliciting inadmissible gang evidence during the penalty phase; (8) trial counsel failed to object to gang rebuttal evidence or to request an in limine hearing; (9) trial counsel called a defense expert whose testimony regarding mitigation was of negligible value to the defense and who, on cross-examination, became a powerful advocate for the prosecution; (10) trial counsel failed to present and argue evidence of lingering doubt; (11) trial counsel failed to argue youth as a mitigating factor; (12) the California death penalty statute is unconstitutional; and (13) miscellaneous arguments.

10. A timely Petition for Writ of Habeas Corpus was filed with the California Supreme Court on January 8, 2001. In summary, the grounds raised in the Petition included: (1) trial counsel was ineffective in the penalty phase; (2) trial counsel was ineffective in the guilt phase; (3) the prosecutor committed misconduct by allowing the jury to hear, and by arguing the effects of, the inadmissible, unimpeached preliminary hearing testimony of a deceased witness; (4) state interference obstructed Jones's right to petition the courts for redress and to investigate and prepare the habeas petition; (5) Jones's conviction and sentence were unconstitutionally imposed based on race and other improper charging, prosecuting, and sentencing considerations; (6) the statutory sentencing scheme under which Jones was sentenced to death is unconstitutional; (7) the State has failed to narrow the class of death-eligible offenders and arbitrarily imposes the death sentence; (8) lethal injection for executions constitutes cruel and/or unusual punishment; (9) Jones is factually innocent of the special circumstance and trial counsel was ineffective for not bringing the evidence before the jury; (10) imposition of the death penalty is unconstitutional and morally unacceptable; (11) the death penalty violates equal protection and the Eighth Amendment as applied to those eighteen to twenty-one years of age at the time of the commission of the capital offense; (12) Jones's youth,

potential for rehabilitation, and exemplary conduct in prison were not considered; and (13) the errors were cumulative. That petition was denied on October 29, 2003. *In re Jones*, No. S094239, 2003 Cal. LEXIS 8297.

11. On June 16, 2003, the California Supreme Court affirmed Jones's conviction and death penalty sentence on automatic appeal. *People v. Michael Lamont Jones*, 30 Cal. 4th 1084, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). The Petition for Rehearing was denied on August 27, 2003. *In re Jones*, No. S024599, 2003 Cal. LEXIS 6404.

12. Jones filed a Petition for Writ of Certiorari with the United States Supreme Court on November 25, 2003. In summary, the grounds raised in the petition included: (1) whether the state court erred in failing to define youth as a mitigating factor when instructing Jones's penalty phase jury, and (2) whether the California death penalty statute, as generally applied, violates the holding of *Ring v. Arizona* because the fact finder at the penalty phase need not find aggravating facts unanimously and beyond a reasonable doubt. Jones's certiorari petition was denied by the United States Supreme Court on April 5, 2004. *Jones v. California*, 541 U.S. 975, 124 S. Ct. 1877, 158 L. Ed. 2d 472 (2004).

13. No evidentiary hearing was held in any state or federal court.

14. On April 20, 2004, Jones filed his Request for appointment of counsel and a stay of execution in the United States District Court, Central District of California. On April 27, 2004, the Office of the Federal Public Defender was appointed to represent Jones. On March 30, 2005, counsel for Jones filed a Petition for Writ of Habeas Corpus in the California Supreme Court in order to exhaust state court remedies. Jones's counsel also filed a Motion for Appointment of Counsel of Record so that the Federal Public Defender's Office may represent Jones in these proceedings. On April 5, 2005, Jones filed a Petition for Writ of Habeas Corpus in

this Court. On July 15, 2005, this Court issued an order holding the case in abeyance pending resolution of the state habeas petition filed with California Supreme Court. On December 7, 2007, Respondent filed an informal response to the state petition. On May 15, 2009, Jones filed an informal reply to the state petition.

15. On November 30, 2011, the California Supreme Court denied the exhaustion petition. Jones now returns to this Court with the instant Amended Petition for Writ of Habeas Corpus.

16. The following court-appointed attorneys have represented Jones: In proceedings before the Riverside County Superior Court, Jones was represented by Frank Peasley, Esq. and David Gunn, Esq. Peasley's address is 3877 12th St., Riverside, California 92501. Gunn's address is 4175 Main Street, Riverside, CA 92501. On automatic appeal to the California Supreme Court and on state habeas corpus, Jones was represented by William Flenniken, Esq. and Kent Russell, Esq. Flenniken's address is 57 Post St., Ste. 608, San Francisco, California 94104. Russell's address is 3169 Washington St., San Francisco, California 94115.

17. As set out more fully below, Jones is being unlawfully held under conviction and sentence of death in violation of the Constitution and laws of the United States and the Constitution of the State of California. He is in the custody of the California Department of Corrections and Rehabilitation at the California State Prison at San Quentin, California, by Respondent Michael Martel, Warden of San Quentin Prison.

III.

VENUE AND INTRADISTRICT ASSIGNMENT

18. The Petition is properly filed in this District and Division because Jones challenges the lawfulness of convictions and a death sentence imposed in Riverside County, California. L.R. 83-17.3(a), 83-17.5(a).

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IV.

INCORPORATION AND AUTHENTICITY OF EXHIBITS

19. Jones incorporates the accompanying exhibits into this Petition by reference as if set forth in full herein. Jones's claims are based on the Petition, the declarations and documents appended thereto, and all records, documents and pleadings filed in the California Supreme Court in his direct appeal and habeas actions. Jones hereby requests this Court to take judicial notice of the entire record from his automatic direct appeal, *People v. Michael Lamont Jones*, Case No. S024599, and his state habeas corpus action, *In re Michael L. Jones*, Case No. S094239.

20. Jones requests that the Court consider all the exhibits filed with this Petition. As to those exhibits that have not been authenticated, which contain hearsay information or which might otherwise be inadmissible at an evidentiary hearing on this Petition, Jones presents them as an offer of proof about what evidence Jones could introduce after full investigation, discovery, and access to this Court's subpoena power. In citing in this Petition to specific exhibits or to specific pages or paragraphs thereof, Jones does not contend or concede that these specific references are the only evidence which could be presented at an evidentiary hearing in support of his claims.

21. All articles, records, photographs, and other documents submitted as exhibits are what they purport to be.

22. Original copies of Jones's exhibits are available at the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012, and will be furnished to the Court or shown to opposing counsel on request. Other original copies will be filed with the California Supreme Court, pursuant to its rules directing Jones to do so.

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V.

STATEMENT OF FACTS

A. Jones's Trial

1. Jones's trial counsel, Frank Peasley and David Gunn, failed to present compelling evidence, and in some instances, were prevented from doing so by the trial court. The prosecutor kept important evidence from the defense and misled the jury. Three other suspects were arrested in connection with the Domino's robbery. The prosecution's theory, that Jones and Eric Bailey held up the Domino's together, fell apart when the prosecutor investigator saw Andre Davis in the Riverside County Jail and compared his picture to the composite drawing. The prosecutor dismissed the charges against Bailey. None of the other participants in the Domino's case were ever prosecuted.

2. Had the jury really learned who Michael Jones was and what life events and outside factors led to his arrest for robbery and murder, Jones would not be on death row today. The pure misfortune of his life circumstances, brain damage, youth, alcoholism, and entanglements with ex-gang members and criminals, coincided to put Jones's life at stake. This is not a case that warrants the application of death-eligibility, nor is Jones the type of person who deserves the ultimate, irreversible punishment of death.

1. The Guilt Phase

a. The Pretrial Motions

3. Jones brought two pretrial motions to sever. The first motion was to sever the defendants and was granted. (CT 90.) The second motion was to sever the counts and was denied with prejudice. (CT 443-59.)

4. Two motions to suppress evidence were brought by Jones. One motion was regarding statements by Jones made to the investigating officers and it was denied. (CT 489.) However, Jones's statements were never introduced at trial. The other motion was regarding the admissibility of the gang evidence, and was also

denied. (RT 2221-22.)

5. Jones also brought a motion to admit expert testimony on eyewitness identification that was denied. (CT 577.) There was also a discovery motion brought by the prosecutor wherein discovery was requested from Jones's counsel. (CT 465.) That motion was granted over Jones's objections. (CT 504.)

b. The Prosecution's Case-in-Chief

6. The prosecution put on a case based solely on unreliable percipient witnesses, and snitches who claimed to have overheard admissions by Jones. There was no testimony that investigation of other potential suspects was conducted. There were six suspects involved in the robbery-homicide of Shane Weeks. Jones was the only one who was put on trial and convicted for his death. This is also true with respect to the robbery at the Mad Greek restaurant. Despite testimony that four men were involved in that robbery, Jones was the only suspect prosecuted.

7. The first witness called by the prosecution was Lola Hall. (RT 2255.) She was one of the victims in the Mad Greek robbery. (RT 2262, 2294.) Hall had been shot at, but was not injured. (RT 2270.) She testified that at least four people were involved in the robbery, but was not able to identify Jones at a live lineup. (RT 2262, 2289.) Hall did identify Jones as the shooter in the suggestive environments of the preliminary hearing and the trial, after her memory had already been influenced by having seen Jones at a live lineup. (RT 2263-65.)

8. Thomas Chegwidden was another victim from the Mad Greek incident that testified. Chegwidden had been punched and then shot in the chest, and survived. (RT 2267-68, 2293-95.) He was never able to identify anyone from the incident, although he attended a live lineup. At trial he was never asked to identify Jones.

9. Maria Zuniga was the only other witness to the Mad Greek incident who testified. (RT 2872-93.) She had identified Jones at a live lineup, and did so again while in court. (RT 2877-80.) She also testified that four black men were involved

with the incident. (RT 2875.)

10. Victor Moreno and Christina Kane were the only witnesses to the Domino's robbery who testified. (RT 2332-44, 2383-2449.) Moreno testified as to the events of the evening, but was unable to identify Jones. (RT 2335-42.) He was never asked if he could say for sure that Jones was not the perpetrator. Christina Kane described the events leading to the shooting of Herman Shane Weeks. (RT 2383-2410.) At a live lineup, Kane identified someone other than Jones, and claimed to be ninety-nine percent sure that the individual she identified at the lineup was the shooter. (RT 2433.) Jones was in that lineup, and Kane failed to identify him. (*Id.*) Once in the suggestive environment of the court, and having seen Jones at the live lineup, Kane was able to identify him there. (RT 2401.) Sandra Everingham was from the company that owned the Domino's Pizza in question and testified to the amount of money that the store was short on that evening. (RT 2451-55.)

11. The jury heard the testimony of two co-conspirators. Najee Muslim was in the car with Jones on the evening of the Domino's robbery. (RT 2471.) Muslim was threatened by police that he would be charged with murder in this case if he didn't talk to the police about the Domino's incident. (RT 2487-88.) He did talk to the police and was subsequently charged with and pled guilty to being an accessory after the fact, a misdemeanor, for his involvement in this case. (RT 2484, 2489-90.) He also pled guilty to an unrelated robbery for which he got a prosecution promise of straight probation. (RT 2484-85.) Muslim was not sentenced on those two charges at the time he testified, and knew he wouldn't be until Jones's trial was over. (RT 2490.) The trial court refused to allow the defense to present evidence that Muslim's plea arrangement of straight probation for a robbery was highly unusual. (RT 2867.)

12. Frankie Cruz drove the car during the Domino's robbery. (RT 2594.) Frankie Cruz testified at the preliminary hearing pursuant to a plea agreement, but that agreement was never disclosed to defense counsel and Cruz was never questioned regarding the agreement. (Ex. 96.) Cruz committed suicide prior to the

trial and his preliminary hearing testimony was read to the jury by the prosecutor. (RT 2546.) The jury never learned of Cruz's plea agreement.

13. Five witnesses testified to incriminating statements that Jones supposedly made. Erin Burton had heard Jones admit to being involved in the Domino's robbery, but she admitted that Jones never said that he was the shooter. (RT 2710.) Later, Burton was shown photographs of two people, Jones and Michael Eugene Jones, and she was asked to pick out the Michael Jones that she knew. (RT 2714.) She picked out the photograph of Michael Eugene Jones rather than Jones, although she denied that she had done that at trial. (RT 2919, 2714.)

14. Tara Taylor testified that she had been threatened by Jones after she assisted the police by providing them with a photograph of Jones. (RT 2696.) However, Taylor did not testify that Jones or anyone else told her that Jones was involved in the Domino's robbery.

15. Enrique Luna testified in the hopes of getting a reduced sentence. (RT 2550.) Initially the prosecutor denied that any agreement existed with Luna, but Luna testified at a 402 hearing that such an agreement did exist. (RT 2550-53.) Luna clearly expected something in return for his testimony. At some unspecified time after the Domino's Pizza robbery, Luna asked Jones about the murder and Jones purportedly admitted that he had killed Weeks. (RT 2562, 2565, 2580, 2561.) According to Luna, it didn't appear to bother him. (RT 2565.) Jones said that they needed some money to get into a party because they didn't have enough money. (RT 2567.) Jones and Bailey got out of the car, went into Domino's Pizza and robbed it, and got something like $12. (RT 2567.) Jones later sold the .22 revolver used in the robbery. (RT 2566-67.)

16. Luna talked to the police about what he knew because they accused him of being the murderer. (RT 2573-74.) He pled guilty to an unrelated robbery in return for a promise of five years probation. (RT 2575-76.) He had not been sentenced at the time of trial but Luna had been told he could get a year of county

time as a condition of probation, and that would be determined by the prosecutor, who promised to "do what he could" for Luna if Luna would "cooperate, work with the system." (RT 2575-76, 2577.)

17. Luna now admits that Jones never confessed anything to him at all about the Domino's robbery-homicide. (Ex. 148, Decl. of Enrique Luna, ¶ 3.)

18. Carlos Hunt, a jailhouse informant, was in custody with Jones and testified that Jones admitted being the shooter in the Domino's incident, and inaccurately stated that a shotgun was used during the shooting. (RT 2772.) Hunt also testified pursuant to a plea agreement. (RT 2768.)

19. Diane Harrison was a deputy district attorney who claimed to have heard Jones say, "They got me good," while in court on a prior occasion. (RT 2686.) This statement had little context, and made no reference as to any facts.

20. Several officers and detectives that were at the lineups and investigated the crime scenes also testified. Detective McFall testified regarding some of the live lineups and the crime scene investigation of the Domino's robbery. (RT 2302-19.) Officer Bartram was involved with the crime scene investigation of the Mad Greek and testified to his participation in the investigation. (RT 2327-30.) Officer Griffitts was the first to arrive at the Domino's location and testified to what he discovered there. (RT 2374-81.) Detective Boyer testified on two occasions. The first time, Boyer testified regarding the amount of money that was found in Shane Weeks's pants pockets. (RT 2458-59.) The second time, Boyer testified regarding prior statements made by Enrique Luna concerning alleged conversations Luna had with Jones. (RT 2716-17, 2724-26.)

21. Officer Portillo testified to a conversation with Muslim wherein Muslim described the events of the Domino's robbery and related statements made by Jones. (RT 2663-71.) Officer Wilson confirmed that Carlos Hunt was in the same cell as Jones and claimed to have heard Jones call Hunt a "snitch." (RT 2785-86.) Officer Vaughn testified to what was discovered at Mario Villarreal's house, the location

where Jones was residing at the time of Jones's arrest. (RT 2789-2801.) Many of the items that were confiscated during that search were not in Jones's room. Other officers also testified regarding the chain of custody of certain items.

22. Doctors involved with the examination of the victims also testified. Dr. Mullen and Dr. Veneman were involved in the examination of, and removal of the bullet from, Chegwidden's chest. (RT 2355-61, 2363-65.) Dr. Ditraglia examined Weeks and determined the cause of his death. (RT 2635.) William Matty, an expert witness, testified regarding his examination of the bullets that were recovered from both crime scenes. (RT 2746-49.) While Matty did note certain characteristics that the bullets shared from the Mad Greek and Domino's scenes, he was unable to determine if all the bullets came from the same weapon. (RT 2751, 2755.)

23. The defense case at the guilt phase consisted of two witnesses and a stipulation. Richard Cleary, a deputy public defender, testified as to the conditions at the location where the live lineups were conducted. (RT 2907-09.) His testimony offered little if any assistance to the defense. Najee Muslim was recalled by the defense and questioned regarding the clothes Jones was wearing on the evening of the Domino's incident. (RT 2990-94.) The stipulation was regarding the fact that Erin Burton had misidentified a picture of a different person, Michael Eugene Jones, as that of Jones. (RT 2919-20.)

24. The jury never heard evidence that in fact, Andre Davis was the shooter and perpetrator of the Domino's robbery-homicide. Although Jones had told his lawyers from the beginning of their representation that Andre Davis was the shooter, trial counsel failed to adequately investigate to find him. Andre Davis was at the Riverside County jail and, once the prosecution investigator saw him, he felt that he matched the composite drawing. Thereafter, the prosecutor dropped all charges against Eric Bailey, who had originally been charged as a co-perpetrator of the Domino's robbery-homicide.

25. The prosecution's case began on Monday, August 5, 1989 and continued

through Monday, August 26, 1989. (CT 619, 635.) The defense case began on Monday August 26, 1989 and continued through Tuesday, August 27, 1989. (CT 635, 636.)

26. The total of the defense evidence lasted less than a day. To the extent that there was a defense theory at all, it only involved the issues of mistaken identity and biased witnesses. On September 3, 1991, the jury found Jones guilty of first degree murder, Penal Code section 187, subdivision (a), found the special circumstances (murder in the commission of the crimes of burglary and robbery) to be true, and found that a gun was used in commission of the crime of murder. (RT 3207.)

2. The Penalty Phase

a. The Prosecution's Case in Aggravation

27. The only aggravating evidence offered by the prosecution was evidence under Penal Code section 190.3, subdivision (b), relating to evidence of a shooting at the Flats area in Moreno Valley to which Jones had pled guilty during jury selection at the guilt phase.[5] By stipulation, the prosecution introduced Jones's guilty plea

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[5] The prosecutor presented no further evidence with respect to the Domino's or the Mad Greek incidents, but he brought facts up during his closing argument under factor (a). (*See generally* RT 3773-89.) He argued that during the Mad Greek robbery, Jones shot at three victims and hit one; that all the shootings were "unprovoked, unjustified, willful, deliberate, and premeditated"; that, with respect to someone who was actually hit by a bullet (Chegwidden), the bullet passed close to the victim's heart; that, as to Lola Hall, Jones pointed the gun at her head and shot at her while she had her hands up; that Jones, as he was leaving, also fired at Zuniga.

With respect to the Domino's robbery-homicide, the prosecutor argued under factor (a) in closing argument that Weeks was shot and killed while he had his hands up and was not provoking the assault or threatening Jones; and that Weeks was shot as Jones was leaving and already had the stolen money in his pocket.

The prosecutor also argued other aggravating evidence with respect to the two robberies including, that Jones kept newspaper clippings of the Mad Greek offense and made statements to his friends that he was going to "make history"; that Jones

colloquy to the Flats incident. (RT 3462-63.)

28. The "Flats" was an isolated area in Moreno Valley that teenagers and young adults frequented to make bonfires, to drink, and to have parties. On Halloween, October 31, 1989, at 8:30 p.m., there was a party at the Flats. (RT 3296, 3310, 3323, 3370.) Thirty or forty people were there drinking around a bonfire. (RT 3297, 3356, 3310.)

29. Before 10:00 p.m., some officers from the Moreno Valley police department arrived and told everyone to go home. (RT 3297-98, 3356, 3323.) Everyone left but seven people. (RT 3356, 3298, 3323, 3310.) One of them, Larry Nave, had his white Ford Courier pickup truck there. (RT 3298.)

30. On the same night, Jones arrived at the Flats, with Patrick Hunt, Nicole Cook, Alan Murfitt, and Mario Villarreal. It was about 10:00 p.m., when Murfitt's small car drove up, made a U-turn and backed up toward the bonfire. (RT 3357, 3299-3300, 3325.) Five people got out of the car when it stopped, walked up to the others seated around the bonfire, and started a friendly conversation. (RT 3358, 3299-3300, 3311-12.) Jones, one of the new arrivals, was wearing a trench coat. (RT 3359, 3300.) According to the prosecution's theory, Jones was armed with a sawed-off shotgun, which was concealed beneath a long coat. Jones asked the men around the bonfire if they had any money to go halves on a bag of pot. (RT 3359-61, 3301, 3312, 3325, 3371.) Larry Nave said he had $15 and asked if they would come back if he gave it to them. (RT 3301-02, 3361, 3306.)

31. According to one identification witness, Jones pulled out a sawed-off shotgun from under his overcoat and Mario Villarreal displayed a small handgun (RT

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had made up a rap song about the Domino's robbery; and that Jones had allegedly expressed no remorse for either the shootings or for the killing of Weeks. The prosecutor also argued that Jones was a danger to the safety of all those he would come into contact with in prison, and therefore, the only appropriate punishment was death.

3361-62, 3326, 3303, 3311-13.) Villarreal said, "Give us your money or we'll blow your fucking head off." (RT 3303, 3313, 3327.) Jones asked who had the money, then shot Brian Wagner, who was about ten feet away, in the stomach. (RT 3363, 3365, 3315.) Then Jones said, "There's one. Who's got the money?" (RT 3363, 3366.)

32. Next, Jones shot Chris Swan in the stomach, saying, "There's two," and again asked for money. (RT 3363-65, 3315-16, 3327.) At that point, Larry Nave started to take cover behind his truck. (RT 3366.) Mario Villarreal shot Nave in the back with the snub-nosed revolver as Nave ran behind the truck. (RT 3365-66, 3316.) After shooting Nave, the five young men walked back to the car they arrived in. (RT 3366-67.) Before leaving, someone said, "Get the car. Get the car." (RT 3305.) One of the truck's tires was shot, and the robbers drove away. (RT 3366-67.)

33. The three wounded men were placed in the back of Nave's truck and Lance Peeples drove to a house about a mile away where the police were contacted and help obtained for the wounded. (RT 3367-68, 3328, 3305, 3317, 3331, 3372.) Wagner, Swan, and Nave got medical assistance and survived.[6]

34. The prosecutor read the preliminary hearing testimony of Luis Villarreal into the record because he was found to be unavailable. The testimony was at times equivocal. The prosecutor made the following inferences from Villarreal's previous testimony: A short time later that night, Jones, Mario Villarreal, and Patrick Hunt were talking in Mario's room at the Villarreal home. (RT 3417-18.) Luis Villarreal,

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[6] The trial court originally had ruled that the prosecutor could not bring in evidence regarding the emergency room physician's care of the wounded, and that the prosecutor was limited to evidence regarding Jones's conduct only. (RT 3255-56.) The trial court later reversed itself and allowed the emergency room evidence in. (RT 3262.) Although the prosecutor pointed out that Jones had not shot Larry Nave, and some evidence regarding Nave should not be presented, the emergency room doctor who worked on Nave did testify.

Mario's brother, heard Jones say, "Boom, one went down. Then, boom, another went down." (RT 3417-18, 3452.) One of them also said that they only wanted the money. (RT 34-3419.)

35. On November 1, 1989, the date Jones, Mario Villarreal, and Alan Murfitt, were arrested, and Villarreal's house was searched, Mario Villarreal telephoned his brother Luis from jail and told him the guns were hidden in the engine compartment of a black Buick parked in their driveway. (RT 3420-21.) Mario told Luis to take the guns to Curtis Water's house. (RT 3419, 3422.) The next day, the guns were seized from the engine compartment of the black Buick by Moreno Valley police officers. (RT 3422, 3450-51, 3455.) A letter addressed to Jones was found with the sawed-off shotgun. (RT 3456.) The shotgun was shown to a witness and identified as the type of shotgun that was used that night. (RT 3361.)

36. The jury never heard that Jones was extremely intoxicated the night of the Flats incident, having drunk an entire case of beer by himself, and having smoked marijuana. (Ex. 140, Decl. of Mario Villarreal, ¶ 16; Ex. 146, Decl. of Luis Villarreal, ¶ 11.) In fact, Jones was so drunk that he did not remember the events of the night when he woke up the next morning. (Ex. 140, Decl. of Mario Villarreal, ¶ 19.) Jones told his lawyers from the beginning of their representation that he did not remember the events of that night.

b. The Defense's Case in Mitigation

37. The defense presentation took less than two days. The defense offered no rebuttal to the prosecution's case and presented no mitigation for any of the specific statutory factors, offering only "sympathy" evidence under catch-all California Penal Code section 190.3, factor (k).

38. Jones presented penalty-phase evidence relating to Jones's upbringing and one expert. Jones did not testify.

39. The defense called as witnesses six members of Jones's family. Cyndy Pitts, Jones's mother, told the jury about Jones's life with his abusive father,

including the time that he tried to push Jones out a second story window as a child. (RT 3474-76, 3481.) She testified that Jones stood up to his father and tried to protect her. (RT 3483-85, 3491-92.) At age twelve or thirteen, Jones was in therapy. (RT 3515.) About age fourteen or fifteen, Jones was on juvenile probation because he and some other children broke into an elementary school. (RT 3515-16.) Pitts made him stay in custody overnight, after the others involved were picked up by their parents, and Jones was very upset about it.[7] (RT 3515-16, 3625-26.)

40. In April 1989, Cyndy Jones Pitts became engaged to Jerry Pitts, whom Jones didn't like. (RT 3497-98.) Jones was living with his mother in Moreno Valley at the time. (RT 3497.) After Pitts moved away from Moreno Valley in April 1989, Jones stayed there and lived with friends, including Najee Muslim. (RT 3499.) When he was arrested, Pitts thought that Jones seemed very different from his usual self. (RT 3508.)

41. Jones's father, Willie Jones, testified that, as a result of marital problems, he and his family moved to California from New Jersey when Jones was five years old. (RT 3644.) The marital problems continued in California. (RT 3646.) Willie Jones was usually never home due to extramarital affairs. (*Id.*) He also had a problem with drugs and alcohol. (RT 3650, 3653.) At one point, Willie Jones had a $500 a day cocaine habit. (RT 3659.)

42. Willie Jones recalled two instances of physical fights between he and Cyndy Pitts, Jones's mother. (RT 3646.) In one incident, Jones was arrested for endangering the life of a child when Jones came between he and Pitts during a fight. (RT 3647.) Jones had tried to push Jones out a second story window. (RT 3652.)

43. Willie Jones also testified that he was sentenced to state prison in 1982 for robbery. (RT 3655.) When he got out, he severed his ties with his family. (RT

[7] Jones's uncle, Glenn Garbot, testified that in 1987, Pitts had problems with Jones. (RT 3615-16.) Garbot also told the jury that the crimes in this case occurred while Jones was living with his mother in Moreno Valley. (RT 3626-27.)

3656). Before leaving his family, Willie Jones tried to kill himself by a drug overdose. (RT 3658.) After taking an overdose of drugs, Willie Jones then took his son Michael to a movie, thinking that he would just go to sleep and die in the movie theater. (RT 3658.) Police took Willie Jones home from the theater when young Michael was found crawling around on the floor. (RT 3658-59.) At home, Willie Jones was almost shot by the police when he got a knife from the kitchen. (RT 3659.) Instead, he was committed to a mental hospital for a few days. (RT 3659.)

44. Jones's fourteen year-old brother, Nathan "Rocky" Jones, testified that he visited Jones in jail, and that Jones had helped him with a school project, which was writing an anti-smoking rap song. (RT 3533-37.) Jones told him that he was involved in the Domino's robbery. (RT 3539-42.)

45. Both Jones's aunt, Sheila Barcus, and his paternal grandmother, Minnie Nixon, testified at the penalty phase. Both agreed that the person who committed these crimes was a completely different person than the Michael Jones they had known as a child. (RT 3592, 3595, 3677, 3688, 3692.) Barcus opined that these crimes seem completely out of character. (RT 3592.)

46. Joseph Gueste, Jones's church pastor, had known Jones for about ten years. (RT 3628.) The person who committed the crimes seemed like a different person. (RT 3635.) He always thought Jones was a follower rather than a leader. (RT 3635.)

47. Beatrice Acosta, the mother of Jones's three year-old son, testified that she lived with Jones for a couple months in Moreno Valley. (RT 3545.) Jones drank most of the time and had a "really bad temper" when he drank (RT 3555.) She never saw him pass out from drinking. (RT 3549.)

48. Dr. Steven Buckey, a clinical psychologist and president of the California School of Professional Psychology, was a specialist in the area of the alcoholic family. (RT 3714-16.) He told the jury that the emotional consequences of growing up in an alcoholic family resulted in children who were quite handicapped in

terms of their emotional development. (RT 3719.) They had difficulty expressing their feelings (RT 3719), and they had particular difficulty with anger. (RT 3719.) They didn't think very clearly about the consequences of their behavior. (RT 3719.)

49. Dr. Buckey opined that Jones had characteristics similar to those found in children from alcoholic families. (RT 3726.) Jones had difficulty with his feelings and anger. (RT 3726.) Jones became an alcoholic himself very early in life, at about age thirteen. (RT 3726.)

50. Dr. Buckey offered no testimony or evidence suggesting that Jones was suffering from any mental disease or defect at the time of the offenses, or that his mental capacity was impaired at the time the offenses were committed. Dr. Buckey never related Jones's drinking or alcoholism to his mental state at the time of any of the charged crimes; and trial counsel never made Dr. Buckey aware of readily available evidence that Jones had drunk copious amounts of alcohol daily over an eleven month period during which the incidents occurred.

51. On cross-examination, Dr. Buckey admitted that Jones showed the symptoms of an antisocial personality disorder listed in the DSM-IIIR diagnostic manual. (RT 3733-36.) In his opinion, people with antisocial personality disorder could not be cured quickly and could be dangerous in society. (RT 3735.) Someone with an antisocial personality disorder had no moral constraints. (RT 3736.) They were going to do what they wanted irrespective of anyone else. (RT 3736.) Jones's conduct in shooting people was more indicative of antisocial personality disorder, or a sociopath, someone with no moral constraints whatsoever. (RT 3739.)

52. The defense offered no evidence that, at the time of the offenses, Jones was laboring "under the influence of extreme mental or emotional disturbance" (factor (d)); or that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication" (factor (h)).

53. As a result, the prosecutor was able to effectively argue in closing that

there were "no mitigating circumstances"; but rather that Jones had acted solely out of a sadistic "lust for violence." (RT 3775, 3780.)

54. Consequently, and notwithstanding Dr. Buckey's testimony, the prosecutor was able to argue that evidence supporting mitigating factors (d) and (h) was totally absent:

> [¶] If he was acting under extreme mental or emotional disturbance, then you can say, well, there's possibly an explanation for this conduct. But we know that is not to be the case. We know he was not suffering from any mental or extreme emotional disturbance. [¶] . . . To a large degree he enjoyed shooting people because in each of these circumstances there was no need to shoot anyone. [¶] He was not suffering from any mental or emotional disturbance other than his own lust for violence, other than his own joy that he had for these particular crimes. (RT 3775) . . . [¶] Again no evidence of mental disease or defect. Again, no evidence of intoxication whatsoever during the commission of these crimes. No mitigating evidence under factor (h). In fact, you heard about Domino's, that they were going to the party, that they had not had alcohol at that point. The were going to have it at the party. So again, no evidence of intoxication, nothing to mitigate or excuse his conduct on that particular night, or the night of December 19, 1998 [Mad Greek robbery], or October 31, 1989 [Flats incident].

(RT 3778.)

55. Jones's trial counsel failed to corroborate and present the complete and accurate story of Jones's life history, drug and alcohol abuse, and brain impairment. Through Dr. Buckey, trial counsel presented affirmatively harmful evidence. Each of

these errors, and their cumulative impact, compels the conclusion that habeas relief is warranted.

B. Jones's Family and Life History

1. Introduction

56. Jones's family has a multi-generational history of mental illness; rampant substance abuse; poverty; abandonment; physical, nutritional, educational, and medical neglect; physical and emotional abuse; domestic violence; and inadequate community resources to effectively overcome any of these barriers to success.

57. Jones's father was diagnosed with mental illnesses requiring treatment. His legendary alcoholism was complicated by frightening violent episodes and violent black outs, during which he would violently attack Jones's mother in an attempt to kill her. Jones attempted to protect his mother, and became a victim of his father's homicidal behavior at times himself. Jones witnessed domestic violence from very early on through disputes between other family members. Chaos ensued throughout Jones's childhood.

58. Jones's mother was a single mother who eventually worked long hours that took her away from her two children. She often physically abandoned the children, and even when present, she failed to provide even basic sustenance and protection to her children.

59. Jones suffered from meningitis as a baby, which resulted in the long lasting effects of brain damage. The eldest of two children, Jones was frequently left responsible for his younger brother, Rocky, beginning in early childhood. Jones changed schools often due to frequent moves as a result of poverty, and had learning difficulties as a result of attention deficit hyperactivity disorder. The lack of stability contributed to a lack of academic progress and an inability to form positive, sustaining bonds outside the family.

60. His father, and countless other family members, were incapacitated by substance abuse. Both parents were very young when Jones was born, and were

raised by parents who were themselves inadequate. Both sides of Jones's family experienced poverty, inadequate services, and educational and occupational failure.

61. Before he was a teenager, Jones had turned to substances to numb some of the pain of his existence. He began displaying other signs of mental and emotional disturbance as well, including alcoholism and depression, and impulsive thoughts and behavior.

62. All of that evidence, including the declarations of Carole Kelly, M.S.W., Natasha Khazanov, Ph.D, William D. Pierce, M.D., Samuel G. Benson, M.D., and Jones's family members and friends, and the extensive supporting documentary evidence, would have provided compelling evidence in mitigation. Carole Kelly is an M.S.W. who specializes in child abuse and domestic violence. Her social history assessment is replete with documentation of the sources and information supporting her conclusions. Contained in that assessment are many compelling facts, anecdotes, and descriptions that would have helped illustrate for the jury in human terms the devastating obstacles that Jones struggled against in his lifetime, and the reasons his life led to a path of dangerous friends, and impulsive behavior at the time of the offenses.[8]

2. Family Background

63. Jones's (hereinafter referred to as "Michael" in this section) family has suffered from generations of poverty, abuse and neglect. Michael's father, Willie Jones, was born out of wedlock into poverty in the rural South. His family suffered from alcoholism, violence, dismal job opportunities, poor educational opportunities, racism and segregation. Willie's mother, Minnie Nixon, migrated to New Jersey in

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[8] For a complete social history, Jones incorporates herein by reference the Declarations of Carole Kelly, M.S.W., Ex. 159, and Natasha Khazanov, Ph.D., Ex. 154; and the declarations of other experts, family members and friends, as well as documentary evidence that also supports the social history of Jones. (*See* Exhibits 1-55, 103-109, 111-13, 116-25, 128, 130-35, 137-38, 140-53, 155, 160.)

order to get away from Willie's father, Frank Jones, and to make a better life for herself. Michael's maternal grandmother, Carmen Thorbourne, also left her native country of Honduras with hopes of gaining economic security in New Jersey.

64. Both families were burdened with their own experiences of abuse, poverty and neglect, and both experienced unanticipated obstacles to success in the Garden State.

a. The Paternal Family: Willie Frank Jones

65. Michael's paternal great grandparents were Roxana and Henry ("Hence") Jones, Jr. Their son, and Michael's paternal grandfather, Frank Ivey Jones, was born in Villa Rica, Georgia on March 29, 1932. (Ex. 33; Ex. 118, Decl. of Ivey Frank Jones, ¶ 1.)

66. Michael's paternal grandmother, Minnie Lee Fells, was born on August 18, 1936 to Ralph (Ralphy/Raphael) Fells and Ida Will Russell, who were all born in Alabama. (Ex. 34.) Minnie had one younger brother, born in 1938, Henry Fells, who left home early. (Ex. 128, Decl. of Minnie Nixon, ¶ 4.) Minnie never knew her real father, and Ida Will married Quincy McCoy several years after Minnie and Henry were born. The family then relocated to Georgia. (*Id.* at ¶ 2.) Minnie recalls that life in Georgia was difficult:

> Life in Carrollton was not easy. I remember having to farm when I was as young as nine years old. We were sharecroppers who grew cotton and corn. We had our own garden for vegetables, but the majority of the crop was grown for a white man by the name of Tom Rooki who owned the land. I remember picking as much as 200 pounds per day. Back then, a lot of the children that I knew did not get to finish school because they had to work, and I only got to go as far as the tenth grade in the public school. My stepfather stopped farming in 1955 because the government

> interfered with what was allowed to be planted and grown. I can remember soldiers coming and plowing under all of our fields. After this point he had to get a job elsewhere.

(*Id.* at ¶ 3.) Minnie stopped working in the fields and going to school at age 15 because she was pregnant with Willie. (*Id.* at ¶ 5.)

67. When Frank Jones met Minnie Lee Fells, he was 19 years of age, and Minnie was 16. (*Id.* at ¶ 5; Ex. 17.) Minnie became pregnant with Willie at a time when Frank Jones had been drafted to serve in Korea. Frank left for the service one month before Willie was born. Minnie was 16 and Frank was 20 when Willie Frank Jones was born. (Ex. 128, Decl. of Minnie Lee Nixon, ¶ 5.) Frank returned from the service when Willie was close to two years old. (Ex. 118, Decl. of Ivey Frank Jones, ¶ 4.) Minnie married another man, John Starks, while Frank was away. (Ex. 128, Decl. of Minnie Nixon, ¶ 6.) She got pregnant and had her second child, Cathy Starks. (*Id.*; Ex. 39.)

68. When Frank came home, Minnie continued to see him. (Ex. 128, Decl. of Minnie Nixon, ¶ 6.) She got pregnant with her third child by Frank while she was married to John Starks. (*Id.*) Frank fathered two more of her children, Willie Clyde, and Robert. (*Id.*; Exs. 50, 54.) While Minnie was pregnant with Clyde, Frank got another woman pregnant and married her. Thereafter, Frank would not leave Minnie alone, and she felt that she had to leave the state in order to get away from him. (Ex. 128, Decl. of Minnie Nixon, ¶ 8.)

69. Frank fathered three children with three different women who were all born around the same time. (Ex. 118, Decl. of Ivey Frank Jones, ¶ 7.) Frank had eleven or more children with four different women. (*Id.*)

70. Everyone in Minnie's family, including Minnie's parents and Minnie were drinkers. (Ex. 118, Decl. of Minnie Nixon, ¶ 10.) According to Minnie, and other family members, Frank and his family were alcoholics, including his parents Hence and Roxanna Jones, who drank every day. (Ex. 118, Decl. of Minnie Nixon, ¶

5; Ex. 50, Decl. of Willie Clyde Jones, ¶ 6.) Hence and Roxanna eventually died because of alcohol-related illnesses. (Ex. 122, Decl. of Willie Frank Jones, ¶ 8.) Minnie's parents, Quincy and Ida Will McCoy made and sold moonshine, which the sheriff of the town encouraged. (Ex. 122, Decl. of Willie Frank Jones, ¶ 7.) With respect to Frank, Minnie said that:

> Frank was an alcoholic. He drank white lightning liquor that they made down in Georgia. It was moonshine whiskey. He drank every day after work and on weekends. Frank was a different person when he was drunk. The only time he would talk and be affectionate was when he had been drinking alcohol. When he wasn't drinking, he was very quiet and just kept to himself. If I asked him a question, he would give the shortest answer possible and not elaborate. He would drink all weekend and go to work on Monday morning.

(Ex. 118, Decl. of Minnie Nixon, ¶ 9.)

71. There was a great deal of violence stemming from both sides of Willie's families, which Willie and his siblings witnessed. Willie's maternal grandparents always kept guns in the house, and they drank and fought:

> Quincy and Ida fought a lot. They would frequently drink together, especially on weekends, and get drunk and fight and get out of control. One time, my grandmother got angry with my grandfather and shot him with a pistol. I remember all us kids were there with my mother [Minnie] and Frank. We hid under the bed when Ida took out the pistol. She shot Quincy and he ended up in the hospital for a few days. They never got that bullet out, he died, many years later, with that bullet still in him. Even after Ida shot Quincy, the

two of them made up and stayed together.

(Ex. 141, Decl. of Cathy Washington, ¶ 7; Ex. 121, Decl. of Willie Clyde Jones, ¶ 6; Ex. 122, Decl. of Willie Frank Jones, ¶ 6.)

72. Minnie beat Willie and her other children with a switch. (Ex. 118, Decl. of Ivey Frank Jones, ¶ 9; Ex. 121, Decl. of Willie Clyde Jones, ¶ 11.) As her son, Willie Clyde, said:

> Growing up, my mother was the primary disciplinarian. Basically, how it worked was that she let everything build up on what you did and then you'd get taxed. In other words, you got a whipping. We knew we were in trouble when she would tell us, "Get a switch." We then went out and got a switch off of a bush outside. Al, on the other hand, would tell you what he let you get away with and then he would get the belt out. We always knew why he was beating us, whereas, with my mother, it wasn't that same way. Us kids got beat often by her without really knowing why. Sometimes, if she walked into the room and didn't like what she saw, she whipped all of us, even if we weren't all at fault.

(Ex. 121, Decl. of Willie Clyde Jones, ¶ 11.)

73. The hardest thing that Minnie ever had to do was to leave Georgia and get over Frank. When Minnie left for New Jersey in 1963, she left her children in the care of her mother, Ida Will. Willie became very close to his grandmother. (Ex. 128, Decl. of Minnie Nixon, ¶ 12; Ex. 122, Decl. of Willie Jones, ¶ 5.) The family was poor. Minnie got work as a domestic in New Jersey, and the children eventually joined her there. (Ex. 128, Decl. of Minnie Nixon, ¶ 13.) Once in New Jersey, Minnie met and married a man named Al Nixon. (*Id*. at ¶ 12.)

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b. The Maternal Family: Cyndy Thomas Jones

74. Michael's maternal grandfather was George Thomas. He was born in Honduras on March 3, 1920, to James Thomas, from Jamaica, and Julia Diaz, from El Salvador. (Ex. 49.)

75. Michael's maternal great grandparents were Timothy Thobourne and Gertrude Strofah, who were from Jamaica, but had moved to Honduras. (Ex. 111, Decl. of Carmen Garbot, ¶ 3.) Their daughter, Carmen Thobourne, Michael's grandmother, was born with a twin brother, Fitz, on July 16, 1928 in Progreso, Honduras when Gertrude was just 16 years old. (*Id.* at ¶ 2.) Timothy and Gertrude separated two years later, after Carmen's little brother Malcolm was born. Gertrude took Malcolm and returned to Jamaica. She died there at a very young age. (*Id.* at ¶¶ 3-4.) Timothy left to live in Guatemala. Her brothers, Malcolm and Fitz, visited their father but Carmen didn't see her father for the first and last time, until many years later. (*Id.* at ¶ 5.) Timothy left the twins with Gertrude's uncle, Henry "Jack" Afflick, and Henry's wife, Lucita. (*Id.* at ¶ 4.)

76. Carmen met George Thomas in Progreso where they lived together. George already had three children with another woman. (Ex. 112, Decl. of Glenn Garbot, ¶ 2; Ex. 111, Decl. of Carmen Garbot, ¶ 7; Ex. 104, Decl. of Sheila Barcus, ¶ 5.) After the Afflicks died, Carmen and George went to Tela to live with Lillian Lynch, a woman from Barbados who Carmen knew. (Ex. 111, Decl. of Carmen Garbot, ¶ 4.) They lived with Lillian Lynch in a two bedroom rented house. It had wood partitions that made very small bedrooms. Other people lived there as well. (Ex. 108, Decl. of Verna Cameron, ¶ 2.)

77. Michael Jones' mother, Cyndy Jones, was born in Tela, Honduras on September 17, 1952. (Ex. 111, Decl. of Carmen Garbot, ¶ 7; Ex. 117, Decl. of Cyndy Jones, ¶ 1.) Carmen and George also had a daughter, Sheila, two years earlier, and a son, Glenn. (Ex. 42; Ex. 104, Decl. of Sheila Barcus, ¶ 1.) George was a strict, and frightening man. (Ex. 108, Decl. of Verna Cameron, ¶ 3; Ex. 104, Decl. of Sheila

Barcus, ¶ 5.) George Thomas left the family and went to Massachusetts on October 8, 1954. Glenn was born less than two weeks later on October 26, 1954. (Ex. , Decl. of Carmen Garbot, ¶ 7; Ex. 42.) George never saw his son Glenn. (Ex. 111, Decl. of Carmen Garbot, ¶ 7.) George promised to call, but just disappeared from their lives. (*Id.*)

78. Carmen left the family to work all week, first as a nurse's assistant, and then working for a company called United Fruit, as a seamstress. (Ex. 111, Decl. of Carmen Garbot, ¶ 9; Ex. 104, Decl. of Sheila Barcus, ¶ 6.) After Carmen lost her job at United Fruit in 1959, she left to find work in Tegucigalpa. She left the children with Lillian, and rarely saw them. (Ex. 104, Decl. of Sheila Barcus, ¶ 6; Ex. 117, Decl. of Cyndy Jones, ¶ 9.) The children felt abandoned. (Ex. 104, Decl. of Sheila Barcus, ¶ 7; Ex. 117, Decl. of Cyndy Jones, ¶ 15.)

79. Carmen met and married a man named Solomon Garbot, and had another child, Christina, with him. (Ex. 41; Ex. 111, Decl. of Carmen Garbot, ¶ 11.) She did not bring her other children to live with her in Tegucigalpa. (Ex. 111, Decl. of Carmen Garbot, ¶ 11.) At one point, a neighbor mistakenly told Cyndy, Sheila, and Glenn that their mother was dead. The reaction was mixed, as Cyndy stated:

> Sheila and I felt bad, but Glenn said that he wasn't going to cry because she was never here anyway. At that point, we had no emotional ties or bond with our mother. When our mother did come to Tela, she slept at a different house. I didn't go over there. I slept with Lillian.

(Ex. 117, Decl. of Cyndy Jones, ¶ 10.)

80. Sheila, Cyndy, and Glenn thought of Lillian as a grandmother. (Ex. 117, Decl. of Cyndy Jones, ¶ 8.) It was a strict Episcopalian home and the children went to church every day. (Ex. 104, Decl. of Sheila Barcus, ¶ 14; Ex. 117, Decl. of Cyndy Jones, ¶ 8.) They could only speak English in the home. (*Id.*) Lillian kept boarders in a very small house; there were other single women in their teens or twenties who

the children called their "aunts," though none of them were blood relations. (Ex. 104, Decl. of Sheila Barcus, ¶ 7.) There were frequent visitors. (*Id.* at ¶ 19.) Glenn shared a room with Lillian, and they had to use an outhouse for their toilet and shower. (Ex. 112, Decl. of Glenn Garbot, ¶ 4.)

81. Lillian was strict and disciplined the children often. Glenn stated:

> I was afraid of Lillian most of the time because she was quite stern with me and often disciplined me. I was disciplined with a whip or a ruler . . .

(*Id.* at ¶ 5.)

82. Life in Honduras was not easy for Cyndy and her siblings. They lived in the bad area of town. The children suffered racial discrimination, poverty, military occupation, and a lack of opportunities. Sheila, the oldest of the three, remembers:

> [¶] The conditions in Honduras were what I would call primitive. It was and still is a very poor third world country with all the poverty and disease which are typical. We didn't have hot water. The toilet and shower were outside of the house in a separate building. Most families who we knew at the time had to receive money from relatives not living there in order to make it. No one had a personal car. We all walked, and some had bicycles . . .
>
> [¶] In Honduras , the state provided education to the sixth grade, thereafter people had to pay . . .
>
> [¶] There were racial disparities in Honduras that were probably even greater than they were in the United States at the same time. The black population in Honduras was relegated to menial labor. We had very limited job opportunities. Some of the men could find work hauling bananas from plantations to the ships or working on the

> ships. For the women, there were no opportunities except for doing laundry or domestic work. You could not go to school and get a better job. Certain jobs you just knew you couldn't get, such as office jobs or jobs at a bank. Even now, when I've visited in the recent past, I notice that the area is still depressed economically. People have money only when their families send it. Otherwise, they do not because they are not working. I don't know what I would have been able to do if I had stayed there.

(Ex. 104, Decl. of Sheila Barcus, ¶ 10-12.) Cyndy in particular had a difficult time in Honduras, in fact, so much so that, as an adult, she has consistently denied her Honduran heritage. (Ex. 104, Decl. of Sheila Barcus, ¶ 13; Ex.113, Decl. of Linda Garbot, ¶ 15.)

83. When Cyndy was 13 years old, her "aunt" Verna Cameron began making plans to get Cyndy and Sheila out of Honduras. (Ex. 117, Decl. of Cyndy Jones, ¶ 11; Ex. 104, ¶ 15.) Verna had already gone to Miami, Florida:

> I called Carmen and urged her to send the girls to the United States so that they could continue their education and have a better life, as the situation in Honduras was very poor and I felt there was no future for them there.

(Ex. 108, Decl. of Verna Cameron, ¶ 7.) On August 6, 1966, Sheila and Cyndy left Honduras and flew to Miami, Florida where Verna Cameron picked them up. Carmen went on to New York. (Ex. 111, Decl. of Carmen Garbot, ¶ 12; Ex. 104, Decl. of Sheila Barcus, ¶ 17.)

84. Sheila and Cyndy stayed for the entire school year with Verna Cameron and her roommate Olga Gordon. (Ex. 117, Decl. of Cyndy Jones, ¶ 12; Ex. 108, Decl. of Verna Cameron, ¶ 7.) Verna decided to send the girls to live near their mother when she found out that Sheila was seeing an older, married man. (Ex. 108, Decl. of

Verna Cameron, ¶ 8.) Carmen had not requested that her daughters come. (*Id.*) When they did, they had to live with a friend for a half of a school year. (Ex. 104, Decl. of Sheila Barcus, ¶ 17.)

85. By this time, Carmen had found another man to live with named Stanley Sendgikoski. (Ex. 111, Decl. of Carmen Garbot, ¶ 16.) In January of the next year, Carmen got an apartment for the girls where they stayed for six months. Carmen, however, did not stay there with them. As Cyndy explained:

> Sheila and I would stay at the apartment alone, and our mother lived with Stanley at his house. Our mother gave us each 5 dollars per week for lunch, grocery money, and everything. I remember that it just wasn't enough to live on. Eventually, Sheila got a part time job and would give me money at times.

(Ex. 117, Decl. of Cyndy Jones, ¶ 12.) The girls eventually moved in with Carmen and Stanley, but it was hard for them to get along:

> Sheila and I weren't used to living with our mother and we didn't feel comfortable living in Stanley's home . . . Our mother was mean to us. She would not let us go places just to spite us. I remember that I would be dressed up and be ready to go out somewhere and she would arbitrarily decide that I could not go. She would think up an excuse from our past wrongs and say that we couldn't go. My mother was detached and cold with us.

(*Id.* at ¶ 13.)

86. When the girls were with their mother, Carmen disciplined them severely:

> [W]e were not accustomed to her extreme mode of discipline. Even as teenagers, she would spank us. She

> would hit us with belts, shoes, or extension cords, or whatever was around.

(Ex. 104, Decl. of Sheila Barcus, ¶ 20.) Their sister Christina recalls:

> My mother was very strict and was very fast to hit us. I remember that she beat us with extension cords and it would leave marks on our arms. Her discipline often didn't feel fair to me; it seemed like I could never do anything right, so she was always beating me. It got to where I would do things even if she told me not to, because I figured I was going to get a beating anyway.

(Ex. 116, Decl. of Christina James, ¶ 9.) On one occasion, Carmen beat Christina so severely that her father took Christina to the police to show them her injuries in an effort to get Carmen to stop the abuse. (*Id.*)

87. Sheila and Cyndy never felt attached to their mother. Cyndy felt that her mother was detached and cold, and that she did not properly bond with her mother as a child. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 13, 15.) Cyndy felt that Carmen had abandoned her and the children with Lillian for too many years. Cyndy stated, "I would not have done that to my children." (*Id.*) Additionally, Cyndy felt that Carmen played favorites with the child whose father she was currently with. (*Id.* at ¶¶ 15, 18.) Carmen especially favored Glenn. (*Id.*)

88. Carmen left Glenn and Christina in Honduras with her husband, Solomon Garbot. (Ex. 104, Decl. of Sheila Barcus, ¶ 17; Ex. 112, Decl. of Glenn Garbot, ¶¶ 6-7.) After three years, Christina and Glenn came to the United States by themselves on November 13, 1969. (Ex. 119, Decl. of Cyndy Jones, ¶ 14; Ex. 112, Decl. of Glenn Garbot, ¶ 8; Ex. 116, Decl. of Christina James, ¶¶ 3-4.) Glenn had just turned fifteen and Christina was six. Solomon came to the United States on December 31, 1969. Carmen callously picked Solomon up at the airport with all the kids, and her new boyfriend, Stanley. (Ex. 117, Decl. of Cyndy Jones, ¶ 14.) There

was animosity between Carmen and Solomon as their daughter Christina remembers:

> It seemed to me that my mother and father hated each other. I'm not sure exactly how it happened, but I recall seeing my father holding my mother by the neck. He was saying that he wanted to kill her and was holding an ice pick that he was going stab her with. I remember saying, "Papi, papi, if you kill her, who is going to take care of me?" He let go of her. The next day he had packed up all his things and had left the house.

(Ex. 116, Decl. of Christina James, ¶ 6.)

89. Cyndy's father abandoned her at a young age, and so had her mother, in a practical sense. Verna Cameron stated:

> Looking back, it probably would have been better for everyone if Carmen had taken more of an interest in her children. They needed a mother figure. They had too much responsibility thrust upon them at too young of an age. I felt like more of a mother figure to Sheila and Cynthia than Carmen ever was . . . [when they were young Carmen] . . . worked all week and rarely saw them. I believe that children need to be noticed and watched very carefully. The mother has to be there for her children.

(Ex. 108, Decl. of Verna Cameron, ¶ 9.) Cyndy would repeat her own mother's inadequate parenting.

3. Michael's Chaotic and Nomadic Upbringing Was Characterized by Physical and Emotional Abuse, Poverty, Abandonment, Neglect, and Domestic Violence

a. New Jersey - Michael's Early Years

90. Willie Jones and Cyndy Thomas met in high school and became high

school sweethearts. (RT 3472; Ex. 117, Decl. of Cyndy Jones, ¶ 15; Ex. 128, Decl. of Minnie Nixon, ¶ 16; Ex. 122, Decl. of Willie Jones, ¶ 9.) Both of them were getting acclimated to their new surroundings in New Jersey. Willie said that moving to Newark was very difficult:

> Moving from Georgia, away from my grandmother, and having to live with my mother and Al, my new stepfather, was the hardest experience of my childhood. Everything changed: new parents, new schools, new language. In fact, there had been more of these types of transitions prior to my 12th year. My family had moved five times and had lived in Florida and several towns in Georgia. All of the moves were hard, but the one to Newark was the hardest.

(Ex. 122, Decl. of Willie Frank Jones, ¶ 4.)

91. Both families had to adjust to their new environment in a big city in New Jersey. As Willie's brother, Willie Clyde, put it:

> There was a lot of racial tension at that time. There was a lot of fear in being bussed because no one in our neighborhood ever left the neighborhood. [¶] The first time that I noticed that I was confined to a certain place based on race was during a teacher's strike in 1971 and 1972 when my history teacher, who was white, got his nose busted for sticking up for blacks. The riots that took place in Newark happened when I was in the third or fourth grade. We had all just moved to Earl Street.

(Ex. 121, Decl. of Willie Clyde Jones, ¶ 16, 17.)

92. Cyndy's brother, Glenn Garbot, said of their environment:

> I remember the racism was very bad in New Jersey. The racist statements were so personal. The schools had

> segregated classrooms. I have learned to expect racism no matter where I go. . .

(Ex. 112, Decl. of Glenn Garbot, ¶ 9.)

93. Cyndy got pregnant and gave birth to Michael Jones on June 13, 1970, when both she and Willie were 17 years old. (RT 3472; Ex. 117, Decl. of Cyndy Jones, ¶ 15; Ex. 128, Decl. of Minnie Nixon, ¶ 16; Ex. 122, Decl. of Willie Jones, ¶ 9.) Her mother, Carmen, gave birth to her last child, Beverly Sendgikowski, six months before Michael was born. (Ex. 131, Decl. of Beverly Sendgikoski, ¶ 1.) Cyndy moved in with Willie's grandmother, Ida Will, at some point during her pregnancy. (Ex. 117, Decl. of Cyndy Jones, ¶ 24.) Willie's mother had become a strict Jehovah's Witness, and was disappointed that his girlfriend, Cyndy, was pregnant out of wedlock. (*Id.*) Willie had to leave the house. (*Id.*) Willie and Cyndy eventually got their own apartment, but could not get married without parental permission. (Ex. 141, Decl. of Cathy Washington, ¶ 13.) They finally married on April 17, 1972. (Ex. 13.)

94. On February 18, 1971, at age 8 months, Michael was stricken with meningitis, a virulent infection of the brain, and treated at Hospital Center at Orange, 307 Elizabeth Street, Orange, NJ. He was brought to the Emergency Room by his parents [redacted] Cyndy said that Michael was different after that:

> [¶] After this illness, Mike changed a lot. At the time, I could not admit to myself that he had changed. Every mother wants to believe her child is perfect. He seemed much brighter and more alert before he was hospitalized. After that, he was not quite the same.

(Ex. 117, Decl. of Cyndy Jones, ¶ 19.)

95. Michael was the first grandchild on both sides of the family, and was given a lot of attention. (Ex. 128, Decl. of Minnie Lee Nixon, ¶ 18.) However, life was not easy even with the extended family. Michael began witnessing domestic violence and experiencing parental neglect at an early age. (Ex. 122, Decl. of Willie Jones, ¶ 14; Ex. 117, Decl. of Cyndy Jones, ¶¶ 25-26.) His Grandma Carmen disciplined her grandchildren just as severely as she did her own children. (Ex. 111, Decl. of Carmen Garbot, ¶ 21; Ex. 103, Decl. of David Barcus, ¶ 3 ("I know that now it would be considered child abuse.").) At that time, Carmen also was embroiled in violent altercations with Solomon Garbot, and with their daughter, Christina. (Ex. 116, Decl. of Christina James, ¶ 6, 9.)

96. Cyndy was an overwhelmed teenaged mother. She frequently dropped Michael off with all of the relatives, including with Minnie and Al Nixon, for babysitting. (Ex. 141, Decl. of Cathy Washington, ¶ 22.) Michael witnessed the chaos of that household:

> Al physically abused and fought with Minnie all the time. Willie witnessed the domestic violence since the time Al and Minnie got together. I saw Al and Minnie physically fight, yell and throw things at each other. Al would also hit Cathy, Willie's sister. Sometimes, the three of them would all get into a fight together.

(Ex. 117, Decl. of Cyndy Jones, ¶¶ 25, 26; Ex. 104, Decl. of Sheila Barcus, ¶ 26.) Cyndy said that "[w]hen he saw them fight, Michael would cry and get upset." (Ex. 117, Decl. of Cyndy Jones, ¶ 26.) To complicate matters, Al Nixon made sexual advances toward his step-daughter, Cathy, from the time she was seven years old. (Ex. 141, Decl. of Cathy Washington, ¶ 11.) Al beat Cathy severely for the most minor reasons. (*Id.*)

97. This must have affected young Michael who was very attached to his Aunt Cathy. She was only 14 years older than him. Cathy babysat Michael nearly

every day, and they spent so much time together that Michael thought Cathy was his mother. (*Id.* at ¶ 14.)

98. Cyndy reportedly had wanted a girl and not a boy, and often treated Michael as if he were female. (Ex. 141, Decl. of Christina James, ¶ 18.) Cyndy "would do his hair by washing it and rolling it dry in curlers and picking it out so it was perfectly round and then spray it with hair spray." (*Id.*) Cyndy also liked to let Michael's hair grow so that she could practice putting braids in, and she manicured his nails. (Ex. 117, Decl. of Cyndy Jones, ¶ 40; Ex. 111, Decl. of Carmen Garbot, ¶ 19.)

99. Cyndy treated Michael like a little performer and a doll to dress up, according to her sister Sheila:

> She seemed to treat Mike like a doll sometimes. She liked to curl and straighten his hair. Cyndy wanted him to grow up and be famous. They would watch television together and she would make him practice doing television commercials . . . They spent a lot of time imitating things on television and she often took him to the movies. She liked to dress Mike up in color co-ordinated outfits . . . Everything he wore had to match. Cyndy made him into a little performer . . . Cyndy never let him get dirty or sweaty in any way.

(Ex. 104, Decl. of Sheila Barcus, ¶ 35; Ex. 111, Decl. of Carmen Garbot, ¶ 19; Ex. 141, Decl. of Cathy Washington, ¶ 14.)

100. Cyndy and Willie moved around to different apartments in New Jersey. Cyndy always wanted something better, and bought things they couldn't afford. She acted sophisticated, as though she was better than anyone else. (Ex. 141, Decl. of Cathy Washington, ¶ 15; Ex. 104, Decl. of Sheila Barcus, ¶ 39.)

101. After Willie's grandmother Ida died, Willie changed. (Ex. 117, Decl. of

Cyndy Jones, ¶ 28; Ex. 122, Decl. of Willie Jones, ¶ 11.) Willie started drinking heavily and mistreating Michael when he was about 1 year old. (Ex. 117, Decl. of Cyndy Jones, ¶ 27.) Willie would drink and drive, and got into several accidents. (*See*, *e.g.*, Ex. 122, Decl. of Willie Jones, ¶ 11, Ex. 19; Ex. 117, Declaration of Cyndy Jones, ¶ 29.) Willie said: "I drank in the morning, in the afternoon, and at night. I drank so much that I couldn't get the smell of liquor off of me." (Ex. 122, Decl. of Willie Jones, ¶ 11.)

102. Early in their marriage, Willie began to have affairs with other women. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 31, 32; Ex. 141, Decl. of Cathy Washington, ¶ 16.) Once, Cyndy caught Willie with another woman in their own bed. (*Id.*; Ex. 122, Decl. of Willie Jones, ¶ 12; Ex. 141, Decl. of Cathy Washington, ¶ 16.) Willie didn't think that what he was doing was wrong. He thought Cyndy was crazy for being so angry. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 31, 32.) Willie's infidelity was the cause for many fights between them. Cyndy would threaten to leave, and throw things at Willie. (Ex. 141, Decl. of Cathy Washington, ¶ 16.) Willie had at least five or six girlfriends in New Jersey, some of whom he would get to babysit Michael. (Ex. 117, Decl. of Cyndy Jones, ¶ 34; Ex. 122, Decl. of Willie Jones, ¶ 12.) Cyndy did not know the babysitters were Willie's girlfriends. (Ex. 122, Decl. of Willie Jones, ¶ 12.)

103. After Cyndy found Willie in bed with another woman, Willie left and went to California. (*Id.* at ¶ 13.) Willie made up with Cyndy on the phone, and promised to stop seeing other women. (*Id.*; Ex. 117, Decl. of Cyndy Jones, ¶ 34.)

b. The Move to California - Infidelity, Abandonment, Poverty, and Violence

104. Willie went out to California in February or March of 1975. Michael and Cyndy joined him on April 17, 1975, Cyndy and Willie's third anniversary. (Ex. 117, Decl. of Cyndy Jones, ¶ 34.) They moved to California when Michael was nearly five years old, at a time when his parents' relationship was already deteriorating. The move was probably difficult for Michael who had been surrounded

by family during his early years. (Ex. 141, Decl. of Cathy Washington, ¶ 22.)

105. The family moved in with Henry Fells, Willie's maternal uncle (Minnie Nixon's brother), who lived in Southeast Los Angeles near 83rd and Central. (Ex. 122, Decl. of Willie Jones, ¶ 14.) Henry was an alcoholic, a drug addict, and a womanizer – a perfect match for Willie. (Ex. 117, Decl. of Cyndy Jones ¶ 35; Ex. 105, Decl. of Marjorie Bruner, ¶ 3.) The environment in this house was inappropriate for a young child like Michael:

> It was a difficult time because my uncle was an alcoholic who would beat his three girlfriends, Anna, Betty, and Roxie. He ended up marrying Roxie. They fought all the time, black eyes, knives, the whole nine yards. When he was living with Roxie, uncle Henry had two other girlfriends, a big one, and a little one. I remember Anna, the smaller one, used to come in through the window all the time. Henry's was a crazy place, a lot of violence, drinking and partying. Mike, who would have been five years old at the time, would witness this. We left there after eight months to get our own place.

(Ex. 122, Decl. of Willie Jones, ¶ 14.) Michael had not escaped being a witness to domestic violence when he came to California. If anything, things got progressively worse, and the police were often called. Willie would get involved in these fights as well. According to Henry's stepdaughter, Marjorie Bruner:

> Henry and his girlfriends, especially Roxie, fought all the time. There was yelling, hitting and shoving. Willie Frank would jump in and start swinging, then tell stories about what happened to anyone who would listen. Cyndy, would try to pull Willie Frank out. The little boy, Michael, was present during these big fights. Things would get so out of

> hand at times that the police had to be called. One time, Roxie broke the window to get in the house after Henry had slapped her and kicked her out.

(Ex. 105, Decl. of Marjorie Bruner, ¶ 4.)

106. During these eight months, Michael was exposed regularly to drugs, alcohol, violence and domestic abuse. Willie's drug and alcohol use continued:

> Willie Frank was trouble. Every time I saw Willie Frank, he was either very drunk or one could tell he had been drinking heavily. He also smoked marijuana . . . I saw Cyndy high on alcohol many times when I went over to Henry's house. It was not uncommon for there to be marijuana around at the house. Willie Frank and Henry were always drinking and smoking marijuana . . . One time I walked in the house and saw Henry and Willie Frank snorting powder cocaine.

(*Id.* at ¶ 5.) Willie also "kidnapped" Marjorie Bruner's 10 year old daughter when she ran away from home and went to Henry's house. Willie took the girl to her father's house without Marjorie's permission. (*Id.* at ¶ 6.) According to Marjorie, "Willie Frank was bad news and a bad influence on everyone." (*Id.*)

107. Willie's pledge of fidelity did not last long. Cyndy recalls that on July 4, 1975, she found out that Willie was seeing someone else because this woman dropped him off at Henry's house after a date. (Ex. 117, Decl. of Cyndy Jones ¶ 36.) Willie asked Cyndy to do favors for his girlfriends without her knowing it:

> The affair with this lady lasted awhile. One day, Willie asked me to buy four new tires for our car. He then took the car and gave it to this woman who drove it back east. I reported the car stolen.

(*Id.*) Willie's philandering was legendary, and everyone knew about it, including Michael. (Ex. 112, Glenn Garbot, ¶ 14; Ex. 113, Decl. of Linda Garbot, ¶ 6; Ex. 121,

Decl. of Willie Clyde Jones, ¶ 21; Ex. 138, Decl. of Willis Turner, ¶ 24; Ex. 141, Decl. of Cathy Washington, ¶ 16.) Willie always had other women in his life, and he was always running off. His philosophy was this:

> My feeling about extramarital affairs is that I could have girlfriends, but my wife couldn't have any outside love interests – that's why I was there. I always had two girlfriends besides my wife.

(Ex. 122, Decl. of Willie Jones, ¶ 12.) The affairs put a strain on the marriage because of the fact that Willie would run off with these women and not be heard from for days or weeks. (Ex. 117, Decl. of Cyndy Jones, ¶ 37.) When Willie would return, a fight with Cyndy was certain to ensue. Willie did what he wanted without regard for the family:

> Now I know that my attitude, that wives are for babies and girlfriends are for fun, ruined my marriage. But then it didn't cross my mind that this was bad for my marriage or for my kids; I just did whatever I felt like doing. I would come and go as I pleased. Cyndy, for a long time, pretended that it didn't bother her. There were times when she became physically aggressive, once throwing a candelabra at me. I would leave without telling her where I was going or when I would be back. In the beginning, Cyndy wanted a family with all that entails, visiting family and doing things together. I, in turn, wanted to break away from the strict Jehovah Witnesses' life that my mother had imposed on me. Our problems became really bad when we came to California.

(Ex. 122, Decl. of Willie Jones, ¶ 16.)

108. Cyndy was indeed upset about Willie's affairs. According to her sister

in law, Linda Garbot:

> [O]ne time, I was in the car with her when she decided to go to the home of a woman she knew Willie was having an affair with. Cyndy let the air out of the woman's car tires. Willie came out and the two of them had words.

(Ex. 113, Decl. of Linda Garbot, ¶ 6.) Although Willie had many obvious girlfriends, Cyndy was not permitted to see other men. As Willie said, "once or twice I found out that Cyndy was seeing other men as well, and I would put an end to it." (Ex. 122, Decl. of Willie Jones, ¶ 21; Ex. 117, Decl. of Cyndy Jones, ¶ 71.) She knew better than to "challenge him on that." (*Id.*) Willie was jealous and at one point he slapped her in front of her family for giving a hug to a male family friend. (Ex. 113, Decl. of Linda Garbot, ¶ 5.)

109. Willie left for Alaska to work as a chef in 1976, and did not return until right before Nathan "Rocky" Jones, Willie and Cyndy's second child, was born on July 7, 1977. (*Id.* at ¶ 17; Ex. 117, Decl. of Cyndy Jones, ¶ 38; Ex. 29.) Michael was seven years old when Rocky was born and was forced to share his mother with the new baby. When Rocky was an infant he was very sickly and therefore received a great deal of attention from Cyndy. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 38, 41.) Willie treated Rocky as "his" son, but was antagonistic to Michael, and would openly show his affection for Rocky and his contempt for Michael. (*Id.*; Ex. 122, Decl. of Willie Jones, ¶ 44; Ex. 119, Decl. of Nathan Jones, ¶ 11.) Willie was jealous of Michael from the moment he was born. (Ex. 117, Decl. of Cyndy Jones, ¶ 63.) He would not allow Michael to hug his mother or sing songs with her in his presence. (Ex. 159, Decl. of Carole Kelly, ¶ 31.) Michael idolized his father and attempted to gain his acceptance, but he was rejected time and time again:

> Willie ignored and rejected Michael. When Michael was little, he would go and try to hug his father. Willie would not hug him back. Willie treated Michael like an unwanted

> step-son and I am sure that Michael knew that his father did not love him.

(Ex. 117, Decl. of Cyndy Jones, ¶ 63.)

110. Willie was consistently unreliable as a father, breadwinner, and husband. He would leave often, quit jobs, and never paid the bills. Cyndy said:

> [¶] When the boys and I were with Willie, we had a hard time financially. Willie worked periodically. Willie quit jobs for no reason, and I wouldn't know that he was out of work until I tried to find him there or until he would finally admit that he quit. When he did work, Willie often refused to set money aside to pay bills. Instead, he spent money on alcohol and drugs. Willie was not dependable at home or at work. He lost jobs due to his drug and alcohol abuse.
>
> [¶] Many times we had to move from an apartment because Willie did not pay the rent. I also remember when we were in Anaheim, sometimes having to stay in cheap motels, as they were only shelter we could afford. I had to apply for welfare a couple of times in the early 1980's in Orange County, while I was still with Willie. Willie would work periodically, but he would not pay the bills or give me the money. Willie also would just leave for months at a time and would take all the money that we had in the house – he would even take money that my mother gave me. Many times when Willie left, there was no food in the house, so getting welfare was the only way that I could feed my children. When Willie returned I would stop asking for welfare.

(*Id.* at ¶ 42-43.) Willie's alcohol and drug addiction had control over the entire

family:

> There were times when I was out of work and we had trouble paying the bills. This was often due to my gambling and drinking. I would go wherever I could find work, but there were times when I would take a year or a year and a half off for mental relaxation. During those times, my girlfriends supported me. My affairs were usually with women who were well off. I never stayed in one job for more than six months.

(Ex. 122, Decl. of Willie Jones, ¶ 19.)

111. At one point, Willie's drug habit was $500 per day. (RT 3659.) Willie also had a gambling problem and would throw their money away at the race track or in Las Vegas. (Ex. 122, Decl. of Willie Jones, ¶ 24.) This cycle continued, long after Willie and Cyndy separated for good. Willie neglected his family while at the same time taking advantage of them. He showed up sporadically, took money from Cyndy and the children, and never gave them anything but trouble. (Ex. 117, Decl. of Cyndy Jones, ¶ 43.)

c. Domestic Violence and Abuse: Willie Jones

112. There was a pervasive lack of physical safety from violence throughout Michael's developmental years. He and his brother both experienced and witnessed violence within the family.

113. Many instances of violence witnessed by Michael were particularly harmful, because they involved serious threats to his mother. These incidents exposed Michael to serious physical danger, reversing the usual parent-child relationship as Michael tried to protect his mother.

114. As a result of drug and alcohol problems, psychiatric problems, and exceptional immaturity, Willie was a terror to the entire family. Willie became violent when drunk or on drugs. He beat his wife on many occasions:

> [Willie] was abusive, a drinker, a gambler, and a drug addict. Willie had a hard time controlling his anger. Willie and I had a lot of fights over the years. Willie would yell, throw things, and hit me, choke me, smash my head against the wall, and hit me with objects. He would break anything with glass, like pictures or vases. He would punch the walls and would always have his knuckles messed up.

(Ex. 117, Decl. of Cyndy Jones, ¶ 47.) Cyndy suffered a lot of damage at the hands of Willie including black eyes, and other more serious injuries. (*Id.* at ¶ 52.) When Willie tried to run Cyndy over in his car, Cyndy was on crutches for months. (*Id.* at ¶ 57.) The violence would start within 10 or 15 minutes of Willie's return from one of his absences. (*Id.* at ¶ 52.) Rocky has many memories of his parents' violent relationship:

> It was not rare or unusual for my dad to hit my mom; he beat her a couple of times a month. When he gave her black eyes, she would cry. My dad would hit her in the same way Ike Turner used to hit Tina Turner in the movie "What's Love Got to Do With It." My dad would punch, slap, kick and strangle my mom. That is the way he fought with my mother.

(Ex. 119, Decl. of Nathan Jones, ¶ 5.)

115. Michael took on the role of protector, even at a young age. He tried to protect his mother from Willie, using all his might to get Willie away from her:

> When I was with their father, Michael tried to protect me and his younger brother, Rocky, from Willie. Michael would get in between us and try to stop the violence. This would get Willie angry with Michael. Willie would hit at him, and I would tell Michael to run and save himself.

(Ex. 117, Decl. of Cyndy Jones, ¶ 51.) Willie would chase his young son down the street and Cyndy was afraid for him because she knew Willie would hurt him very badly if he caught him. (*Id.*) Cyndy tried not to leave the children alone with Willie because he was unreliable and unpredictable:

> I never left Willie alone with Michael if I could help it. Since I did not work when Michael was young, there was no reason for the two of them to be alone together. Willie would beat Michael for any little thing.

(Ex. 117, Decl. of Cyndy Jones, ¶¶ 59, 64.)

116. Willie was affirmatively cruel to the children when they were young. One year, in a fit of anger, Willie threw the family's Christmas tree out the window. (*Id.* ¶ 50; Ex. 119, Decl. of Nathan Jones, ¶ 4; RT 3672-73.)

117. Willie physically threatened all members of his family and had reckless disregard for their safety. Willie kept loaded guns in the house. (Ex. 117, Decl. of Cyndy Jones, ¶ 49.) On one occasion he pointed a gun at Michael and Cyndy and threatened to shoot them both. The danger was averted only when Cyndy knocked the gun out of Willie's hand. (*Id.*) Willie put his family in danger often:

> Willie was always driving while he was drunk. He used to drive like a bat out of hell. The kids were scared by his driving. During the time that Willie was around, if we were ever going to go anywhere, the kids would always ask if Daddy was going to drive. He'd drive 70 miles an hour or higher. Rocky used to cry, but Mike tried to be quieter. I would ask that he drop us off to walk home, but Willie would refuse. If anyone complained, Willie would say, "We're all going to die anyway."

(Ex. 117, Decl. of Cyndy Jones, ¶ 58.)

118. One episode of violence was particularly dangerous to both Cyndy and

the children. On June 12, 1982, Willie left the apartment without saying where he was going. He did not return the next day for Michael's 12th birthday, and Cyndy and the boys celebrated without him. (*Id.* at ¶ 53.) Willie returned on June 14, and a fight between he and Cyndy began almost immediately:

> [¶] I walked in and found [Willie] there and we had a discussion about him missing Michael's birthday, and the fact that he took the car and left for two days without letting me know where he was going or when he would be coming home. Willie started pushing me because he was of the opinion that I did not have a right to challenge him in that way. I pushed him back. Willie then grabbed me and started slamming my head against the wall. I was able to get away and ran to the bathroom. Willie was right behind me, and I could not lock the door in time. He pushed me down to the floor and started to choke me. Willie then put my head under the water in the bathtub and tried to drown me. I believe that there was already water in the tub, and that Willie possibly had intended to take a bath before I arrived home. I was truly in fear for my life, and believed that Willie was going to kill me. Willie was on top of me. I could not get up and I could not breathe.
>
> [¶] I guess Michael heard the commotion and came into the bathroom. He managed to get Willie's attention by hitting him to try to save me. Michael told him to "leave my mommy alone." Willie then let go of me and ran after Michael. Willie picked up Michael and told him that he was going to throw him out the window. Willie carried Michael to the window and started pushing him out.

> Michael was screaming. I ran over and managed to hit Willie with something, which made him let go of Michael. Michael ran out of the apartment.
>
> [¶] At that point, Willie picked up a souvenir rock that we had in the apartment and hit me on the side of the head with it. My ear started bleeding. Willie left the apartment and I followed to try to get the car keys. Rocky followed after us. Willie got into the car. I tried to pull the keys away by reaching in the window. Rocky opened the door and started getting into the back seat of the car. Willie started the car and drove down the street with me and Rocky barely hanging on. Rocky and I were screaming. Willie drove fast and then slammed on the breaks to try to get us to let go of the car. Rocky let go. Willie sped off again as I was hanging on to the car through the driver's side window. I was nearly hit by another car. Finally, Willie stopped the car and I let go. The neighbors had called the police. I believe that Willie was arrested for attempted murder and child endangerment.

(Ex. 117, Decl. of Cyndy Jones, ¶¶ 54-56.) The police report of the event corroborates Cyndy's story. (Ex. 14; *see also*, Ex. 119, Decl. of Nathan Jones, ¶ 9.)

119. Michael's reaction to the violence was to kept it bottled up inside, while Willie's abuse of Rocky caused him to have "emotional asthma," which only abated after the father left home. (Ex. 117, Decl. of Cyndy Jones, ¶ 38.)

120. Willie's violence was not limited to his wife and children alone; he attacked others as well. When Linda Garbot, Cyndy's sister in law, was staying with them, Willie grabbed her and tried to kiss her. (Ex. 113, Decl. of Linda Garbot, ¶ 4.) When Linda turned him down, Willie hit her. He then pulled a gun on her and

threatened her when she said she was going to call Cyndy. (*Id.*; Ex. 112, Decl. of Glenn Garbot, ¶ 15.) Linda and Glenn left their home immediately and went far away. (*Id.*) Willie has also attacked his young niece, Tammie Washington:

> My brother, LaJay, and my cousin, Donnie, and I used to play cards at our grandmother's house. Willie joined us in our game. He said something to me and I didn't like it and told him so. Willie got really angry and grabbed me by neck and arms and pinned me up against the wall. I was twelve years old at the time.

(Ex. 160, Decl. of Tammie Washington, ¶ 4.)

121. Willie was deeply troubled, involved in criminal activity, and was dangerous and unstable. He had psychiatric problems, including black-outs, and was diagnosed as having Temporal Lobe Epilepsy, Multiple Personality Disorder, Paranoid Schizophrenia, "intermittent explosive disorder," a psychotic episode, and extreme depression, including serious suicide attempts. (Ex. 122, Decl. of Willie Jones, ¶¶ 37, 39; Exs. 24, 25, 26, 27, 28.) Willie was hospitalized and treated for depression with Haldol, a drug used in the treatment of mental disorders such as schizophrenia, and one that itself causes side effects such as seizures which are exacerbated by use of alcohol. (Ex. 25.) He has also been treated with anti-anxiety medication. (*Id.*; Ex. 24.) Willie's black-outs sometimes lasted hours, sometimes days. (Ex. 122, Decl. of Willie Jones, ¶ 36.) On one occasion, Willie was found wandering in unknown houses and attempted to strangle Michael's mother. (Ex. 25; Ex. 122, Decl. of Willie Jones, ¶ 36.) Willie was also a danger to himself, and tried to commit suicide in front of the kids, taking an overdose at a movie theater:

> I remember going to a movie theater and attempting to overdose there. I had Rocky and Mike with me. Mike was fourteen and Rocky was seven years old at the time. I had another blackout. I was later told that I was crawling on the

> floor at the movie theater. Mike said that the police were there and were threatening to shoot me because I had a kitchen knife with me. When I woke up, I was at a mental health unit.

(Ex. 122, Decl. of Willie Jones, ¶ 38.)

122. Willie's pattern of violence continued: He would leave, return and beat Cyndy in front of her son, Michael, who would try, ineffectively, to protect her. Then, Willie would leave again. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 45-57.) When his father was away from the family, which was frequent, Michael, 10 to 12 years old, stepped into the role of "man of the house" and protector of his brother and his mother. (*Id.* at ¶¶ 64, 69.)

123. Willie was in and out of jail or prison from 1982 to 1986. (Ex. 20-22, 24, 25.) Willie's children had seen him arrested. On one occasion, he was running from the police and tried to get into the apartment, but Cyndy had locked the door. (Ex. 117, Decl. of Cyndy Jones, ¶ 66.) He then tried to get the neighbor, Jackie Rodriguez, to let him in. (Ex. 130, Decl. of Jackie Rodriguez, ¶ 11.) Willie had stolen a car and attempted to rob a gas station. Bullets were flying and he was trying to get away. There are still bullet holes at the apartment complex. (*Id.*) Willie spent whatever money he had or could steal on drugs. (Ex. 122, Decl. of Willie Jones, ¶¶ 20, 34.) He also stole the neighbor's car. (Ex. 130, Decl. of Jackie Rodriguez, ¶¶ 8, 9.)

124. When Willie returned from prison, things went back to the same pattern. As Cyndy said:

> After his release from prison, Willie came to stay with us for a few months. The physical abuse continued. Willie would slap me and hit me in front of the kids. Michael was still trying to protect me and getting in between Willie and me.

(Ex. 117, Decl. of Cyndy Jones, ¶ 68.) Rocky and Michael had had it with their father. Rocky said:

> It did not bother me when Dad left. Our general feeling was, "Just go!". . . Mike and I were always angry at my father. We would tell one another "He's your father." I would tell Mike, "he was your father first."

(Ex. 119, Decl. of Nathan Jones, ¶ 10.) Michael asked his father to leave so that Cyndy could finally be happy. (Ex. 122, Decl. of Willie Jones, ¶ 44.) Willie went back to New Jersey after one last episode that Cyndy recounted as follows:

> During one fight, me, Rocky, and Michael challenged Willie. Michael put me behind him, and Willie gave up, saying that he couldn't fight all three of us.

(Ex. 117, Decl. of Cyndy Jones, ¶ 68.) Rocky remembers that Mike fought Willie that night, and the police were called. Willie never came back again. (Ex. 119, Decl. of Nathan Jones, ¶ 14.) Willie acknowleged his shortcomings:

> I got out of their lives. I wasn't a good example for Mike or a good father figure, given my many problems. I had almost no relationship with Mike. We never formed much of a father-son bond. I was always closer to Rocky, and favored him over Mike.

(Ex. 122, Decl. of Willie Jones, ¶ 44.) Willie was a bad role model for his children and a dangerous parent, and Michael got the worst of it, "being the oldest," and the disfavored son. (Ex. 117, Decl. of Cyndy Jones, ¶ 99.)

d. Michael's Poor Academic Performance and the Constant Moves

125. Because of their unstable economic situation, Michael's family moved constantly, causing enormous disruptions not only in his home life, but in school. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 42-45.) The frequent relocations meant that

Michael had to start over and over again at new schools. (Ex. 3.) This was disruptive to his education. Perhaps more importantly, it prevented Michael from developing the kinds of sustaining friendships and ties outside the family that could have helped them overcome the many other obstacles in their lives. Furthermore, at a certain point, it is evident that Cyndy was failing to ensure that Michael regularly attended school.

126. For years, Michael suffered from attention deficit/hyperactivity disorder, which went undiagnosed and untreated. According to Dr. Natasha Khazanov:

> It is my professional opinion after careful consideration of these findings and review of the school records (discussed in ¶¶ l02 et seq.) that this is a pervasive and stable pattern of inattention that he acquired early in life prior to age seven, which allows me to diagnose Jones with Attention Deficit/Hyperactivity Disorder (ADHD). [¶] In reviewing his history, the most significant aspect is the evidence of early-acquired patterns of dysfunction that clearly point to ADHD and which shaped his cognitive, psychological and social development.

(Ex. 154, Khazanov Decl., ¶¶ 34 n.4, 105.) This disorder left Michael at a clear disadvantage academically, which would be borne out through the years.

127. By the time Michael started second grade, he had been in four different schools and had made friends and lost them. (Ex. 3.) At home, he was also competing with his new baby brother for his mother's attention and love. (Ex. 117, Declaration of Cyndy Jones, ¶ 41.) He was the lone African-American student in his class. (Exs. 3, 5.) Michael's second grade teacher, Mary Shackford, stated that Michael was behind academically and looked to the other students for assistance:

> Mike often turned to the others in the class for help. Instead of doing his own work, he would go talk to the other kids

> and try to get help from them. He just did not hang in long enough if the work was too difficult. Mike was often distracted in class. Generally, he looked around at the others in the class. He looked to them for help.

(Ex. 133, Decl. of Mary Shackford, ¶ 6.) Shackford found Michael to be an enthusiastic, outgoing boy who frequently talked in class. She said:

> [Michael] lacked the basic academic skills to do the work, so he tried to impress the other kids by talking. He covered his uncertainty by making new acquaintances . . . he distracted the class by frequently talking out of turn. I saw this as an attempt to get attention.

(*Id.* at ¶¶ 4-5.)

128. During 1978, when Michael turned 8 years old, his school reports reflected the instability at home, and Michael's problems at school became more apparent. (Ex. 3.) His teacher noted that he lacked reading skills and had a short attention span, not wanting to try if he was not sure -- a sign of his feelings of insecurity and inadequacy. (*Id.*) He had not completed assignments in reading, math and language. (*Id.*) He was placed in a reading lab, given individualized assignments, and the teacher had conferences with his "parents" (i.e., his mother), and daily reports were sent home. (*Id.*) In April, the school sent a note home about his eyesight, indicating that Michael had evidenced "convergence" (squinting) in Kindergarten and grades 2 and 3. (*Id.*) The condition apparently went untreated, since another note was sent in December stating he was "under convergence" and still another the following year, when the school nurse sent a note home about problems with his eyesight. (*Id.*) By the end of Grade 2, Michael had already fallen behind at school and had received his first D - for language. (*Id.*) His G.E. score was at the 3.0 level, suggesting that he had the ability but was not performing. (*Id.*) He was not only having trouble academically, but also in regard to his behavior – citizenship was

poor. (*Id.*) In October, his CTBS scores show that although he was in grade 3, he was performing at a Grade 1 level in everything except reading, where he was at grade 2. (*Id.*) Michael's problems at school reflect the problems at home with his father. Willie was living at home this year. They were having financial problems because "Cyndy . . . lived above her means . . . Nothing was ever good enough for her." (Ex. 122, Decl. of Willie Jones, ¶ 31.)

129. At the end of third grade, Michael's teacher commented that his performance was well below capacity, and that he talked too much, often became discouraged and disinterested, and often disturbed the class with his behavior, even though he was "a leader and very popular." (Ex. 3.) During third grade alone, Michael was absent 16 times. (*Id.*) As Dr. Isabel Wright noted in her draft social history, the situation cried out for intervention which was not forthcoming:

> Despite the obvious need for intervention in some way, Michael was automatically put in grade 4 in the Fall. This was probably because they moved and he was sent to yet another new school, his 5th in as many years, in a new school district. The emergency information card is dated October 22, so he may have missed the beginning of the school year, something which would make it very difficult for him to catch up with the class, particularly since he was already badly behind in Grade 3.

(*See generally*, Ex. 3.)

130. In February of 1980, Michael was moved again to another school district in Buena Park. (*Id.*) In the fall, they moved again, with Michael going to 3 schools in one calendar year. (*Id.*)

131. In grade 6, Michael was performing in the bottom third of students in the state. (*Id.*) He showed improvement toward the end of that year in grades and behavior, but in the fall, his mother moved them again to another new school in

Placentia. (*Id.*) Michael was automatically moved up a grade, despite his inability to perform at grade level. (*Id.*) As Dr. Wright noted in her draft social history:

> His grades for the Fall were appalling, 4 D's, 1 F and 2 C's. He was tested in October and his language level was 3.7, his reading 6.7, and his math 6.2 - he was a grade behind the other students. However, the school does not appear to have done anything to help him. . . . As usual, he had to make new friends again in a school where many of the children knew each other from their elementary years together.

(*See generally*, Ex. 3.)

132. In February of 1982, Willie Jones was arrested for failing to provide support and put on 3 years probation. (Ex. 24.) Michael and his family were now living on County Aid. (Ex. 159, Decl. of Carole Kelly, ¶ 90.) In June of 1982, Willie had been arrested for the attempted murder of Cyndy, and Michael also had been subjected to Willie's homicidal behavior. (Ex. 14.)

133. During 1982, Michael started having problems in Junior High School. He would get into trouble, talking in class and getting into fights. (Ex. 117, Decl. of Cyndy Jones, ¶ 74.) He was sent to the principal often, but the school did nothing else and continued to promote him to higher grades despite his obvious failure to perform. (Ex. 3.) During this year or early the next year, Michael was taken by his mother to a therapist in Placentia because he was so frustrated and she could not reach him. Michael went a few times. (Ex. 117, Decl. of Cyndy Jones, ¶ 76.)

134. Michael started drinking in the 7th grade to escape from the frustration of seeing his father beat his mother. He would steal liquor from his mother's fully stocked liquor cabinet while she was working all day and away from home, and sit in the alley in the back of his house drinking it. (Ex. 138, Decl. of Willis Turner, ¶ 23; Ex. 113, Decl. of Linda Garbot, ¶ 12; Ex. 117, Decl. of Cyndy Jones, ¶¶ 85, 86.) As a

result of his chronic drinking, Michael got into further trouble at school.

135. During 1983, Michael's test results put him in the bottom quarter of students statewide. His math was below grade level and his language was at third-grade level. (Ex. 3.) In 1984 his scores were so bad that the school had a Benchmark Proficiencies conference about him; however, his mother did not attend, nor did she respond to repeated efforts by the school to contact her. (*Id.*) The record of the conference notes Michael's lack of commitment to school work and his previous low grades, and the school recommended a program of instruction to strengthen his basic skills, have his homework reviewed parentally, and summer school. (*Id.*) However, the school failed to follow through on any of these suggestions and then his mother moved the family again. In the fall, Michael entered Esperanza High School and failed consistently, with all his grades D's and F's. (*Id.*)

136. By April of 1985, Michael was in 9th grade but was functioning only at grade 6-7 level and was now amongst the lowest one-fifth of students statewide. (*Id.*) He was moved again to Valencia High School, where his grades were all F's. By the end of grade 9 he was listed as a no-show. (*Id.*) Michael started to improve, but then the family decided it could no longer afford to send Michael's brother to school. When Rocky was pulled out of the school, Michael felt totally isolated and started ditching school after being dropped off for first period. (*Id.*) When his mother found this out from the school, Michael was put back into the public school, where again he got all D's and F's, with notations of excessive absences, neglect of homework, and numerous no-shows. (*Id.*) In 1986, he went back to New York for several weeks but did not attend school.

137. As early as the second grade, Michael's teacher knew that the constant moves were having and would continue to have, a profoundly negative impact on Michael:

> Mike already was having difficulty performing at his class level in my second grade class. Several moves to different

> schools after that would have exacerbated Mike's academic problems. For almost any child, frequent moves to different schools would have a disruptive impact. For a child like Mike, who was very concerned with making friends, these moves would be particularly detrimental. Mike was a naturally overly exuberant child and very talkative. Socializing was very important to him. With each new move, he would have to make new friends. These moves would prevent him from stabilizing, causing him to have problems adjusting to his new environment.
>
> [¶] Over time, a child like Mike could get lost in the system. Instead of getting the help he needed, his problems would continue. With the frequent moves, no teacher or educator would have become familiar enough with him to be able to help him. He would be here today, gone tomorrow and would miss out on the things he needed.

(Ex. 133, Decl. of Mary Shackford, ¶¶ 8-9.) Michael did indeed get lost in the system.

e. A Single Mother: Cyndy Jones

138. From the time that Rocky was born in 1977, Cyndy Jones was an overwhelmed single mother of two. Willie had been unfaithful, suicidal, homicidal, a drug addict, and alcoholic who never helped her support the children. Cyndy had been counseled to go to a woman's shelter after Willie had attempted to kill her. (Ex. 14.) She never went. Cyndy wanted to keep her family together at all costs:

> Even though Willie treated me badly, and it was clear that he did not like Michael, I tried to make our marriage work. That's why I stayed with Willie as long as I did. I have always felt that a child should have two parents, and I did

> not want to deprive my children of their father. I grew up without a father, and that's why I suffered through the years with Willie, so that my kids would have a father in their life.

(Ex. 117, Decl. of Cyndy Jones, ¶ 61.)

139. Cyndy was still quite young to have to endure the burden of being a single mother, and the chaos had affected her deeply:

> Cyndy also has had her share of emotional problems. She used to talk about walking off and just leaving the kids. Cyndy would become depressed and talk about killing herself. She would go through periods of time when she would just stay in bed and sleep and not get up for days. Cyndy had a nervous breakdown at one point and didn't leave the house for over a month. Although she normally cleaned the house obsessively, during that time, she stopped completely.

(Ex. 122, Decl. of Willie Jones, ¶ 41.) Michael was sensitive to what his mother was going through. He would worry about his mother and check on her. Cyndy said that her abusive relationship with Willie frightened Michael:

> He would wake me up at night to see if I was okay. I think that he was always afraid that Willie was going to do something to me.

(Ex. 117, Decl. of Cyndy Jones, ¶ 81.)

140. Cyndy's depression could also turn to anger as she was quick to take her frustrations out on the boys. "Cyndy spanked [the boys], and beat them more if they tried to cover up. Cyndy would holler a lot." (Ex. 122, Decl. of Willie Jones, ¶ 41; Ex. 131, Decl. of Beverly Sendgikoski, ¶ 6.) Michael got the blame for a lot of the things that Rocky would do. He would even take responsibility for Rocky's misdeeds at times. (Ex. 132, Declaration of Larry Sepulveda, ¶ 8; Ex. 103, Decl. of David

Barcus, ¶ 3.) Michael got the brunt of Cyndy's bad temper, and often did not know why she hit him:

> When Cyndy got mad, she would just go up to Mike and slap him without warning. It wasn't until after Cyndy had hit Mike that she would tell him whatever she was angry about, and sometimes she never would let him know. Cyndy was in the habit of slapping Mike in the face or coming up from behind and smacking the back of his head. I don't know what would set Cyndy off but she would hit and belittle Mike on a regular basis. Cyndy was always calling Mike degrading names, such as stupid.

(Ex. 132, Decl. of Larry Sepulveda, ¶ 9; Ex. 119, Decl. of Nathan Jones, ¶ 17.) Cyndy was too harsh with Michael, while at the same time she gave him little guidance:

> It never made sense to me that Cyndy would shrug off some of Mike's behaviors that deserved some stern talking and yet she would be harsh to the point of being abusive about minor things. Because of the way Cyndy dealt with him, I think it was difficult for Mike to understand consequences. His mother was not teaching him right from wrong.

(Ex. 132, Decl. of Larry Sepulveda, ¶ 10.)

141. Both from witnessing domestic violence, and from being abused himself, Michael started showing signs and symptoms of post-traumatic stress disorder:

> He was a great kid, open and talkative, almost bubbly, when someone paid attention to him. In contrast, when Mike's mother was around, he was robotic, guarded and he would clam up. He was like two different people. When Cyndy was there, his eyes would dart around as if he was

> wondering what was going to happen to him next. There were also times when he would overly try to please his mother.

(Ex. 132, Decl. of Larry Sepulveda, ¶ 18.) Michael was hyper vigilant, watching whereever he was:

> When Michael was young and visiting in New Jersey, I remember that he was very excitable and had a very difficult time focusing on any task for a particular period of time. He seemed to not know what it was okay to say, and what it was not okay to say, and he was always very watchful. I can remember Mike being in our living room and always needing to sit at the end of the couch and always watching the door to see what was going on, and never being very sure of himself when we asked a question.

(Ex. 104, Decl. of Sheila Barcus, ¶ 45.) Michael's youth was characterized by stress, and waiting for the bad things that always seemed to happen.

142. Cyndy was secretive, and always tried to put on airs of being better and more sophisticated that others. She did not like having Michael's friends over to the house. (Ex. 124, Decl. of Loren Kinney, ¶ 3.) She spent beyond her means. (Ex. 145, Decl. of Milton King, ¶ 3.) Cyndy wanted to move up in life, but just could not afford it. (*Id.*; Ex. 116, Decl. of Christina James, ¶ 22.) Cyndy moved the family often because of the lack of steady income:

> Many times we had to move from an apartment because Willie did not pay the rent. I also remember when we were in Anaheim, sometimes having to stay in cheap motels, as they were only shelter we could afford. I had to apply for welfare a couple of times in the early 1980's in Orange County . . .

(Ex. 117, Decl. of Cyndy Jones, ¶ 43; Ex. 119, Decl. of Nathan Jones, ¶ 21.)

143. At the expense of her children, Cyndy went out and partied and socialized whenever she got the chance. In the summer of 1980, Verna Cameron visited Cyndy in California. Verna had helped Lillian Lynch at the boarding home where Cyndy lived in Honduras and had sponsored Cyndy to come to Miami in 1966. Verna said:

> Cynthia had a young girlfriend who called her constantly. I could tell from their conversations that they went out a lot. They dressed up to go out partying. The girl looked and acted like she was in her late teens or early twenties, perhaps ten years younger than Cynthia. It seemed like Cynthia was portraying herself as a much younger, unattached woman. I wondered how Cynthia could maintain this kind of lifestyle and still be a good mother. I felt that she wasn't spending enough time with the children.

(Ex. 108, Decl. of Verna Cameron, ¶ 10.) Cyndy stayed out late, and had started drinking more heavily. Cyndy had unreliable babysitters, and at one point, Willie found the kids home alone. (Ex. 122, Decl. of Willie Jones, ¶ 28.) Cyndy said:

> I had a babysitter for awhile when Michael was around 10 and Rocky was 3. Her name was Peggy and I knew her from the church. There were times when I would come home and find that Peggy had just left the kids alone. I would get really angry, but I gave Peggy a few more chances.

(Ex. 117, Decl. of Cyndy Jones, ¶ 62.)

144. In 1982, Cyndy began working at Rockwell. (Ex. 117, Decl. of Cyndy Jones, ¶ 87.) She started a whole new life for herself and she went out even more often. As Willie said:

> She would drink and party at night, go out for happy hour and then get up at 6:00 or 7:00 a.m. to go to the gym. I sometimes stayed with the kids when she would be out. There were times when she would stay out all night.

(Ex. 122, Decl. of Willie Jones, ¶ 32.)

145. Cyndy made the children her last priority. She always tried to pawn them off on others, especially her neighbor Jackie Rodriguez who said that she "practically raised Rocky." (Ex. 130, Decl. of Jackie Rodriguez, ¶ 2.) Freddie Turner also did her share of babysitting for Cyndy:

> Both of her sons would come to my place after school. Rocky used to come over to watch cartoons when he got home from school in the afternoons. I am not sure what she would have done with the kids had I not been there.
>
> I know that [Cyndy] went out on Friday nights. She used to call down to my house and ask how long Mike and Rocky could stay at my place. I would tell her that they could stay until 9:00 or 9:30 p.m. I used to send them home at that hour. I stood outside and watched until they got inside. I do not know if she was home when they got there.

(Ex. 137, Decl. of Freddie Turner, ¶¶ 10, 11.)

146. Michael and Rocky were always on their own. Michael was thrust into a parental role at the early age of seven; Rocky was always Michael's primary responsibility. Rocky went with Michael everywhere, and Mike took care of him, tending to all of his needs. (Ex. 104, Decl. of Sheila Barcus, ¶ 37; Ex. 106, Decl. of Christopher Bunn, ¶ 3.) Rocky said:

> Mike became my primary babysitter [because] my mom was always working. When I was a child, Mike used to take me to the park and to the playground. He spent lots of time with

me.

(Ex. 119, Decl. of Nathan Jones, ¶¶ 6-7; *see also*, Ex. 145, Decl. of Milton King, ¶ 4 ("I told her that I thought she left the boys alone too often, and that the boys were too young to be left alone for so long").)

147. Michael would make sure that Rocky ate, and he tried to make simple foods for the two of them. (Ex. 138, Decl. of Willis Turner, ¶ 11.) Cyndy did not know how to cook, and rarely fixed meals for the kids. Sometimes she would drop off fast food. (*Id.*) Cyndy neglected the children, and as one friend believes, "[n]owadays, Child Protective Services would be called if children spent that much time on their own." (*Id.* at ¶ 9.)

148. Cyndy sent Michael to New Jersey to stay with the relatives almost every summer, for the entire summer, without fail. (Ex. 111, Decl. of Carmen Garbot, ¶ 21.) Mike would take Rocky with him as well:

> Cyndy did not come with Mike when he flew out. He would fly alone and we would pick him up. When Mike was around 12 years old, Rocky came with him too. Cyndy arranged for the children to fly out to Newark the day after school got out to stay the entire summer and return right around Labor Day. When the children were in New Jersey, she was freed up to go out with her friends.

(Ex. 104, Decl. of Sheila Barcus, ¶ 37.) Willie's mother, Minnie Nixon, and other family members had to provide necessities and school clothes for the children when they came to visit because they did not have much. (*Id.*) Once, Michael visited in winter and did not have clothes or a jacket for the cold weather. (Ex. 142, Decl. of LaJay Washington, ¶ 3; Ex. 160, Decl. of Tammie Washington, ¶ 2.) During the summer visits, Cyndy was having fun on her break from the children. Willie said:

> There were other times in Cyndy's life when she would perk up, like the summertime. She looked forward to having the

> free time without the kids and would spend much of the time out partying.

(Ex. 122, Decl. of Willie Jones, ¶ 42; *see also*, Ex. 145, Decl. of Milton King, ¶ 4.)

149. Cyndy had many boyfriends over the years and Michael became resentful of them. Cyndy dated several men at a time, and dated men who she worked with and married men.

> Mike used to say how he had lost respect for her, especially when she brought home a married man. Mike showed his loss of respect by challenging her and accusing her of loving her male friends more than she loved him.

(Ex. 137, Decl. of Freddie Turner, ¶ 8; *see also*, Ex. 117, Decl. of Cyndy Jones, ¶ 73.)

150. Cyndy dated many men over the years, and tried to find someone who would take care of her. She looked to take advantage of these men to get money, jewelry, and free babysitting. (Ex. 123, Decl. of Tim Keels, ¶ 3.) According to one of Cyndy's babysitters:

> It seemed to me that [Cyndy] put the men in her life before her children. [Cyndy] made a point of bragging to me about the things her male friends had. She was very concerned with material things and possessions and the things the men would give her.

(Ex. 137, Decl. of Freddie Turner, ¶ 13.)

151. Cyndy met a somewhat younger man named Larry Sepulveda in 1982, and moved in with him in 1983. (Ex. 117, Decl. of Cyndy Jones, ¶ 71; Ex. 132, Decl. of Larry Sepulveda, ¶ 1.) Cyndy accepted the offer because she was struggling financially, and Larry had room for her in his apartment. (*Id.* ¶ 3.) They lived together for less that six months. A mutual acquaintance, Timothy Keels, recalled how he met Cyndy at the bowling alley and he felt he needed to warn his friend about Cyndy because he had the impression that she was a "gold-digger" out to exploit

Larry. (Ex. 123, Decl. of Timothy Keels, ¶ 2.) Timothy remembers:

> Cyndy ended up milking Larry for money, jewelry and babysitting. Larry bought her a diamond ring which cost him a couple . . . thousand[] dollars, which she did not return to him when they split up. . . . Larry spent a lot of time taking care of Michael and Rocky while Cyndy was out.

(*Id.* at ¶¶ 3, 4.)

152. For the first six months of their courtship, Cyndy did not tell Larry that she had children. She then told him about Rocky. On moving day, Michael showed up with his mother and brother, and Larry did not know who he was:

> On the day she moved in, Mike showed up with her and Rocky. Cyndy simply told me Mike's name, nothing else. I thought he was a nephew or someone who was helping her move. Six or seven hours later, I started wondering about Mike's relationship to Cyndy and asked her who he was. Cyndy said he was her son. I was shocked. She had not told me that she had another child nor had she said that he was moving in. I thought it was odd that a mother would hide her son.

(*Id.*)

153. The fact that Cyndy hid the existence of her family was nothing new. Even before Cyndy was free from Willie, she would deny that she had a husband. She introduced Willie as a "friend" to her co-workers. (Ex. 122, Decl. of Willie Jones, ¶ 32.) Cyndy often denied the existence of her children, sometimes saying that they were her nephews if they were present.

> C.J. [Cyndy] made Mike and Rocky call her "Aunt C.J." at the company picnics and things like that. I remember Mike

> and Rocky calling her Aunt C. J. when one of her male friends came to pick her up. C.J. told her date that Mike and Rocky were her nephews and she was keeping them for her sister.

(Ex. 138, Decl. of Willis Turner ¶ 13.)

154. Larry reported that "[a]lmost immediately from the time they moved in, I was attending to the boy's needs, both for attention and food." (Ex. 132, Decl. of Larry Sepulveda, ¶ 5.) Cyndy and the kids stayed at Larry's apartment for less than six months. Larry and Michael had become very close. Larry took an active role in Rocky and Michael's life, playing sports with them and taking them places. (*Id.* at ¶ 7.) Cyndy was becoming less and less reliable. She left the kids home with Larry often, and sometimes would be gone all weekend. (*Id.* at ¶ 13.) At times, Michael would get distraught over Cyndy's constant absences. (*Id.* at ¶ 14; Ex. 117, Decl. of Cyndy Jones, ¶ 72.)

155. Larry noticed the difference in the way that Cyndy treated Michael versus the way that she treated Rocky. He witnessed Cyndy's indifference, neglect, and physical abuse of Michael. Michael could never do anything right, and always got blamed for Rocky's misdeeds. (Ex., 132, Decl. of Larry Sepulveda, ¶ 8.) Cyndy never thought of Michael, to the point where she only bought food for herself and Rocky. She would tell Larry, "Mike likes you better, so you get him some food." (*Id.* at ¶ 5.) As Larry summed it up:

> In short, if your name was Rocky, you had a blast. If your name was Mike, you would have it tough and would be looking for attention you would never get.

(*Id.* at ¶ 8.)

156. Ultimately, Cyndy's relationship with Larry came to an end when he discovered that she was dating other men, and using him to take care of her children:

> One Friday, Cyndy called and told me to finish work early

> and go home and wait for her so that we could all go out and do something fun. I got home and Mike was there alone. He told me that his mom had gone to pick up Rocky. As the evening grew late, and Cyndy didn't show up, I decided to call Jackie. It turned out that Rocky was still at Jackie's house and Cyndy had gone away for the weekend. Mike finally confided in me that Cyndy had told him that she was really going out with a man named Bill from work, but that she told Mike to lie to me and say that she had gone to pick up Rocky. Mike made me promise him that I would not tell Cyndy what she had told him. Mike said that, if she found out, she would beat him. We went to Jackie's house at the end of the weekend, and sure enough, a man was dropping Cyndy off. He was an older, white man. I later found out that he was married and worked with her at Rockwell. She continued to disappear with him on weekends.

(*Id.* at ¶ 15.)

157. One day, Larry came home from work and all of Cyndy's things were gone. According to Larry:

> Mike was there alone and he told me, "She left me here with you. She said that you were going to take care of me." Mike told me that Bill had helped her pack. Mike begged me to let him stay with me. He said, "She doesn't want me."

(*Id.* at ¶ 17.) Michael stayed for a while, but Cyndy called the police on Larry, saying that Michael had to go with her because he was her responsibility. (Ex. 117, Decl. of Cyndy Jones, ¶ 72.) After Michael was returned to his mother, he argued with her

and ran away from home. He hid in the garage of a friend's house. (Ex. 138, Decl. of Willis Turner, ¶ 20; Ex. 137, Decl. of Freddie Turner, ¶ 14.)

158. Larry described having to say goodbye to Michael for the last time as a very difficult experience:

> I don't remember if when Mike finally left my home, Cyndy ended up picking him up or if I dropped him off at the Rodriguez's. What I do recall vividly is that Mike was crying frantically. It was very sad to see that and to have to say goodbye to Mike.

(Ex., 132, Decl. of Larry Sepulveda, ¶ 21.)

159. Cyndy put her own needs over those of her young sons. Michael deserved more, and had so much potential, as Turner said:

> Mike had the sweetest heart and was very humble. He tried really hard to please me. He would always say the things adults wanted to hear from children. If I got on Willis about washing the dishes, Mike would immediately start washing them. Whenever I mentioned that something needed to be done, Mike would jump right on it. I remember telling [my son] Willis that he should be more like Mike.

(Ex. 137, Decl. of Freddie Turner, ¶ 15; *see also*, Ex. 147, Decl. of Mario Villarreal, Sr., ¶ 2 (Michael had "respectful qualities").) Larry Sepulveda would agree, but knew that Michael did not have much of a chance:

> Even when I was twenty-three and involved with Cyndy, I knew that the way she treated Mike was abusive and neglectful. I now have three kids of my own, three of them teenagers, and it's even more evident to me now how difficult Mike's life was.

(Ex. 132, Decl. of Larry Sepulveda, ¶ 23.)

f. Michael's Teenage Years

160. As Michael approached his 16th birthday, he became extremely unhappy, did not want to participate in any family activities, and did little besides drink, sleep and occasionally eat. (Ex. 117, Decl. of Cyndy Jones, ¶ 83.) At one time, Michael had been a great baseball player and Cyndy was proud of him. (*Id.* at ¶ 82.) Things started changing, and Mike avoided his mother. (Ex. 119, Decl. of Nathan Jones, ¶ 16.)

161. In October of 1987, Michael's mother moved the family to Moreno Valley, in Riverside County. Through Carmen and Glenn's financial help, Cyndy was able to put a down payment down on a house right next door to Glenn. (Ex. 112, Decl. of Glenn Garbot, ¶ 18; Ex. 113, Decl. of Linda Garbot, ¶ 8.) The kids were mostly on their own both before and after school. At times, Glenn's wife, Linda Garbot, or Michael's girlfriend would watch Rocky after school, but there was no regular babysitting arrangement. (Ex. 113, Decl. of Linda Garbot, ¶ 10; Ex. 144, Decl. of Beatrice Acosta, ¶ 8.) Mostly, Michael looked after Rocky. (*Id.*)

162. After the move to Moreno Valley, Michael's mother had a several-hour commute to work, went to the gym in the morning, and socialized after work, so that she was away from before dawn until after dark virtually every day. (Ex. 117, Decl. of Cyndy Jones, ¶ 87; Ex. 122, Decl. of Willie Jones, ¶ 32; Ex. 144, Decl. of Beatrice Acosta, ¶ 9.)

163. By himself at home, Michael would drink on a daily basis and fill up the liquor bottles with water to conceal it. (Ex.138, Decl. of Willis Turner, ¶ 23; Ex. 113, Decl. of Linda Garbot, ¶ 12; Ex. 117, Decl. of Cyndy Jones, ¶¶ 85, 86.) Although Michael had been drinking and doing drugs for quite some time, that was the first time that Cyndy started suspecting something. (*Id.*) Michael stopped going on family outings, and spent almost all his time at home, surreptitiously drinking alcohol and sleeping.

164. When Michael was in the 9th grade he told his mother he wasn't going

to school any more. By the end of 1977, the relationship between Michael and his mother had completely deteriorated; she hated being around her son and made that clear to both Michael and to his friends. (Ex. 125, Decl. of Danny Limar, ¶ 7; Ex. 138, Decl. of Willis Turner, ¶ 15.) Willis Turner said:

> C.J. [Cyndy] seemed to have given up on Mike at a certain point. Her attitude was *not* one of you are my son and we will get through this together. C.J. ignored Mike and didn't seem to care anymore.

(Ex. 138, Decl. of Willis Turner, ¶ 15; Ex. 125, Decl. of Danny Limar, ¶ 7 ("[Cyndy] acted as though she could not stand him").) Freddie Turner said that "it was clear to [her] that [Michael's] mother had written him off. (Ex. 137, Decl. of Freddie Turner, ¶ 9.)

165. By the time Michael was 17 years old, he had become a nomad. His mother kicked him out of the house on several different occasions, for various reasons. (Ex. 117, Decl. of Cyndy Jones, ¶ 88.) Danny Limar said:

> One time Mike left the house, telling his mother that he would be gone for the weekend and ended up staying with me in Orange County for about a week. After that week had passed, I drove Mike back home to Moreno Valley. At first no one was home when we got there. Mike and I started to play darts and drink 40 ounce bottles of beer and listen to music. Rocky came home and told Mike that their mother had said that Mike had to take all of his things and get out. Mike and I were practically crying when we heard this. I felt responsible because I was seven years older than Mike. It took us two hours to pack up all of Mike's stuff and put it in the trunk of my car. Mike stayed with me for a while after that, though I had roommates so he had to stay other

places at times.

(Ex. 125, Danny Limar ¶ 8.) Rocky remembered Cyndy kicking Mike out on one occasion:

> When Mike was about 17 years old, my mom was sick of his room smelling like marijuana and cigarette smoke and she said he had to leave. At that point, my mom got so mad at Mike that she threw an entire chess set at him, including the board and the pieces. After that, Mike moved out. He stayed with various friends. Sometimes, he would come back home and stay with us for brief periods of time.

(Ex. 119, Decl. of Nathan Jones, ¶ 17.)

166. Michael lived with various friends from 1987 through 1989. At one point he moved in with the Muslim family in Moreno Valley. He also lived with Danny Limar, Loren Kinney and the Villarreals. Cyndy did not seem to care where he was. (Ex. 124, Decl. of Loren Kinney, ¶ 5.) Luis Villarreal recalls when Michael came to live with them in the summer of 1989:

> [¶] I remember that Mike would get blamed for things that his little brother Rocky did. Mike took responsibility for Rocky breaking a window and was kicked out of the house. Mike didn't have anywhere to go.
>
> [¶] My brother Mario felt bad for Mike, so he would let him stay at our home. At first he did not ask my parents if Mike could stay and he would come and go. Then, it became apparent that Mike needed a stable place to live, so Mario sat down with our parents and they agreed to let him stay. I remember that Mike stayed at the house for at least four months straight.

(Ex. 146, Decl. of Luis Villarreal, ¶¶ 5, 6.)

167. Michael felt that his mother kicked him out when the new man in her life, Gerald Pitts, moved in. Michael took this as a rejection of him. (Ex. 124, Decl. of Loren Kinney, ¶ 5; Ex. 119, Decl. of Nathan Jones, ¶ 18.) Gerald acted as though he was threatened or jealous of Michael, always irritated and arguing with Michael. (Ex. 144, Decl. of Beatrice Acosta, ¶ 14.)

168. In January of 1988, Michael's girlfriend Beatrice Acosta became pregnant with Michael's child. Beatrice recalls,

> Soon after I met Michael, he had an argument with his mother and moved out of her house. Everything was messed up at the time. . . Michael moved in with his drinking buddy, Danny Limar . . . I did not have a permanent place to live and was bouncing around myself before Mike, Jr.'s birth . . . Times were really hard for both me and Mike . . . Michael's mother worked a lot . . . [and] Michael [had] to babysit [Rocky] pretty often. Michael drank quite a bit. On one occasion, after Michael went out drinking, and he did not remember how he had gotten home . . . After Mike, Jr.'s birth, I . . . lived with Mike's family briefly.

(*Id.* at ¶¶ 5, 7, 8, 11, 13; Ex. 31.)

169. Michael left school in June of 1988, but enrolled in a summer training program at the Data Control Institute (DCI) to get his GED. (Ex. 159, Decl. of Carole Kelly, ¶ 129; Exs. 3, 7.) He attended daily and succeeded in getting a certificate for "outstanding achievement in GED preparation/work readiness." (Ex. 7.) However, when he went to take the exam he had no driver's license (he didn't drive) and only a school I.D. and a copy of his birth certificate (but not a certified copy). (Ex. 159, Decl. of Carole Kelly, ¶ 129.) The test administrator determined that this I.D. was not sufficient, and Michael was prevented from taking the test and did not graduate. (*Id.*)

At that point, Michael, had no place to live, no high school education, no skills, and no job.

170. On October 27, 1988, Beatrice, who was only 15 years old, had Michael's child, and named him Michael Jones, Jr. (Ex. 31.) Meanwhile, Michael started spending most of his time at Najee Muslim's house or Luis and Mario Villarreal's house. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 1, 4, 7, 9; Ex. 146, Decl. of Luis Villarreal, ¶ 1, 5, 10; Ex. 124, Decl. of Loren Kinney, ¶ 10, 11.) In April of 1989, Cyndy and Gerald Pitts moved to their new house in Ontario. Michael did not want to leave Moreno Valley. (Ex. 159, Decl. of Carole Kelly, ¶ 45.)

171. Michael was out on his own again, hanging out at Najee Muslim's house, a congregating place for drinking, doing drugs, and illegal activities. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 1, 4, 7, 9; Ex. 146, Decl. of Luis Villarreal, ¶ 1, 5, 10; Ex. 124, Decl. of Loren Kinney, ¶ 10, 11.) Talia Muslim, Najee's mother, was "scandalous." She gave the kids weapons and asked them to get revenge:

> Talia, got into a hassle with someone, so she called all of the guys over to her home and gave them guns to jack someone up. Talia also took the family to go on a drive by shooting to get revenge on someone who had fought with Najee.

(Ex. 146, Decl. of Luis Villarreal, ¶ 10.)[9] Some of Michael's friends in Moreno

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[9] Talia also seemingly threatened a defense investigator working for Eric Bailey's attorney:

> In ordering the photograph of Andre Davis [Najee Muslim's cousin] from the CDC youth authority, it is my understanding that Davis' family was informed. After I had requested the photo, I began to receive threats. Some of the threats specifically warned me, "Don't butt in," and, "Watch your back." I was also called and warned by the called that I should not be "Bringing [her] nephew into this."

Valley were ex-gang members or were looking for trouble. His girlfriend, Loren Kinney, said that Michael was intimidated by the Muslims and started to change: She said:

> The people he hung out with in Moreno Valley were a bad influence on Mike. There was a major change in Mike's behavior; he didn't seem like the same person I knew. Around the Moreno Valley friends, Mike had to hold in his feelings. He couldn't be himself. Even his laugh was fake with them. Things got out of control when Mike met and started spending time with Najee Muslim and his family. Mike was afraid of Talia Muslim, Najee's mother, and a guy, who I believe was named Markell from Los Angeles.
>
> [¶] I went over to the Muslim's house several times. It was a strange scene there. Talia and Markell intimidated all these young kids. They were scary people. Talia Muslim would let the boys get drunk and smoke marijuana at her house. Talia engaged in illegal activities and egged on the boys' tough-guy behavior. Mike got marijuana from Talia Muslim. In addition to the drinking, Mike was smoking marijuana, every day, all day.
>
> [¶] I asked Mike what was wrong with him because he was acting so differently from before. He told me that he had to adapt because that was where he was living. Mike was scared at that house; he sometimes would come over and hold on to me really tight.

(Ex. 124, Decl. of Loren Kinney, ¶¶ 10-12.) Given that he was on his own and he and

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(Ex. 161, Decl. of Judy McCollin, ¶ 5.)

his mother were no longer close, Michael was frustrated and angry; he felt the need to be accepted somewhere, by anyone.

4. Michael's Functioning, Psychiatric Background, and History of Substance Abuse

172. An understanding of Michael's background and functioning would not be complete without information about his family's psychiatric and substance abuse history, and a recitation of Michael's neurological and psychiatric deficits, and substance abuse history. Because of his unstable environment, Michael faced extraordinary challenges to normal development and achievement throughout his life, and had no resources to assist him.

a Family Psychiatric History and History of Substance Abuse

173. Michael's great-grandparents, Hence and Roxanna Jones, and Quincy and Ida McCoy were alcoholics. (Ex. 141, Decl. of Cathy Washington, ¶ 7; Ex. 109, Decl. of Minnie Dennis, ¶ 5 ("they drank every day"); Ex. 121, Decl. of Willie Clyde Jones, ¶ 6.) Michael's father, grandfather, and uncles and aunts were all chronic alcoholics. (Ex. 120, Decl. of Robert Jones, ¶ 9; Ex. 141, Decl. of Cathy Washington, ¶ 22, 23; Ex. 134, Decl. of Donnie Starks, ¶ 4, 7.) Virtually every one of Michael's aunts, uncles, and grandparents were alcohol abusers. There is a history of excessive drinking and alcoholism on the mother's side of the family as well, including Cyndy. (Ex. 105, Decl. of Marjorie Bruner, ¶ 5; Ex. 117, Decl. of Willie Jones, ¶¶ 32, 33.)

174. Willie Jones started drinking alcohol at an early age:

> My grandparents gave me alcohol from the time I was a baby. By the age of ten, in Georgia, I was drinking regularly. I drank home brew, a type of beer.

(Ex. 117, Decl. of Willie Jones, ¶ 33.) Michael followed suit, starting to drink at the age of eleven.

175. Willie Jones and his brothers, Robert and Willie Clyde, are all now or have been serious drug addicts, becoming homeless, stealing from family and others,

and doing whatever it takes to get powder cocaine and crack cocaine. (Ex. 117, Decl. of Willie Clyde Jones, ¶¶ 23-24; Ex. 109, Decl. of Minnie Dennis, ¶ 13; Ex. 143, Decl. of LeJay Washington, ¶ 4; Ex. 142, Decl. of LaJay Washington, ¶ 5; Ex. 120, Decl. of Robert Jones, ¶ 8.)

176. With respect to a family history of mental illness, Willie Jones suffered from acute and chronic depression, and made serious suicide attempts, had several documented incidents of blackouts and loss of consciousness. He has been diagnosed with Temporal Lobe Epilepsy, Multiple Personality Disorder, Paranoid Schizophrenia, "intermittent explosive disorder," having a psychotic episode, and extreme depression, including serious suicide attempts. (Ex. 122, Decl. of Willie Jones, ¶¶ 37, 39; Exs. 24, 25, 26, 27, 28.) Willie was hospitalized in a mental institution and treated with antipsychotic medications, and has been treated with anti-anxiety medication. (Ex. 117, Decl. of Willie Jones, ¶¶ 35-40; Exs. 24-27.) His black-outs could last hours, and were sometimes classified as seizures. (*Id.*)

177. Cyndy Jones displays signs and symptoms of bi-polar disorder. Cyndy was know as a "cleaning fool" and obsessive-compulsive. (Ex. 108, Decl. of Verna Cameron, ¶ 10; Ex. 124, Decl. of Loren Kinney, ¶ 3.) She also had periods of depression when she would "just stay in bed and sleep and not get up for days . . . [she] had a nervous breakdown at one point and didn't leave the house for over a month." (Ex. 122, Decl. of Willie Jones, ¶ 41.) She evidenced signs of post traumatic stress disorder (PTSD), possibly from the spousal abuse, and a co-dependent personality. (Ex. 159, Decl. of Carole Kelly, ¶ 293.)

178. Rocky Jones was a sickly baby and was diagnosed as having "emotional asthma" when he was under stress. (Ex. 38.) Sheila Barcus's son, David, was sexually molested as a child and is a convicted sex offender. (Ex. 116, Decl. of Christina James ¶ 28; Ex. 104, Decl. of Sheila Bacus, ¶ 53.)

179. There has been both suicidal and homicidal behavior within the family, mostly by Michael's father, Willie. Additionally, Michael's paternal grandmother,

Carmen, was the victim of a murder attempt at the hands of her husband, Solomon Garbot.

b. Michael's Psychiatric History and History of Substance Abuse

180. Michael was given alcohol at a very young age:

> I know that Mike also started drinking when he was really young. My mother told me that my father, Frank, gave Mike beer when he was four years old. My mother had taken Mike to visit the family in Georgia. I started giving Mike holiday wine, Manishewitz, at around eleven years old at home.

(Ex. 122, Decl. of Willie Jones, ¶ 33.) Michael continued to drink from the age of eleven. Throughout the years, there was "always alcohol in the house and it was always available." (*Id.*; *see also*, Ex. 132, Decl. of Larry Sepulveda, ¶ 19; Ex. 138, Decl. of Willis Turner, ¶ 23; Ex. 113, Decl. of Linda Garbot, ¶ 12; Ex. 117, Decl. of Cyndy Jones, ¶¶ 85, 86.) Michael drank at an early age with Willis Turner and Eugene Bunn. (Ex.106, Decl. of Christopher Bunn, ¶ 2; Ex.138, Decl. of Willis Turner, ¶ 23.) Rocky witnessed Michael drinking at an early age as well. (Ex. 119, Decl. of Nathan Jones, ¶ 13.) Michael's drinking became exceedingly excessive, and he was an alcoholic by the time he was thirteen years old. Michael also began to smoke marijuana, and used various other psychoactive substances, such as cocaine and crystal methamphetamine. (Ex. 125, Decl. of Danny Limar, ¶ 2; Ex. 140, Mario Villarreal, Jr., ¶ 3.)

181. Michael had neurological deficits as well. As noted above, Michael had difficulty with academic achievement. As a child, many, including teachers, noticed that Michael was hyperactive:

> When [Mike] was little, always running, could not listen very well, was very hyperactive, and was always interrupting adults in their conversations

(Ex. 104, Decl. of Sheila Barcus, ¶ 45.) His mother agreed with that, saying that Michael had a short attention span, hyperactive, tendency to procrastinate and difficulty remembering instructions. (Ex. 117, Decl. of Cyndy Jones, ¶¶ 79-80; Ex. 3; Ex. 109, Decl. of Minnie Frank Dennis, ¶ 11.) As noted above, Michael has finally been diagnosed with Attention Deficit Hyperactivity Disorder:

> In reviewing his history, the most significant aspect is the evidence of early-acquired patterns of dysfunction that clearly point to ADHD and which shaped his cognitive, psychological and social development.

(Ex. 154, Khazanov Decl., ¶ 105.)

182. Michael was impulsive, could not think things through, and had little insight into the consequences of his behavior. (Ex. 138, Decl. of Willis Turner, ¶¶ 26, 27; Ex. 106, Decl. of Christopher Bunn, ¶ 6.) He also frequently made socially inappropriate comments, and was generally socially awkward. (*Id.*) Dr. Natasha Khazanov has found that many of Michael's impairments are attributable to organic brain damage. Michael's brain was damaged during a virulent episode of meningitis as a baby. Dr. Khazanov summarizes:

> [Michael has] suffered the cumulative effects of longstanding brain damage, learning disabilities reflecting severe impairments in attention and concentration and a serious psychiatric disorder characterized by depression and long-term alcohol abuse.

(Ex. 154, Decl. of Dr. Khazanov, ¶¶ 114, 115.)

183. With respect to his psychiatric history, it does not appear that Michael had any psychological testing as an adolescent. Michael has exhibited behavior and symptoms consistent with post-traumatic stress disorder, schizophrenia, depression and other potential mood disorders, and addictive personality disorder. (Ex. 159, Decl. of Carole Kelly, ¶ 293.) Multiple personality disorder has not been ruled out.

184. Also, as noted above, Michael has exhibited the signs and symptoms of post-traumatic stress syndrome from witnessing domestic violence, and from being abused. He was described as "jumpy" and hyper vigilant. (Ex. 132, Decl. of Larry Sepulveda, ¶ 18; Ex. 104, Decl. of Sheila Barcus, ¶ 44-45.)

185. With respect to his other psychiatric symptoms, his friend, Danny Limar described Michael as having a Jekyll and Hyde personality:

> His face literally changed and he looked like a different person. He would get a strange look on his face. One of the things I remember most is that he would have what I called the "thousand yard stare", the far away, intense look soldiers get in combat. When Mike changed like this, it truly seemed to me that he was an entirely different person. His eyes got small and glazed over, almost like he was "hurting" inside, and he would go into an angry depression, worst when he was drinking. He would often not talk at all, and when he did he would mumble, possibly to himself or possibly to us, and often saying something about being "on a mission." He would say things that he seemed to understand, but that nobody else understood. You'd have to actually touch him and say, "Mike, snap out of it" for him to come out of that state, which could last from just a few minutes to an hour. When he did come out of it, it was like turning a light switch on or off. The Mike I knew would come back, his face would change back, and his eyes no longer had that faraway look in them. He looked like nothing out of the ordinary had happened, like he was totally unaware of the way he had just changed.

(Ex. 125, Decl. of Danny Limar, ¶ 4.) Eugene Bunn also noted that at times Michael

would just "fade out." (Ex. 106, Decl. of Christopher Bunn, ¶ 5.) Loren Kinney also described Michael as having a "split personality." (Ex. 124, Decl. of Loren Kinney, ¶ 6.)

186. In 1987, Michael was acting out in a self-destructive way, taking unreasonable risks. Mike acted unafraid of anything, even dying. (Ex. 125, Decl. of Danny Limar, ¶ 6.) Michael engaged in life-threatening behavior:

> Although it's cool to show you are not afraid, Mike took it too far, to the point where he seemed almost suicidal. I remember one time when he initiated this crazy conversation about how he "couldn't die," and then got out on my third-story balcony, climbed up on the wooden railing, and walked along the balcony back and forth, all the while "pimping" with his finger to his nose. Another time, we were driving back from Moreno Valley and, while I was driving us at 80-90 mph, Mike put his head so far out the car window that he would have fallen out if I'd had to suddenly turn the steering wheel.

(*Id.*)

187. Other witnesses noticed the difference in his personality when he drank or did drugs:

> When Mike was drunk, he changed a lot. He became a very different person. It would only take four beers and Mike would be out of it. He became insecure and sometimes mean. When Mike was not drunk, he was a cool guy.

(Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 5; *see also*, Ex. 146, Decl. of Luis Villarreal, ¶ 6.) Many individuals who suffer from symptoms of mental disorders turn to psychoactive substances in an effort to ameliorate those symptoms, as a form of self-medication.

5. Michael's Mental State Prior to and During the Incidents Subject to His Criminal Case

188. During the same eleven month period of time during which all of Michael's alleged criminal acts were committed, he consumed large, toxic amounts of alcohol on a daily basis. Family members noticed his drinking, including his brother Rocky, Tammie Washington, Christina James, and Beverly Sendgikowski. (Ex. 119, Decl. of Nathan Jones, ¶ 13; Ex. 160, Decl of Tammie Washington, ¶ 3; Ex. 116, Decl. of Christina James, ¶ 24.) Luis Villarreal believed that Michael "escaped into alcohol and drugs because of his home life." (Ex. 146, Decl. of Luis Villarreal, ¶ 3.) Michael's friend, Danny Limar states that:

> From the time we started hanging out together until Mike was arrested, we would drink beer together all day long and do whatever drugs were available. In a typical day, we would each drink five or six 40-ounce cans or bottles of Old English 800, a particularly strong brew. Later on, we also did large amounts of cocaine. I was dealing at the time, so supply was not a problem. We would ingest cocaine on a daily basis, and both of us together would frequently consume one to two ounces in a single day.

(Ex. 125, Decl. of Danny Limar, ¶ 2.) Michael also lived with Loren during the time period that led up to the robberies in 1988:

> Mike and I would start drinking in the morning and keep it up all day, every day. We drank about 12 to 13 40- ounce beers between us daily, as well as hard alcohol such as Tangeray, E & J, and "Cisco." At the time, I did not realize that our drinking was really excessive.

(Ex. 124, Decl. of Loren Kinney, ¶ 7.) Many others witnessed Michael's excessive drinking. Michael drank every day during that time period. (Ex. 107, Decl. of Erin

Burton-Uribe, ¶ 3; Ex. 135, Decl. of Tara Taylor, ¶ 2; Ex. 144, Decl. of Beatrice Acosta, ¶ 11; Ex. 148, Decl. of Enrique Luna, ¶ 2; Ex. 125, Decl. of Danny Limar, ¶ 2.) When he was staying with the Villarreals, Michael was drinking with the other guys at the house all the time when Mario's parents were gone at work. (Ex. 147, Decl. of Mario Villarreal, Sr., ¶ 5.) Mario Villarreal, Jr. recalls:

> Mike had been drinking beer ever since I met him through my brother, Luis. Mike may have been drinking years before. He drank cheap beers, like malt liquor.
>
> [¶] Mike was already smoking a lot of pot on a daily basis. Once in a while he smoked crystal methamphetamine.
>
> [¶] As we started hanging out together, Mike and the rest of my friends would meet at my house. We would drink beer and smoke marijuana all day long, everyday, until 6:00 p.m. when my parents would arrive home from work. From there, we would go to the park and continue drinking and smoking. We got drunk and high most everyday.

(Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 4-6.)

189. On a daily basis, Michael drank massive quantities of malt liquor, beer, and also took drugs, including cocaine and crystal methamphetamine. (*Id.* at ¶ 3.) In this same time period, Michael also was experiencing alcohol and drug related black-outs and memory losses:

> Mike would sometimes blackout when he was drunk. He would forget whatever he had done when he was drunk. The next day when Mike was sober, I would tell him about what had happened when he was drunk the night before. Mike was convinced he did not do whatever it was I told him he had done because he could not remember.

(*Id.* at ¶ 3; *see also*, Ex. 146, Decl. of Luis Villarreal, ¶ 6.)

190. During this period of 1988 through 1989, Michael was getting drunk every day and blacked out on several occasions. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 6; Ex. 144, Decl. of Beatrice Acosta, ¶ 11; Ex. 146, Decl. of Luis Villarreal, ¶ 6; Ex. 125, Decl. of Danny Limar, ¶ 4.) On December 19, 1988, the Mad Greek robbery occurred in Lynwood, on January 21, 1989, the Domino's robbery-homicide took place, and on October 31, 1989, the Flats robbery occurred. There was substantial evidence that could have been presented at trial that Michael was extremely high and intoxicated at the time of the crimes. (Ex. 115, Decl. of Chemeka Goss-Kater, ¶ 4; Ex. 135, Decl. of Tara Taylor, ¶ 4; Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 16, 18.)

VI.

AEDPA STANDARDS

1. Jones filed his initial federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and therefore his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed.2d 363 (2003).

2. Under AEDPA, a habeas petition challenging a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). 28 U.S.C. section 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

3. The terms "contrary to" and "unreasonable application" have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007). A state court

decision is "contrary to" clearly established federal law if it arrives at a conclusion opposite to that of the Supreme Court on a question of law, or decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To be an "unreasonable application of" clearly established federal law, the state court decision must have identified the correct legal rule but unreasonably applied it to the facts at hand. *Id.* at 406; *Gonzalez v. Duncan*, 551 F.3d 875, 889 (9th Cir. 2008).

4. "Supreme Court holdings at the time of the state court's last reasoned decision are the source of clearly established Federal law for the purposes of AEDPA," *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005) (citing *Williams*, 529 U.S. at 412), *accord Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) (granting habeas relief under AEDPA because state court decision ignored "fundamental principles established by [the Supreme Court's] most relevant precedents"). Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999); *accord Barajas v. Wise*, 481 F.3d 734, 740 (9th Cir. 2007); *Arnold v. Runnels*, 421 F.3d 859, 865 n.6 (9th Cir. 2005).

5. As the Supreme Court has stated, "in the context of federal habeas [d]eference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (Miller-El I). To that end, while the standard as articulated in section 2254 is demanding, it is "not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Miller-El II) (granting habeas relief under AEDPA), *citing Miller-El I*, 537 U.S. at 340; *see Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) (AEDPA does not "'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be

applied.'"); *See also Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009); *Jones v. Ryan*, 583 F.3d 626, 636 (9th Cir. 2009); Bradley v. Henry, 510 F.3d 1093, 1096 (9th Cir. 2007).

6. While a state court's summary denial is considered an adjudication on the merits subject to § 2254(d), *see Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), where the state courts make no findings of fact or fail to hold a hearing, there are no factual determinations for this Court to defer to, or for § 2254(e)(1)'s presumption of correctness to apply to. *Taylor v. Maddox*, 366 F.3d 992, 1014 (9th Cir. 2004) ("It is well-established that when the state courts do not make findings at all, no presumption of correctness attaches, and we must make our own findings") (*citing Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2540, 156 L. Ed. 2d 471 (2003)); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003) ("with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings – if that is indeed how those stated findings should be characterized – when they were made without such a hearing"); *Killian*, 282 F.3d at 1208 (similar).

7. The limits on habeas relief contained in § 2254(d) do not apply, and the federal habeas court reviews a claim de novo when:

(a) the state court did not adjudicate the merits of the claim but instead denied the claim solely on procedural grounds. *Cone v. Bell*, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009);

(b) the state court misperceived or mischaracterized the claim, and did not address it, or ruled solely on a state law claim and did not address a corollary federal claim. *Bauder v. Department of Corrections*, 619 F.3d 1272, 1273, 1274 n.3 (11th Cir. 2010) (per curiam);

(c) the state court did not adjudicate elements of the claim, in which case those elements are reviewed de novo (*Wiggins*, 539 U.S. at 534; *Rompilla* v. Beard, 545 U.S. 374, 390 (2005); *Porter v. Mccollum*, 130 S. Ct. 447, 452 (2009) (per curiam));

and

(d) when the state court decision is contrary to or an unreasonable application of federal law (§ 2254(d)(1)) or based on an unreasonable determination of the facts (§ 2254(d)(2)). *Panetti*, 551 U.S. 930; *Wiggins*, 539 U.S. at 528-29; *Maxwell v. Roe*, 2010 WL 4925429, at *15 (9th Cir. Nov. 30, 2010); *Frantz v. Hazey*, 533 F. 3d 724, 735 (9th Cir. 2008).

VII.

ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

1. In the interest of brevity and to avoid repetition, Jones makes the following allegations for each of the enumerated claims below and incorporates these allegations into each claim:

2. The facts in support of each claim are based on the allegations in the Petition, the declarations and other documents contained in the exhibits; the entire record of all the proceedings involving petitioner in the trial courts of Riverside County; the documents, exhibits, and pleadings in Riverside County Superior Court, No. CR 40124, *People v. Michael Jones*, Case No. S024599, *In re Jones*, Case No. S132646; *In re Jones*, Case No. S094239; judicially noticed facts; and all other documents and facts that Jones may develop.

3. Legal authorities in support of each claim are identified within that claim. Each and every claim is based on the federal constitutions.

4. Jones does not waive any applicable rights or privileges by the filing of this Petition and the exhibits, and in particular, does not waive either the attorney-client privilege or the work-product privilege. Jones hereby requests that any waiver of a privilege occur only after a hearing with sufficient notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver. Jones also requests "use immunity" for each and every disclosure he has made and may make in support of this Petition.

5. The violation of Jones's constitutional rights constitutes structural error

and warrants the granting of this Petition without any determination of whether the error was harmless. Even assuming that the harmless error doctrine applies, however, relief is nevertheless required because the error "had substantial and injurious effect or influence" in determining Jones's convictions and sentences. *Brecht v. Abrahamson*, 507 U.S. 619, 627, 631, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Fry v. Pliler*, 551 U.S. 112, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007). Relief is also required because the error so infected the integrity of the proceeding as to warrant habeas relief even if did not substantially influence the jury's verdict. *Brecht*, 507 U.S. at 638 n.9.

6. The constitutional violations set forth in each individual claim alone mandate relief from the convictions and sentences. However, even if these violations do not mandate relief standing on their own, relief is required when each claim is considered together with the additional errors alleged in the other claims in the Petition. Cumulatively, these errors mandate relief from Jones's convictions and sentences. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978); *Phillips v. Woodford*, 267 F.3d 966, 985 (9th Cir. 2001).

7. If Respondent contends that any claim should not be considered on the merits because the final state court decision found the claim to be procedurally barred under state law, Jones contends that the bar does not preclude federal merits review because it is not an adequate and independent state ground. *See Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003). If this Court finds any claim to be procedurally defaulted, federal review of the merits of the claim is nevertheless required because Jones can establish cause and prejudice for the default and that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Id.* at 753-54 ("[a]n error that constitutes ineffective assistance of counsel is cause"); *House v. Bell*, 547 U.S. 518, 522, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) ("In certain exceptional cases involving a compelling claim of

actual innocence . . . the state procedural default rule is not a bar to a federal habeas corpus petition.").

8. To the extent that any claim, or part thereof, is deemed to be unexhausted, untimely, or procedurally or otherwise barred, it is a result of the ineffective assistance of prior counsel (state trial, appellate, and/or habeas counsel) and/or inadequate state court funding for post-conviction proceedings, and accordingly this Court should adjudicate the claim on the merits. Prior counsel (state trial, appellate, and/or habeas counsel) were ineffective in not raising the claim earlier.

VIII.
CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF FOR INCOMPETENCE TO STAND TRIAL AND INVALID GUILTY PLEAS TO THE GANG ALLEGATION AND THE FLATS ALLEGATIONS

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Jones pled guilty to certain charges and stood trial while incompetent to understand his constitutional rights and the proceedings against him, or to aid and assist in his defense in 1989-1991. *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Jones was also mentally incompetent to knowingly, intelligently, and voluntarily waive his various constitutional rights, including his right to jury trial, and his right to effective assistance of counsel, all of which rights were lost through his incompetent guilty pleas. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 89 L. Ed. 2d 631

(1986); *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Trial counsel was ineffective for failing to investigate the circumstances of the crimes that Jones pled guilty to, for failing to investigate Jones's psychological condition, for failing to raise a doubt as to Jones's competence, and for advising Jones to plead guilty to Counts I, X, XI, XII, and XIII at all. Trial counsel was additionally ineffective for failing to declare a doubt regarding Jones's competency during his guilty plea and during the capital trial. The trial court erred in failing to conduct a competency hearing regarding both.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Jones Was Not Competent to Waive His Constitutional Rights, Including His Right to Jury Trial, Nor Was He Competent to Stand Trial

4. On July 31, 1991, Jones pleaded guilty to crimes relating to the "Flats" incident. (CT 588-615.) Jones was rendered incompetent to waive his rights when he pled guilty to Count I, participation in a criminal street gang (Cal. Penal Code § 186.22), Count X, attempted robbery of Larry Nave, Brian Wagner and Chris Swan (Cal. Penal Code §§ 664/211), with personal use of a shotgun (Cal. Penal Code §§ 12022.5, 1192.7, subd. (c)(8)), and while armed with a handgun; Count XI, attempted murder of Brian Wagner, with personal use of a shotgun, and infliction of great bodily injury; Count XII, attempted murder of Chris Swan, with personal use of a shotgun and infliction of great bodily injury; and Count XIII attempted murder of Larry Nave, with personal use of a shotgun and infliction of great bodily injury, by his severe mental limitations and disabilities, by his mental illness and escalating symptoms thereof that altered Jones's mental functioning during proceedings that culminated in a guilty plea. For the same reasons, Jones was also incompetent to

stand trial in 1991.

5. A waiver of constitutional rights must be knowing, intelligent and voluntary. *See* section B, below. Jones's purported waivers are invalid because he was incompetent at the time and was thus incapable of knowingly and intelligently waiving his rights. Jones was not, in fact, competent to stand trial, to waive his constitutional rights, or to enter guilty pleas to charges.

6. Jones's trial counsel unreasonably and without tactical justification failed to investigate, consult experts, and adequately litigate the issue of Jones's competence, and failed to declare a doubt even though Jones was unable to aid and assist him in developing exculpatory evidence due to his mental condition, and his lack of memory for key events on the night of the offense of the Flats incident. Jones's lack of knowledge and lack of memory of these key matters continues to render him incompetent to aid and assist counsel in developing the facts supporting the other claims in this Petition. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003).

7. Trial of a mentally incompetent person such as Jones violates the right to due process within the meaning of the Fourteenth Amendment. It also produces violations of the host of trial rights protected by the Sixth and Fourteenth Amendments, including fair trial, to present a defense, to compulsory process, to confrontation, and to the assistance of counsel. In a capital case such as this, it further violates the protections of the Eighth and Fourteenth Amendments, including the rights to a reliable, accurate, non-arbitrary determination of capital murder and the appropriate punishment. Jones's constitutional rights were violated, and the conviction and sentence are void. *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980); *Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir. 1979); *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985); *Bundy v. Dugger*, 816 F.2d 564, 567 (11th Cir. 1987). Jones was deprived of his right to put on a defense because he was tried while incompetent. *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636

(1986).

8. Jones's longstanding impairments rendered him incompetent. At the time the pleas were entered, Jones was both depressed and agitated. Given both his youth and lack of brain maturation, and his organic brain disorder, Jones was in no position to plead guilty competently to Counts I, X, XI, XII, and XIII, or to stand trial in 1991. Jones refers to and incorporates herein the declarations of Carole Kelly, M.S.W., Natasha Khazanov, Ph.D., and Samuel Benson, M.D. (Exs. 154, 155, and 159.) As Dr. Khazanov states:

> Mr. Jones' combined disabilities suggest that he may well have been unable to assist in the preparation of his defense. His profound deficits in attention and concentration made it likely that he was unable to comprehend the issues involved in his case or to accurately relate to counsel relevant information concerning the offenses with which he was charged, including but not limited to the extent of his participation and the roles played by others in those offenses. Similarly, he likely was equally unable to relate his personal history and experience in a manner that would have allowed him to aid and assist in his defense, especially any relevant information regarding the extent and consequences of his own impairments. These obstacles undoubtedly were exacerbated by his age (18 and one half at the time of the offenses, 21 when convicted and sentenced to death) and the overwhelming nature of the capital trial proceedings.

(Ex. 154, Decl. of Natasha Khazanov, Ph.D., ¶ 112.)

9. The trial court and trial counsel failed to request a competency determination. The trial court and trial counsel erred in failing to declare a doubt and

initiate proceedings to determine Jones's competence to plead guilty or to stand trial, despite having in their possession evidence that Jones did not have a rational and factual understanding of the proceedings, lacked a memory of key periods of time, and could not aid and assist counsel. At a minimum, this information would have alerted reasonably competent trial counsel that the client was then not competent to stand trial. Trial counsel had an obligation to investigate such a possibility and at least seek the appointment of an expert to evaluate Jones's competency prior to advising his client to plead guilty to attempted murder charges. Trial counsel, of course, has a clear duty to declare a doubt in such circumstances, since he is charged with the zealous defense of his client.

10. Jones's incompetence prevented him from having a rational and factual understanding of the proceedings. Trial counsel had a duty to declare a doubt.

> [A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

Drope v. Missouri, 420 U.S. at 171 (1975). This remains the law throughout the trial.

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Id. at 181.

11. Jones's incompetence to waive his rights and stand trial prevented him from having a fair trial, meaningfully cooperating with counsel, receiving the effective assistance of counsel, confronting and cross-examining witnesses,

presenting himself in an accurate light to the jury, or receiving the requisite due process, heightened capital case due process, or heightened capital case reliability guaranteed by state law and the federal constitution.

12. Jones's incompetence meant that he could not have a rational understanding of the proceedings, the roles of the various participants, the legal issues, the tactical considerations involved in reaching decisions about the presentation of the defense, or the relative risks and benefits of decisions such as the defense to present. His inherent deficits, symptoms, and circumstances during incarceration, moreover, rendered him not mentally present, and the trial court and jury, not being adequately apprized of these matters, necessarily viewed him in a false light.

13. Jones's incompetence to stand trial meant that he could not meaningfully assist counsel in developing and presenting his defense, because he lacked adequate understanding of the issues, adequate means of acquiring necessary information, adequate memory or language skills, or an adequate ability to manipulate the information and reach rational conclusions.

14. Jones's incompetence is a fundamental flaw in the trial proceedings pervading every aspect thereof. Jones lacked any ability to meaningfully and rationally participate in his trial. Jones lacked the ability to make a rational decision concerning whether to speak with police and prosecution agents following his arrest, or to meaningfully participate in the investigation and evaluation of potential defenses.

B. There Was No Knowing, Intelligent or Voluntary Waiver of Jones's Rights

15. On July 31, 1991, Jones pleaded guilty to the allegations arising out of the "Flats" incident. (CT 588-615.) For a waiver of constitutional rights to be valid, the record must establish an affirmative explanation of the surrendered rights and a showing that the defendant's waiver is both voluntary and intelligent, and is made with an understanding of the consequences thereof. Thus, inferences drawn from

silent acquiescence or familiarity with the legal system are irrelevant.

16. With respect to a jury waiver, any criminal judgment imposed without jury participation must be closely scrutinized because jury determination is the preferred method of fact finding. There is a strong presumption against a jury waiver, which must be express, voluntary, and intelligent. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

17. Four general precepts flow from the sacrosanct nature of jury trial and the strong presumption against waiver of essential rights. The first rule is that a court may not accept a guilty plea without an on-the-record waiver of rights, including the rights to a trial by jury and against self-incrimination. *Boykin*, 395 U.S. at 242-43[10]. It must be stated expressly and on the record. A second requirement is that any waiver must be knowing and intelligent. *Id.* at 242. Without an understanding of the right being abandoned, a valid choice cannot be made. Third, the trial court is responsible for providing a positive showing of the express knowing waiver on the record; a waiver of jury must be expressed in words by the defendant and cannot be implied from defendant's conduct. *Id.* Finally, the record must demonstrate the defendant's awareness of the essential characteristics of the jury procedure. *Id.* Thus, a defendant might validly waive part of his jury right but, without explication of the full right, the remainder of the waiver may still be invalid. The record must demonstrate that the defendant was advised of the essential characteristics of the jury proceedings so that an educated choice between the alternatives could be made. Because of this central role of jury trial, any judgment imposed without jury participation must be scrutinized.

18. The Supreme Court has stated that the purpose of the "knowing and voluntary" requirement is to have a court determine if an accused "understand[s] the

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[10] Demonstrating its importance is the fact that this rule has since been codified in Federal Rule of Criminal Procedure, Rule 11(b).

significance and consequences of a particular decision." *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (citing *Godinez v. Moran*, 509 U.S. 389, 401 n.12, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)). An accused's mere understanding of the "significance and consequences" of a decision to waive one's constitutional rights is not enough. When determining whether such a decision is in fact "knowing and voluntary" at the time it is made, all unique circumstances of each case must be taken into account.

19. The record establishes that Jones's purported waiver of constitutional rights, including his right to a jury trial, was not knowing and intelligent and was made by Jones without an understanding of the consequences of the waiver. During the plea colloquy, Jones mostly said only, "yes" and "admit" to questions by the trial court. (CT 588-613.)

20. Even if Jones was competent to enter guilty pleas, and even if it was not the law that waivers must be express and on the record, Jones's mental impairments and his trial counsel's incompetence in failing to investigate prior to recommending a plea prevented the purported pleas from being knowing, intelligent, and voluntary. Jones's trial counsel did not make a reasoned choice in light of all the evidence, because he made virtually no effort to ascertain the evidence. Jones, who was immature, depressed, suffering from organic brain dysfunction, poorly educated, and incarcerated, had even less of a basis for choice than trial counsel.

21. No questions were asked which actually tested Jones's understanding of the lengthy and complex advisements administered by the prosecutor. Therefore, the record is insufficient to show any more than that Jones went along with what was asked of him. Jones's mostly monosyllabic responses do not amount to a "knowing and intelligent" waiver and a showing that Jones understood any of the consequences of his purported waivers.

22. Far from being demonstrably knowing and intelligent, the purported waivers occurred without advisement of the nature of the rights being waived. The

lack of adequate admonishment and knowing, intelligent, and voluntary on-the-record waivers renders Jones's conviction regarding the Flats incident unconstitutional, and habeas relief is necessary in this capital case in light of the fact that the prosecutor presented the evidence regarding that case during the penalty phase. Moreover, Jones could not have "knowingly and intelligently" waived his constitutional rights because he was incompetent to do so.

C. Ineffective Assistance of Counsel

23. Trial counsel was ineffective for failing to investigate the circumstances of the crimes to which Jones pled guilty, for failing to investigate Jones's psychological condition, for failing to raise a doubt as to Jones's competence, and for advising Jones to plead guilty to Counts I, X, XI, XII, and XIII at all.

24. Trial counsel was unconstitutionally ineffective for failing to conduct adequate investigation concerning the circumstances of the Flats offense, Jones's social and psychiatric history, or his substance abuse history and use in the period of time prior to the Flats offense. Trial counsel knew or reasonably should have known that Jones had a history of trauma, that he had a history of chronic substance abuse, that he ingested a large amount of alcohol shortly before the offense, and that Jones repeatedly reported having no memory of the events surrounding the Flats offense.

25. Trial counsel recommended that Jones enter guilty pleas to both the gang allegation and the Flats incident although they had not thoroughly investigated either circumstance. Given Jones's lack of memory regarding the Flats incident, a factual basis for the guilty plea did not exist. Trial counsel had not discovered that Jones was not really part of a true street gang, and therefore a factual basis for pleading guilty to Count I did not exist. Jones incorporates herein by reference Claim Eight, sections F-G.

26. If trial counsel's strategy was to eliminate going through a trial on the Flats incident, that did not happen in any practical sense. The jury still heard the presentation of many witnesses at the penalty phase, including two victims, Brian

Wagner and Christopher Swan, and doctors who testified regarding the extent of their injuries. If Jones had not pled guilty, the prosecution would have had to prove his guilt beyond a reasonable doubt. Trial counsel's advice failed to "subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984).

27. Trial counsel was ineffective for failing to obtain anything in consideration for Jones pleading guilty to those counts on July 31, 1991. No agreement had been reached with the prosecutor that, because of the plea, the Flats incident and evidence of gang involvement would not be introduced during the penalty phase. In fact, Peasley does not state a valid tactical reason for the guilty plea at the time the plea was taken. He simply states: "I disagree with Mr. Pacheco that it will help in the penalty phase. I think that's one of the disadvantages of doing it. That this comes in – will come in probably in the penalty phase." (RT 2075.)

28. Trial counsel's advice to Jones to plead guilty to these counts was unreasonable in light of the circumstances. Trial counsel had not adequately investigated the circumstances surrounding the gang allegation and the Flats allegations. None of the alleged co-perpetrators of the Flats incident, Mario Villarreal, Alan Murfitt, or Patrick Hunt, testified against Jones at the penalty phase. One witness, Christopher Shumate, identified Jones as a suspect at the scene on the night of the Flats incident. Trial counsel did not conduct an independent investigation of the events that night. Further, trial counsel did not investigate whether or not Jones had been drinking heavily. Trial counsel did know that Jones had no memory of the events that night, and had determined at one point in their investigation, that Jones was an alcoholic. However, trial counsel did not seek to determine Jones's state of mind on the evening in question. It is well-established that once trial counsel has notice of a potential defense to the charged offenses, he must investigate that defense. *See Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998).

29. Had trial counsel investigated the events of the night at the Flats, they would have discovered that there was evidence of a potential defense. Jones was charged with three attempted murders. Under California Penal Code section 21(a), attempts to commit crimes, the prosecution would have had to prove "specific intent to commit the crime, and a direct but ineffectual act done toward its commission" with respect to Counts X through XIII, the attempted murder charges of Brian Wagner, Christopher Swan, and Larry Nave. Cal. Penal Code § 21(a). Because attempted murder is a specific intent crime, Jones's lawyers could have presented evidence to undermine the prosecution's theory that Jones possessed such an intent. Under California Penal Code section 22(b), Jones could have presented evidence of his voluntary intoxication on the night of the Flats incident:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . .

Cal. Penal Code § 22(b).

30. If trial counsel had conducted a thorough investigation, they would have discovered that there was evidence of the fact that Jones was extremely intoxicated on alcohol and drugs on the night of the Flats incident. Co-defendant Mario Villarreal could have been called to testify for the defense.[11] He would have testified that:

> I recall the events that led up to the Flats incident. I relive this horrible day in my mind all the time and that's why I remember it so clearly. It was around 2:00 p.m. when Mike came to my house with a 24 pack of Keystone beer. It was a new brand of beer and had just come out a couple months

[11] On June 4, 1991, Mario Villarreal pleaded guilty to the allegations arising out of the Flats incident. (Ex. 71.) The defense could have interviewed him thereafter, and obtained this evidence before Jones pleaded guilty to the same offenses on July 31, 1991. (CT 588-615.)

> earlier. Mike drank almost all of the 24 pack by himself. I was drinking 40 ounces of Olde English 800 Malt Liquor. I remember Mike having some of my Olde English as well. We also had three dime bags of Marijuana: two were of Red Hair Sinsemilla and the third was of a more potent form, Thai. We were drinking and getting high all day.

(Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 16.) Jones was extremely intoxicated because of the enormous amounts of alcohol and drugs that he had ingested before going to the Flats party. Mario Villarreal could have testified that:

> When we got there, the party was over. At that time, Mike was still drunk and high. Patrick started instigating a robbery by telling Mike to rob the people at the party. When Mike is drunk, you can get him to do anything.

(*Id.* ¶ 18.) This testimony would have also shown that Jones was not the instigator of the robbery and was being manipulated by Patrick Hunt during Jones's intoxication.

31. Luis Villarreal corroborated the fact that Jones was very drunk:

> Mike had been drinking and partying that day. Mike, Mario, and Patrick came back sometime between 10:00 p.m. and 11:30 p.m. I remember that Mike was really drunk. He was just wasted.

(Ex. 146, Decl. of Luis Villarreal, ¶ 11.)

32. In fact, Jones was so intoxicated that he had no memory of the events the next morning:

> The next day Mike did not remember what had happened the night before. When I told him, he did not believe it.

(Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 19.)

33. This is consistent with what Jones had told his trial counsel from the beginning of their representation – that he could not remember what happened the

night of October 31, 1989.

34. Furthermore, trial counsel should have investigated the facts of the Flats incident to find out what really happened that night. If they had just interviewed Mario Villarreal, and nothing else, they would have found out that Villarreal has taken credit for shooting Christopher Swan in the stomach. Villarreal has admitted to such in a habeas corpus petition. (Ex. 74.)

35. If trial counsel had conducted a reasonable investigation and Jones had been made aware of potential defenses, Jones would not have pled guilty. The Seventh Circuit has specifically held that the assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding. *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984); *see also Sober v. Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981) (before pleading guilty, a defendant should be made aware of possible defenses, at least when the defendant makes known facts that might form the basis of such defenses); *Woodard v. Collins*, 898 F.2d 1027 (5th Cir. 1990) ("When a lawyer advises his client to plea bargain to offense which the attorney has not investigated, there is no presumption that counsel has exercised reasonable professional conduct"); *United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997) (defense counsel's performance fell below objective standard of reasonableness under *Strickland* test when he failed to pursue any investigation into insanity defense before advising client to plead guilty despite having seen letter from defendant's treating psychiatrist stating that defendant was manic and psychotic when offense was committed).

36. Furthermore, although a court may defer to counsel's reasonable and informed decisions, *Strickland v Washington*, 466 U.S. 668, 681, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a counsel's presentation at trial, either during penalty or guilt phase, that is premised on a constitutionally inadequate investigation cannot constitute reasoned strategic judgment. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.

Ct. 2527, 156 L. Ed. 2d 471 (2003) (holding that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' . . . A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'") (quoting *Strickland*, 466 U.S. at 690-91); *Porter v. McCollum*, 130 S. Ct. 447, 453, 175 L. Ed. 2d 398 (2009) (citing *Wiggins*, 539 U.S. 510).

37. Finally, trial counsel was ineffective for advising Jones to plead guilty to Count XIII, attempted murder of Larry Nave, with personal use of a shotgun and infliction of great bodily injury given the fact that, even under the prosecutor's theory, Mario Villarreal shot Larry Nave with a handgun. No evidence or testimony supports the theory that Jones shot Larry Nave or ordered Villarreal to do so. No conspiracy charges had been filed against Jones and Jones could not have been responsible for Count XIII. Even the prosecutor recognized this after the plea was taken:

> Number two, there was an attempted first degree murder that the defendant pled to that involved a shooting by another individual. That's Mario Villarreal. He shot a guy by the name of – I think it's Larry Nave, in the back. Now that evidence I think is admissible. However, Mr. Jones' admission to that particular charge I think is inadmissible in that he did not cause that particular injury, someone else did. But his admission to that is – is probably – could probably – be improperly construed by the jury as some kind of prior conviction.

(RT 3244.)

D. Conclusion

38. Advising Jones to plead guilty to Counts I, X, XI, XII, and XIII of the Amended Complaint was ineffective given the fact that there was no knowing,

intelligent, or voluntary waiver of Jones's rights, there was a lack of meaningful investigation into the allegations and ineffective assistance of counsel, and Jones was incompetent to plead guilty. Jones was prejudiced by pleading guilty, which certainly had an effect on the outcome of the penalty phase determination. Further, Jones was incompetent to stand trial in 1991, warranting guilt phase habeas relief.

39. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

SECOND CLAIM FOR RELIEF FOR DENIAL OF RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, a trial by a fair and impartial jury of his peers, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: (1) Jones was unconstitutionally shackled in front of the jury; (2) the prosecution intentionally excluded Jewish, Catholic, and Christian jurors because of pre-conceptions that individuals of those faiths might be less inclined to render death verdicts; (3) jurors failed to answer voir dire questions honestly, which prejudiced Jones; (4) the jury voir dire was insufficient to identify and remove those prospective jurors prejudicially exposed to inflammatory publicity and/or extra-judicial proof of guilt because the trial court conducted an insufficient voir dire of the jury and

prevented Jones's trial counsel from conducting a sufficient one; (5) jurors engaged in juror misconduct, including visiting crime scenes and experimenting with evidence; (6) jurors were exposed to extraneous influences and extra-judicial proof of Jones's guilt throughout the trial, resulting in misconduct by jurors; (7) jurors engaged in premature jury deliberations; (8) persons with a bias against Jones remained on the jury making the jury abnormally prone to finding Jones guilty; (9) Jones was compelled to use peremptory challenges granted by state law to dismiss biased jurors who the court refused to dismiss for cause; (10) the penalty phase determination for a sentence of death was unconstitutionally invalid because the jurors believed that, even if they all voted for the death penalty, Jones would never be executed; (11) jurors considered extrinsic evidence, including biblical passages and one juror's improper and undisclosed account of an assault by a gang member; (12) jurors improperly relied on their belief that if sentenced to life without the possibility of parole, Jones could be set free; (13) the trial court improperly excused jurors based upon their religious beliefs regarding the death penalty; (14) the trial court improperly excused individuals who could have reached a death verdict and refused to exclude individuals who were not willing to meaningfully consider a life sentence; (15) trial counsel was ineffective in failing to challenge individuals who were not willing to meaningfully consider a life sentence; (16) the prosecutor engaged in misconduct in his use of questions during voir dire; (17) the court improperly deprived trial counsel of a peremptory challenge; and (18) the jury that tried Jones was selected in such a manner that the jury was prejudicially exposed to extra-judicial proof of guilt.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

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A. Jones Was Unconstitutionally Restrained

3. Jones was prejudicially and unconstitutionally restrained during his trial in view of the jurors. Juror Donald M. remembered seeing Jones in shackles when the penalty verdict was read, and also believes that he saw Jones in shackles at the time of the reading of the guilt verdict. (Ex. 126, Decl. of Donald M., ¶ 4; *see also* Ex. 163, Decl. of Elizabeth L., ¶ 5.)

4. The Fifth and Fourteenth Amendments of the United States Constitution forbid the use of physical restraints visible to the jury, unless justified by an essential state interest specific to the particular trial. *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970) (no person should be tried while shackled and gagged except as a last resort because of the distinct possibility of a "significant effect on the jury's feelings about the defendant"); *Larson v. Palmateer*, 515 F.3d 1057, 1062 (9th Cir. 2008) (citing *Deck* and *Allen*). Shackling, like prison attire, is an "indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999).

5. In *Dyas v. Poole*, 309 F.3d 586 (9th Cir. 2002), the Ninth Circuit held that: "shackling during trial carries a high risk of prejudice because it indicates that the court believes there is a need to separate the defendant from the community at large, creating an inherent danger that a jury may form the impression that the defendant is dangerous or untrustworthy." *Id.* at 588 (quoting *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999), and citing *Holbrook v. Flynn*, 475 U.S. 560, 568-569, 106 S. Ct. 1340, 1345-1346, 89 L. Ed. 2d 525 (1986). *See also Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970).

6. Under *Parrish v. Small*, 315 F.3d 1131 (9th Cir. 2003), Jones should be permitted to have an evidentiary hearing to develop his claim that his shackling prejudiced his trial. Just as in the *Parrish* case, the state court transcripts in Jones's

case are unclear as to how visible the restraints were during his trial. In reversing the district court, the Ninth Circuit in *Parrish* recognized that the record needed to be developed, that there were possibilities that the handcuffs were visible, and that "there is no evidence that any of the state courts conducted an evidentiary hearing on this matter." *Id.* at 1133.

7. Furthermore, under California state law, the trial judge abused his discretion in shackling Jones without evidence of a "manifest need" that restraints were required in the courtroom. *People v. Duran*, 16 Cal. 3d 282, 290-91, 545 P.2d 1322, 127 Cal. Rptr. 619 (1976) ("defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints."); *see* Cal. Penal Code § 688 ("No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."). Neither the fact that Jones had been charged with a capital crime nor that he may have had prior convictions is sufficient by itself to justify shackling. *Duran*, 16 Cal. 3d at 293 ("we cannot condone physical restraint of defendants simply because they are prisoners already incarcerated on other charges or convictions").

B. Jones Was Denied His Right to a Fair and Impartial Jury Because a Juror Intentionally Concealed Material Facts During Voir Dire

8. During the course of voir dire, the jurors filled out questionnaires that asked them whether: (1) they or a relative had ever been a victim of a violent crime; (2) they or a relative had ever been a victim of any other crime, reported or unreported; or (3) they, or a relative had ever had a violent act, which was not necessarily a crime, done to them. (*See*, *i.e.*, Supp. 1 CT. 9.)

9. During the course of jury deliberations, one of the jurors, who had not answered affirmatively to any of these three questions, told other members of the jury that the juror's father had been the victim of a violent attack by gang members. The juror described this attack in emotional terms, at length, and with vivid detail. None

of the jurors revealed the fact that this had happened during voir dire, but it was the turning point of the jury's penalty phase deliberations.

10. "The sixth amendment right to a jury trial 'guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors.'"" *Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990) (citing *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)); *see also Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." *Tinsley*, 895 F.2d at 523-34 (citing *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979), and *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.)); *see also Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 1452, 173 L. Ed. 320 (2009); *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). Dishonesty by a prospective juror during voir dire supports an inference of bias. *Dyer v. Calderon*, 151 F.3d 970, 981-983 (9th Cir. 1998); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) ("dishonesty, of itself, is evidence of bias"); *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) (a juror's dishonesty "is a strong indication that [the juror] was not impartial"). *See also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984) (Blackmun, J. concurring) ("in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial"); *id.* at 558 (Brennan, J., concurring) (dishonesty is a factor to be considered in the determination of bias).

11. The juror's deliberate concealment of this essential fact during voir dire deprived Jones of an unbiased jury and severely prejudiced him. Accordingly, habeas relief is warranted.

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C. Jones Was Deprived of His Right to a Fair and Impartial Jury Because the Jurors Considered Prejudicial and Extrinsic Evidence During the Course of Their Deliberations

12. Jones's rights to due process, a fair trial and a reliable verdict were violated when the jurors consulted biblical passages in an effort to arrive at a penalty phase verdict. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965); *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d. 392 (1980); *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995); *United States v. Harber*, 53 F.3d 236 (9th Cir. 1995); *United States v. Hernandez-Escarsega*, 886 F.3d 1560 (9th Cir. 1989); *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980); and *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961). As described in Section B, *supra*, Jones's rights were further violated by one juror's lengthy, vivid, and improper account of the assault by gang members on the juror's father.

13. The jurors' improper consideration of this evidence had a substantial and injurious influence in determining the jury's verdict that requires relief under the Sixth Amendment. *Jeffries v. Woods*, 114 F.3d 1484, 1492 (9th Cir. 1996). When as in this case, jurors consider extraneous materials never admitted into evidence, the potential harm to the defendant's constitutional rights is substantial:

> When a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to the jury consideration of the extrinsic evidence. In one sense, the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take

other tactical steps that might ameliorate its impact.

Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980).

14. The Ninth Circuit has embraced a multi-factored approach to evaluating jurors' viewing of extrinsic evidence: (1) whether the extrinsic material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the jurors discussed and considered the extrinsic evidence; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); *accord Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988); *see also In re Lucas*, 33 Cal. 4th 682, 696, 94 P.3d 477, 16 Cal. Rptr. 3d 331 (2004) (jurors may commit misconduct by receiving information not received in evidence at trial).

15. Moreover, the jurors' reliance on biblical rather than legal standards to determine the appropriate punishment for Jones undermined the reliability of his guilt phase verdict in violation of his Eighth Amendment rights. Accordingly, Jones's sentence should be overturned.

D. Jurors Considered Extrinsic Evidence Regarding Whether or Not Life Without the Possibility of Parole Did Not Really Mean that Jones Would Never Be Set Free

16. During the course of deliberations on the penalty phase of Jones's trial, jurors discussed the meaning of a sentence of life without the possibility of parole ("LWOP"). That discussion included deliberations on whether or not Jones would be released in spite of an LWOP sentence. Jones incorporates by reference Claim Nine, section A, *infra*. The discussion by the jurors as to whether Jones would ever be released clearly demonstrated their misunderstanding of what the LWOP sentence truly entailed.

17. When the jurors considered the possibility of Jones's release, what they

were considering was extrinsic evidence. When the jury considered extrinsic evidence, Jones was effectively denied the rights of confrontation, cross-examination, and the assistance of counsel with regard to that extraneous evidence. *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980).

18. Furthermore, the jurors consideration of these factors clearly demonstrate that the jury did not take their obligation to consider only evidence presented at trial seriously enough. These failures violate Jones's constitutional rights to a fair and impartial jury and disturb the fundamental fairness of the sentencing proceeding. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1986).

E. Deprivations of Constitutional Rights in the Jury Selection Process

1. The Prosecution Used Peremptory Challenges to Exclude Catholics, Christians, and Jews From the Jury

19. During the course of voir dire, the prosecution used their peremptory challenges to exclude Catholics, Christians, and Jews from voir dire. The prosecutor exercised these challenges for the sole purpose of excluding individuals of these faiths from the jury. In so doing, the prosecutor violated Jones's rights to equal protection of law. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717, 90 L. Ed. 2d 69 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *Miller-El v. Cockrell*, 537 U.S. 322, 328-29, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207, 170 L. Ed. 2d 175 (2008).

20. The prosecutor dismissed prospective juror Robbie T. because "[s]he is a fairly religious person. She's a Baptist. She goes or attends those types of proceedings twice a week." (RT 2120.)

21. The prosecutor also dismissed prospective juror Marie L., stating, "[s]he also is very religious, Church of God and Christ . . . I also noticed she was wearing a cross, which, again, reaffirmed at least my belief that she was a very religious woman and wouldn't be able to impose the death penalty, and that was the great concern."

(RT 2121-22.)

2. Violation of the Jurors' Free Exercise of Religion

22. The trial court, in contravention of the First, Fifth (both due process and equal protection), Sixth, Eighth and Fourteenth Amendments to the federal constitution, substantially burdened the free exercise of religion of prospective jurors without either a compelling reason or a reasonably narrowing strategy, by sustaining challenges for cause to those prospective jurors who, for religious reasons, would not impose the death penalty. The trial court thereby forced prospective jurors to choose between exercise of their right to serve on juries and exercise of their right to practice their religion. Furthermore, the trial court did not have a compelling interest in imposing this substantial burden on the free exercise of religion. Jones, as the accused in the trial, has standing to assert the right of the prospective juror. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *Powers v. Ohio*, 499 U.S. 400, 410-417, 111 S. Ct. 1364, 113 L. Ed. 2d 411(1991).

23. When a prospective juror's refusal to impose the death penalty is a product of their sincerely held religious beliefs, those beliefs are protected by the First Amendment of the federal constitution. All individuals are guaranteed the right to the free exercise of religion, even when the exercise of that religion places them outside the societal norm. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972) (the refusal of Amish to educate children beyond elementary school is inseparable from their religious beliefs). The right to the free exercise of religion is clearly a fundamental right. *Larson v. Valente*, 456 U.S. 228, 244-246, 102 S. Ct. 1673, 1683-1684, 72 L. Ed. 2d 33 (1982) ("[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 886 n.3, 110 S. Ct. 1595, 1604, 108 L. Ed. 2d 876 (1990) ([j]ust as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental

classifications based on religion"); *Gillette v. United States*, 401 U.S. 437, 450, 91 S. Ct. 828, 836, 28 L. Ed. 2d 168 (1971) ("the Establishment Clause prohibits government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization").

24. Just as individuals are guaranteed the right to the free exercise of religion, they are also guaranteed the right to serve on a jury. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 91-92, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *Georgia v. McCollum*, 505 U.S. 42, 48-49, 112 S. Ct. 2348, 2353, 120 L. Ed. 2d 33 (1992); Cal. Code of Civil Procedure § 191.[12] The right to be considered for jury service should also be considered a fundamental right. *See United States v. Jackman*, 46 F.3d 1240, 1254-1255 (2nd Cir. 1995) (Walker, J., dissenting), citing *Powers v. Ohio*, 499 U.S. at 407 ("with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process"), and *cf. Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *United States v. Gomez*, 911 F.2d 219, 221(9th Cir. 1990) (finding that the right to vote and the right to serve on a jury are important civil rights); *United States v. Maines*, 20 F.3d 1102, 1104 (10th Cir. 1994); *United States v. Thomas*, 991 F.2d 206, 214 (5th Cir. 1993); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990).

25. Because the right to free exercise of religion is fundamental, and the right to serve on a jury must be similarly respected, any state action infringing on either of these rights is subject to heightened scrutiny, requiring proof of both a compelling state interest, and governmental conduct that is narrowly tailored to serve that interest. *Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) ("[a] law that

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[12] Section 191 was adopted in 1988. Prior to that, Cal. Code of Civil Procedure section 197 also guaranteed the right that "all qualified persons have the opportunity, in accordance with this chapter to be considered for jury service in the state."

targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases"); *quoting Wisconsin v. Yoder*, 406 U.S. at 215. Moreover, by forcing the jurors to choose between the right to exercise a religious belief and the right to serve on a jury, the trial court imposed a substantial burden on the exercise of their right to practice religion, in contravention of the federal constitution and the California constitution. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 405, 83 S. Ct. 1790, 1794, 10 L. Ed. 2d 965 (1963) (the government imposed a penalty on the exercise of religion when it forced persons to choose between the exercise of two constitutionally protected rights).

26. The State's restrictions on the free exercise of religion and the right to serve on a jury in this case fails to satisfy heightened scrutiny analysis. While the interest advanced in criminal trials, deterrence of and retribution for criminal conduct, is compelling, the means to advance that interest, the burden on the exercise of the juror's religion and jury service, is not narrowly tailored to those ends.

27. Jurors in capital trials are entitled to choose between two equally acceptable forms of punishment for any individual convicted of a capital crime – death or LWOP. Either of these choices is acceptable, and a state may not automatically prefer death to LWOP. There is no reason why a selection of LWOP does not serve the state's interests in deterring crime and imposing retribution or punishment on the criminal, just as much as does a death sentence.

28. In terms of the goal of deterring crime, there is not now and has never been any proof that there is any incremental state benefit to the imposition of a death sentence over an LWOP sentence in deterring crime. There is no persuasive empirical data demonstrating whether the actual imposition of the death penalty, as opposed to LWOP, deters murder. The statistics indicate that while the homicide rate continues to climb in those states with the most active death penalties, the homicide rates in states that do not impose the death penalty has fallen.

29. There is also no incremental increase in the retributive value of the death penalty, as it is administered in the State of California, over a sentence of LWOP. To the contrary, a death sentence is the functional equivalent of a sentence of life imprisonment without the possibility of parole, given that executions rarely take place.

30. Because there is no compelling state interest that is better served by imposing the death sentence on an individual over an LWOP sentence, the exclusion of those who would not impose the death penalty does not advance any legitimate state goal.

31. Accordingly, the exclusion from capital juries of individuals who would impose LWOP over the death penalty based on their religious beliefs violates due process and equal protection rights under both the federal constitution and the California constitution, and violated Jones's rights to due process, equal protection, a fair and impartial jury composed of a fair cross-section of the population, and a reliable, non-arbitrary guilt determination, and a reliable, non-arbitrary and individualized sentencing determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution, and their analogous rights under the California constitution. These violations entitle Jones to relief from his conviction and sentence.

3. The Court Incorrectly Ruled on Motions to Excuse Jurors for Cause During the Death Qualification Portion of Jury Selection

32. Criminal defendants have the right to raise challenges to prospective jurors to ensure their right to a fair and representative jury. Venire panel challenges include exclusions of specific protected classes, *see Whitus v. Georgia*, 385 U.S. 545, 549-50, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599 (1967) (challenge based on exclusions of African-Americans); and in a death penalty case, challenges for improper exclusions of those individuals who might hesitate to impose the death penalty. *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776

(1968). In *Witherspoon*, the Supreme Court held that it was unconstitutional to remove individuals from the venire "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. The Court noted that it was also an impermissible "double standard" to allow a potential juror who was prone towards the death penalty to remain on the venire, while excusing jurors who expressed a hesitancy to impose the penalty of death. *Id.* at 521 n.20 (further citations omitted).

33. In *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), the Supreme Court clarified the standard as to whether the "juror's views [on the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright*, 469 U.S. at 420, 423. Further, the Court clarified that the party seeking removal must establish that the juror's views would prevent the juror from conscientiously applying the law to the facts adduced at trial. *Id.* at 421.

34. *Witherspoon* and *Wainwright* focused on whether jurors could be excused for cause if they are unequivocally opposed to the death penalty. The Supreme Court has also clarified that the contrary is true: any juror whose ability to consider the imposition of a sentence of LWOP is substantially impaired and also must be excused for cause. *Morgan v. Illinois*, 504 U.S. 719, 728-29, 12 S. Ct. 2222, 2229-30, 119 L. Ed. 2d 492 (1992). When there has been such an impermissible venire selection, the sentence of death is unconstitutional and relief is required. *Witherspoon*, 391 U.S. at 523; *Morgan*, 504 U.S. at 729; *see also Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976).

35. In a challenge to the jury panel, a juror should be dismissed for cause if his or her views would prevent or substantially impair his or her ability to perform the duties of a juror in accordance with the instructions and oath. *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526, 65 L. Ed. 2d 581 (1980). On habeas review, the

question is "whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993) (citation omitted). The proper test for determining whether a juror is biased is "whether the juror[ ] . . . had such fixed opinions that [s/he] could not judge impartially the guilt of the defendant." *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995)), *quoting Patton v. Young*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 2891, 81 L. Ed. 2d 847 (1984). Bias is presumed "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations." *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (citation omitted), *cert. denied* 498 U.S. 1091, 111 S. Ct. 974, 112 L. Ed. 2d 1059 (1991). Again, where such bias has been shown, the error is *per se*, and relief is mandatory. *Morgan*, 504 U.S. at 729.

36. During the course of the voir dire, twenty-four jurors were removed for cause. The court incorrectly denied motions made by defense counsel to remove jurors for cause, and incorrectly granted motions to remove jurors for cause by the prosecution over defense counsel's objection. As a result of those errors, jurors were both removed without good cause and remained on the panel despite the fact that good cause for their removal existed.

a. Jurors Successfully Removed for Cause by the Prosecutor Over Defense Counsel's Objection

37. The trial court erroneously granted the prosecutor's challenge for cause for prospective juror Josephine T. Although Josephine T. expressed some reservations about the death penalty, she agreed that some crimes were so horrible, they deserved the death penalty, and she could consider it. (RT 1218.) When the prosecutor asked if the defendant were to be executed the next day, she indicated that she would be able to return a death penalty verdict, but would also go back and forth between either punishment, and it would be a difficult decision. (RT 1242-44.) Also, when asked by the prosecutor whether Jones's age would prevent her from giving

him the death penalty should she think it was appropriate, Josephine T. said, "No." (RT 1252.)

38. She indicated later to the Court, "Right now I can honestly say I cannot say for the death penalty" and would "probably vote for life without the possibility of parole." (RT 1259.) Here the juror's opinion was precisely what it should have been. The burden was on the prosecution to prove the special circumstance. The removal of this juror for cause was clearly inappropriate. Her difficulties with the death penalty certainly would not have prevented or substantially impaired her ability to perform the duties of a juror in accordance with the instructions and oath. *Adams*, 448 U.S. at 45.

39. The court also erroneously granted the prosecutor's motion to excuse prospective juror Susan V. for cause. (RT 1545-47.) Susan V. had responded to the prosecutor's inappropriate question about executing Jones the next day if the sentence was death by saying that it would be very difficult to vote for death in that situation. (*Id.*) The California Supreme Court has already stated that a negative response to this question "would not offer a prosecutor any grounds for concluding that the juror was inclined against the death penalty." *People v. Jones*, 30 Cal. 4th 1084, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). After court questioning, Susan V. indicated that she would not say no to imposing death, but felt it was very, very unlikely. (RT 1560.) Trial counsel correctly argued that Susan V. did not ever clearly state that she could not impose the death penalty. The court incorrectly felt Susan V. was clear and erroneously granted the prosecutor's excuse for cause (RT 1562-63.)

b. Jurors Who Were Not Removed Despite Good Cause for Their Removal and a Timely Motion by Defense Counsel

40. Trial counsel properly challenged prospective juror Gary B., but the trial court denied counsel's request. (RT 1856-58.) Gary B. had stated,

> You see, our court system, the way I feel, is overburdened with cases. . . . If you give a person – they're found guilty.

> And it's a fair trial. [¶] And you give them the death penalty. They could be sitting there on death row for 25 years before something is done. They could die of natural causes. [¶] I mean, what's the purpose of the death penalty? It should be – if person's given a fair trial, – and he's found guilty, – and he's a person, murders somebody, I mean, he should face his punishment. I mean, what's the use for appeal? I mean, just take care of things . . . What's this case now, *Harris*? . . . I mean, how many appeals has he gone through?

(RT 1792-93.) And later, Gary B. said that if "[Jones] was a gang member, he probably wouldn't be fair with him . . . and if [Jones] was shown to be a gang member, his mind may close to emotional pleas or to his character, may lead to other judgments." (RT 1794-95.) Later, Gary B., in his answer to the question of what his vote would be if the death penalty were on the ballot today, Gary B. replied,

> I would vote for it, but I might add something. Like I said before about the death penalty, a person can be there for 20 years and nothing happens, so if there was something in that law that would say that you have a guy on the death penalty, and the death penalty will be taken within 365 days, yeah, I'd vote for it.

(RT 1835.) Trial counsel challenged for cause Gary B., but the court denied it. Trial counsel was forced to use one of Jones's alternate peremptory challenges to remove Gary B. from the jury. (RT 2141.) The court's refusal to remove Gary B. for cause was error, and defense counsel's need to exercise a peremptory challenge clearly prejudiced Jones.

41. Trial counsel appropriately challenged prospective juror Michaelle G. for cause, but the court denied the challenge. (RT 1624-28.) Michaelle G.'s statements

regarding a sentence of LWOP mirrored Susan V.'s responses regarding the death penalty. When asked by trial counsel about a response in Michaelle G.'s questionnaire re: whether she would want to consider information about a person's background, she responded, "If he's guilty of the murder, get rid of the garbage." (RT 1586.) She would only have a twenty-five percent chance of believing mitigating circumstances. (RT 1586-87.) Michaelle G. also stated that trial counsel would have to pull a miracle in order to get her to vote in favor of LWOP over death. (RT 1600.) This bias towards the sentence of death would warrant a removal for cause just as much as Susan V.'s bias towards a sentence of LWOP. Trial counsel had to use one of his alternate peremptory challenges to excuse her as an alternate juror. (RT 2159.)

c. Jurors Were Not Challenged for Cause by Defense Counsel Despite Good Cause Existing for Their Removal

42. Jones was further denied his constitutional rights when a "death prone" juror was inappropriately seated at his trial. Frank G. was a death prone juror who became the penalty phase jury foreman. Frank G. was incapable of acting as a fair and impartial juror for Jones because he had a fixed opinion regarding the imposition of the death penalty such that he could not have impartially deliberated on the appropriate penalty to be imposed on Jones. *See Quintero-Barraza*, 78 F.3d at 1349, quoting *Patton v. Young*, 467 U.S. at 1035.

43. Jones was forced to accept juror Frank G., because Jones had exhausted his peremptory challenges dismissing prospective jurors whom the court failed to dismiss for cause. (RT 2140.) Frank G. stated that he felt that there was "too much emphasis on rights of defendants and not enough on the rights of the victims." (RT 979.) Frank G. also stated that he was a strong believer in the death penalty and that "being locked up for life without a possibility of ever regaining your freedom is cruel and unjust punishment." (RT 980.) Although Frank G. indicated at one point that he would be open to both punishments (RT 980-81), he restated that "it's a much more

crueler punishment to be locked up, in my opinion, to be closed in for life." (RT 997.) And, later, Frank G. stated that the death penalty "would be appropriate for [Jones] if the evidence dictated it, whether he was 16 or whether he was 116." (RT 1000.) Frank G. remained on the jury and became its penalty phase foreman. (CT 852.)

44. Trial counsel failed to challenge the seating of Frank G. for cause. This failure significantly undermined Jones's right to a fair and impartial jury considering the strong likelihood the motion would have been granted, and considering Frank G.'s role in the decision making process. Defense counsel's omission clearly demonstrated ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

45. The seating of juror Frank G., who was not only incapable of acting fairly and impartially, but who then went on to become the penalty phase jury foreman, must be viewed as contaminating the entire deliberative process of the jury. Because this juror was incapable of acting fairly and impartially during the penalty phase deliberations, his inclusion on the panel violated Jones's rights to due process, equal protection, a fair and impartial jury composed of a fair cross-section of the population, a reliable, non-arbitrary guilt determination, and a reliable, non-arbitrary and individualized sentencing determination. These violations entitle Jones to relief from his conviction and sentence.

46. In addition, the trial court failed to excuse for cause prospective juror Michael M. when he stated,

> I believe if any person decides of their own free will that they're going to kill somebody else, without just cause . . . then I believe that they should have to pay the consequences for their crime, no matter what those consequences are. [¶] And if the death sentence with special circumstances applies, then that's the sentence that should be imposed.

(RT 810.) Michael M. also had previously worked for the Riverside District Attorney's Office as a victim witness advocate. He had previously met Deputy District Attorney Pacheco. (RT 803.) Trial counsel was forced to use one of Jones's peremptory challenges to remove Michael M. from the jury. (RT 2124.) The use of this peremptory significantly undermined Jones's right to a fair and impartial jury.

47. Trial counsel did not challenge Michael M. for cause despite the strong likelihood that such a challenge would have been sustained. Instead, defense counsel was forced to use one of Jones's peremptory challenges. Failure to challenge Michael M. for cause demonstrated ineffective assistance of counsel which severely prejudiced Jones. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

F. The Prosecutor Improperly Questioned the Jury with a Question That Offered No Insight into Their Willingness to Find a Sentence of Death

48. The prosecutor improperly used, as an example to prospective jurors that they had to make a decision regarding the death penalty knowing the defendant would be executed the next day. (RT 1234-35, 1237, 1242, 1245-47, 1300-02, 1345, 1418-19, 1546-47, 1658-59, 1665.) Trial counsel objected to the use of this hypothetical on several occasions. (RT 1238-41, 1427-28, 1672-75.) The California Supreme Court has already found in this claim that:

> the refusal of a juror to vote for death if the sentence would be carried out without appeal–a patently illegal procedure–would not offer a prosecutor any grounds for concluding that the juror was inclined against the death penalty.

People v. Jones, 30 Cal. 4th 1084, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). The question has two clear intentions. One is to offer an excuse for the exercise of a peremptory challenge that would otherwise be based on race. In support of this contention Jones incorporates the arguments made in Claim Three, *infra*. The second

intention is to placate the jurors' fears about their decision, and relieve them from the responsibility regarding the sentence of death.

49. The prosecutor, during the voir dire, even suggested to the jurors that appeals "give comfort, don't they?" (RT 1547.) This, as well as other impressions that this question gives, clearly affected the jurors. To be informed that the appeals process is there to fix any mistakes the jury may make clearly causes the jury to take their role less seriously. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1986). This error significantly undermined the jury's deliberative process.

G. The Refusal to Allow Defense Counsel to Use the Additional Peremptory Challenge That the Court Had Granted Him, and Defense Counsel's Failure to Use That Peremptory Challenge

50. The Court had granted each counsel twenty peremptory challenges during the regular juror challenge process. After trial counsel had exercised his twentieth peremptory challenge, prospective juror Frank G. was called to fill the vacant slot. The People accepted the jury as it was then constituted. (RT 2140.) The court then immediately turned to the alternate juror selection process and gave four peremptory challenges to each counsel. The court gave the first alternate juror challenge to the People. (RT 2140-41.)

51. The People exercised their first challenge, then the defense exercised theirs, and then the People exercised their second challenge. (RT 2141-42.) As soon as a prospective alternate juror went up to the slot, selected juror Kamryn M. raised her hand and requested to speak to the judge in chambers. (RT 2140-42.) In chambers, Kamryn M. indicated that it suddenly dawned on her during her voir dire questioning that the victim, Shane Weeks, was her boyfriend's friend. Although she did not know Weeks personally, she knew him well enough to know that he was a really good friend of her boyfriend's. She was excused out of chambers and it was stipulated that she would be excused. (RT 2142-43, 2158.) Both counsel and the

court discussed how they would deal with the now-vacant juror seat. They discussed the problem of randomization. If they picked up where they left off during the alternate juror selection process, they already knew which four prospective jurors would be in the seats for possible peremptory challenges. Using this method, the next juror to go into the vacant juror seat would be prospective alternate juror Shirley H. (RT 2147). The prosecutor indicated that Shirley H. was Black, and that he liked her, but would exercise one of his peremptory challenges on her in order to have the next juror in line, Sterrett, in the seat. Trial counsel already had previously exhausted all of his peremptory challenges. (RT 2147.) Because of the dismissal of Kamryn M., trial counsel requested an additional peremptory challenge. The prosecutor argued that trial counsel should not receive this additional peremptory. (RT 2148-50.) After further argument, the court decided that since counsel could not agree, Shirley H. would be put in the box and he would allow trial counsel one more peremptory challenge. (RT 2155.) The court allowed the People to, once again, go first to exercise a challenge. The People accepted the jury as presently constituted. The court called up one more alternate to fill Shirley H.'s vacated alternate seat, then allowed the defense to exercise their challenge on the alternate jurors. (RT 2158.) Counsel could, and should have, used his extra peremptory challenge to dismiss seated juror, Frank G. But, the court seemed to preclude that by moving immediately to the alternate jury selection.

52. The court's failure to allow trial counsel to exercise the extra peremptory challenge that the court had granted him was error. Criminal defendants have the right to use peremptory challenges to prospective jurors to ensure their right to a fair and representative jury. The court had granted defense counsel the opportunity to use one additional peremptory challenge. That additional peremptory was never taken from the defense. The failure to allow the defense the opportunity to use that peremptory was error on the part of the court.

53. The failure of defense counsel to use the extra peremptory challenge

against Frank G., a juror who was clearly going to advocate for the death penalty in Jones's case, was unreasonable and prejudiced Jones's case. Jones incorporates the arguments from section E.3.c above.

H. Conclusion

54. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

THIRD CLAIM FOR RELIEF FOR THE PROSECUTOR'S REMOVAL OF JURORS BASED ON THEIR RACE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair cross-section of the community, a fair trial, and an accurate and reliable guilt and penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because, during the course of the voir dire, the prosecutor exercised his peremptory challenges for a racially discriminatory purpose, specifically, to excluded jurors of African-American descent from serving in Jones's trial. It was an unreasonable determination of the facts presented when the trial court failed to find a prima facie case of discrimination and reach the second prong of the test set forth in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), after the defense attorney made three timely and proper objections.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

4. During the course of voir dire defense attorney Frank Peasley made three objections pursuant to *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).[13] When the first objection was made, Peasley pointed out that only eight jurors of African-American descent were available after the venire had been death qualified, and the prosecutor had struck the only two that were in the jury box. (RT 2117.) At this point the prosecutor had exercised four peremptory challenges, so half were against jurors of African-American descent. (*Id.*) The court then offered reasons that the prosecutor may have had for exercising his peremptory challenges that were not race based, and found that the defense had not made a prima facie case. (RT 2117-18.) The prosecutor requested and was given the opportunity to put reasons for the exercise of his challenges on the record. (RT 2119-22.) However, the court had already ruled that Jones had not made a prima facie case.

5. The second objection by trial counsel occurred when the prosecutor exercised two more peremptory challenges against jurors of African-American descent. (RT 2131.) At that point, five African-American jurors had been called into the jury box and the prosecutor had exercised peremptory challenges against four of them. (*Id.*) A total of 14 peremptory challenges had been exercised by the prosecutor when the second objection was made and there were no African-American jurors in

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[13] In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge, and thus an objection on the basis of *Wheeler* is sufficient to preserve both state and federal constitutional claims. *Fernandez v. Roe,* 286 F.3d 1073, 1075 (9th Cir. 2002); *McClain v. Prunty*, 217 F.3d 1209, 1216 n.2 (9th Cir. 2000); *Tolbert v. Gomez*, 190 F.3d 985, 987 (9th Cir. 1999) (citing *People v. Jackson*, 10 Cal. App. 4th 13, 21 n.5, 12 Cal. Rptr. 2d 541 (1992); *People v. Yeoman*, 31 Cal. 4th 93, 117-18, 72 P.3d 1166, 2 Cal. Rptr. 3d 186 (2003).

the jury box.[14] The court followed the exact same procedure during the second objection that it had during the first. Several potential reasons for the exercise of the challenges by the prosecutor were offered by the court, and the court found that Jones had failed to establish a prima facie case. Once again the court gave the prosecutor the chance to offer alternative reasons for his exercise of the challenges, but they were irrelevant because the court had already ruled on the objection.

6. The third objection by the defense occurred during the selection of the alternate jurors. (RT 2144.) The prosecutor exercised a peremptory challenge against an alternate juror who was of African-American descent. However, the court did not rule on the defense's objection at the time. The next day, after all jurors and alternates had been sworn in, the district attorney brought up the objection, which the defense had raised the day before under *Wheeler*. (RT 2173.) The court allowed the prosecutor to put his reasons for exercising his peremptory challenge on the record, and found that the challenge was not exercised on the basis of group bias. (RT 2173-76.)

7. The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson v. Kentucky*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating the challenge. *Hernandez v. New York*, 500 U.S. 352, 358-60, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. 162, 167, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). To meet this burden, the defendant need only raise an inference that the strike was motivated by racial animus. *Batson v.Kentucky*, 476 U.S. at 96 ("the defendant must

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[14] Peasley had exercised a peremptory challenge against a juror of African-American descent who was a career military man. (RT 2132.)

show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race").

8. This showing can be satisfied based upon statistical disparities alone. *Paulino v. Castro*, 371 F.3d 1083, 1091 (9th Cir. 2004); *see also Fernandez v. Roe*, 286 F.3d 1073, 1077-80 (9th Cir. 2002). Relevant factors include: (a) a pattern of exclusion of minority venire persons, *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995), *overruled on other grounds*, *Tolbert v. Page*, 182 F.3d 677, 684 (9th Cir. 1999) (five of nine possible African-Americans stricken), *Fernandez*, 286 F.3d at 1078 (exclusion of four of seven (fifty-seven percent) Hispanic jurors satisfied prima facie showing); *United States v. Lorenzo*, 995 F.2d 1448, 1453-54 (9th Cir. 1993) (exclusion of three of nine (thirty-three percent) Hawaiian jurors stricken); *United States v. Bishop*, 959 F.2d 820, 822 (9th Cir. 1992) (two of four (fifty percent) African-American jurors stricken); (b) disproportionate rate of strikes employed by the prosecutor against minority members; *Turner v. Marshall*, 63 F.3d at 813 (use of five of nine (fifty-five percent) peremptory challenges to strike African-American venire persons); *Paulino*, 371 F.3d at 1090 (use of five of six (eighty-three percent) of peremptory challenges); and (c) the challenge rate of minority members compared to the percentage of total minority members comprising the jury venire, *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (finding that prosecutor's use of fifty percent peremptory challenges against African-Americans who made up only twenty-nine percent of the pool established prima facie case); *Fernandez*, 286 F.3d at 1078 (twelve percent of the venire, twenty-one percent of the prospective juror challenges were made against Hispanics).

9. Other factors include the prosecutor's contrastive questioning of minority members compared to other venire persons as well as an historical practice of excluding minority members in a particular jurisdiction. *Miller-El v. Cockrell*, 537 U.S. 322, 345, 346, 123 S. Ct. 1029, 1041, 154 L. Ed. 2d 931 (2003).

10. Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. *Batson v. Kentucky*, 476 U.S. at 97. The proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson v. Kentucky*, 476 U.S. at 98 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Good faith denials of discriminatory intent or vague assertions do not suffice. *Batson v. Kentucky*, 476 U.S. at 98; *Bui v. Haley*, 321 F.3d 1304, 1316 (11th Cir. 2003) ("vague explanations will be insufficient to refute a prima facie case of racial discrimination"); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989)(per curiam). In addition, the purported justification must be "related to the particular case to be tried." *Batson v. Kentucky*, 476 U.S. at 98 & n.20. A group-based presumption applicable in all criminal trials to members of a minority does not qualify as race-neutral. *Collins v. Rice*, 365 F.3d 667, 678 (9th Cir. 2004); *Stubbs v. Gomez*, 189 F.3d 1099, 1106 (9th Cir. 1999); *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992).

11. If the first two steps are satisfied, the court must then reach "the ultimate question of intentional discrimination." *Hernandez v. New York*, 500 U.S. at 359. "[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." *Miller-El v. Dretke*, 545 U.S. 231, 251-52, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (internal citations omitted). The court has an affirmative obligation to reach step three, even absent further requests from counsel. *United States v. Alanis*, 335 F.3d 965, 968 (9th Cir. 2003); *Lewis v. Lewis*, 321 F.3d 824, 832 (9th Cir. 2003). A finding of discriminatory intent turns largely on the trial court's evaluation of the prosecutor's credibility. *See Batson v. Kentucky*, 476 U.S. at 98 & n.21; *Hernandez v. New York*, 500 U.S. at 367 ("the credibility of the prosecutor's explanation goes to the heart of the equal protection analysis").

12. At this third and final stage of the *Batson* analysis, the court must

undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson v. Kentucky*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). Such circumstantial evidence includes: (1) where the classification has a disproportionate impact upon a particular racial group; *Hernandez v. New York*, 500 U.S. at 363, quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); (2) where the exclusion criterion is equally valid for a juror of a different race who was not stricken peremptorily by the prosecutor; *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998); *Devose v. Norris*, 53 F.3d 201, 203-05 (8th Cir. 1995); *see*, *e.g.*, *Miller-El v. Cockrell*, 537 U.S. at 343 (relying in part upon a comparative analysis between black excluded jurors and two white seated jurors in questioning the district court's finding of no discriminatory intent); and (3) where the neutral explanations are either unsupported or directly refuted by the record. *Collins v. Rice*, 365 F.3d 667, 683 (9th Cir. 2004); *Lewis v. Lewis*, 321 F.3d 824, 834 (9th Cir. 2003); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993). "A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997).

13. In addition to these objective factors, courts should examine the persuasiveness of the prosecutor's justifications. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam). This may be ascertained by evaluating "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. at 339. "Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. at 97.

14. In the end, the trial court must issue a deliberate decision either accepting or rejecting the claim of purposeful discrimination. *United States v. Alanis*, 335 F.3d at 968. Cursory conclusions that the proffered explanations were "probably reasonable" or even "plausible" do not satisfy the court's obligation under step three. *Lewis v. Lewis*, 321 F.3d at 832; *United States v. Alanis*, 335 F.3d at 969 & n.3.

15. The trial court conducted the analysis of trial counsel's objection under *Wheeler* inconsistently with the mandated federal procedure under *Batson*. The trial court evaluated the prosecutor's use of peremptory challenges only under state and not federal law. The trial court's analysis of the prosecutor's peremptory strikes was based upon the "strong likelihood" standard articulated in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). However, the United States Supreme Court has since rejected that standard. *See Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (finding a distinction between the *Wheeler* "strong likelihood" standard and the "reasonable inference" test of *Batson*); *accord Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 972-73, 163 L. Ed. 2d 824 (2006). Because the unconstitutional Wheeler standard was used in Jones's case, the trial court's ultimate determination is inherently unreliable. A statistical analysis of the peremptory challenges brought by the prosecution reveals at least an inference of racial bias that should have led to a second and third prong analysis of the challenges under *Batson*.

16. At the time the first objection under *Batson* was brought, the prosecutor had exercised fifty percent of his peremptory challenges against African-American jurors. (RT 2117-18.) Only two of the seventeen jurors that had been called into the jury box at that point were of African-American descent, that is less than twelve percent of the potential jurors, yet they constituted fifty percent of the prosecutor's challenges. (*Id.*) The prosecutor had struck one hundred percent of the African-American jurors that had been called into the jury box. Statistical analysis alone is enough to demonstrate a prima facie case. *See Paulino v. Castro*, 371 F.3d at 1091.

However, the trial court ignored the statistical analysis and instead listed reasons why the prosecutor may have exercised peremptory challenges against the two African-American jurors in question. (RT 2117-18.) At the end of this analysis the trial court made the finding that Jones had failed to make a prima facie case. (RT 2118.) This procedure contravened the ability of trial counsel to adequately analyze and argue any second or third prong analysis.

17. The second *Batson* objection proceeded in essentially the same way. At that point, four of the fourteen peremptory challenges exercised by the prosecutor were against African-American jurors, that is more than twenty eight percent. (RT 2130-32.) Yet, African-Americans comprised less than twelve percent of the jurors that had been called into the jury box, that is five of forty-four. (RT 2114-31.) The statistical disparity is striking. This means that the prosecutor challenged African-Americans at a challenge rate more than twice that of the percentage of African-Americans in the jury box (twenty-eight percent of peremptory challenges used against twelve percent of the jury pool). *Cf. Alvarado*, 923 F.2d at 256 (finding purposeful discrimination based in part on the fact that the challenge rate was nearly twice the percentage of minority members in the jury). "Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. at 342. Yet the court again found that no prima facie case existed. (RT 2134.) After the court made this finding, the prosecutor put his reasons for exercising his peremptory challenges on the record. (RT 2135-37.) There was some debate and an eventual finding by the court that the peremptory challenges were not based on group bias, however the entire process was undermined by the initial ruling by the court that there was no prima facie case. (RT 2137-38.) No comparative analysis of the challenges was conducted because that type of analysis is part of the second prong of *Batson* and not the first. Upon a finding that a prima facie case existed, this Court must grant an evidentiary hearing to fully and fairly conduct a second and third prong analysis. It would be inappropriate to rely on the finding of the trial court with regard to the second and third prong

analysis, because the entire procedure was biased by the court's initial ruling that Jones had failed to present a prima facie case.

18. When the final *Batson* objection was made, the court failed to even make a finding regarding whether a prima facie case had been made. The court initially decided not to rule on the objection until after the jury had been selected in its entirety. (RT 2144-45.) The next day, after the jury and alternates had been selected, the court gave the prosecutor the opportunity to explain his reasons for exercising the peremptory challenge that was being objected to. This can be considered a waiver of the first prong of *Batson* by the prosecutor. *Hernandez v. New York*, 500 U.S. at 358 (finding a waiver of the first prong of *Batson* where the prosecutor offered reasons for exercising challenges before the court found a prima facie case). However, the court failed to properly perform the *Batson* analysis. The court clearly stated, "the People's exercise of their peremptory challenge was not based on any group bias." (RT 2176.) The conclusion is obviously only regarding the single challenge that was being defended at that time. The trial court failed to analyze the prior challenges in light of the circumstances. An evidentiary hearing to fully conduct a second and third prong analysis is necessary to resolve the error of the trial court in this case.

19. A full and fair analysis of the reasons offered by the prosecutor for the exercise of his peremptory challenges never occurred. If this analysis had taken place, the result of the motion would likely have been far different.

20. Even a partial examination of two of the witnesses that the prosecutor removed reveals at least an inference of group bias. The prosecution excused two African-American jurors, Robbie T. and Leo W., after asking them outrageous hypothetical questions that were designed to evoke a disqualifying response.

21. The prosecutor asked Robbie T. hypothetically, over defense objection, if she could impose a death sentence if she knew, before deliberations began, that Jones would be taken out and executed the next day, with no appeals, if the jury decided on a death sentence. Robbie T. said that she might be prevented from

imposing a death sentence if she knew before she deliberated that, with no appeals, Jones would be executed the next day if the jury returned a death verdict. (RT 1242, 1245-47.) The prosecutor used her response to that question as a basis for his challenge.

22. The way that the prosecutor handled Leo W. was even more revealing of the prosecutor's wrongful intent because the prosecutor actually misled the six-person group of jurors he was examining. Leo W. was the last African-American prospective juror questioned during voir dire. (RT 2038-2108.) The prosecutor falsely implied that the evidence in this case would show that the death occurred accidentally during a robbery. (RT 2014-15.) Then the prosecutor asked the group of six jurors that included Leo W. whether they could impose the death penalty even if the death was accidental. (RT 2016.) Leo W. said that it would be difficult for him to impose a death verdict under those circumstances. (RT 2031-33.) The prosecutor used that response as a basis for his later challenge of Leo W. (RT 2135-37.)

23. Both of the hypotheticals suggested by the prosecution in the questioning of these two African-American jurors offered no insight into their qualifications. The first presented a procedure which would be unconstitutional, and the second a situation which has never taken place.

24. It would be clearly unconstitutional to deny a defendant due process and execute him immediately following sentence at trial. There is no insight into a juror that can be gained through questioning regarding this hypothetical. However, an excuse to remove a juror can be developed through this question that would mask the reality of striking the juror based on group bias.

25. A sentence of death for an accidental killing would not only be unique, but did not reflect the facts of the present case. In fact, no case has been found where a death sentence has ever been imposed for an accidental death during the course of one of the special circumstance felonies. A number of cases have imposed life without possibility of parole for an accidental death during the course of a special

circumstance felony, but no case has been found imposing a death sentence. *See*, *e.g.*, *People v. Young*, 11 Cal. App. 4th 1299, 1309, 15 Cal. Rptr. 2d 30 (1992); *People v. Johnson*, 5 Cal. App. 4th 552, 555, 7 Cal. Rptr. 2d 23 (1992). The hypothetical was clearly designed to give the prosecutor an excuse to remove Leo W.

26. A more in depth examination of all of the jurors as well as a comparative analysis of the jurors removed to the jurors who remained on the jury would clearly reveal further examples – an examination that did not take place during the trial. The prosecutor's reasons for striking the African-American prospective jurors were pretextual. *See Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (court of appeals finding that all of the prosecutor's nonracial reasons for striking a minority prospective juror, and most of the prosecutor's nonracial reasons for striking the other "dark skinned women" from the juror pool were pretextual).

27. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

FOURTH CLAIM FOR RELIEF FOR FACTUAL INNOCENCE AND INSUFFICIENT EVIDENCE FOR A CONVICTION

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Jones is factually innocent of

the special circumstance and there was insufficient evidence for a conviction on the special circumstance. The errors contributing to this fundamental miscarriage of justice include, but are not limited to: (1) there was an incomplete investigation by the police resulting in a failure to investigate Andre Davis and Eric Bailey, the actual perpetrators; (2) prosecutorial misconduct for withholding evidence of a deal that witness Frankie Cruz had entered into with the government; (3) ineffective assistance of counsel; (4) denial of a defense expert reasonably necessary to demonstrate the witness's misidentification of Jones; (5) failure by the prosecutor to prove either that Jones was the actual shooter or intended to kill the victim. Jones is factually innocent of the capital crime. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Further, the evidence against Jones regarding the allegations for which he was convicted was insufficient to convince a rational trier of fact beyond a reasonable doubt that Jones was guilty. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Jones's Eighth and Fourteenth Amendment rights were also violated, since the factual findings supporting the sentence of death were not supported by the evidence. Furthermore, Jones's rights to due process and equal protection were violated, in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments, when the prosecution charged Jones with allegations not supported by the evidence available to the prosecution.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. The Evidence Was Insufficient to Convince a Rational Trier of Fact That Jones Was the Shooter

4. Jones was convicted of the special circumstance for the Domino's robbery/homicide based on the testimony of a single eyewitness, two accomplices, and his own alleged statements to others regarding the incident. Given the lack of

direct evidence that Jones committed the shooting of Weeks, and the devastating impeachment and unreliability of the witnesses presented by the prosecution, no rational trier of fact could have found proof of Jones's guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Jones incorporates herein by reference Claim Eight, section Y; Claim Twelve, section G; and Claim Fourteen.

1. Jones Has Consistently Denied Being the Shooter

5. Jones has maintained the fact that he was not the shooter from the first time that he was accused by the authorities.

6. On November 1, 1989, after Jones's arrest, during an interview conducted by the police, Jones admitted to being involved in the Domino's Pizza robbery, but denied that he shot Shane Weeks. (CT 213, RT 3829-30.) Jones told officers that he was outside "watching [the robbers'] back[s]." (*Id.*) Jones told the officers that Eric Bailey and Andre Davis robbed the Domino's and that Andre Davis was the person who shot Weeks.

7. Jones has also consistently denied being the shooter to his trial lawyers, from the beginning of their representation of him. (RT 3829, 3838.) In fact, after the death verdict was read, Jones spontaneously shouted "Your honor, I didn't kill him. I did not kill him. I didn't kill him. Andre killed him. I didn't even kill him." (RT 3814-15) In light of this statement, Jones's trial counsel investigated Andre Davis further, and made a Motion for New Trial. *See* Claim Fourteen.

2. Jones Was Never Reliably Identified as the Shooter, and in Fact, Has Been Excluded as the Shooter by Eyewitnesses

8. Christina Kane, the Domino's assistant manager, was the only eyewitness to the shooting who identified Jones as the shooter; however, her testimony was unreliable. On November 6, 1989, Kane identified the "gunman" in a lineup, however she picked someone other than Jones. (RT 2408, 2420, 2434.) Kane stated that she was ninety-nine percent positive of her identification and recalled that

the shooter's right profile was very distinctive. (RT 2433.)

9. After the lineup, Eric Roland, Kane's supervisor at Domino's who was at the lineup, told her that she had identified the "wrong" person. (RT 2433-34.) Presumably, Roland, or someone from law enforcement or the prosecutor's office, told Kane who the "right" person was.

10. On April 17, 1990, at the preliminary hearing, Kane then identified Jones as the shooter and Alan Murfitt as the second robber. (RT 2434-35, 2445, PHRT 1.) Even if Roland had not informed Kane who the "right" person was, she had seen Jones and Murfitt before at the lineups, and her viewing them there clearly influenced her identification at trial. (*See* Ex. 157, Decl. of Kathy Pezdek, ¶¶ 28-29.) At the preliminary hearing, Kane was "99.9 percent positive" that Jones was the shooter. (RT 2445.) Kane was not a reliable identification witness. (*See* Ex. 157, Decl. of Kathy Pezdek, ¶ 34.)

11. Kane's identification at the preliminary hearing is made further unreliable by the circumstances in which it was conducted. The only individual in the courtroom who fit the physical description Kane had previously given of the perpetrator was Jones. *See* Claim Five, section C.

12. The prosecution admitted, outside the presence of the jury, that as their sole eyewitness, Kane's identification of Jones as the shooter was "not that strong." (RT 569.)

13. The prosecutor was correct. In fact, expert identification witness Kathy Pezdek has opined the following, regarding Kane's identification:

> With regard to Christina Kane, her identification of Mr. Jones was unreliable due to the following factors: her exposure to the perpetrator was short in duration; she was distracted and ducked; her view was obstructed by the handkerchief that the perpetrator used to cover his face; the perpetrator's use of the gun likely resulted in "weapon

> focus;" the cross-racial nature of the identification; the 15-month time delay between the incident and her first identification; the suggestive influence of viewing the initial lineup that included Mr. Jones and then being told that she had identified the wrong individual in that lineup; the suggestiveness of the situation that existed at her in court identification of Mr. Jones when he was the only individual who fit the physical description that she had given; and the unreliability of her confidence in the identification considering how confident she was about her identification of an individual other than Mr. Jones at the previous lineup.

(Ex. 157, Decl. of Dr. Kathy Pezdek, ¶ 36.)

14. Christina Kane's testimony was the lynchpin of the State's case identifying Jones as the shooter in the murder of Shane Weeks. The unreliability of her statements undermines any confidence in the verdict.

3. The Testimony of the Informants Was Unreliable

15. Informants, Najee Muslim, Frankie Cruz, and Carlos Hunt stood to gain by their testimony. The testimony of the co-conspirators is not compelling. Muslim was released from custody after he was questioned for the first time by the officers investigating the Domino's robbery. (RT 2663.) He had plenty of time to contact Frankie Cruz and inform Cruz of the details of the story Muslim had told the officers. Once Muslim and Cruz both had their stories straight, they entered into plea agreements with the prosecutor's office and were able to avoid prosecution all together. The strongest evidence against Jones in the Domino's robbery was the testimony of Cruz and Muslim. It is Cruz's and Muslim's testimony that the jury requested be read back during their deliberations. (CT 776.) But because of their inherent biases as co-conspirators who accepted significantly reduced sentences for their cooperation, the statements of Cruz and Muslim are insufficient to support the

verdict.

16. Considering the involvement of Andre Davis in the Domino's robbery-homicide, Muslim had another reason to fabricate his story – Andre Davis is Najee Muslim's cousin, and the relationship clearly influenced his testimony. Muslim covered up Davis's involvement to protect him.

17. Additionally, the statements that Jones allegedly made that were used to show he was the shooter in the Domino's incident are not reliable. Erin Burton had never heard Jones admit to being the shooter. Jones only responded to a general question about the "Domino's thing," which cannot be interpreted as proving that he was the shooter. (RT 2710.) Jones's alleged threats to Tara Taylor only show his involvement with the Domino's robbery, but do not reveal he was the shooter. (RT 2696.)

18. The remaining two witnesses who allegedly heard Jones take credit for being the shooter not only gave inconsistent statements, but both occurred in situations when Jones had a motive to fabricate his involvement. First, Enrique Luna testified at the preliminary hearing that Jones had not openly stated that he was the shooter. (PHRT 82.) At trial, Luna suddenly became more sure of the statements Jones made regarding taking credit for being the shooter in the Domino's robbery. Luna's false testimony was motivated solely in the attempt to get a deal on the prior robbery he had been involved in with Najee Muslim.

19. Second, Carlos Hunt's testimony is inconsistent with the facts of the Domino's robbery. Hunt was a jailhouse informant.[15] He was certain that Jones

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[15] Jailhouse informant testimony has been repeatedly cited as unreliable, especially in light of recent discoveries of widespread use of perjured testimony by career informants in California. *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010), *cert. denied*, *Cash v. Maxwell*, 2012 U.S. LEXIS 410. *See also*, Stephen S. Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1394 (1996).

claimed that a shotgun was used at the Domino's robbery, but that is inconsistent with the physical evidence. (RT 2772.) A shotgun was not used in the Domino's incident. It is conceivable that the inmates were discussing the Flats incident, and not the Domino's incident, given that a shotgun was used to perpetrate that crime. Furthermore, while in custody, Jones had a motive to make himself appear more threatening to avoid being harassed.

4. No Physical Evidence Established Jones's Guilt

20. No physical evidence ties Jones to the crime. No such evidence disclosed or used by the State was found at the Domino's restaurant. No physical evidence taken from Jones was tied to the crime scene.

5. There is Strong Evidence that the Capital Crimes Were Actually Committed by Other Persons

21. There is significant evidence that Jones was not the shooter in the Domino's robbery. Shane Weeks made a dying declaration in which he said the shooter wore an earring. (CT 949.) Andre Davis wore an earring at the time. (CT 949.) Jones has never had pierced ears and did not wear an earring at the time. (CT 949.) The fact that Jones did not have a piercing in either ear, and that he did not wear an earring at the time is significant exculpatory evidence that Jones was not the shooter.

22. Jones consistently asserted to his trial attorneys that Andre Davis shot Weeks. One of the composite sketches so closely resembles Andre Davis that the prosecution dismissed the murder case against Eric Bailey, originally Jones's co-defendant, based on the fact that the prosecution could no longer conclude beyond a reasonable doubt that Bailey was involved in the crime. (RT 3828, 3835.)

23. After the death verdict was read, Jones spontaneously shouted "Your honor, I didn't kill him. I did not kill him. I didn't kill him. Andre killed him. I didn't even kill him." (RT 3814-15.)

24. Had evidence that Andre Davis matched the description of the shooter

much more so than Jones did been admitted during the trial, the prosecution's chief co-conspirator witness, Najee Muslim, would have been severely impeached, since he was Andre Davis's cousin and had testified that Andre Davis was not at the Domino's crime scene that night. Muslim's desire to protect his cousin was a bias that would have existed from the first time Muslim was questioned.

6. Jones Did Not Intend to Kill

25. If Jones was not the shooter, then he can only be guilty of the felony murder special circumstance if he had the intent to kill; however, intent was never proven. Indeed, there is no evidence whatsoever that anyone other than the shooter had any intent to commit murder at all. No statements at all came from the second individual at the Domino's robbery. Nor was there any evidence of a plan that involved the killing of Weeks. Indeed, Christina Kane made statements that the incident was "random" and the shooter "just took his hand and just shot, didn't even look." (RT 2429.) The evidence of intent, even on the part of the shooter, was very thin. If Jones was not the shooter, then he is innocent of the felony murder special circumstance.

26. Further, Jones could not have had the required mental state during either the Domino's incident or the Mad Greek incident, given his mental impairments, brain damage, and high level of intoxication due to drugs and alcohol.

7. Jones Was Not the Shooter in the Mad Greek Robbery and Therefore is Not Guilty of the Attempted Murder Charges

27. There were at least four individuals involved in the Mad Greek robbery. (RT 2262, 2289.) The evidence convicting Jones as the shooter was the testimony of two eyewitnesses and the statements that were made to Najee Muslim. Muslim's testimony can be called into question based on the information raised above. The testimony of the two eyewitnesses can also be called into question based on the circumstances in which they occurred.

28. Maria Zuniga identified Jones at a live lineup, but she was the only

individual who viewed him at that lineup that identified him. Zuniga was extremely agitated at the time of the robbery. (RT 2880.) According to her own testimony, she was unable to open the register when asked because she was so nervous. (*Id.*) Her nervousness, combined with the number of individuals involved, can easily lead to a misassignment of the roles of the individuals involved. The common mistakes of eyewitnesses are documented in the declaration of Dr. Kathy Pezdek, an expert in the field of eyewitness identification. (Ex. 157, Decl. of Kathy Pezdek.) Zuniga's testimony may prove that Jones was involved with the Mad Greek incident, but cannot prove that he was the shooter. The common mistakes of eyewitnesses bring us to this conclusion.

29. Lola Hall is even less reliable. Including all of the factors cited above, Hall was unable to identify Jones at a live lineup. After seeing Jones at the live lineup, Hall was able to identify him at the preliminary hearing and the trial. However, those identifications are tainted by Hall having seen Jones at the live lineup. Jones's presence there significantly influenced Hall's in court identifications rendering them unreliable. (*See* Ex. 157, Decl. of Kathy Pezdek, ¶ 31.) If Jones was not the shooter, then it is impossible to prove intent for the attempted murder. None of the other individuals involved with the Mad Greek were ever arrested and charged regarding the incident. No evidence exists that the shootings were anything more than a spontaneous act. There is very little evidence that Jones was the shooter during the Mad Greek incident.

30. Javier Sierra was one of the witnesses to the Mad Greek robbery that managed to stay calm throughout the incident and whose view of the perpetrator was as good as Maria Zuniga's. (RT 2872.) Sierra was the individual who was able to open the cash register when Zuniga could not. (RT 2881.) He was called to a lineup and identified someone other than Jones as the perpetrator. (RT 2321.) His failure to identify Jones after seeing him in the lineup is a clear indication that Jones was not the gunman.

B. Jones is Factually Innocent of the Murder of Shane Weeks

31. Not only is the evidence insufficient to support the conviction, but Jones is factually innocent of the capital crimes, *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Jones has adduced additional evidence to support his claims that the evidence against him was unreliable and misled the jury into wrongly believing that Jones was the shooter. As a result, given that evidence, no rational trier of fact could find that Jones shot Weeks beyond a reasonable doubt. Jones incorporates the facts and allegations in Section A, *supra*.

1. Jones Has Been Excluded As the Shooter by Eyewitnesses

32. In a newly discovered interview[16] between Christina Kane and Eric Bailey's investigator, Kane inadvertently exposed why her in-court identifications were unreliable. Kane stated that the Domino's investigator working with the police told her that they knew Jones was the shooter months before she attended any line-ups and years before her in-court identification. "Dennis came up to me months before and said that [the shooter's] street name is 'Money-Mike' and he tracked him down to an arcade in Moreno Valley from some of his buddies. I guess some of Michael Jones' buddies." (Ex. 183 at 1878.) She then implicated the investigating officer for the Riverside police department, Mark Boyer:

> Dennis was the first one who told me and then I asked Mark about it later on and I had talked to him again when went to a line-up. I go, "is that who you think it is, the street name of Money-Mike." "Yes but they can't . . . we know the vicinity he's at but there's too many strings not tied to pick him up now, when we pick him up, we want him in for

[16] Jones first obtained the transcript to the interview between Eric Bailey's investigator and Christina Kane in November of 2008 as part of the post-conviction discovery materials handed over by the Riverside District Attorney's Office pursuant to California Penal Code section 1054.9. This interview is new information.

> good, we don't want him released on a stupid little charges, ya know, something like that" is what he told me. So I said, "okay." That was the reason they were not picking him up at the time . . . is that they didn't have enough to hold him on, is what he said to me.

(*Id.* at 1879.) Kane's remarks prove that she was given improper and highly suggestive information that Jones was responsible for the murder of Shane Weeks well before he was ever even charged. When she failed to identify Jones at the line-up she did not know what "Money-Mike" or "Mike Jones" looked like. However, by the time she was in court, she knew that the person she saw in the live line-up, at which she was told the shooter was participating, was Jones. Accordingly, she suddenly identified Jones as the shooter for the first time. This evidence would have proven that her identification was unreliable.

33. In contrast to the flawed testimony of Kane, Maria Torres was also present at the Domino's robbery and witnessed the incident. She specifically remembers smiling at the perpetrators as they walked into the Domino's restaurant. (Ex. 136, Decl. of Maria Torres, ¶ 2.) Her memory is untainted, and when shown pictures of Jones at the time of the incident she was able to unequivocally state, "I can say for sure that the shooter is not one of the individuals pictured in these photographs." (*Id.* ¶ 5.) This is powerful evidence of Jones's innocence.

34. Even Victor Moreno, another individual who witnessed the Domino's robbery, was unable to identify Jones as the shooter when he was shown photographs of Jones. (Ex. 127, Decl. of Victor Moreno, ¶ 8.) Moreno specifically recalled not seeing Christina Kane until after the robbery and shooting had already occurred, which would further impeach Kane's identification. (*Id.* ¶ 5.) Moreno stated he did not see Kane until after the robbery and shooting had already occurred and heard her stating at the live lineup, "'I saw what was going on and hid in the back.'" (*Id.*; see also Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2 ("The girl who was making pizzas

almost immediately ran and hid when the two men entered.").) Corroborating the veracity of Moreno's statement, Kane admits in a newly discovered interview that a "mexican kid that was the carry out" was present in the lineup room with her; presumably, Kane was referring to Moreno. (Ex. 183 at 1863.) Together, these declarations establish that Kane was not truthful in her testimony at trial and that she was unable to reliably identify the perpetrator after hiding in the back of the store.

35. Additionally, Alvin Eason has stated that he was part of the lineup in question and "could see someone pointing and recall hearing a man say, 'Are you sure it's not number 4? Look again.' (Said twice)." (Ex. 184, Decl. of Alvin Eason, ¶ 4.) Jones was the man in position number four in the live lineup. Eason "assumed that everyone in the line-up [including Jones] heard the same thing [he] did." (*Id.*) Eason's statement lends further support to other evidence showing that the live lineup that Kane participated in was unduly suggestive and tainted her later identification of Jones.

2. The Testimony of the Informants Was Unreliable

36. Evidence that Jones has adduced since trial supports his contentions that the statements of Najee Muslim and Frankie Cruz were rendered unreasonably biased and that Jones's own alleged statements to third parties were not reliable evidence of guilt.

37. In addition to being given an unusually lenient sentence for his own role as a co-conspirator, Frankie Cruz was offered the incentive of relocation to Utah. Evidence exists that the Riverside District Attorney's Office promised compensation to the family housing Cruz. (Ex. 139, Decl. of Alan Vanmetere, ¶ 3.)

38. In addition to being given a similarly lenient sentence, Najee Muslim's role in the conviction of Jones becomes even more significant when his relationship with Enrique Luna is considered. Both were charged in connection with a robbery that occurred in September of 1989. (Ex. 82, Information filed in *People v. Enrique Luna, Jr.*, Riverside County Superior Court Case No. CR36818, dated September

17,1990; Ex. 88, Felony Complaint filed in *People v. Najee Muslim, et al.*, Riverside County Municipal Court Case No. 017090, dated December 15, 1989 (robbery w/use of handgun, vehicle tampering).) Muslim had used a shotgun during the commission of that crime. (Ex. 87, Declaration in Support of Arrest Warrant filed on December 15, 1989, in *People v. Najee Muslim, et al.*, Riverside County Municipal Court Case No. 017090, dated November 27,1989.) Less than two years later, Muslim and Luna were involved in a robbery and assault with a deadly weapon. (Ex. 85, Imperial County Sheriffs Office reports regarding Enrique Luna and Najee Muslim dated January 21,1992.)

39. The September 1989 robbery that Muslim and Luna committed together was plea bargained down to a probationary sentence in exchange for their testimony in Jones's case. Muslim was the first to make a plea agreement with the prosecutor's office, and he had plenty of time to inform Luna of how to get out of the charges on the robbery that they had committed together.

40. Such evidence of Cruz, Muslim, and Luna's having given statements in exchange for significantly reduced sentences undermines their statements against Jones and supports Jones's claim that he is factually innocent.

41. As for the allegations that Jones made statements confessing to the shooting, a recent declaration by Enrique Luna reveals that Jones never made any statements regarding the Domino's robbery to him at all, and he has recanted his testimony at trial. He stated:

> Mike never told me about the Domino's incident. He never personally told me that he shot the guy at Domino's. I never seen that side of him. I only heard Najee Muslim talking about this, but everything he said was just hearsay.

(Ex. 148, Decl. of Enrique Luna, ¶ 3.) Luna's false testimony was motivated solely in the attempt to get a deal on the prior robbery he had been involved in with Najee Muslim.

42. Jones also had the reputation of being a braggart. Luis Villarreal describes Jones as a "bragger" who would say anything to give himself clout and hype himself up. (Ex. 146, Decl. of Luis Villarreal, ¶ 8; *see also* Ex. 135, Decl. of Tara Taylor, ¶ 6 ("Mike . . . was just a lot of talk"); Ex. 107, Decl. of Erin Burton-Uribe, ¶ 3 (" . . . a bunch of macho guys always talking a lot of stuff").) If Jones had actually made such statements, he was likely exaggerating his role in certain crimes in an attempt to increase his reputation among the individuals who he spent time with. This is consistent with the neurological and socio-psychological assessments made by experts who have evaluated Jones. Jones's history of family abuse and abandonment throughout his childhood and adolescence resulted in "poor impulse control" and "signs of poor self-esteem and a lack of confidence." (Ex. 159, Decl. of Carole Kelly, M.S.W., ¶¶ 213, 307.) Further, a child falling victim to such abuse may "excessively seek adult approval and attention." (*Id.* ¶ 229.) Dr. Natasha Khazanov declared that Jones suffers frontal lobe damage, which may result in difficulties with modulating emotions and behavior and lead to inappropriate or unwanted responses, diminished frustration tolerance, or deficient judgment and self-awareness. (Ex. 154, Decl. of Dr. Khazanov, ¶ 66.) In combination, these evaluations show any statements by Jones regarding the incident were merely fitting into a long pattern of Jones impulsively seeking approval and attention from those around him.

3. There is Strong Evidence That the Capital Crimes Were Actually Committed by Other Persons

43. There is significant post-trial evidence supporting the claim that Jones was not the shooter in the Domino's robbery. Shane Weeks made a dying declaration in which he said the shooter wore an earring. (CT 949.) Both Andre Davis and Eric Bailey wore earrings at the time. (Ex. 107, Decl. of Erin Burton-Uribe, ¶ 1; Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22; see also Ex. 162.) Jones does not have pierced ears and did not wear an earring at the time. (CT 949; Ex.135, Decl. of Tara Taylor, ¶ 7.) Christina Kane had heard Weeks make a reference to an earring that the shooter

wore. (Ex. 68, Transcript of Interview of Christina Kane by Detective Michael Jordan.) An earring was even included in the artist's renditions of the shooter that Kane helped to prepare. (Ex. 63, Composite Drawings Based on Christina Kane's Description Done by D. Miller on January 25, 1989; Ex. 64, Composite drawings based on Christina Kane's description done for Domino's Pizza.) The fact that Jones did not have a piercing in either ear, and that he did not wear an earring at the time is significant exculpatory evidence that Jones was not the shooter.

44. A supplemental report completed by Officer Joy who was on the scene of the Domino's robbery states that the victim, before he died, identified the shooter as having a "diamond stud earring." (Ex. 181 at 1843.) Indeed, Kane seemed aware of this fact herself since the composite sketches based on her descriptions showed the shooter as having an earring in his left ear. (Ex. 179 at 1783.) Additionally, in the newly discovered interview of Kane by Eric Bailey's investigator, Kane acknowledges the shooter wore an earring: "[the victim] was telling the female . . . there was a female police woman . . . that um . . . that the guy had an earring in his ear . . . So, that had to have been Michael Jones cuz Shane didn't really get a look at the other guy . . ." (Ex. 183 at 1889.) It is undisputed that Jones has never worn an earring or had his ears pierced. (CT 949; Ex. 135, Decl. of Tara Taylor, ¶ 7; Ex. 180 at 1792.) Kane's statements demonstrate that the shooter must have worn an earring.

45. Several witnesses have stated that the shooter had a darker complexion than the non-shooter and that Davis and Bailey were darker than Jones. Maria Torres specifically described the shooter, "I remember that the guy with the gun was darker, uglier, heavier, and meaner than the other guy." (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2.) Erin Burton knew both Jones and Eric Bailey and described Eric Bailey as darker than Jones. (Ex. 107, Decl. of Erin Burton-Uribe ¶ 31.) Mario Villarreal, Jr. also was aware of the fact that Bailey and Davis had darker complexions than Jones. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22.)

46. Additionally, there was testimony by Najee Muslim that Jones was

wearing a black and white checkered jacket on the evening of the Domino's incident. (RT 2991.) Maria Torres would have directly contradicted Muslim's claims that Jones was the shooter. She described the jacket the shooter was wearing as a "dark blue denim jacket," and failed to identify any checkerboard pattern whatsoever. (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 3.)

47. Judy McCollin, the defense investigator for Eric Bailey, was able to get a photograph of Andre Davis. (Ex. 161, Decl. of Judy McCollin, ¶ 3.) When McCollin interviewed Christina Kane and presented her with the photograph of Andre Davis, Kane spontaneously stated, "That's him," meaning one of the perpetrators of the Domino's robbery-homicide. (*Id.*)

48. Five jurors admitted in post-trial interviews that if they had known about Andre Davis, and that he matched the composite drawings based on Kane's description, it would have made a difference in their verdicts. These jurors were really bothered by Jones's outburst and wanted to know the entire story. (CT 977 ("It cast a lot of doubt for me . . . Yes, it would have [made a difference]"); CT 967 ("After the verdict, this threw me for a loop [when the defendant yelled about Andre Davis] . . . this information would bring doubts."); CT 963; CT 965 ("I would have given it strong consideration, just knowing that would have made a great difference. I was shocked to hear that after the verdict. There just was not any evidence presented"); Ex. 163, Decl. of Elizabeth Layman, ¶ 4.) Jones hereby incorporates all arguments made in Claim Twelve, section G.

49. Had the Andre Davis evidence been admitted during the trial, the prosecution's chief co-conspirator witness, Najee Muslim, would have been severely impeached, since he was Andre Davis's cousin and had testified that Andre Davis was not at the Domino's crime scene that night. Muslim's desire to protect his cousin was a bias that would have existed from the first time Muslim was questioned.

50. Additionally, Andre Davis and another man parked their vehicle at the gas station across from the Domino's on the night of the January 21, 1989 robbery-

homicide. (Ex. 70.) Davis met up with the other co-perpetrators somewhere in between the two vehicles. At a recent interview by Jones's investigator, Andre Davis made statements and behaved as though he were guilty of this crime. He was told that the interview was regarding the Domino's robbery-homicide of January of 1989, and perhaps showed remorse at the thought of his role:

> Mr. Davis immediately began to cry and weep for several minutes. Mr. Davis continually wiped tears from his eyes and uttered unintelligible words. After several minutes passed Mr. Davis gained his composure and decided to talk to me.

(Ex. 114, Decl. of Rick Gentillalli, ¶ 4.)

51. Andre Davis also made incriminating statements about the Domino's incident. Without being prompted, Davis claimed that he was not at "the gas station":

> Mr. Davis spontaneously stated that if we checked around, no one would be able to identify him as being at the gas station across from the Domino's on the night of the murder. Mr. Davis said that all of them looked alike back then, therefore no one could identify him from the station. I did not know what Mr. Davis was talking about regarding the gas station since no information was provided to me concerning this.

(*Id.* ¶ 6.) There in fact was, and still is, a gas station in front of the Domino's restaurant where the incident occurred. (Ex. 70, Photographs of Shopping Center Where Domino's Pizza Is Located.) Somehow Davis knew that gas station was there, and that Jones had placed him at that gas station on the night of the crime.

52. Even Eric Bailey made statements implicating Andre Davis. Bailey has admitted that he was at the location, and that Andre Davis was also there. (Ex. 115,

Decl. of Chemeka Goss-Kater, ¶ 4.) Eric Bailey did not see Mike with a gun before or after the robbery. (*Id.*)

53. Jones also made statements prior to charges being brought against him that Davis was the shooter. Jones told at least two people that Andre Davis was the shooter that night. (Ex. 124, Decl. of Loren Kinney, ¶ 13; Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 13.) Najee Muslim has also stated that Andre Davis was the shooter. (*Id.*)

54. Many potential witnesses heard that Andre Davis had shot the clerk at the Domino's and could have been interviewed either to provide further information or to testify. Mario Villarreal had specifically heard Najee Muslim speak about the Domino's robbery:

> Najee would also brag to the same girls about being at the Domino's Robbery and that Dre shot the guy. Najee would also add that Mike didn't do anything during the Domino's robbery.

(Ex. 140 Decl. of Mario Villarreal ¶ 13.) Tara Taylor was also aware of the fact that Andre Davis was involved with the Domino's robbery:

> I remember that it was known that Andre ("Dre") Davis had been involved in the Domino's crime. Dre was part of the crew. He was real quiet and did not say much. I remember that there was some kind of beef between Dre and Mike at the time. Dre liked to push Mike's buttons a lot. I knew that Dre and Najee were cousins.

(Ex. 135 Decl. of Tara Taylor, ¶ 6.)

D. Conclusion

55. Trial counsel was ineffective in failing to investigate all of the above. Further, the police unreasonably failed to investigate the circumstances of the offense, instead relying on unreliable co-conspirators and informants who stood to

gain by their testimony. The prosecutor failed to turn over exculpatory evidence and evidence of the unreliability of the state's case, including information regarding Frankie Cruz's plea agreement, other benefits, and his whereabouts, and a composite drawing made during an interview of Maria Torres.

56. The United States Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Upon the record evidence adduced at Jones's trial, no rational trier of fact could have found proof of Jones's guilt beyond a reasonable doubt. There existed no direct evidence that Jones committed the crimes for which he is convicted. There was no physical evidence of any kind connecting Jones with the crime. As noted above, there were other more likely suspects to the crimes for which Jones was convicted and sentenced to death. The evidence of guilt presented at trial could not possibly support a conviction for murder "beyond a reasonable doubt." There was substantial doubt given the scant and wholly insufficient and unreliable evidence in this case. This evidence was insufficient to sustain a finding of guilt, especially in light of the combined constitutional errors of the trial court, Jones's trial counsel and those arising from prosecutorial misconduct. The evidence was equivocal at best and is hardly sufficient to support a conclusion that Jones was the perpetrator. It most certainly is insufficient to put Jones to death. No rational trier of fact could have found proof of Jones's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

57. Furthermore, Jones is not only factually innocent of the capital crimes, *Herrera*, 506 U.S. 390, he is actually innocent under the standard set forth in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

58. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507

U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

FIFTH CLAIM FOR RELIEF FOR COURT ERROR DURING THE GUILT PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: (1) the trial court erred when it refused to allow the defense to reopen its case to lay a foundation for the admission of photographs of Alan Murfitt and Eric Bailey; (2) the trial court erroneously prevented trial counsel from questioning Najee Muslim about a threat from the police to charge him with being the shooter in the murder of Weeks; (3) the trial court erred when it rejected the defense's repeated motions to call an expert in the field of eyewitness identification; (4) the trial court erroneously allowed irrelevant and highly prejudicial gang affiliation testimony into evidence; (5) the trial court erred when it admitted evidence of out of court statements made by Najee Muslim and Enrique Luna; and (6) the trial court erroneously denied Jones's request to call an expert witness from the office of the Public Defender to testify to the rarity of getting a probationary sentence when convicted of armed robbery; (7) and the trial court erred in making other evidentiary rulings and remarks in front of the jury.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. The Trial Court Committed Error When It Prohibited Trial Counsel from Re-opening the Case to Lay a Foundation for the Introduction of Photographs of Alan Murfitt and Eric Bailey into Evidence

4. Christina Kane was the only eyewitness from Domino's to identify Jones at trial as the person who shot Shane Weeks. At the preliminary hearing, Kane identified Alan Murfitt as the other robber, the non-shooter, at Domino's. Eric Bailey was also at the preliminary hearing as a defendant but was not identified by Kane. (RT 2434-35, 2445.) The prosecution claimed that Eric Bailey was the other participant and had charged him with Shane Weeks's murder. (CT 46.) His trial had been severed from Jones's trial. (CT 577.)

5. At a physical lineup on November 6, 1989, Christina Kane identified "person number three" as the shooter at Domino's, and said she was "99 percent" positive of her identification. (RT 2433.) She recalled that the right profile of the suspect was very distinctive. (*Id.*) Jones was "person number four" at that lineup. (RT 2432.)

6. After the lineup, Eric Roland, Kane's supervisor at Domino's, who was at the lineup, told her that she had identified the wrong person. (RT 2433-34.) Later, at the preliminary hearing on April 17, 1990, Kane identified Jones as the shooter. (RT 2434.) At the preliminary hearing, Kane claimed to be 99.9% sure that Jones was the shooter at Domino's, despite her earlier identification of someone else at the first lineup. (RT 2445.)

7. Kane originally described the robbers to the police as "two black men, around 18 to 22 years old, medium build, very short Afro, dark complexion." (RT 2420.) She told police that the man without the gun was about five foot ten inches tall. (*Id.*) She said the person with the gun was between five eight and six feet tall. (RT 2423.) She testified at trial that the second robber, the man without a gun, weighed 160 to 170 pounds. (RT 2423.)

8. Najee Muslim was called to testify by the defense. During the

examination of Muslim, trial counsel failed to lay a foundation for admission of booking photos of Alan Murfitt and Eric Bailey, which had been previously marked for identification as defense exhibits.[17] (RT 3003-05.) Muslim could quickly and easily have laid that foundation because he knew both men. (RT 2462-64.) The defense rested after Muslim testified, and the prosecution had no rebuttal case. (RT 2998-3043.)

9. Shortly after having rested the defense case, trial counsel discovered his error. The prosecution objected to the defense photographs of Murfitt and Bailey for lack of foundation when they were offered into evidence. The prosecutor's objection was sustained because the defense had failed to lay a foundation for their admission. (RT 3003.) At that point, trial counsel moved to reopen his case to recall Muslim to lay a foundation for admission of the photographs. (RT 3004.) When trial counsel's motion to reopen was denied, he moved for a mistrial, citing his own ineffectiveness. (RT 2998-3005, 3008-09.) The jury never saw any photograph of Murfitt and had no idea what he looked like, even though they heard that Kane had identified Murfitt at the preliminary hearing as one of the Domino's robbers.

10. Just a few minutes before, during the prosecutor's cross-examination of Muslim in the defense case, the trial judge had allowed the prosecutor to reopen his examination of Muslim when the prosecutor "forgot something." (RT 2995.)

11. Under California law, in order to determine whether a trial court has abused its discretion, four factors are considered:

> (1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the

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[17] The prosecution had introduced into evidence a photograph of Jones and Eric Bailey. (RT 2707-08.)

significance of the evidence.

People v. Funes, 23 Cal. App. 4th 1506, 1520, 28 Cal. Rptr. 2d 758 (1994).

12. Application of these four factors clearly shows that the trial court abused its discretion when it denied the defense motion to reopen to lay the foundation for introducing the booking photographs of Allan Murfitt and Eric Bailey into evidence. The defense motion to reopen was not made at a late stage in the proceedings. Najee Muslim was the last witness for the defense. (RT 2998.) At the conclusion of his testimony as a defense witness, the defense rested. The prosecution then elected not to put on any rebuttal case. (RT 2998.) Then the defense moved to reopen when trial counsel discovered that he had neglected to ask Muslim about the photographs. (RT 3003-05.) It would have been a simple matter to bring Muslim back the next morning for a few minutes to allow trial counsel to ask the two questions he needed to ask Muslim to lay the proper foundation. Muslim had already admitted that he knew the two men, so all he had to do was identify their likenesses in the photographs. In all probability, had the trial court indicated that it would permit the defense to reopen, the prosecution would have stipulated to the foundation. These were not greatly disputed facts.

13. The two photographs had already been pre-marked for identification by the defense. (RT 3004.) Trial counsel discovered his inadvertent mistake within minutes of when it occurred and immediately brought it to the attention of the trial court. (RT 2998-3004.)

14. There was virtually no likelihood that the jury would have accorded the evidence undue emphasis. Although both the prosecution and the defense rested their cases in front of the jury and the jury was excused for the rest of the day, it would have been a simple matter to reopen the defense case the next morning for less than five minutes of additional testimony by Muslim identifying the people in the photographs. (RT 2998-99.) Given the technical nature of the requested additional testimony laying a foundation for the two pictures, the likelihood that the jury would

have given Muslim's brief foundation-laying testimony undue emphasis was virtually nil.

15. Jones's contention focuses on Murfitt's picture. Trial counsel thought having the jury see Murfitt, either live or by photograph, was "critical to the defense." (RT 3004.) He had Murfitt subpoenaed so the jury could look at him. (RT 3004.) He had the defense investigator take pictures of Murfitt so the jury could see what he looked like. (*Id.*) Instead, he relied on the booking photographs obtained from the police by subpoena duces tecum which he had marked for identification. (RT 3004-05.) Trial counsel wanted the photographs because he thought they were "critical to [his] closing argument and to impeach the in-court identification of Christina Kane." (RT 3005.) As a result of the trial court's ruling, the jury saw no photograph of Murfitt and was unable to consider Murfitt's appearance in assessing the reliability of Kane's in-court identification of Jones as the shooter at Domino's.

16. The California Supreme Court has already concluded that the trial court, "abused its discretion in refusing to reopen the case to permit the defense to lay a foundation for the identification of Alan Murfitt." *People v. Michael Jones*, 30 Cal. 4th 1084, 1111, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). The California Supreme Court's conclusion that the error was harmless is incorrect. *Id.* The exclusion of Murfitt's photograph prejudiced Jones because it prohibited trial counsel from effectively discrediting Christina Kane's in-court identification of Jones.

17. That trial counsel would have used Murfitt's and Bailey's photographs to discredit the in-court identification of Jones made by Christina Kane is clear from defense counsel's closing argument. The theme was that Kane's in-court identification was unreliable and incorrect because Jones was not the shooter. (RT 3080.)

18. Based on the photograph of the lineup, counsel argued that Christina Kane was 99% sure the man she picked at the lineup was the shooter, but Jones and that man looked nothing alike. (RT 3076-77.) Had the photograph of Murfitt been

admitted into evidence, defense counsel could have bolstered his argument by showing that Kane's identification of Jones was unreliable because Kane's identification of the second robber was proven to be unreliable. At the preliminary hearing, where both Bailey and Murfitt were present as defendants, Kane picked Murfitt as the second robber, but the evidence at trial showed that Bailey, not Murfitt, was the second robber. (RT 3077-78.) The purpose of the photographs would have allowed trial counsel to argue, and the jury to see, that Bailey and Murfitt looked nothing alike. This additional evidence that Kane could not remember what the robbers looked like would have strengthened trial counsel's argument that Kane's in-court identification of Jones was unreliable.

19. Trial counsel did argue that Bailey looked nothing like Kane's description of the non-shooter. (RT 3079.) Kane described the second robber, the non-shooter, to police as "around 18 to 22 years old, medium build, very short Afro, dark complexion, almost to six foot, approximately between five ten, in that neighborhood." (RT 2420.) During her testimony at trial, she stated that the second robber "was approximately five ten in height, medium build, short Afro" and weighed 160 to 170 pounds. (RT 2423.) Bailey weighed between 250-280 pounds, according to Tara Taylor and her picture of Bailey. (RT 2703.)

20. Photographs of Murfitt and Bailey were essential to Jones's "mistaken identity" defense because they would have cast strong doubt on Christina Kane's ability to accurately identify the two men involved in the robbery. Photographic documentation of Kane's uncertainty about the identity of the participants in the robbery was critical to Jones's defense. One misidentification of people who looked nothing alike might be disregarded by the jury as a fluke, but two misidentifications involving people who looked nothing alike cast serious doubt on the ability of Christina Kane to make a reliable identification. This photographic evidence was even more critical, given Kane's possible bias in identifying Jones only after she had seen him in court at the preliminary hearing and informed by her supervisor that she

picked the "wrong" person at the lineup. The trial court's refusal to allow the defense to reopen to produce photographic proof that Murfitt and Bailey looked nothing alike undermined Jones's guilt phase defense.

21. Furthermore, the absence of the pictures of Murfitt and Bailey prevented trial counsel from arguing the suggestiveness of the identification by Kane at the preliminary hearing. The prosecutor argued that the identification at the preliminary hearing was reliable because the defendant was identified while among four individuals in the jury box. (RT 3114.) However, Jones was the only individual among those four who fit the initial physical description Kane had given of the perpetrators. Kane testified that one of the four were Hispanic. (RT 2435.) She testified that the second perpetrator weighed 160-170 pounds. (RT 2423.) Tara Taylor testified that Eric Bailey, one of the individuals at the lineup, weighed 250-280 pounds, and photographic evidence corroborated this testimony. (RT 2703.) Finally, Murfitt was light-skinned, and Kane had identified both perpetrators as being particularly dark-skinned. (*See* Ex. 67, Booking Photo of Alan Murfitt; RT 2421.) Without Murfitt's photograph, counsel could not show the jury that he was light-skinned, and therefore, significantly different from Kane's initial identification could not be argued. The court's ruling undermined defense counsel's ability to argue the suggestiveness of the preliminary identification and the prosecutor unfairly took advantage of the erroneous ruling.

22. The arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

B. The Trial Court Committed Error When It Prohibited the Cross-Examination of Najee Muslim about Threats from the Police to Charge Muslim with Being the Shooter in the Murder of Shane Weeks

23. The jury found Najee Muslim to be credible and relied heavily on his testimony in reaching their verdict as was demonstrated by both their request for a

read-back of Muslim's guilt phase testimony and the jurors' post-trial statements. (CT 776, 953-80.) They found Jones guilty of all charges the day after they heard the read-back of Muslim's testimony. (CT 775-77, 780.)

24. During his direct examination, Muslim admitted that he had been convicted of a felony robbery. (RT 2483.) Before trial, he pled guilty to an unrelated robbery that had occurred after the Domino's robbery and murder. (RT 2483-84.)

25. Muslim was contacted by police about his involvement in the Domino's robbery-homicide. On direct examination by the prosecution, Muslim testified that he agreed to be interviewed by Officers Horst and Portillo at the police station. (RT 2483-84.) After talking to these officers, Muslim was charged with misdemeanor being an accessory after the fact to the Domino's murder. Before Jones's trial, he pled guilty to the misdemeanor accessory charge and to his pending unrelated robbery. (RT 2484, 2490.) He was promised probation for both the pretrial accessory plea and the robbery plea. (RT 2485.)

26. On defense cross-examination, Muslim denied that the police accused him of committing the Domino's robbery or killing Shane Weeks. (RT 2486-87.) When confronted with his prior preliminary hearing testimony, he admitted that at the preliminary hearing he testified that Officer Horst of the Riverside Police Department told him before he agreed to be interviewed, that the perpetrators of the Domino's robbery-homicide were going to be picked up "tomorrow or the next day" and "[e]ither you go down with them and get charged with murder or you can come down and talk with us." (RT 2488.)

27. A few minutes later, erroneously sustaining a prosecution "asked and answered" objection, the court refused to allow Muslim to answer a defense question asking whether the police had accused him of being the shooter. (RT 2503-04.)

28. Trial counsel later put his offer of proof on the record, along with his views on the relevance and importance of the rejected evidence. (RT 2522-24.)

29. The trial court's exclusion of the proffered evidence was clearly

erroneous. That evidence was highly relevant to the issues of motive to fabricate or bias. Had trial counsel been permitted to ask his questions, he would have established that the reason Muslim talked to the officers was that "they came to me saying that I was the shooter and saying – I guess trying to put it on me . . . " (PHRT 172.) Later in the preliminary hearing, Muslim continued, ". . . I was put in as the gunner already. They had me mistaken for somebody else, for, I guess, for me going in, seeing that me and Eric are the same, big, and probably the same dark skinned, almost. They had me switched with him so –" (PHRT 177.) Due to the prosecutor's objection, the jury never heard Muslim's testimony at trial that he talked to the police because they had accused him of being the shooter at Domino's.

30. That preliminary hearing testimony directly contradicted Muslim's trial testimony that the police never accused him of committing the Domino's robbery or murder. In addition, his testimony at the preliminary hearing was relevant that Muslim had a motive to fabricate or bias at the time he talked to the officers.

31. The prosecutor's "asked and answered" objections should have been overruled. Trial counsel had never asked that specific question before about Muslim being accused by police of being the shooter. Although Muslim had previously testified that he agreed to talk to the police due to Officer Horst's threat that Muslim would be charged with murder within a few days if he did not talk to them, the jury never heard that Muslim was also accused by police of being the shooter.

32. Muslim's preliminary hearing testimony was unclear about when these "shooter" accusations were made by police officers. (RT 2503-04.) At the preliminary hearing, Muslim said only that "They came to me saying that I was the shooter . . . " Trial counsel was entitled on cross-examination of Muslim to find out when that accusation was made. It might well have involved a different time and a different location. Thus, evidence was neither cumulative nor repetitive.

33. For those same reasons, the trial judge's view that trial counsel was "beating a dead horse" was equally erroneous. The questions to which the

prosecutor's objection was sustained might well have related to a different time, a different location, and a different event. The ruling on the prosecutor's objection erroneously precluded trial counsel from eliciting facts on that important point.

34. Both the trial court and the prosecutor misunderstood the state of the record about Muslim's having been accused by the police of being the shooter before he agreed to talk with them. Being accused as the shooter would have made Muslim eligible for the death penalty. The misunderstanding of the prosecutor and the trial judge prevented the jury from hearing this important piece of evidence. *See People v. Hill*, 17 Cal. 4th 800, 824-25, 952 P.2d 673, 72 Cal. Rptr. 2d 656 (1998) (the prosecutor and the trial court were both wrong on their understanding of the state of the testimony in the record). This arbitrary deprivation of Jones's state procedural protections violated Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

C. Trial Court Erred When It Refused to Allow Trial Counsel to Present Expert Testimony on Eyewitness Identification

35. On June 26, 1991, the defense filed a written motion to present testimony by Dr. Kathy Pezdek, Ph.D., about scientific research that refuted many commonly held assumptions about eyewitness testimony. (CT 522-31.) About ten months after the robbery, Christina Kane, an eyewitness, was not able to identify Jones at an in-person lineup on November 6, 1989. (RT 2408, 2434, 2420.) Fifteen months after the robbery, on April 17, 1990, she identified Alan Murfitt as the second robber at the preliminary hearing although Eric Bailey, the man whom the prosecution claimed robbed Domino's with Jones, was also present at that preliminary hearing as a defendant. (RT 2434-35, 2445, PHRT 1.) In order to provide the necessary evidentiary foundation for a "mistaken identification" defense as to the identity of the shooter, the defense wanted to introduce expert testimony to establish that eyewitness testimony, such as Kane's, has inherent weaknesses that jurors typically do not understand. (CT 525-26.)

36. The trial court, on July 10, 1991, denied the defense motion based on the prosecution's oral representations that eyewitness identification was not a key issue in their case since Jones had made admissions to others about committing the murder. (CT 577; RT 565-76; RT 592-93.) The argument on the motion focused almost entirely on the testimony of Christina Kane and the incident at Domino's. Trial counsel unsuccessfully renewed the motion on August 26, 1991, just before calling the last defense witness in the guilt phase. (RT 2895.)

37. The introduction of expert testimony on eyewitness identification is controlled in California by the case of *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). The court in *McDonald* stated, "[W]hen an eyewitness identification for the defendant is a key element of the prosecution's case, but is not substantially corroborated by evidence giving it independent reliability . . . , it will ordinarily be error to exclude that testimony." *Id.* at 377.

38. The United States Supreme Court has recognized that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). An inordinate number of wrongful convictions occur because of a fundamentally flawed, or incorrect, eyewitness identification. *See*, *e.g.*, *United States v. Smithers*, 212 F.3d 306, 311-12 (6th Cir. 2000); *State v. Henderson*, 2011 N.J. LEXIS 927 (N.J. Aug. 24, 2011). The United States Supreme Court has also granted a writ of certiori for the 2011-12 term in a similar case, *Perry v. New Hampshire*, USSC No. 10-8974, indicating that it may join the chorus of courts recognizing inherent problems with eyewitness misidentification as it affects criminal cases.[18] *See Perry v. New Hampshire*, case page, SCOTUSblog,

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[18] The *Henderson* court cited a number of decisions from around the country in which other courts have acknowledged various factors affecting eyewitness identification. *Henderson*, 2011 N.J. LEXIS 927 at *128-30. *See*, *e.g.*, *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) (confidence-accuracy relationship and

http://www.scotusblog.com/case-files/cases/ perry-v-new-hampshire (last accessed January 12, 2011).

39. There is little doubt that eyewitness identification was a key element of the prosecution's death case against Jones. The additional evidence offered by the prosecution did not substantially corroborate the claim that Jones was the shooter, nor did it give Christina Kane's identification of Jones as the shooter any independent reliability. Identifying Jones as the shooter was a necessary part of the prosecution's death case. As pled in Claims Four, Seven, and Eight in the instant Petition, the testimony of Najee Muslim, Frankie Cruz, Enrique Luna, Carlos Hunt, and Erin Burton were all unreliable and do not substantially corroborate the identification of Jones.

40. The ambiguous statements to Burton certainly do not substantially corroborate the fact that the defendant was the shooter. The conversation that she testified to in fact is ambiguous. Burton testified that in May, 1989, about four months after Weeks was shot and killed, Jones had a conversation with her about the

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memory decay), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1137, 175 L. Ed. 2d 971 (2010); *United States v. Brownlee*, 454 F.3d 131, 142-44 (3d Cir. 2006) ("inherent unreliability" of eyewitness identifications and accuracy-confidence relationship); *United States v. Smith*, 621 F. Supp. 2d 1207, 1215-17 (M.D. Ala. 2009) (cross-racial identifications, impact of high stress, and feedback); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208, 1220-22 (Ariz. 1983) (memory decay, stress, feedback, and confidence-accuracy); *Benn v. United States*, 978 A.2d 1257, 1265-68 (D.C. 2009) (citing expert consensus regarding system and estimator variables); *People v. LeGrand*, 8 N.Y.3d 449, 867 N.E.2d 374, 380, 835 N.Y.S.2d 523 (N.Y. 2007) (confidence-accuracy relationship, feedback, and confidence malleability); *State v. Copeland*, 226 S.W.3d 287, 299-300, 302 (Tenn. 2007) (weapons effect, stress, cross-racial identification, age, and opportunity to view); *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, 1113 & n.22 (Utah 2009) (citing with approval research on multiple system and estimator variables). *But see State v. Marquez*, 291 Conn. 122, 155, 967 A.2d 56 (Conn. 2009) (finding scientific literature "is far from universal or even well established" and that "research is in great flux").

Domino's Pizza robbery. (RT 2709.) Burton asked Jones, "Mike, about the Domino's Pizza thing, did you do it? Jones replied, "Yeah." (RT 2710.) Then Burton asked, "How could you do it? How could you kill someone? Don't you feel any remorse?" (RT 2711-12.) He answered, "Nah. It was a good party." (RT 2712.) Jones never told her that he personally was the one who shot Weeks. (RT 2713.) While Burton testified that Jones admitted that he was part of the Domino's "thing," in the statement she attributed to Jones he never claimed to have been the shooter. Jones's answer to Burton's second question is even more ambiguous than the first. It is not clear what part of the compound question he is responding to. Burton's testimony certainly does not substantially corroborate Kane's identification of Jones as the shooter.

41. The accomplice testimony of Najee Muslim and Frankie Cruz, requiring corroboration itself, could not substantially corroborate that Jones was the shooter. Frankie Cruz and Najee Muslim were accomplices. According to Muslim and Cruz's testimony, they were present in the parking lot of Domino's Pizza at the time the robbery occurred. (RT 2470-72.) Muslim originally suggested that they commit a robbery. (RT 2470-71, 2387, 2419-20, 2497-98.) According to Muslim's testimony, when Jones and Bailey got out of the car, Muslim believed they were going to rob someone. (RT 2472.) According to Cruz, the driver of the getaway car, he knew that Jones and Bailey were going to commit a crime when they left his car and Cruz was going to help them get away after they did it. (RT 2605-06.) Cruz claimed that he helped them get away with the robbery proceeds knowing they had robbed Domino's Pizza. (*Id.*)

42. It is undeniable that Cruz and Muslim were accomplices. Therefore, it defies reason to think that substantial corroboration could be established by evidence from an accomplice that itself is so unreliable as a matter of law that it requires independent corroboration. A jury is routinely instructed to "view the testimony of an

accomplice with mistrust."[19] CALJIC No. 3.12; *People v. Bevins*, 54 Cal. 2d 71, 76, 351 P.2d 776, 4 Cal. Rptr. 504 (1960); CALJIC No. 3.18; *People v. Terry*, 2 Cal. 3d 362, 398-99, 466 P.2d 961, 85 Cal. Rptr. 409 (1970). To allow substantial corroboration to be supplied by evidence that itself requires corroboration would be equivalent to bootstrapping.

43. The testimony of Enrique Luna was also not enough to substantially corroborate the identification of Jones as the shooter by Kane. Luna made inconsistent statements, and he received a plea bargain for his testimony. (RT 2569, 2575-76.) Furthermore, the court would be relying on admissions by Jones, which a jury is also routinely instructed to "view with caution."[20] CALJIC No. 2.70.

44. The testimony of Carlos Hunt failed to corroborate the statements of Kane at all. Carlos Hunt testified that Jones used a shotgun. (RT 2772.) This was completely inconsistent with Kane's testimony that a handgun was used. (RT 2389.) Furthermore, Carlos Hunt testified pursuant to a plea bargain and supplied only admissions by Jones. (RT 2769.) Hunt's testimony which was both tainted and inconsistent with Kane's could not substantially corroborate Kane's identification of Jones as the shooter.

45. The case of the Mad Greek robbery relies even more heavily on eyewitness identification and definitely warranted allowing an expert in that field to testify. Two witnesses identified Jones as the gunman in the Mad Greek robbery, Maria Zuniga and Lola Hall. The only corroboration for the eyewitness identifications was Najee Muslim's testimony that Jones had told Muslim that Jones was involved in the robbery. (RT 2482.) However, as discussed above, Muslim's testimony was highly unreliable. Furthermore, the statement constituted an admission by Jones, which the jurors were already instructed to view with caution. (RT 3152.)

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[19] The jury here was so instructed. (RT 3159, CT 706.)

[20] The jury here was so instructed. (RT 3152, CT 689.)

46. CALJIC No. 2.92, an instruction which was given to Jones's jury, was not a substitute for the testimony of a defense eyewitness expert. It is merely a quantitative "laundry list" of factors that may affect an eyewitness identification. It is the eyewitness identification expert testimony that provides the missing qualitative ingredient. A lawyer's argument standing alone is not an adequate substitute for a similar argument based on factual testimony by an established expert explaining to the jury the results of professional research. *People v. Vu*, 227 Cal. App. 3d 810, 278 Cal. Rptr. 153 (1991).

47. The testimony of eyewitness expert Kathy Pezdek would have been far more in depth than any jury instruction. Dr. Pezdek would have testified to the short duration of time in which the witness had to look at the perpetrator in the Domino's and Mad Greek robberies. Specifically, Dr. Pezdek would have testified that "[i]n a brief period of time a witness can observe the general characteristics of a person i.e., race, gender, size, physical build), but not the more *specific* details of the person that would be necessary for discriminating among similar looking individuals, for example, in a photo lineup. (Ex. 157, Decl. of Kathy Pezdek, Ph.D., ¶ 13 (emphasis in original).)

48. Dr. Pezdek could and would have testified about the following effects that distraction can have on an eyewitness:

> It is also important to note that when there are more sources of distraction during an incident, witnesses are more likely to confuse "who did what." For example, during the Mad Greek robbery, where there were 4 perpetrators and apparently more customers in the restaurant, it is more likely that one of the witnesses may have correctly identified an individual as one of the perpetrators, but be confused about which role each suspect played (i.e., the shooter, the guy by the door, etc.).

(*Id.* at ¶ 19.)

49. This expert testimony was especially relevant to the testimony of witness Maria Zuniga. Because Dr. Pezdek's testimony was erroneously excluded, trial counsel was precluded from attacking Zuniga's testimony in any meaningful way. The attempted murder and the issue of intent would have been impossible to prove if there was evidence that Jones was not the shooter.

50. Dr. Pezdek also would have testified about the issue of "weapon focus", which was significant in the present case with regard to the testimony of witnesses Zuniga, Kane, and Hall:

> In the present case, Maria Zuniga, Christina Kane, and Lola Hall each observed a gun in the hand of the perpetrator and could describe this weapon. Looking at the gun would have availed even less time to focus on the perpetrator's face. The gun was pointed at all three witnesses, further serving as a point of focus, and Lola Hall specifically testified to focusing on the gun as it was pointed at both her and Mr. Chegwidden. Consequently, these identifications are more likely to be inaccurate compared to the situation in which no weapon or stress were present. In addition, two of the witnesses, Christina Kane and Lola Hall saw a close friend shot during the incident. The weapon focus, combined with the high level of stress, would have impaired their memory for the shooter.

(*Id.* at ¶ 22.)

51. The limited ability of the witnesses to observe the face of a perpetrator is a significant issue in the eyewitness identification of Jones as the shooter.

52. The cross-racial nature of the identification and the time delay also significantly affected the accuracy of the identifications of all the eyewitnesses in the

present case. Dr. Pezdek clearly discusses those issues in her declaration and would have testified to the very same issues had she been allowed. This information would have been invaluable to the jurors, given the results of studies done on the failures of cross-racial identifications and the significant effect of time delay are astounding. (*Id.* at ¶¶ 24, 26.)

53. The specific suggestiveness of viewing an individual at a lineup before an in-court identification is an issue that is only truly made clear through the testimony of an expert. Dr. Pezdek's declaration is very clear about the information she would have testified to on this issue:

> In the present case, witness Lola Hall did not select Mr. Jones at the live lineup that she attended on November 6, 1989, but did identify him subsequently at the Preliminary Hearing 5-months later and then at the trial. Similarly, Christina Kane did not identify the defendant at the live lineup on November 6, 1989, but did identify him 5-months later at the Preliminary Hearing and then at the trial. Ms. Kane actually identified a different person at the lineup and stated that she was 99% certain of that identification. Thereafter, Ms. Kane was informed that she had made a mistake. Such a suggestion would affect the reliability of her later identification of Mr. Jones. In both of these situations, the suggestive influence of viewing the defendant at the live lineup – and not the familiarity of the defendant during the incident – could explain why these witnesses selected the defendant after the live lineup.

(*Id.* at ¶ 22.)

54. Lola Hall's and Christina Kane's identifications are even further called into question when these issues are considered.

55. The failure of the court to allow an expert on eyewitness observations to testify on either the Mad Greek or the Domino's robbery significantly undermined the ability of trial counsel to defend Jones. The arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

D. Trial Court Failed to Exclude Highly Prejudicial and Irrelevant Gang Affiliation Evidence

56. The trial prosecutor argued that gang evidence was relevant for three reasons. First, the prosecutor claimed that reporter Joe Vargo was going to testify that the defendant had made an admission to him regarding defendant's gang activity while Vargo was writing an article on gangs. (RT 2184.) However, Vargo did not testify.

57. Second, the prosecutor claimed that Jones had admitted the robbery of the Mad Greek was part of a gang enterprise and because the name of the gang included the numbers 211 and 187, which are the sections of the California Penal Code for robbery and homicide, the gang affiliation evidence demonstrated intent to commit attempted murder and robbery. (RT 2187.) However, this admission by Jones was not introduced as evidence during the trial.

58. Finally, the prosecutor argued that the name of the gang was "211/187 Hardway Gangster Crips," and that this name demonstrated intent to murder and rob in both the Mad Greek and Domino's pizza robberies. (RT 2182.) Throughout the trial, however, evidence was introduced that the name of the gang had changed over time. Evidence of the gang's name could only have been relevant to the issue of intent if two conditions had been met: (1) evidence was introduced that the name of the gang included the number 211 and 187 and at the time the crimes were committed, and (2) evidence was introduced that the crimes were gang-related activities.

59. The trial court agreed with the prosecutor, relying heavily on the

argument that evidence of gang affiliation was necessary to show intent relating to the name of the gang. The trial court abused its discretion by allowing the prosecutor to make this inflammatory argument.

60. Because evidence that a criminal defendant is a member of a youth gang has a "highly inflammatory impact" on the jury, trial courts should carefully scrutinize such evidence before admitting it. *People v. Cox*, 53 Cal. 3d 618, 660, 809 P.2d 351, 280 Cal. Rptr. 692 (1991); *see generally People v. Champion*, 9 Cal. 4th 879, 922-23, 891 P.2d 93, 39 Cal. Rptr. 2d 547 (1995).

61. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Cal. Evidence Code § 210. Evidence is relevant if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent or motive." *People v. Garceau*, 6 Cal. 4th 140, 177, 862 P.2d 664, 24 Cal. Rptr. 2d 664 (1993). However, membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. *People v. Perez*, 114 Cal. App. 3d 470, 477, 170 Cal. Rptr. 619 (1981); *see also Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997). And "the prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." *People v. De La Plane*, 88 Cal. App. 3d 223, 243 (1979); *People v. Cardenas*, 31 Cal. 3d 897, 905, 647 P.2d 569, 184 Cal. Rptr. 165 (1982).

62. The term "prejudicial" is not synonymous with "damaging." The "prejudice" referred to in California Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against the party as an individual and that has very little effect on the issues. *People v. Karis*, 46 Cal. 3d 612, 638, 758 P.2d 1189, 250 Cal. Rptr. 659 (1988).

63. The prosecutor's view of his case conveniently changed depending on the issue he was arguing at the particular moment. For example, when the issue to be decided by the trial court was the admission of defense testimony by an eyewitness

expert, the prosecutor's view of his case was that eyewitness identifications played no part in his case because he had strong evidence that Jones admitted to third persons that he had committed the crimes with which he was charged. (RT 565-76.) And when the defense wanted to sever the various counts for trial, the prosecutor argued that in "none of these particular [counts] is there a substantial weakness." (RT 128-30.) But when the issue was admission of evidence of gang affiliation, the prosecutor's evidence about Jones's admissions to others of his culpability suddenly lost its strength and gang affiliation evidence was, according to the prosecutor, necessary to prove planning and execution of the crimes. (RT 2184-85, 2178-80.) After the trial was over, the prosecutor once again urged, in opposition to Jones's new trial motion, that eyewitness identification was not important because Jones had confessed to others. (RT 3831-32.)

64. Although the prosecutor promised much in his offer of proof upon which the trial court based its ruling that the gang membership evidence was relevant, he produced none of the foundational evidence at trial that he claimed would have made the gang affiliation evidence relevant. Apparently at the time he promised the court that he would produce the reporter's testimony linking Jones to the Domino's robbery as a gang activity, he hadn't yet talked to the reporter, Joe Vargo. Vargo successfully asserted the "Reporter's Shield" law and did not testify at trial. (RT 2858, 2812-24.)

65. With regard to Jones's purported statements to police officers that the Mad Greek and Domino's robberies were gang activities, the jury heard no evidence whatsoever of any statements made by Jones to police officers.

66. There was no evidence that either the Mad Greek or the Domino's robbery was planned as a gang activity.[21] There was no evidence at all about any

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[21] Thomas Chegwidden did testify over defense objection that the blue or dark clothing the robbers wore indicated to him that there was gang involvement. (RT 2300.) But there was no evidence introduced at the guilt phase that blue or dark clothing related to any gang. (RT 3562.) Chegwidden's state of mind about gang

planning of the Mad Greek robbery. All of the evidence relating to the Domino's robbery showed that it was not a gang activity. The evidence at trial suggested that the robbery took place only because the five young men in the car that night did not have enough money to get into a party, which had nothing to do with gang affiliation.

67. According to the testimony of Frankie Cruz, three of the five people in the car the night of the Domino's incident, when the decision was made to commit a robbery to obtain money to get into the party, were not members of the Hard Way Crips. (RT 2592, 2587, 2611, 2606, 2609.) He claimed that only Jones and Eric Bailey were members. (RT 2592, 2587.) If it was necessary to show that Jones and Bailey were long-time friends and associates, there was a photograph available of the two men together and testimonial evidence that they previously hung out together with a third person and called themselves "Three the Hard Way." (RT 2603, 2496, 2588.)

68. Ultimately, evidence of premeditation and deliberation played no part in Jones's murder conviction. The prosecution elected to go to the jury only on a felony-murder theory, which required no proof of premeditation or deliberation. (RT 2956-58.) At the point where the prosecution elected to proceed on only a felony-murder theory, the trial court should have struck all of the evidence sua sponte, including the gang evidence, which had previously been admitted on the premeditated murder theory. Once the prosecutor made the decision to proceed solely on the felony murder theory, such evidence was clearly irrelevant. Cal. Evidence Code § 352; *People v. Hall*, 41 Cal. 3d 826, 834-35, 718 P.2d 99, 226 Cal. Rptr. 112 (1986); *People v. Jackson*, 18 Cal. App. 3d 504, 509, 95 Cal. Rptr. 919 (1971). Before that decision by the prosecution when guilt-phase instructions were being settled, the jury

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involvement in the Mad Greek robbery was irrelevant. He did not testify that gang involvement played any part in his failure to identify Jones. (RT 2286-02.) He gave suspected gang involvement as his reason for trying to maintain a low profile during the robbery. (RT 2300.)

heard gang association evidence from three different prosecution witnesses.

69. Najee Muslim, Enrique Luna, and Frankie Cruz, each testified that Jones was a member of the "211/187 Hard Way Gangster Crips." (RT 2463, 2561, 2586-87.) As a result of their testimony, the jury learned that the gang was formed before the Domino's robbery. (RT 2464.) Eric Bailey, Jones, and someone named Montrell, formed the gang with a few other kids from around the neighborhood. (RT 2496, 2588.) It was originally just three guys that hung around together and called themselves "Three the Hard Way." (RT 2603, 2496.) Later, the gang was usually called "211 Hard Way." (RT 2574.) No date was given for when the name change occurred.

70. Frankie Cruz, the non-gang member who committed suicide sixty days after testifying at the preliminary hearing, testified in his preliminary hearing transcript, which was read to the jury over defense objection, that when he used to go to the Villarreal house, "gang members" Eric Bailey, Mario Villarreal, "Bomber," and Jones used to talk about robberies. (RT 2624-25, 2529, 2539, CT 574.) They said they were going to do a "jack move," which means a robbery. (RT 2562.) But, if it was important to prove that Jones and others at some unspecified time talked about committing unidentified robberies – a contention with which Jones strongly disagrees – smearing them with a "gang" label did not add anything to Cruz's description of those conversations and it should have been redacted. At the time of Cruz's testimony at the preliminary hearing, gang activity was important because Jones had not yet pled to the gang charge alleged against him. By the time of trial, that was no longer an issue. Clearly, evidence of gang association had no relevance to any issue in the case, or any slight relevance it might have was overwhelmingly outweighed by its prejudicial effect. Gang evidence in the present case shed no light on the issues of motive, identification, or any of the other grounds upon which it is sometimes admitted. It served only to inflame the jury against Jones.

71. Normally, errors in admission of gang evidence in California are

measured by the prejudice standard of *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956). *People v. Price*, 1 Cal. 4th 324, 433, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991); *People v. Perez*, 114 Cal. App. 3d 470, 479, 170 Cal. Rptr. 619 (1981). Here, however, because the error arose as the result of prosecutorial misconduct when the prosecutor misled the trial court in his offer of proof in support of his motion to admit the gang evidence, the error must be reviewed under the *Chapman* standard because the erroneous admission of that evidence resulted in an unfair trial, denial of due process, and denial of a reliable determination of penalty under both the federal and California constitutions.[22] *See generally*, *People v. Hill*, 17 Cal. 4th 800, 823-27, 952 P.2d 673, 72 Cal. Rptr.2d 656 (1998). The California Supreme Court failed to apply the proper standard to their review of the evidence on this particular matter. *People v. Jones*, 30 Cal. 4th 1084, 1114-17, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003).

72. The prosecutor's offer of proof in support of his in limine motion to mention gang membership in his opening statement and to admit gang membership evidence at trial was deceptively based on misrepresentations to the trial court. Some of those misrepresentations involved misrepresentations of fact and some involved misrepresentations of intent to present certain evidence as part of his case-in-chief. An offer of proof is just that: a statement of what the prosecutor intends to prove in his or her case-in-chief.

73. The prosecutor misled the trial court when he represented that he intended to use Jones's statement to police in his case-in-chief. He told the court, in relevant part, "[I]n fact he [Jones] was specifically asked by law enforcement, did you have anything to do or did your gang have anything to do with the Mad Greek or with a fast food restaurant? And Mr. Jones says, you mean the Mad Greek? And the officer said, yes. And he said, yeah, we robbed that, saying we robbed that and went

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[22] When errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under the *Chapman* standard. *People v. Williams*, 22 Cal. App. 3d 34, 58-59, 99 Cal. Rptr. 103 (1971).

on to explain that it was a gang action so to speak. . . . " (RT 2186-88.) As it turned out, the prosecutor presented no evidence, in his case-in-chief or otherwise, of any statements Jones made to police officers on November 1, 1990, the date he was arrested.

74. First, the use of deceptive methods requires no showing that the prosecutor acted in bad faith, nor is a showing of good faith a defense. *People v. Price,* 1 Cal. 4th 324, 447, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991), citing *People v. Bolton*, 23 Cal. 3d 208, 214, 589 P.2d 396, 152 Cal. Rptr. 141 (1979). Second, there is a very real strategic reason that the prosecutor did not intend from the outset to introduce in his case-in-chief evidence of Jones's statements to police after he was arrested.

75. If the prosecutor inquired in his case-in-chief about post-arrest statements Jones made to police officers, the defense was entitled to cross-examine. The prosecutor could not count on the trial court's limiting defense cross-examination only to statements about the Mad Greek robbery, because the officer also mentioned fast food restaurants in his question, which would have included Domino's. If the defense had been allowed to go into all of Jones's post-arrest statements to police, then the jury would have learned that Jones also told police that he was not inside Domino's when it was robbed by Eric Bailey and Andre Davis, and that Davis was the person who shot and killed Shane Weeks. (RT 3830, 2499-2500, CT 525.) This would have allowed the defense to get its version of the Domino's events to the jury without Jones having to testify and subject himself to prosecution cross-examination. Thus, there is an extremely strong inference to be drawn that the prosecutor never intended to use Jones's post-arrest statements in his case-in-chief at the time of his offer of proof.

76. The prosecutor misled the trial court with his representation that Joe Vargo, a newspaper reporter from the Press Enterprise, was going to testify that Jones admitted killing someone. (RT 2184.) It may have been true that the prosecutor

wanted Vargo to testify, but the prosecutor couldn't honestly represent to the court that Vargo was going to testify. Obviously, the prosecutor hadn't interviewed Vargo before he represented to the trial court that Vargo had agreed to testify because Vargo successfully asserted the Reporter's Shield law and did not testify. (RT 2858, 2812-24.) Thus, the prosecutor's representation that Vargo had agreed to testify was false.

77. In another instance, at the time the court ruled that the prosecution could adduce evidence of gang membership, the trial court was under an obvious misapprehension that the prosecution evidence would show that gang hand signals were used during the two robberies. The court said, "I can envision the – if hand signals are, in fact, a part of a particular way that this group acts [during these robberies], and those – there's witnesses that apparently will testify about hand signals, this is consistent with the intent of this gang and also would seem to be relevant in showing a particular motive or way that this – that Mr. Jones acts. " (RT 2193-94.)

78. In fact, there was no evidence that gang hand signals were used during either of the two robberies involved here, and the prosecutor knew it. Rather than jeopardize a favorable ruling, however, the prosecutor remained silent and left the trial judge believing the truth of his misperception. By mere happenstance, three days later, on August 5th, just before opening statements, the topic of gang hand signals arose again in the context of a defense objection to a photograph of Jones and Bailey that the prosecution wanted to introduce that contained gang hand signals. (RT 2223.) In the ensuing colloquy the prosecutor finally admitted that he had no evidence that gang hand signals were used during the two robberies. (RT 2224.) However, the prosecutor not only allowed the trial court's misperception to linger uncorrected for three days, but also let pass another opportunity to alert the court that it had erroneously relied upon this fact in ruling on the gang evidence.

79. Although the jury did not hear any evidence about gang hand signs in the mass of other gang evidence they heard, the fact that the prosecutor did not

immediately correct the trial judge's obvious misperception when it occurred is strong probative evidence of the prosecutor's intent to deceive or mislead the court in order to have highly prejudicial gang membership evidence improperly put before the jury.

80. There is significant evidence that the prosecutor exercised undue influence over the witnesses regarding the name of the gang. During Najee Muslim's initial testimony at the preliminary hearing he identifies the name of the gang as the "211 Hard Way Crips" and does not make any reference to the name "211/187 Hard Way Gangster Crips." (PHRT 151.) The prosecutor subsequently completed his direct examination of Muslim and cross examination began. (PHRT 170-71.) Before cross examination of Muslim was completed the proceedings were adjourned for the day. (PHRT 182.) When proceedings resumed, the prosecutor requested to reopen his direct examination and Muslim suddenly recalled the name of the gang as being "211/187 Hard Way Gangster Crips." (PHRT 184.) It is clear that the prosecutor spoke with Muslim during the break and it is reasonable to believe Muslim's memory was influenced by that conversation. The trial judge would later state that the gang evidence would be examined differently if the name was just "211 Crips:"

> I mean the point is though, if the gang was called the 211 Crips, then maybe I have a different viewpoint. If they're called the 211/187 Crips, to me, that is some indication of a certain type of intent or motive or the way they're going to go about their business of doing robberies, so that's how I see that that can become relevant. . .

(RT 2201.)

81. The undue influence of the prosecutor had a significant effect on the admissibility of the gang evidence in this case.

82. Finally, contrary to the prosecutor's offer of proof, there was no evidence that either of the two robberies were gang enterprises. At the time the

prosecutor represented to the court that the two robberies were gang activities, he knew from the preliminary hearing testimony that the Domino's robbery was a spur of the moment affair, with no advance planning, so that the five young men could obtain money to go to a party. Three of the five men involved were not members of the same gang as Jones. And as to the Mad Greek robbery, he presented no evidence that robbery was a gang enterprise or involved other members of Jones's gang. Other than Jones's post-arrest statements to police, there was apparently no such evidence.

83. In sum, the prosecutor presented none of the evidence upon which his offer of proof was based. The fact that the prosecutor produced none of the evidence upon which he based his offer of proof and failed to alert the court about this strongly points to the fact that he intentionally misled the trial court in his offer of proof. It is well established that evidence of subsequent conduct is relevant to preexisting intent. *People v. Garceau,* 6 Cal. 4th 140 at 183. Accordingly, because the gang evidence was admitted as a result of the prosecutor's misrepresentations to the court, *Chapman* is the proper standard of review.

84. On the merits, either alone, or in conjunction with other errors, the error here was not harmless beyond a reasonable doubt. The only purpose and effect of the gang membership evidence was to show that Jones was a bad person with a criminal disposition who was, therefore, likely to have committed the charged crimes as the shooter and who should therefore die rather than spend the rest of his life in state prison.

85. As previously shown in this argument, although the prosecutor produced none of the foundational evidence at trial that he promised in his offer of proof upon which the trial court relied in ruling that the gang membership evidence was admissible, he strongly rang the gang bell with the jury in the very first substantive part of his opening statement, making it virtually impossible, as a practical matter, for the trial court to effectively reverse its ruling because the gang bell could not effectively be un-rung. (RT 2244.) Since none of the foundational evidence making

the gang membership evidence relevant was forthcoming, the sole effect of that evidence was to show that Jones had a criminal disposition or bad character as a means of creating an inference that he committed the charged offenses as the shooter.

86. Here, the jury learned through the testimony of Frankie Cruz that gang members used to talk about committing robberies. But that evidence was not connected to any evidence in this case about the two charged robberies. It was simply left that members of this gang had a propensity to commit or talk about committing robberies. Thus the jury could only speculate about any connection. The jury almost certainly viewed Jones as more likely to have committed the violent offenses charged against him because of his membership in a Crips gang. *People v. Cardenas*, 31 Cal. 3d at 906.

87. Finally the prejudice suffered by Jones from admission of the irrelevant gang membership evidence is manifest due to the misuse the prosecutor made of that highly prejudicial evidence. He improperly argued to the jury in his closing final argument in the guilt phase:

> You decide how to use that [evidence of gang membership]. And the reason, like I told you before, the reason why you heard that is because of the name of that gang and the formation of that gang *immediately before these two crimes occurred*. [¶] 211/187 Hard Way Gangster Crips, that tells you all you need to know about what he was thinking and the other guys involved in that gang were thinking when they went out and committed crimes. They were going to do a robbery and a murder. So what have you heard about in this case? A robbery and attempted murders and a murder. Is that a coincidence they named their gang 211/187 Hard Way Gangster Crips *and the next month* they go out and commit this crime, a 211 and a 187?

(RT 3125-3126 (emphasis added).)

88. The prejudice to Jones from the prosecutor's misuse of the highly inflammatory gang membership evidence was patently obvious. Not only did he mislead the trial court in order to obtain an order permitting admission of that evidence, he misled the jury about it's impact in his closing final argument in the guilt phase. *See People v. Hill*, 17 Cal.4th at 827-828.

89. There was no evidence that the gang was formed or named "211/187 Hard Way Gangster Crips" either "immediately" before the Mad Greek or Domino's robberies. Similarly, there was no evidence that the gang was formed or named a month before the Domino's robbery. The only evidence on that issue that the jury heard was Najee Muslim's testimony the he did not remember the exact year the gang was formed, "but it was a while back." (RT 2463-64.) Frankie Cruz recalled that the gang started "somewhere in 1988." The prosecutor invented the proximity of the gang formation and naming to the date of the two robberies with no foundation. Both Muslim and Cruz testified that the gang was originally named Three the Hard Way. (RT 2603, 2496.) No witness testified as to when the name of the gang was changed. Indeed, it is just as likely that the name of the gang changed after the incidents at the Mad Greek and Domino's occurred.

90. It must be concluded that the erroneous admission of the gang membership evidence was not harmless beyond a reasonable doubt. If the prosecutor went to such extreme efforts to place that irrelevant and highly prejudicial evidence before the jury, and then misused it to win a conviction, the error be harmless beyond a reasonable doubt because it played no part in Jones's conviction. As noted in *People v. Powell*, 67 Cal. 2d 32, 57, 429 P.2d 137, 59 Cal. Rptr. 817 (1967), a case reversing under *Chapman*, "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." *See also*, *People v. Louis*, 42 Cal. 3d 969, 995, 728 P.2d 180, 232 Cal. Rptr. 110 (1986). Thus, since Jones was denied the fair trial, due process, and reliable determination of

guilt and penalty guaranteed to him by the federal constitution, relief must be granted.

91. The arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

E. The Trial Court Committed Error When It Allowed the Jury to Hear Testimony of Prior out of Court Statements by Both Najee Muslim and Enrique Luna

1. The Trial Court Erroneously Admitted Evidence of Muslim's Statements to the Police

92. After Muslim had concluded his testimony, the prosecutor offered the testimony of Officer Portillo. (RT 2636.) At a hearing outside the presence of the jury, the prosecutor stated that Officer Portillo would testify that Muslim's statement to police officers on October 27, 1989, was the same as his trial testimony, and that statement was taken before Muslim's deal with the prosecutor on the robbery and accessory charges was reached on March 14, 1990. (RT 2647, 2661-2663.) The prosecutor contended that Portillo's testimony was admissible under Evidence Code sections 1236 and 791 as prior consistent statements to overcome the defense claim that Muslim's testimony was fabricated or biased due to his plea agreement with the prosecution. (RT 2636-37, 2643.)

93. The defense objected based on the fact that Muslim had testified that Officer Horst threatened to charge him with murder before Muslim agreed to talk to the two officers. (RT 2488.) Overruling the defense objection that Muslim's bias or motive to fabricate predated his statement to police officers, the trial judge allowed Officer Portillo to testify. (RT 2644-45.) Officer Portillo's testimony about the statement Muslim made to him on October 27, 1989, was consistent with Muslim's trial testimony. (RT 2662-71.)

94. California Evidence Code section 791, subdivision (b), allows admission of prior consistent statements only where "the statement was made before the bias,

motive for fabrication, or other improper motive is alleged to have arisen." The party attempting to use prior consistent statements has the burden of proving that no improper motive existed at the time the statements were made. *People v. Frank*, 51 Cal. 3d 718, 733, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990); *People v. Coleman*, 71 Cal. 2d 1159, 1165-66, 459 P.2d 248, 80 Cal. Rptr. 920 (1969). Here, although the defense had improperly been precluded by the prosecutor's unfounded objections from showing that Muslim had been accused by the police in October 1989 of being the shooter, that burden shifted to the prosecution when it offered Portillo's evidence of Muslim's purported prior consistent statement. The prosecutor was required to prove as a condition of admissibility that no improper motive existed at the time Muslim's statement was made. *See People v. Hamilton*, 48 Cal. 3d 1142, 1168, 774 P.2d 730, 259 Cal. Rptr. 701 (1989) (prosecutor failed to prove absence of prior existence of bias or motive to fabricate). Thus, before Portillo's testimony was admissible the prosecutor had to prove that Muslim was *not* threatened with a murder charge by Officer Horst or that Officers Horst and/or Portillo did *not* accuse Muslim of being the shooter prior to Muslim's alleged prior consistent statement.

95. The prosecutor's offer of proof, and the proof itself, failed to show that there was no motive for fabrication or bias at the time Muslim made his purported prior consistent statement to police. The proof showed that Muslim's motive to fabricate arose the minute he was threatened by Officer Horst with being charged with the murder. The threats occurred before Muslim talked to the police. In addition, as the defense offer of proof set out in the previous subsection showed, Muslim was also accused by police at some point of being the shooter. Thus, the prosecutor failed to show, indeed could not show, that Muslim's October 1989 statements to the police, offered as prior consistent statements, were made before Muslim had a bias or motive to fabricate.

96. The prosecutor's offer of proof did not address Horst's threats to charge Muslim with murder, which precipitated Muslim's agreement to speak with the two

police officers. Instead, the prosecutor merely showed that Muslim's October 1989 statement occurred before he reached a plea agreement with the prosecutor on March 14, 1990, prior to the preliminary hearing. (RT 2647, 2642, 2660-63.) The prosecutor also did not address the fact that the police accused Muslim of being the shooter. Muslim had a strong motive at the time of his October 1989 interview with police to minimize his own knowledge and participation and to maximize the participation of others. Accordingly, the testimony of Officer Portillo about Muslim's October 1989 interview with Riverside police was erroneously admitted.

2. The Trial Court Erroneously Admitted Testimony about an August 1989 Police Interview with Enrique Luna

97. Enrique Luna was not with Jones on the night of the Domino's robbery. However, at trial Luna testified about conversations he had with Jones after the robbery in which he claimed that Jones had admitted that he killed Weeks. (RT 2562, 2565, 2580, 2561.) Luna also testified that Jones later sold the .22 revolver used in the robbery. (RT 2566-67.) The trial court's erroneous admission of testimony about a purported prior consistent statement by Enrique Luna to police officers in August 1989 gave Luna's trial testimony a false aura of veracity.

98. During Enrique Luna's direct examination, the prosecutor brought out the fact that on September 14, 1990, Luna pled guilty to a robbery charge and also that he had not yet been sentenced. (RT 2567.) Defense cross-examination established that Luna was to receive five years probation for his robbery conviction. (RT 2576.) The defense also established that Luna talked to the police in August 1989 because they accused him of being the murderer at Domino's. (RT 2574.)

99. Later, the prosecutor offered testimony by Officer Mark Boyer about an interview Boyer had with Luna on August 29, 1989. (RT 2716.) Over defense objection, the court allowed the testimony. (RT 2717-19.) Boyer was allowed to testify that Luna told Boyer that Jones told Luna that he [Jones] shot the clerk as he was leaving Domino's. (RT 2724.) Luna also said that Jones told Luna that he had

received about $10.00. (RT 2726.)

100. Just as in the Najee Muslim instance in the preceding argument, the trial court erroneously admitted the purported prior consistent statement. Luna's motive for fabrication existed at the time he talked to Boyer in August 1989 because the police had accused Luna of being the murderer at Domino's. (RT 2574.) Thus, evidence of Luna's August 1989 statement was inadmissible hearsay that did not come within the "prior consistent statement" exception to the hearsay rule. Trial counsel's objection was timely and should have been sustained. This arbitrary deprivation of Jones's state procedural protections violated Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

F. The Trial Court Erred When It Denied Jones's Request to Call an Expert Witness to Demonstrate That the Sentence That Prosecution Witness Najee Muslim Received in Exchange for His Testimony Was a Substantial Departure from the Normal Sentence, Considering the Charge

101. The defense wanted to call as an expert witness a member of the Public Defender's Office who did the plea bargaining for that office "and [who] probably handles more case dispositions . . . than anyone else in this County and has a great deal of experience in dealing with armed 211's." (RT 2866.) That witness would have testified that to get probation on an armed robbery was rare. (RT 2866.) That evidence was important to the defense to show the jury that Muslim received substantial consideration from the prosecution in return for sticking to his story.

102. The prosecutor objected on California Evidence Code section 352 grounds because, he claimed, to effectively cross-examine he would have to get into the circumstances of the offense. (RT 2866-67.) The prosecutor stated to the court that Muslim was not armed when he committed the robbery. (RT 2866.) This claim by the prosecutor was false. The evidence regarding the initial charge against Muslim and declaration in support of the warrant issued for his arrest clearly indicate that he was the shooter. (Ex. 87, 88.) The declaration in support of Muslim's arrest

warrant signed by Diane Harrison clearly states:

> Muslim admitted he had taken the Buick Regal at gunpoint from a person in Riverside . . . Beamon claimed not to have actually stolen the Villela car, but he knew Muslim had made the driver give up the keys at gunpoint, and he named the other individuals involved.

(Ex. 87, Declaration in Support of Arrest Warrant filed on December 15, 1989, in *People v. Najee Muslim*.) The prosecutor misrepresented the facts of Muslim's robbery to the court.

103. The trial judge, based on personal experience, held that straight probation on an armed robbery conviction in Riverside County was not a rare or unusual occurrence. (RT 2867.) He ruled that the defense could not call that witness because "whatever relevance that might have or probative value is so slight when compared with the confusing the issues and misleading the jury." (RT 2867.) However, the court's ruling was based on inaccurate information provided by the prosecutor.

104. It is well established that California "[E]vidence Code section 352 must bow to the federal due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense." *People v. Reeder*, 82 Cal. App. 3d 543, 553, 147 Cal. Rptr. 275 (1978) (emphasis in original). This is because the law on the admissibility of evidence is subject to a defendant's federal due process and Sixth Amendment rights to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

105. The section 352 balancing test is especially critical where a defendant's life is at stake. Courts have recognized that "[c]apital cases are different." *In re Carpenter*, 9 Cal. 4th 634, 646, 889 P.2d 985, 38 Cal. Rptr. 2d 665 (1995); *Gardner v. Florida*, 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *Gregg v.*

Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *United States v. See*, 505 F.2d 845, 853, n.13 (9th Cir. 1974). "Death is indeed different, for the state's execution of a human being as a penal sanction is both final and irreversible, modern society's most serious criminal penalty. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Gardner v. Florida*, 430 U.S. at 358 (because of finality and severity of the death penalty, "[i]t is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). Where the evidence is relevant and has more than slight probative value, the discretion of the court should favor the defendant who seeks to have the evidence admitted because of the defendant's due process right to a fair trial. *People v. Burrell-Hart*, 192 Cal. App. 3d 593, 599, 237 Cal. Rptr. 654 (1987).

106. Here, Muslim was the only live witness at trial who was in Cruz's car with Jones at the time the Domino's Pizza robbery was committed. His credibility was probably the single most crucial issue in this case. To deprive Jones of the opportunity to present evidence that Muslim's disposition of straight probation for a robbery conviction was unusual was to deprive him of the right to present a defense. In weighing the credibility of Muslim's testimony, Jones was entitled to have the jury hear just how much the prosecution paid for that testimony. Without evidence that Muslim's robbery disposition was unusual, the jury had no yardstick against which to measure their knowledge of Muslim's agreement with the prosecution or to properly understand its significance. Muslim was charged with that robbery in September 1989. (RT 2488.) His crime partner, John Isaacs, got three years in state prison for the same crime. (PHRT 345, 353-54, 359-60.) This arbitrary deprivation of Jones's state procedural protections violated Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

G. The Trial Court Erred When It Allowed the Joinder of the Mad Greek and Domino's Robberies

107. The joinder of the cases of the Mad Greek robbery and the Domino's robbery prejudiced Jones in a number of ways. On March 1, 1991, Jones filed a motion to sever the counts of his trial with the court. (CT 266.) On April 22, 1991, the government filed an opposition to the motion to sever the counts. (CT 365.) The motion was argued on May 3, 1991. (CT 445.) The court issued an oral ruling on that same day, denying the motion with prejudice. At the time of the motion to sever, Jones had not yet pled to the Flats incident or the gang allegations.

108. The court's denial of Jones's motion with prejudice is entirely inappropriate. That ruling by the court prevented the bringing of a subsequent motion to sever the counts after Jones had pled to the Flats incident or the gang allegations. The court also subsequently ruled that, despite the plea on the gang allegations, Jones's participation in a gang would be admissible to prove intent. The court's ruling on this issue was erroneous, and a more complete discussion of the objections are raised above.

109. It was clear from that ruling that the gang evidence would be admissible only where it was necessary to prove intent. While it was necessary to prove intent as an element of the attempted murder charge during the Mad Greek robbery, it was not necessary to prove intent for the felony murder charge of the Domino's incident.

110. The joinder of the Mad Greek robbery and the Domino's robbery was not objected to after these rulings. However, the joinder was extremely prejudicial. The highly prejudicial gang evidence may have been relevant to charges related to the Mad Greek robbery, but not to the charges related to the Domino's robbery. Gang evidence is so prejudicial as to warrant special care by the courts. In Jones's case it is unreasonable to expect that a jury could limit gang evidence, which was relevant to the commission of one crime, to proof of that crime alone. In such a situation severance is appropriate. *United States v. Massa*, 740 F.2d 629, 645 (8th Cir. 1984).

Failure to sever inappropriately joined counts violated Jones's right to a fair trial. *United States v. Lewis*, 787 F.2d 1318 (9th Cir. 1986); *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000).

H. Conclusion

111. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

SIXTH CLAIM FOR RELIEF FOR TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY AT THE GUILT PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: (1) the trial court failed to instruct the jury regarding the element of intent for the felony murder special circumstance; (2) the trial court misinstructed the jury on the issue of accomplice liability; and (3) jury instructions were given in the guilt phase that individually and collectively could have been understood by a reasonable juror as precluding the jury from considering the benefits Najee Muslim, Frankie Cruz, and Enrique Luna received from the prosecution in return for their trial testimony.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this

Petition by reference as though fully set forth herein.

A. Trial Court's Failure to Instruct on the Element of Intent for the Felony Murder Special Circumstance

4. In *People v. Anderson*, 43 Cal. 3d 1104, 1142, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), the California Supreme Court held that intent to kill is not an element of the felony-murder special circumstance when the defendant is the actual killer. However, there is one important exception: "When the defendant is an aider and abetter rather than the actual killer, intent must be proved." *People v. Anderson*, 43 Cal. 3d at 1147.

5. In carving out the requirement of an intent-to-kill instruction where defendant is charged as an aider and abettor, the *Anderson* court "relied heavily" on the United States Supreme Court's interpretation of Eighth Amendment principles in the then-recent decision of *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). *People v. Anderson*, 43 Cal. 3d at 1139, citing and discussing *Enmund v. Florida*. In *Enmund*, the Supreme Court conducted an exhaustive examination of the death row population and concluded that there was ample basis for finding "society's rejection of the death penalty for accomplice liability." *Id.* at 794. Accordingly, the *Enmund* court held that the Eighth Amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Cabana v. Bullock*, 474 U.S. 376, 378, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1982), citing *Enmund v. Florida*, 458 U.S. at 797.

6. Construing and further explaining the holding in *Enmund*, the *Cabana* court held that a death sentence must be reversed where the "jury could have found [defendant] guilty of capital murder solely on the basis of his participation in a robbery in which he had aided and abetted someone else who had killed." *Cabana v. Bullock*, 474 U.S. at 382. The court based its reasoning on the premise that the "jury

instructions did not require a finding of any intent to kill on [defendant's] part, nor did they require the jury to find that [defendant] actually killed"; and further, that apart from the felony-murder finding itself, the instructions "nowhere required the jury to make any further findings regarding [defendant's] personal involvement in the killing. Thus it was quite possible that the jury had sentenced [defendant] to death without ever finding that he had killed, attempted to kill, or intended to kill." *Id.* at 382. As a result, based on the *Enmund* requirement as interpreted in *Cabana*, the Eighth Amendment "prohibited execution of a defendant absent such findings by the trier of fact." *Cabana v. Bullock*, 474 U.S. at 382.

7. In the present case, a fair-minded juror could have understood the court's instructions to mean that, if Jones merely participated in the robbery without being the actual shooter, he still could be found guilty of the felony-murder special circumstance based on his knowing participation in the robbery, regardless of whether or not he actually intended to kill. Similarly, because there were no other instructions which required the jury to find that Jones had necessarily fired the weapon which killed the victim or inflicted any bodily injury upon him, or that Jones himself intended to kill or to assist the actual shooter in the killing of victim, the special-circumstance jury instructions given in the instant case evidence a failure of the jury to necessarily find that Jones "killed, attempted to kill, or intended to kill." Accordingly, even though Jones may have been guilty of capital murder "as defined by state law," nevertheless, "the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty on . . . a class of murderers who did not themselves kill, attempt to kill, or intend to kill." *Cabana v. Bullock*, 474 U.S. at 385.

8. In the instant case, the evidence showed that there were two individuals who entered the Domino's restaurant and took part in the robbery, while others waited outside in the car, assisted in the getaway, and shared the loot. As to the two individuals who did enter the restaurant, only one of those individuals displayed a

gun and shot and killed Shane Weeks. The other person, although taking part in the robbery, did not threaten Weeks in any way. Moreover, the killing of Weeks occurred after the money had been taken in the robbery, and was essentially a "random" act of violence that had no necessary connection to the robbery. (RT 2429.) Consequently, while the person who actually shot the Domino's clerk would necessarily have been liable for first-degree felony-murder and for the felony-murder special circumstance, the second robber who entered the restaurant and those who waited outside or assisted the getaway and shared in the proceeds could well have been subject to the *Enmund* exception, since they were all arguably aiders and abettors in the robbery, but who lacked the intent to kill.

9. Christina Kane was unable to reliably identify the second robber. Moreover, as to admissions introduced specifically against Jones, there was evidence that in at least one important instance – the admission to Jones's girlfriend Erin Burton – Jones may have said that he "did the Domino's thing," but he did not admit that he shot and killed the victim. (RT 2710.) This statement allows for the argument that Jones was involved without being the actual shooter. However, without the appropriate instructions, such an argument would be ineffective.

10. Thus, there was evidence in the case that Jones had been present at the Domino's robbery and had aided and abetted the robbery but had not actually shot the victim and was not therefore the "actual killer." The defense had requested a jury instruction that would have required them to find "that the defendant intentionally killed the victim." (RT 2973.) However, the prosecution objected, and the court refused to give the requested intent-to-kill instruction. (RT 2977.) Similarly, the court refused to give the bracketed portion of CALJIC No. 8.80 which would have instructed the jury that, if they did not find Jones to be the actual killer, then they "must also find beyond a reasonable doubt that the defendant participated in the robbery with 'the intent to kill.'"

11. Jones incorporates herein by reference Claim Four. Applying the rules

set forth in *Enmund* and *Cabana*, the trial court erred by refusing to give the defense instruction on intent to kill and by deleting from the CALJIC instruction the bracketed phrase requiring the jury to find intent to kill when a defendant is guilty of felony-murder on an aiding-and-abetting theory.

12. Moreover, the killing in the instant case is not excluded from *Enmund*'s embrace by *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), which refuses to apply *Enmund* to a situation in which the defendant, although not the actual killer, was "a major actor in a felony in which he knew death was highly likely to occur." *Id.*, 481 U.S. at 154. The Domino's robbery-murder clearly lacks the compendium of "aggravating" factors which were present in *Tison*. Additionally, if Jones was present at the scene as one of the people who waited in the car or as the second non-shooting robber, then *Tison* would not apply because of the lack of intent to kill.

B. Trial Court's Failure to Properly Instruct the Jury on the Issue of Accomplice Liability Regarding Najee Muslim and Frankie Cruz

13. The court submitted the issue of whether Najee Muslim and Frankie Cruz were accomplices to the jury. (RT 2184-85, CT 699-708.) There was more than ample evidence from which the jury could have concluded that Frankie Cruz and Najee Muslim were accomplices in the Domino's incident from the inception. They were present in the parking lot of Domino's Pizza at the time the robbery occurred. (RT 2470-72.) When Jones and Bailey got out of the car, Muslim believed they were going to rob someone. (RT 2472.) Cruz, the driver of the getaway car, knew that Jones and Bailey were going to commit a crime when they left his car and Cruz was going to help them get away after they did it. (RT 2605-2606.)

14. However, it was not a certainty that the jury would find that they were accomplices from the inception. There was no evidence that Najee Muslim or Frankie Cruz specifically knew when they arrived at the shopping center that night that Domino's was the specific place that was going to be robbed. (RT 2470-71,

2387, 2419-20, 2497-98.) But there was evidence, if the jury found that Muslim and Cruz were not accomplices from the inception, that they were accomplices because they were late-joining aiders and abettors. When Jones returned to the car after the Domino's robbery, Muslim and Cruz knew the Domino's robbery, and a shooting, had occurred and helped Jones leave the robbery scene with the robbery proceeds by driving him away and later shared in the proceeds by having their way paid into the party by Jones. (RT 2474-77, 2599, 2601-02.)

15. The jury was improperly instructed because the accomplice instructions given did not inform the jury that, in the event they found that Muslim and Cruz were not accessories from the inception, accomplice status based on late-joining aiding and abetting could be predicated on that conduct. Jones was prejudiced because there is a reasonable likelihood that based on the instructions given, the jury found that Muslim and Cruz were not accomplices to the Domino's robbery and therefore did not view their testimony with the requisite distrust or require that it be corroborated by other evidence connecting Jones to the crime.

16. The law regarding late joining aiders and abettors in California changed shortly before Jones's trial. *People v. Cooper*, 53 Cal. 3d 1158, 1165, 811 P.2d 742, 282 Cal. Rptr. 450 (1991) (decided on June 27, 1991). Jury selection began in Jones's case on July 15, 1991. (RT 639.) The jury was instructed in the guilt phase on August 28, 1991. (RT 3143.) *People v. Cooper* clearly changed the content of instructions regarding aiders and abettors. The California Supreme Court succinctly held that "[f]or purposes of determining liability as an aider and abettor, the commission of robbery continues so long as the loot is being carried away to a place of temporary safety." With regard to jury instructions, the California Supreme Court said in *Cooper*, that "[i]n the future, courts should instruct that for purposes of determining liability as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety."

People v. Cooper, 53 Cal. 3d at 1170.

17. There was ample evidence from which the jury could have rationally concluded that if Muslim and Cruz were not accomplices from the inception, as Jones believes they were, Muslim and Cruz were accomplices to the Domino's robbery as late-joining aiders and abettors.

18. The principles of law applicable to the testimony of accomplices are such general principles of law governing the case that they must be given sua sponte. Specifically, an instruction defining "accomplice" must be given sua sponte. *People v. Gordon*, 10 Cal. 3d 460, 470, 516 P.2d 298, 110 Cal. Rptr. 906 (1973); *People v. Bevins*, 54 Cal. 2d 71, 76, 351 P.2d 776, 4 Cal. Rptr. 504 (1960). With the case of *People v. Cooper*, the California Supreme Court changed the definition of "accomplice" so that it would include late-joining aiders and abettors. Failure to give the updated definition prevented the jury from considering Najee Muslim and Frankie Cruz as late-joining accomplices. This arbitrary deprivation of Jones's state procedural protections violated Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

C. Court Error in Giving Incorrect Instructions That Confused the Jury and Improperly Prevented Their Full and Fair Assessment of the Witness Testimony

19. The state of California requires trial courts to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the prosecution or the defense was incorrect. *People v. Malone*, 47 Cal. 3d 1, 49, 762 P.2d 1249, 252 Cal. Rptr. 525 (1988); *People v. Whitehorn*, 60 Cal. 2d 256, 265, 383 P.2d 783, 32 Cal. Rptr. 199 (1963); *People v. Fudge*, 7 Cal. 4th 1075, 1110, 875 P.2d 36, 31 Cal. Rptr. 2d 321 (1994); *People v. Coates*, 152 Cal. App. 3d 665, 670-71, 199 Cal. Rptr. 675 (1984); *People v. Bolden*, 217 Cal. App. 3d 1591, 1597, 266 Cal. Rptr. 724 (1990); *People v. Cole*, 202 Cal. App. 3d 1439, 1446, 249 Cal. Rptr. 601 (1988). Even though a trial court may have no sua sponte duty to instruct, if instructions are

given, the court has a duty to instruct correctly. *See People v. Cummings*, 4 Cal. 4th 1233, 1337, 850 P.2d 1, 18 Cal. Rptr. 2d 796 (1993).

20. Instructions that improperly invade the province of the jury to determine the facts and assess the credibility of witnesses deprive an accused of a fair trial. *United States v. Rockwell*, 781 F.2d 985, 991 (3rd Cir. 1986); *See also United States v. Rubio-Villarreal*, 967 F.2d 294; *United States v. Chu* (9th Cir. 1993) 988 F.2d 981 (9th Cir. 1992).

21. CALJIC No. 2.11.5 (1989 Revision) as given to the jury in this case stated:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. There may be reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial.

(CT 676.)

22. It is well established in the State of California that when there are multiple unjoined perpetrators, CALJIC No. 2.11.5 must be modified to apply only to those other perpetrators who have not received incentives to testify. *People v. Carrera*, 49 Cal. 3d 291, 312, n.10, 777 P.2d 121, 261 Cal. Rptr. 348 (1989); *see also People v. Sully*, 53 Cal. 3d 1195, 1218, 812 P.2d 163, 283 Cal. Rptr. 144 (1991) (CALJIC No. 2.11.5 must be clarified when an accomplice testifies). In *People v. Williams*, 16 Cal. 4th 153, 226, 940 P.2d 710, 66 Cal. Rptr. 2d 123 (1997), the California Supreme Court stated: "Defendant correctly observes 'CALJIC No. 2.11.5 should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.'"

Id.

23. In Jones's case, CALJIC No. 2.11.5 was requested by the prosecution but not by the defense. (CT 631, 632.) A correction by the trial judge was required because the instruction was correct as to Eric Bailey, whom the prosecution contended was the second man in the Domino's robbery, and incorrect as to Najee Muslim and Frankie Cruz who were accomplices to the robbery. They were never prosecuted for the crime of robbery even though they aided and abetted the commission of the robbery in which Weeks was killed. *See People v. Cooper*, 53 Cal. 3d 1158, 811 P.2d 742, 282 Cal. Rptr. 450 (1991).

24. As previously seen, Muslim received favorable treatment from the prosecution in return for his testimony. He was allowed to plead to a misdemeanor charge of accessory after the fact and was to receive probation for his involvement in the robbery which led to Weeks's death. By telling the jury "do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted," the risk that a reasonable juror could have understood that he or she was not to consider the lenient treatment of the two accomplices in evaluating their testimony was high enough that the jury's consideration of this instruction fatally tainted Jones's conviction.

25. CALJIC No. 8.83.2 was requested by the defense. (CT 631-632.) As requested by the defense, that instruction told the jury:

> In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case.

(CT 716.)

26. Similarly, CALJIC No. 17.42 was requested by the defense. (CT 631-632.) As requested by the defense, that instruction told the jury: "In your deliberations do not discuss or consider the subject of penalty or punishment. That

subject must not in any way affect your verdict."

27. These two instructions are overly broad where the potential penalty facing a prosecution witness may bear on that witness' credibility. In *People v. Pitts*, 223 Cal. App. 3d 606, 273 Cal. Rptr. 757 (1990), the court recognized the problem, but did not resolve it in light of a reversal on other grounds and potential retrial. The court "assume[d] the error will not be repeated in the event of a retrial." There, some of the defendants requested a modified version of CALJIC No. 17.42, which would have instructed the jury not to consider punishment as to the defendants, but that it could be considered with regard to any witness who had charges pending at the time he or she testified, or who was on probation. The trial court refused all of these instructions. On appeal, it was held that the defendants were entitled to appropriate instructions on request.

28. In Jones's case, Muslim, and Luna had charges pending because they had not yet been sentenced at the time they testified. By telling the jury not to consider punishment, without specifying whose punishment they were not to consider, a reasonable juror could have easily understood that he or she was not to consider the lenient treatment of the chief prosecution witnesses in evaluating their testimony. Thus, supplemental language by the trial court modifying the two instructions was required to assure that the jury would fully consider the charges pending against Muslim, Cruz, and Luna when evaluating their credibility. This arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

D. Court Error in Refusing to Instruct the Jury on the Sufficiency of Circumstantial Evidence

29. Defense counsel requested CALJIC No. 2.01, sufficiency of circumstantial evidence, generally. (RT 2939.) The prosecution initially requested CALJIC No. 2.01, but later withdrew their request and argued that the instruction

should not be given. (RT 2939-2940.) The court eventually heard argument on whether to give the requested instruction several days later. (RT 3011-3016.) The court decided not to give CALJIC No. 2.01 because it found that the prosecutor's case was not substantially relying on circumstantial evidence. (RT 3016.) That assessment by the court was incorrect; a substantial amount of circumstantial evidence regarding the Domino's robbery was presented and relied upon by the prosecutor. As further elaborated on *infra* in Claim Four, the evidence presented that Jones was the shooter was unreliable and insufficient.

30. The only direct evidence that Jones was the shooter was the eyewitness testimony of Christina Kane, which the prosecutor was not relying on very heavily, as he had characterized it as, "not that strong." (RT 569.) The prosecutor argued that he was relying heavily on the statements of Jones, but many of those statements only inferred Jones's guilt.

31. The statements to Erin Burton and Tara Taylor did not clearly identify Jones as the shooter. Erin Burton had never heard Jones admit to being the shooter. Jones only responded to a general question about the "Domino's thing," which cannot be interpreted as proving he was the shooter. (RT 2710.) Jones's threats of Tara Taylor only show his involvement with the Domino's robbery, but do not reveal he was the shooter. (RT 2696.) This was all circumstantial evidence of Jones's guilt .

32. The testimony of Diane Harrison offered solely circumstantial evidence. Harrison testified that Jones mentioned something about "going away forever." (RT 2685.) Harrison claimed an inmate next to Jones inquired as to whether Jones really thought that was going to happen. Harrison testified that Jones "laughed at that point, and he said, 'Yeah. They got me good.'" (RT 2686.) This is purely circumstantial evidence of Jones's guilt.

33. Portions of Carlos Hunt's testimony, an adoptive admission by Jones, certainly contains circumstantial evidence. (RT 2765-66.)

34. The forensic evidence that the same gun was used in the Domino's

robbery that was used in the Mad Greek robbery is circumstantial evidence of Jones's guilt.

35. With respect to the testimony of Frankie Cruz and Najee Muslim, substantial portions of their testimony included circumstantial evidence. They testified that Jones ran from their car in the direction of the Domino's restaurant. While Jones was gone, Cruz and Muslim heard gun shots and then they saw him running back with a gun. They claim that he disposed of two rounds from his gun after the incident. This is all circumstantial evidence.

36. Even the admissions offered by Cruz and Muslim required an inference by the jury. The jury had to find first that the statement was made and then infer whether or not it was true. Regardless, the substantial amount of circumstantial evidence presented by the prosecutor required an instruction on how the jury was to handle that evidence. Without those instructions, the jury easily misinterpreted the inferences that could be made from the circumstantial evidence presented. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997). This arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

E. The Trial Court Erred When It Refused to Instruct on the Lesser Included Charges Requested by Jones's Counsel

37. The defense requested instructions on murder in the second degree. (CT 645-48.) The court refused to give any of the requested instructions. The court's refusal to give the instructions regarding second degree murder was error. The instruction regarding murder in the second degree clearly applied to the facts of Jones's case. Failure to give the requested instruction significantly undermined Jones's ability to present a defense.

F. Conclusion

38. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

SEVENTH CLAIM FOR RELIEF FOR PROSECUTORIAL MISCONDUCT DURING THE GUILT PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the prosecutor: (1) knowingly presented perjured testimony; (2) failed to disclose to the defense legally discoverable and material evidence that the defense was entitled to; (3) argued evidence that was struck or inadmissible, along with matters wholly outside the record; (4) asserted that there was other incriminating evidence against Jones that was not presented; (5) made inflammatory, disparaging, and argumentative remarks throughout the trial; (6) argued that Jones had the burden of proving his innocence by improperly vouching for the credibility of witnesses; (7) engaged in misconduct with law enforcement authorities prior to and during the trial in this matter; (8) improperly influenced witnesses; (9) misrepresented facts to the court and jury; (10) violated Jones's rights through the unlawful use of a jailhouse informant; (11) knowingly presented the perjured testimony of informants; and (12) made other impermissible statements during closing argument.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Prosecutorial Misconduct for Violations of the State's Obligation to Disclose Exculpatory Evidence Under *Brady*

4. It is well established that the prosecution has a non-delegable duty under the due process clause of the Fourteenth Amendment to disclose evidence which may reflect on the credibility of a material witness, including any inducements made to secure the witnesses' testimony. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). Suppression of evidence, even when it is unintentional or inadvertent, violates federal due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Responsibility for *Brady* compliance lies exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995). Regardless of whether or not it was requested from the defense, the suppression of favorable, material evidence is constitutional error. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383-84, 87 L. Ed. 2d 481 (1985). Brady evidence includes both direct evidence and impeachment evidence favorable to the defendant and is not limited to evidence that would be admissible at trial. *Id.* at 682; *see also Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995).

5. Favorable evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough 'to undermine [ ] confidence in the outcome of the trial." *Smith v. Cain*, __ U.S. __,

2012 WL 43512, *2 (Jan. 10, 2012), citing *Kyles v. Whitley*, 514 U.S. at 434; *see also Maxwell v. Roe*, 628 F.3d 486, 512 (9th Cir. 2010) (finding withheld impeachment evidence "material" where the evidence against petitioner "was weak," the petitioner "maintained his innocence," and the witness who could have been impeached "was crucial to the prosecution's case.")

6. The prosecutor is deemed to have knowledge of everything in the investigation of the defendant. *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989). This includes evidence of another suspect. *Smith v. Secretary of New Mexico Dep't. of Corrections*, 50 F.3d 801 (10th Cir. 1995). The prosecutor must present reliable evidence and avoid the presentation of false evidence. *Foster v. California*, 394 U.S. 440, 442, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). Further, the prosecution has an affirmative obligation to reveal to the defense any material exculpatory or impeachment evidence, *Kyles*, 514 U.S. at 419, not to present false evidence, and to notify the court and counsel when it has reason to believe that false evidence has been presented. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Even if the defense impeaches the witness, the prosecution's failure to disclose information is nonetheless material. *United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998). And, in determining materiality, if the information could have been used to either undermine the state's case or support the defense, and is reasonably likely to have affected the outcome, a new trial is warranted. *United States v. Severdija*, 790 F.2d 1556 (11th Cir. 1986) (undisclosed statement would have supported defense theory that he lacked intent); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3rd Cir. 1955) (information would have supported mental state defense).

1. Prosecutorial Misconduct for Failure to Disclose Benefits Provided to Frankie Cruz and Subsequent Argument That There Were No Benefits Provided to Frankie Cruz

7. In March of 1990, a plea agreement between the District Attorney's

Office and Frankie Cruz was drafted. (Ex. 95, Memorandum of Agreement between Frank Cruz and DDA Rodric Pacheco – unsigned.) That agreement was signed by Frankie Cruz and Rodric Pacheco, the prosecutor in the present case, on April 18, 1990. Frankie Cruz testified for the prosecutor during the preliminary hearing on April 18, 1990. It is clear that the plea agreement with Cruz was signed prior to his testimony, as the prosecutor stated it was his intention to have all the plea agreements "executed prior to the witnesses' individual testimony." (Ex. 98, Decl. of Rodric Pacheco, ¶ 7.) The prosecutor never questioned Cruz about the agreement that Cruz had with the prosecutor's office during Cruz's preliminary hearing testimony. Two months later, Frankie Cruz committed suicide. (Ex. 94, West Jordan Department of Public Safety Report regarding suicide of Frank Cruz dated June 25, 1990.) His testimony was read into the record at trial due to his unavailability.

8. At the preliminary hearing, Cruz was cross examined by four different defense attorneys. James Spring represented Jones, Allan Sandquist represented Eric Bailey, James Johnston represented Alan Murfitt, and Bernard Schwartz represented Mario Villarreal. None of the defense attorneys questioned Frankie Cruz regarding the plea agreement that he had with the prosecutor.

9. As well as the existence of the agreement that has finally been turned over to Jones's counsel, there is further evidence of the prosecutor's failure to disclose the agreement to trial counsel. James Spring, the attorney who represented Jones at the preliminary hearing, and who did cross-examine Frankie Cruz at that time, has clearly stated that it was:

> my custom and practice to cross-examine any prosecution witness who had a plea agreement with the prosecutor regarding their plea agreement. I cannot recall ever being in a situation when I knew a prosecution witness had signed a plea agreement, but chose not to question that witness regarding the plea agreement. [¶] In the case of my

> representation of Mr. Jones, I have no recollection that I acted in any manner other than what would be my normal custom and practice at the time of Mr. Jones' preliminary hearing.

(Ex. 102, Decl. of James Spring, ¶¶ 4-5.) This is clear evidence that no plea agreement had been turned over to trial counsel with regard to Frankie Cruz. Further evidence exists in Spring's questioning of Najee Muslim. Spring, consistent with his declaration, cross-examined Muslim regarding his plea agreement. (PHRT 175-78.) Muslim's plea agreement had been disclosed, whereas Cruz's had not.

10. The declaration of Allan Sandquist, the attorney for Bailey at the preliminary hearing, further supports that the prosecutor did not turn over the plea agreement to trial counsel. It was also Sandquist's custom and practice to cross examine a witness regarding their plea agreement with the prosecutor if he had knowledge of such an agreement. (Ex. 101, Decl. of Allan Sandquist, ¶ 3.) Sandquist, "has no recollection that [his] actions were inconsistent with [his] normal custom and practice in [his] representation of Mr. Bailey . . . " (*Id.* ¶ 4.) Indeed, none of the attorneys who cross-examined Frankie Cruz questioned him regarding his plea agreement. They were four excellent attorneys, who by all accounts, would have questioned Frankie Cruz regarding his plea agreement if they had known about it. (Ex. 102, Decl. of James Spring, ¶ 6.)

11. After the preliminary hearing, James Bender was assigned to represent Eric Bailey. Bender reviewed his trial file on the request of the Attorney General's Office and signed a declaration on their behalf regarding what he discovered. (Ex. 97, Decl. of James Bender.) It is clear from his declaration that Bender never received an executed copy of Frankie Cruz's plea agreement. Bender very clearly states that the plea "[a]greements contained in my file were not executed, and those of Cruz and Muslim were generally dated March __, 1990." (*Id.* ¶ 5.)

12. After the preliminary hearing, John Aquilina was assigned to represent

Alan Murfitt. On February 15, 1991, well after the preliminary hearing, Aquilina still had not received an executed copy of Frankie Cruz's plea agreement. This is evidenced by the letter Aquilina sent to the prosecutor on February 15, 1991, wherein Aquilina requested the date that the agreement was executed by Frankie Cruz. (Ex. 98, Decl. of Rodric Pacheco, ¶ 10 (agreement is attached to Declaration as Exhibit 8.) The executed copy of Cruz's plea agreement was dated. (Ex. 96, Memorandum of Agreement between Frank Cruz and DDA Rodric Pacheco signed April 18, 1990.) If Aquilina possessed the executed agreement, he would not have needed to inquire about the date it was signed.

13. An executed copy of Frankie Cruz's plea agreement was not turned over to James Spring, counsel who represented Jones during the preliminary hearing, or to subsequent counsel, Frank Peasley and David Gunn. The agreement is not contained in trial counsel's files. (Ex. 99, Decl. of Kent Russell, ¶ 6.) It is clear from the declarations of trial counsel, Frank Peasley and David Gunn, that they were not aware of the agreement that existed between Frankie Cruz and the prosecutor's office. Gunn and Peasley both state in their declarations that there was "no reason to suspect the prosecutor would withhold an agreement if one existed." (*See* Declarations of Frank Peasley and David Gunn, filed with the California Supreme Court by Respondent on November 26, 2001, as an exhibit to their Informal Response; see Decl. of Frank Peasley, ¶ 6, and Decl. of David Gunn, ¶ 6.) Clearly Peasley and Gunn did not know that such an agreement existed. Later in the same paragraph both attorneys clearly state that they "had no reason to assume the existence of an agreement . . . " (*Id.*) Of course there would be no need to "assume" that an agreement existed if the prosecutor had, in fact, informed trial counsel of such an agreement.

14. The prosecutor gave Frankie Cruz other benefits that he did not disclose to trial counsel, including placing him in Utah under the witness protection program, paying for his round trip flights from Utah, and paying for his hotel expenses. Prior

to Frankie Cruz's testimony in the preliminary hearing, "the government flew him to Utah," to stay with his cousin Alan Vanmeter. (Ex. 139, Decl. of Alan Vanmeter, ¶ 3.) Before the flight, Vanmeter spoke with a representative from the Riverside District Attorney's Office. That representative informed Vanmeter that he would be compensated for providing Cruz with a place to stay. (*Id.* ¶ 3.) Vanmeter was also informed that Cruz's transportation would be paid for by the prosecutor's office. Cruz himself stated that his trip to Utah "was the result of his participation in the witness protection program." (Ex. 110, Decl. of Kimberly Duncan, ¶ 3.) While Cruz was living in Utah, he began a dating relationship with Kimberly Duncan and informed her of his involvement in the witness protection program. (*Id.*)

15. Alan Vanmeter specifically remembers Frankie Cruz flying back to Riverside to testify at the preliminary hearing. (Ex. 139, Decl. of Alan Vanmeter, ¶ 4.) Cruz's round trip flight to Riverside and hotel accommodations while he was in Riverside were paid for by the government. (*Id.*)

16. Information about the benefits offered to the Vanmeter family for housing Cruz, Cruz's admission into the witness protection program, and the flights and hotel that were provided to Cruz to facilitate his testimony at the preliminary hearing were never directly provided to trial counsel by the prosecutor. No information about these benefits from the prosecutor was contained in the trial file. The declarations of trial counsel clearly support the fact that they did not know anything about these benefits, and Cruz was never cross- examined about any of these benefits by any of the attorneys at the preliminary hearing.

17. During his closing argument, the prosecutor specifically discussed Frankie Cruz's testimony and used it to bolster the testimony of Najee Muslim and Enrique Luna. The prosecutor argued:

> But remember, there is no evidence, and also keep in the back of your mind just in general there is no evidence whatsoever that Frankie Cruz got any deal at all or that

> Frankie Cruz is a convicted felon. None of that. Nothing whatsoever. He testified at the prelim. You heard his testimony here in court. That's what he said, consistent with what Najee Muslim told you.

(RT 3119.)

18. There is a significant difference between arguing that the jury has not heard any evidence of a fact and arguing that there is no evidence of a fact. Here, the prosecutor did the latter.

19. It is clear in the present case that prosecutorial misconduct occurred. First, information regarding the plea agreement with Frankie Cruz was never turned over to Jones's trial counsel. Second, information regarding the government's payment for Cruz's round trip flight to Riverside and stay in a hotel was never turned over to Jones's trial counsel. Third, Cruz's participation in the witness protection program and a promise to pay the Vanmeters was never revealed to trial counsel.

20. Despite knowledge of all these facts, the prosecutor argued in his closing argument that "there is no evidence whatsoever that Frankie Cruz got any deal at all." (RT 3119.)

21. The Supreme Court has held that suppression of evidence favorable to an accused is itself sufficient to amount to a denial of due process. *Brady*, 373 U.S. 83. Furthermore, a false impression given to the jury by the prosecutor and the state violates a defendant's right to due process of law. *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957). Here the prosecutor failed to turn over a plea agreement in addition to other benefits provided to the witness, Frankie Cruz, giving the false impression that Cruz had received no benefit for his testimony. The prosecutor then proceeded to argue in his closing argument the very impression which he knew to be false. Cruz was the only unimpeachable witness that testified regarding the Domino's robbery. The statements and events testified to by every other witness were impeached, or ambiguous as to whether or not Jones was the

shooter.

22. The present case is strikingly similar to the facts of *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005). In that case, a plea agreement was reached with a witness' attorney without the attorney informing the witness of the plea agreement. The procedure allowed the witness to avoid perjuring himself when he testified to not having any agreement. The witness' round trip flight into California to testify was paid for by the prosecutor. The prosecutor never turned over that information to trial counsel, and the Ninth Circuit Court of Appeals found in Hayes's favor and granted habeas relief. *Id.*

23. It is clear that the prosecutor was attempting to give the jury the false impression that there was no plea agreement between his office and Frankie Cruz. In his declaration, the prosecutor claims he argued that there was no evidence Cruz got a deal "because the agreement had not been introduced at trial." (Ex. 98, Decl. of Rodric Pacheco, ¶ 13.) The prosecutor's closing argument was no accident, but rather a calculated attempt to deceive the jury. Furthermore, the distinction that the prosecutor attempted to make is not consistent with the law. His statement that, "there is no evidence whatsoever that Frankie Cruz got any deal," is false. In fact, evidence of a deal did exist. Evidence does not cease to exist simply because it is not presented. Even evidence that is excluded by a judge at trial still exists. Any claim that evidence that is not presented can be argued by the prosecution not to exist would be contrary to the law. *Davis v. Zant*, 36 F.3d 1538 (11th Cir.1994) (prosecutor's deliberate misrepresentations regarding evidence that was not presented at trial was misconduct).

24. The California Supreme Court's ruling regarding this issue on direct appeal was based on the fact that the plea agreement between the prosecutor and Frankie Cruz was not proven to exist. *People v. Jones*, 30 Cal. 4th 1084, 1109-10, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). The court specifically stated that the "issue depends upon proof in a habeas corpus proceeding that such a bargain existed."

People v. Jones, 30 Cal. 4th 1084, 1109 (2003). We have provided such evidence here. Indeed the prosecutor has admitted that such an agreement existed and has finally provided a copy of it. (Ex. 98, Decl. of Rodric Pacheco; Exs. 95-96.)

25. There were significant benefits provided to Frankie Cruz that were never disclosed to the defense. Failure to disclose those benefits is a clear *Brady* violation. Had Cruz's agreement and the other benefits been disclosed to trial counsel, they certainly would have impeached the credibility of this key witness.

26. The evidence that the prosecutor failed to turn over was material and "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. at 682; *Kyles v. Whitley*, 514 U.S. at 432-41. The importance of Cruz's testimony is discussed in depth in Claim Eight, section E and Jones incorporates those arguments herein by reference.

2. Failure to Disclose Plea Agreement with Enrique Luna and Presenting Luna's False Testimony

27. It is not disputed that a plea agreement existed between Enrique Luna and the prosecutor. (RT 2548.) However, the prosecutor claimed that he had no memory of making any promises to Luna, and even assuming such, the agreement was not entered into until after the preliminary hearing. (RT 2553-54.) The prosecutor offered hearsay evidence of Luna's preliminary hearing testimony, and claimed it was admissible because there was no agreement at the time of the preliminary hearing. (RT 2553-54, 2579-80.) It is apparent from the prosecutor's involvement in Enrique Luna's and Najee Muslim's plea agreements that they existed well before the preliminary hearing. (Ex. 83, Magistrate's Findings Upon Entry of Plea and Recommendation filed in People v. Enrique Luna, Jr., Riverside County Superior Court Case No. CR36818, dated September 17, 1990; Ex. 91, Magistrate's Findings Upon Entry of Plea and Declaration of Defendant Upon Plea filed in People v. Najee Muslim, Riverside

County Superior Court Case No. CR35058, dated March 29, 1990.) Failure to disclose the agreement, and the attempts to deny that such an agreement existed are clearly misconduct. *Giglio v. United States*, 405 U.S. at 154; *Brady v. Maryland*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. at 437.

28. Enrique Luna has recanted the testimony he gave at Jones's trial. At the trial, Luna testified Jones had claimed Jones killed Herman Shane Weeks. (RT 2562.) Luna has more recently clarified what happened between himself and Jones:

> Mike never told me about the Domino's incident. He never personally told me that he shot the guy at Domino's. I never seen that side of him. I only heard Najee talking about this . . .

(Ex. 161, Decl. of Enrique Luna, ¶ 3.)

29. It is clear that perjured testimony was offered in the conviction of Jones. The prosecutor's knowing use of perjured testimony is misconduct.

30. Luna was part of the same robbery for which Najee Muslim had received a plea agreement. That incident took place on September 16, 1989, but Luna was not charged until September 17, 1990. (Ex. 82, Information filed in People v. Enrique Luna, Jr., Riverside County Superior Court Case No. CR36818, dated September 17,1990.) While Luna's case was not filed until after the preliminary hearing, it is clear that his involvement in the robbery was known from the beginning. The sworn declaration in support of the arrest warrant for Najee Muslim states that the other individuals involved were named. Furthermore, Muslim's immediate cooperation indicates that he named the other individuals involved in the robbery. The prosecutor was closely involved in Muslim's agreement, therefore his knowledge of the others involved with Muslim's same robbery is clear.

31. Luna's agreement with the prosecutor is further evidenced by the magistrate findings upon entry of the plea. (Ex. 83.) The adopted recommendation of the magistrate has Najee Muslim's name crossed out and Luna's name written in,

showing that the two actually received the exact same benefit. (*Id.*)

32. Luna testified that he had not been arrested or charged with any crime, and was receiving no benefit for his testimony at the preliminary hearing. (PHRT 85.) The prosecutor allowed this perjured testimony to be admitted at the preliminary hearing without correcting it. Indeed, the prosecutor then argued that he should be able to offer the preliminary hearing testimony of Luna because Luna did not have any agreement at the time of the preliminary hearing. The prosecutor not only allowed perjured testimony to be admitted into evidence, but argued it as a foundation for an evidentiary ruling.

33. These actions of offering and arguing perjured testimony are clearly prosecutorial misconduct. *Giglio v. United States*, 405 U.S. at 154; *Brady v. Maryland*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. at 439.

3. Misrepresentation by the Prosecutor That Najee Muslim Was Not Armed When He Committed a Prior Robbery

34. The prosecutor stated to the court that Muslim was not armed when he committed the robbery. (RT 2866.) This claim by the prosecutor was false. The evidence regarding the initial charge against Muslim and declaration in support of the warrant issued for his arrest clearly indicate that he was the shooter. (Ex. 87, Declaration in Support of Arrest Warrant filed on December 15, 1989, in *People v. Najee Muslim, et al.*, Riverside County Municipal Court Case No. 017090, dated November 27,1989; Ex. 88, Felony Complaint filed in *People v. Najee Muslim, et al.*, Riverside County Municipal Court Case No. 017090, dated December 15, 1989 (robbery w/use of handgun, vehicle tampering).) The declaration in support of Muslim's arrest warrant, signed by Diane Harrison, clearly states:

> Muslim admitted he had taken the Buick Regal at gunpoint from a person in Riverside . . . Beamon claimed not to have actually stolen the Villela car, but he knew Muslim had made the driver give up the keys at gunpoint, and he named

the other individuals involved.

(Ex. 87, Declaration in Support of Arrest Warrant.) The prosecutor misrepresented the facts of Muslim's robbery to the court.

35. During his closing argument, the prosecutor objected to trial counsel's statement that Muslim was armed with a gun during the commission of the prior felony for which he received a deal to testify. (RT 3085-86.) The prosecutor claimed, "that's not the truth, and it's not the testimony either, armed with a gun." (RT 3086.) That claim by the prosecutor was itself inaccurate. To repeatedly argue facts that the prosecutor knew to be false is clearly misconduct. *See United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001) (prosecutor committed prejudicial misconduct in misrepresenting that testifying witness was not told that she had misidentified the defendant when witness testified that she was in fact told); *Gall v. Parker*, 231 F.3d 265, 315-16 (6th Cir. 2000) (prosecutor's mischaracterization of evidence was improper); *Paxton v. Ward*, 199 F.3d 1197, 1217-18 (10th Cir. 1999) (deceitful argument by prosecutor constituted misconduct); *Davis v. Zant*, 36 F.3d 1538, 1547-48 (11th Cir. 1994) (misrepresentation by prosecutor that the defense "thought up" case when prosecutor knew otherwise was fundamentally unfair).

36. The prosecutor was closely involved with the initial dismissal of Muslim's robbery. He appeared and dismissed the case against Muslim without giving a reason on the record. (Exs. 87, 88.) Indeed, the minute order identifies the prosecutor as appearing on behalf of Najee Muslim. (*Id.*) The prosecutor's knowing misstatement prejudiced Jones. Trial counsel was attempting to place into context the favorable plea Muslim received for testifying. Muslim did not incur any jail time beyond time-served for the armed robbery. In combination with the trial court error preventing counsel from informing the jury that similarly situated defendants have received significantly harsher penalties for the same crime, (*see* Claim Five), the jury was prohibited from assessing the degree of bias infecting Muslim's testimony. Accordingly, Jones has alleged a prima facie claim for relief.

4. Failure to Turn over the Composite Drawing Maria Torres Helped to Prepare

37. The composite drawing prepared by Maria Torres was never turned over to trial counsel. Torres was inside the Domino's restaurant when it was robbed on January 21, 1989. (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 1.) She saw both of the perpetrators and was interviewed by the police on the evening of the robbery. (*Id.* ¶ 4.) Torres assisted the officers in preparing a composite drawing of at least one of the perpetrators. (*Id.*) Victor Moreno, Torres's cousin who was also present at the Domino's restaurant on the night of the robbery, confirmed the preparation of a composite drawing done by an artist based upon Torres's statements. (Ex. 127, Decl. of Victor Moreno, ¶ 4.)

38. Torres was shown a photo line-up in which Jones was participating as well as four composite drawings. (Ex. 136, ¶ 5.) Torres "can say for sure that the shooter is not one of the individuals pictured in these photographs . . . [and she does] not recognize any of these drawings as the one that was created based upon my description of the non-shooter to the police." (*Id.*) Based upon Torres's statements, any composite sketches derived from her description of the shooter would be exculpatory for Jones. Her composite drawing, if it is of the shooter, does not resemble Jones at all. A composite drawing of the non-shooter could have challenged both the testimony of Christina Kane, who helped prepare composite drawings herself, and attacked the prosecution's theory of the case that Eric Bailey was the second robber. Either issue is exculpatory. Failure to turn over this exculpatory evidence is prosecutorial misconduct. *Giglio v. United States*, 405 U.S. at 154; *Brady v. Maryland*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. at 437.

5. Failure to Disclose Interview of Christina Kane

39. In 2008, Jones filed a motion pursuant to California Penal Code section 1054.9 requesting post-conviction discovery from the Riverside District Attorney's Office. (*See* California Supreme Court Case No. S168380.) In the course of that

proceeding, the Riverside District Attorney's Office disclosed to Jones an interview dated November 13, 1990 (approximately nine months prior to the start of trial) between Judy McCollin, the defense investigator for Eric Bailey, and Christina Kane, the only eyewitness identifying Jones as the shooter in the Domino's Pizza Robbery. (*See* Ex. 183, Transcript of Interview of Christina Kane by McCollin.)

40. Neither an audio-tape or transcript of this interview exists in trial counsel's files and the interview was first disclosed to Jones in 2008. That interview, taking place almost nine months before Jones's trial, contained significant exculpatory evidence that would have helped both prove Jones was not responsible for the murder of Shane Weeks and severely impeach the testimony of Christina Kane.

41. The McCollin interview of Kane is exculpatory for many reasons. First, Kane admits that while she had a "less perfect" view of the shooter during the Domino's robbery, the victim, Shane Weeks, had a good look at the shooter. (*Id.* at 1884, 1889.) She explained to McCollin that the victim told a female police officer "that the guy had an earring in his ear." (*Id.* at 1889.) Kane then explained that Weeks must have been referring to the shooter when he mentioned the earring because, according to Kane, Weeks "didn't really get a look at the other guy, he was looking at the guy that had the gun to his face." (*Id.*) While trial counsel may have known that Weeks relayed to a responding Officer that one of the suspects had an earring (*See* Claim Eight), Kane's statement that Weeks must have been referring to the shooter was not disclosed until 2008. Kane's statement is essential to exonerating Jones because (1) Jones has never worn an earring or had his ears pierced (*see* Claims Four and Eight), and (2) it shows that Weeks could not have been talking about the non-triggerman when he described a suspect having an earring.

42. Second, during the interview, Kane admits that she was told, prior to viewing the live lineup, "that this was possibly one of the men . . . the shooter guy . . . they're assuming, this line-up, that he will be in it is what Mark Boyer told me on

the phone . . .” (Ex. 183 at 1869.) This evidence demonstrates just how suggestive the live lineup was for Kane. She failed to identify anyone in the lineup despite Jones’s participation. However, because she was told that the shooter was among them, she was improperly and unconstitutionally influenced to pick Jones when she again saw him in court and recognized him from that lineup. Her exculpatory statements about what Mark Boyer, the investigating officer, had told her were not disclosed to trial counsel.

43. Finally, in the interview, Kane admits that the Domino’s investigator working with the police told her that they knew Jones was the shooter. “Dennis came up to me months before and said that [the shooter’s] street name is ‘Money-Mike’ and he tracked him down to an arcade in Moreno Valley from some of his buddies. I guess some of Michael Jones’ buddies.” (*Id.* at 1878.) She goes on to implicate the investigating officer for the Riverside police department, Mark Boyer:

> Dennis was the first one who told me then I asked Mark about it later on and I had talked to him again when I went to a line-up. I go, ‘is that who you think it is, the street name of Money-Mike.’ ‘Yes but they can’t . . . we know the vicinity he’s at but there’s too many strings not tied to pick him up now, when we pick him up, we want him in for good, we don’t want him released on a stupid little charges [sic], ya know, something like that’ is what he told me. So I said, ‘okay.’ That was the reason they were not picking him up at the time . . . is that they didn’t have enough to hold him on, is what he said to me.

(*Id.* at 1979.) Kane’s remarks prove that she was given improper and highly suggestive information that Jones was responsible for the murder of Weeks well before he was ever even charged. When she failed to identify Jones at the lineup she did not know what “Money-Mike” or “Mike Jones” looked like. However, by the

time she was in court, she knew that the person she saw in the live lineup, in which she was told the shooter was participating, was Jones. As a result, Kane suddenly identified Jones as the shooter for the first time. Evidence of Kane's unreliable identification and improper suggestion would have eviscerated her testimony and undercut the prosecution's case against Jones.

44. Had Kane's interview been disclosed to trial counsel, Jones would not have been convicted as the shooter in the Domino's robbery. Kane's interview demonstrates that her in-court identification was wholly unreliable and the product of improper suggestion by the authorities and investigating agents, and that the actual shooter wore an earring.

B. Other Instances of Prosecutorial Misconduct at Trial Based on the Record

1. Pressuring Witnesses to Incorrectly Claim the Name of the Gang Was the "211/187 Hard Way Gangster Crips"

45. The prosecutor inappropriately pressured witnesses to testify that the name of the gang was the "211/187 Hard Way Gangster Crips." There is significant evidence that the prosecutor committed misconduct by fabricating evidence that the name of the gang was "211/187 Hard Way Gangster Crips." No police report identifies the gang that Jones was allegedly a part of with the numbers "211/187" as part of the name of the gang. Even when the witnesses testified for the prosecution regarding the name of the gang at the preliminary hearing they had to be prompted to add the "211/187" information. Enrique Luna and Najee Muslim both initially identified the name of the gang as not including the number "187". This argument is presented in Claim Eight and is fully incorporated herein.

46. Alan Murfitt and Mario Villarreal both pled guilty to gang related activities pursuant to a plea agreement. In the transcript of the court's taking of that plea agreement, the prosecutor referred to the gang that Jones was allegedly involved with as "the Hardway Gangster Crips," and did not use the numbers "211/187" anywhere when referencing the name of the gang. (Ex. 71, RT 147-188; transcript of

proceedings on June 3,1991; pg. 36.)

47. Even Murfitt's and Villarreal's probation reports discuss the name of the gang as the "Hardway Crips," and never mention any numbers in connection with the name of the gang. (Ex. 72, Mario Villarreal, Jr. Probation Report; Ex. 73, Alan Murfitt Probation Report.)

48. The gang evidence became admissible at trial, primarily because the "211/187" numbers, representing the penal code sections for robbery and murder, were part of the name of the gang. Yet the evidence that those numbers were part of the name of the gang came primarily from Najee Muslim, Enrique Luna and Frankie Cruz, all of whom had to be prompted by the prosecutor with regard to those numbers being part of the name of the gang. This manipulation of the facts deprived Jones of due process. *Nickerson v. Roe*, 260 F. Supp. 2d 875 (N.D. Cal. 2003); *see also United States v. Schindler*, 614 F.2d 227, 228 (9th Cir. 1980) ("[W]hile prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch or spite.").

49. The misconduct by the prosecutor had a material effect on the outcome of the trial. Without the numbers "211/187" the name of the gang would have been inadmissible. In Claim Five, section D, the weaknesses of the gang evidence offered by the prosecutor and the importance of the gang evidence to the outcome of the trial are discussed, and all arguments from that claim are incorporated herein.

2. Knowingly and Incorrectly Arguing That the Felony Murder Rule and the Felony Murder Special Circumstance Were the Same

50. Under a felony murder theory, the prosecutor need not prove intent to kill, even if the defendant is an aider and abettor. However, at the time of the crimes for which Jones was charged, the felony murder special circumstance required that if "the defendant is an aider and abettor rather than the actual killer, intent must be proved." *People v. Anderson*, 43 Cal. 3d 1104, 1147, 742 P.2d 1306, 240 Cal. Rptr.

585, 611 (1987). In the present case there is little doubt that two individuals were involved in the robbery, and there is a reasonable possibility that Jones was not the shooter.

51. Trial counsel had made a request to include a portion of CALJIC No. 8.80 that required the jury to find beyond a reasonable doubt that either Jones was the actual killer or that Jones participated in the robbery with the intent to kill in order to convict on the felony murder special circumstance. (RT 2970-76.) The state of the law at the time maintained that distinction. However, in the prosecutor's closing argument he claimed there was no distinction between the felony murder rule and the felony murder special circumstance. Specifically, when discussing the special circumstance, he described it as "basically the same thing as the felony murder rule." (RT 3061.) As described above, this was not true.

52. The felony murder special circumstance has requirements that are above and beyond the requirements of felony murder. The courts failure to instruct on this distinction was in and of itself error. The arguments from Claim Six section A are incorporated herein. The prosecutor argued a legal fallacy that he knew not to be true, that there is no distinction between felony murder and the felony murder special circumstance. Such misconduct presented false and misleading information to the jury in violation of Jones's rights. *Giglio v. United States*, 405 U.S. at 154.

3. Inappropriately Arguing That the Jury Should Convict Jones to Send a Message and Other Inappropriate Statements Made During Opening Statement and Closing Argument

53. During the course of the prosecutor's opening statement and closing argument several statements that were entirely inappropriate were made. The arguments presented and statements made were more than simply undesirable or universally condemned, but rose to the level of a constitutional due process violation. The comments so infected the trial with unfairness that the resulting conviction was a violation of due process. *Darden v. Wainwright*, 477 U.S. 168, 181; 106 S. Ct. 2464,

2471; 91 L. Ed. 2d 144 (1986).

54. It is prosecutorial misconduct to present evidence and arguments that are intended to appeal to the emotions of the jury and inflame their passions. *See*, *e.g.*, *Miller v. Pate*, 386 U.S. 1, 4-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Commonwealth v. Mendiola*, 976 F.2d 475, 486-87 (9th Cir. 1992), *overruled on other grounds*, *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (repeated references to false evidence). When such conduct is more than an isolated statement in "closing arguments [but] follow[s] on the heels of improper and indecorous prosecutorial conduct during trial," it is "more likely to amount to the type of severe misconduct that justifies reversing a conviction." *United States v. North*, 910 F.2d 843, 897 (D.C. Cir. 1990) (citing *Berger*, 295 U.S. at 84-89); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 84 L. Ed. 1129 (1940).

a. Arguing that the Jury Should Send a Message

55. In the course of the prosecutor's closing argument he stated:

> It's horrifying, isn't it? It's just horrifying that something like this happens in our community. And it does every day. And it's unfortunate, but the difference is now that you ladies and gentlemen have the opportunity to do justice. You have an opportunity to do something about it.

(RT 3051.) It is clear from this statement that the prosecutor is calling on the jury to send a message. Claiming that crimes like those Jones was charged with happen "every day" and that the jurors now can "do something about it" was a clear call for them to send a message.

56. These arguments improperly influenced the jury. The claim that the crime that Jones was being accused of happens every day was meant to improperly influence the jury, and cause them to stray from their responsibility to be fair and unbiased. Improper argument, as such, which causes a jury to act in an unfair or biased manor is misconduct. *See United States v. Young*, 470 U.S. 1, 17; 105 S. Ct.

1038; 84 L. Ed. 2d 1 (1985); *Viereck v. United States*, 318 U.S. 236, 247, 63 S. Ct. 561, 87 L. Ed. 734 (1943) (prosecutor's statements suggesting that the American people were relying on the jurors for protection compromised right to a fair trial); *United States v. Leon-Reyes*, 177 F.3d 816, 823 (9th Cir. 1999) (prosecutor's statements suggesting it was jurors' duty to uphold justice system was improper); *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (prejudicial misconduct included telling jurors it was their duty to find the defendant guilty).

b. False Claims Made During the Prosecutor's Closing Argument Regarding Gang Evidence

57. In his final argument, the prosecutor prejudicially told the jury, without any support in the record, that Jones was the one who named the gang "211/187 Hard Way Gangster Crips." (RT 3067.) Later, the prosecutor told the jury, without any support in the record, that the gang was formed as the "211/187 Hard Way Gangster Crips" either "immediately" before or "a month before" the two robberies involved in this case. (RT 3126.) Jones incorporates herein by reference all the arguments presented in Claim Eight, section S.3.

58. These false and prejudicial comments were completely inappropriate and constituted misconduct on the part of the prosecutor. There was no evidence to support them, and their use greatly prejudiced Jones.

c. Information in the Prosecutor's Opening Statement Regarding Maria Zuniga's Pregnancy

59. The prosecutor inappropriately and prejudicially mentioned the pregnancy of Maria Zuniga during his opening statement. (RT 2243-44.) This information about Zuniga was irrelevant and discussed by the prosecutor in an attempt to garner sympathy. Zuniga was one of the victims in the Mad Greek robbery, and information regarding her pregnancy affected the ability of the jurors to fairly assess her testimony. This information was improperly revealed to the jurors and its discussion during the opening statement was misconduct on the part of the

prosecutor. *See Moore v. Morton*, 255 F.3d 95 (3rd Cir. 2001) (finding misconduct where the prosecutor appealed to jurors' sympathy for the victim).

d. Inappropriate Argument in the Opening Statement

60. An opening statement should be limited in its scope to only the facts to be presented in evidence. Any argument in the opening statement is inappropriate. In Jones's case, there were several occasions during the opening statement when the prosecutor presented argument. These actions on the part of the prosecutor constituted misconduct.

61. When discussing the name of the gang the prosecutor claimed Jones was a part of , he stated, "Obviously, in the name they're stating their intentions." (RT 2244.) This is argument. As a possible inference from evidence to be presented, the presentation of the argument in the opening was completely inappropriate.

62. During the prosecutor's discussion of the Mad Greek incident he claimed that Jones committed the crime "with his friends, also gang members." (RT 2246.) However, no evidence was ever presented that the Mad Greek robbery was a gang activity. This was inappropriate argument offered by the prosecutor during the opening statement.

63. The prosecutor's descriptions of the Domino's robbery were also argumentative. The prosecutor argued that Jones was "mad it [was] only 15 bucks" and that "Mr. Weeks paid with his life because Mr. Jones needed 15 bucks to get into a party." (RT 2248.) Further descriptions of Christina Kane and Weeks as "both totally helpless, both praying to god that they don't get killed" were also argument. (RT 2249.)

64. The descriptions of the discussion with Erin Burton were extremely argumentative. The discussion of Burton reading a book quietly in her home when she was disturbed by Jones and "some other gang members," was completely inappropriate. (RT 2250.) The further information as to whether Jones had any remorse regarding the Domino's incident was completely inappropriate for the

opening argument of the guilt phase. (RT 2251.) The court had not ruled on the admissibility of this evidence, and remorse is not a factor in the guilt phase.

65. The several instances during the opening statement when the prosecutor presented argument amounted to misconduct.

e. Improperly Instructing the Jury Regarding Their Findings in Jones's Case

66. The prosecutor suggested to the jury in his closing argument that Jones's case was an "all or nothing" situation. (RT 3045.) The argument that Jones either committed all the crimes or none of them was completely inappropriate. This prejudicial argument embodied the attempt on the part of the prosecutor to bootstrap the Domino's robbery with the Mad Greek robbery. The argument completely ignored the potential for the jurors to come back guilty on the Mad Greek robbery and not guilty on the Domino's robbery.

67. The prosecutor purposefully misled the jurors because the evidence on the Mad Greek robbery was stronger than the evidence in the Domino's robbery. This attempt to bolster one case with the other was misconduct on the part of the prosecutor.

f. Improper Presentation of the Prosecutor's Personal Opinion as to the Guilt of Jones

68. During the prosecutor's closing argument he presented his own personal opinion as to the guilt of Jones. The prosecutor stated, "We do have him good." (RT 3053.) Later the statement was reiterated with, "we do have him good and he knows it." (*Id.*) This is a clear statement of the opinion of the prosecutor. This information in closing is a clear act of misconduct. Presentation of the prosecutor's opinion during the closing argument, with the strength of his office behind him, was clear misconduct. *See also United States v. McKoy*, 771 F.2d 1207, 1212 (9th Cir. 1985) (improper for prosecutor to proffer opinion that government had an extremely strong case, especially in light of the fact that case hinged upon credibility determinations of

government witnesses); *Bates v. Bell*, 402 F.3d 635, 645-46 (6th Cir. 2005) (penalty phase reversal warranted where prosecutor repeatedly voiced his personal opinions); *United States v. Molina*, 934 F.2d 1440, 1444-45 (9th Cir. 1991) (recognizing that the expression of personal opinions is prohibited).

g. The Prosecutor's Argument Inappropriately Shifted the Burden of Proof to Jones

69. The prosecutor's argument on several occasions attempted to shift the burden of proof to the defense. He specifically said, "I didn't hear any alibi witnesses." (RT 3046.) The prosecutor improperly asked the jury to require Jones present some evidence of his innocence:

> There is no evidence to the contrary. Not one witness came into this courtroom and said he wasn't there, he didn't do it. Nobody. And we'll hear from Mr. Peasley, the defense attorney. Maybe he can express some of those or that type of testimony that we never heard from.

(RT 3068.) Further this statement is clearly a comment on Jones's decision not to testify. Commenting on Jones's exercise of his right to remain silent is clear prosecutorial misconduct. *Griffin v. California*, 380 U.S. 609; 85 S. Ct. 1229; 14 L. Ed. 2d 10 (1965).

70. The prosecutor further commented on the trial counsel's closing as failing to prove Jones innocence. Specifically the prosecutor argued:

> And what he basically told you was, when he got up here in closing argument, he didn't tell you my client's innocent. He didn't tell you he didn't do it. He told you, well, he's guilty, but they didn't prove it. They didn't prove it is basically what he was telling you. He did not claim that his client was innocent or not guilty or anything of that nature.

(RT 3109.) This is again, a clear call to Jones to prove his innocence. Furthermore, it

is a request for the trial counsel to act in an ethically questionable manner. This argument called on trial counsel to state an opinion as to his client's guilt. The statement of an opinion by the attorney would have been entirely inappropriate and irrelevant. These comments by the prosecutor are clear misconduct.

4. Inappropriately Vouching for the Credibility of Witnesses

71. The prosecutor inappropriately vouched for witnesses throughout his opening and closing argument during the guilt phase of the trial. The reading in of the testimony of Frankie Cruz was obviously inappropriate. That action lent a credibility to the testimony that would not have existed had the transcript been read into evidence by an unbiased third party such as the clerk of the court. The calling of Diane Harrison, a member of the prosecutor's office also essentially presented itself as the prosecutor's office vouching for the credibility of the individuals who allegedly overheard admissions by Jones. This misconduct so infected the trial with unfairness as to make the resulting conviction and sentence a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

72. "As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991). "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (citing *Molina*, 934 F.2d at 1445).

73. The United States Supreme Court has identified "two dangers" inherent in vouching: "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the

imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). "Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal." *Molina*, 934 F.2d at 1445.

5. Use of an Informant Who Was Placed in the Jail Cell with Jones by the Prosecutor

74. The prosecutor utilized Carlos Hunt as an informant. Hunt was arrested for driving without a license and jailed on November 1, 1989. (RT 2763.) Jones was in the same jail cell as Hunt for a few hours. Hunt asked Jones about the Domino's robbery. The specific question was, "Did you do that?" (RT 2767.) Hunt testified that Jones responded with, "yeah." (*Id.*) Hunt asked, "How much money did you get?" and Jones said, "[a]bout $25.11." Then Hunt asked, "[w]ell, why did you kill the dude?" and Jones replied, "I don't know. I just did it." (RT 2767, 2772, 2783.) Jones said he had gotten the money from the guy and then was walking out and just turned around and shot him. (RT 2767.) Hunt testified that he spent the night in jail and then went to the police the next day. (RT 2769.) He offered to tell them about his conversation with Jones if they would "take care" of all six of Hunt's misdemeanor traffic offenses. (RT 2769.) Later, all six of his misdemeanor traffic cases were dismissed. (RT 2773.)

75. In reality, Hunt was purposefully placed in the cell with Jones and told to get information. The evidence of this fact is that Hunt, someone in police custody for traffic violations, would not have been put into a cell with supposedly dangerous gang members. It is a violation of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), for law enforcement or paid agents to attempt to obtain evidence from a criminal defendant without informing him of his rights.

76. If Jones did make the alleged statements, Carlos Hunt was a government agent who interrogated Jones and deliberately elicited incriminating statements from him after Jones was formally charged, without informing Jones that he was a police agent, and that Jones had a right to remain silent, and to have his attorney present in violation of *Massiah v. United States*, 377 U.S. 201 (1964). Jones also contends that when the informants failed to obtain evidence against Jones, the prosecutor had the informants provide perjured testimony, claimed that Jones had confessed, and that the prosecutor failed to provide exculpatory evidence regarding these informants, in violation of *Brady*, *Giglio*, *Kyles*, and their progeny.

6. The State Used a Highly Suggestive and Inappropriate Procedure in Conducting the Live Lineups and in Court Identifications

77. Several witnesses observed a live lineup that was conducted prior to Jones's preliminary hearing. The constitutionality of lineup and identification procedures is considered by examining the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Here, the line-up procedures combined with statements made to the eyewitnesses and the in-court identification procedures, in their totality, amounted to a prejudicial constitutional violation entitling Jones to relief.

78. Among the individuals who attended that live lineup were Maria Zuniga, Lola Hall, Christina Kane, Thomas Chegwidden, Javier Sierra, and Victor Moreno. (RT 2878-79, 2264-65, 2431-34, 2319-2320, 2320-21; Ex. 127, Decl. of Victor Moreno ¶ 6.) Several aspects of that lineup suggest it occurred in a suggestive and unfair manner. Hall, Chegwidden, and Moreno were all unable to identify anyone at the lineup. Both Sierra and Kane identified an individual in the lineup other than Jones. Maria Zuniga was the only witness to identify Jones at the lineup.

79. The lineup itself was highly suggestive. In the group of individuals that included Jones, the clothes which Jones was wearing clearly cause him to stand out. (Ex. 59, Moreno Valley Police Department Continuation Sheet regarding lineups and

photographs of lineup #1.) Jones's jumpsuit is of a significantly lighter shade of orange than the jumpsuit of the other individuals in the lineup. To have Jones among a group from which he significantly stands out was extremely suggestive.

80. Additionally, as stated in Claim Four, Alvin Eason has stated that he was part of the lineup in question and "could see someone pointing and recall hearing a man say, 'Are you sure it's not number 4[?] Look again.' (Said twice)." (Ex. 184, Decl. of Alvin Eason, ¶ 4.) Jones was the man in position number four in the live lineup. Eason "assumed that everyone in the line-up [including Jones] heard the same thing [he] did." (*Id.*) Eason's statement lends further support to other evidence showing that the live lineup was unduly suggestive and tainted Christina Kane's later identification of Jones.

81. The live lineup and in court identifications were conducted in a highly inappropriate and suggestive manner. Kane's and Hall's identifications of Jones in court were tainted by their observation of him at the lineup. Jones's presence there significantly influenced their in court identifications rendering them unreliable. (Ex. 157, Decl. of Dr. Kathy Pezdek.) To conduct an in court identification in this manner is far too suggestive to be considered reliable. For the prosecutor to have handled the witnesses in this unfair and unreliable manner was clearly misconduct.

82. Most significantly, the in court lineup during the preliminary hearing when Christina Kane identified Jones was highly suggestive in that only three other defendants were present with Jones. The prosecutor argued that the identification at the preliminary hearing was reliable because the defendant was identified while among four individuals in the jury box. (RT 3114.) However, Jones was the only individual among those four who fit the initial physical description Kane had given to the police regarding the perpetrators. Kane testified at trial that one of the four in the jury box at the preliminary hearing was Hispanic. (RT 2435; Ex. 62.) She testified that the second perpetrator weighed 160-170 pounds. (RT 2423.) Tara Taylor testified that Eric Bailey, one of the individuals that was in the jury box during the

preliminary hearing, weighed 250-280 pounds. (RT 2703.) The only two remaining individuals were Jones and Alan Murfitt. Kane went on to identify the two of them, claiming she was unsure about the identification of Murfitt, obviously because he is light skinned, and that would not be consistent with her initial identification. This misconduct was prejudicial to Jones.

7. The Prosecutor Prejudicially Influenced Witness Christina Kane with Respect to Her Identification of Jones

83. Significant evidence that Christina Kane never clearly saw the individuals who robbed the Domino's restaurant exists. Victor Moreno specifically recalled not seeing Christina Kane until after the robbery and shooting had already occurred. (Ex. 127, Decl. of Victor Moreno, ¶5.) Moreno also recalls a women at the live lineup, presumably Kane, stating, "'I saw what was going on and hid in the back.'" (*Id.*) Corroborating the veracity of Moreno's statement, Kane admits in a newly discovered interview that a "mexican kid that was the carry out" was present in the lineup room with her; presumably, Kane was referring to Moreno. (Ex. 183 at 1863.) Together, these declarations establish that Kane was not truthful in her testimony at trial and that she was unable to reliably identify the perpetrator after hiding in the back of the store.

84. After the lineup, Eric Roland, Kane's supervisor at Domino's, who was at the lineup, told her that she had identified the "wrong" person. (RT 2433-34.) Presumably, Roland or someone from law enforcement or the prosecutor's office, told Kane who the "right" person was.

85. The statements of Maria Torres further cast doubt on Kane's identification. It is clear that Torres was referencing Kane when she stated, "[t]he girl who was making pizzas almost immediately ran and hid when the two men entered." (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2.) Torres further contradicted Kane when she revealed that "neither of the individuals had a handkerchief over their face." (*Id.*) The influence exerted by law enforcement and the prosecutor on Kane becomes more

apparent when these facts are considered.

86. Statements to Victor Moreno by the officers clearly indicate they were not hiding the fact that Kane identified the wrong person. (Ex. 127, Decl. of Victor Moreno, ¶ 6.) Moreno was informed by the police that "the lady from Domino's picked the wrong guy as the shooter." (*Id.*)

87. Kane's viewing of the live lineups clearly prejudiced her testimony. The four lineups that were viewed by Kane included Mario Villarreal, Alan Murfitt, Patrick Hunt, and Jones. (Exs. 59, 60, 61, 62.) At the preliminary hearing, three of those individuals were present. Mario Villarreal was clearly not one of the Domino's perpetrators because he was Hispanic and not black. However, the other two individual were black and were the two that she identified. It is clear that her testimony was improperly influenced by these improper proceedings.

88. The prosecutor exercised undue influence over Kane. The suggestive and prejudicial process which the prosecutor put her through was misconduct.

8. Inappropriate Threats to Witnesses and Investigators and the Concealing of Witnesses

89. Inappropriate threats and intimidation were used against witnesses to influence their testimony in Jones's case. These threats entailed prosecutorial misconduct on the part of the government.

90. Tara Taylor was threatened regarding her ability to go to college as a result of her involvement with Jones. She was told by the Riverside Police, "that this case 'will slim my chances to get into college.'" (Ex. 135, Decl. of Tara Taylor, ¶ 8.) Taylor stated, "I was made to feel as though my testimony would affect me for the rest of my life." (*Id.*) These clear and inappropriate threats were intended to influence and manipulate the testimony of Taylor. She had also been intimidated when the police first came to speak with her. (*Id.* ¶ 5.)

91. Luis Villarreal has specifically discussed how intimidating the prosecutor was, and how he was physically assaulted by the officers during their

search of his home. (Ex. 148, Decl. of Luis Villarreal, ¶ 12.) Luis was very specific about the abuse he received from the officers during their search of his house:

> I was the first one at the door, but before I could open the door it was kicked in by the officers. One of the officers hit me in the head with a pistol. and threw me to the floor. I was pinned down by one of the officers who pushed his foot or knee into the back of my neck or head. They really roughed me up. It was intense. Basically, the cops tore the place up.

(*Id.* ¶ 12.) Luis Villarreal's description of the prosecutor as "an intimidating man" that Villarreal was "really afraid of," further evidences the inappropriate pressure that was being put on the witness for the sake of getting a conviction.

92. Even investigators were subject to undue and inappropriate pressures as demonstrated by Judy McCollin's experiences. McCollin described the prosecutor as making it "very difficult" to interview one of the witnesses in Jones's case. (Ex. 161, Decl. of Judy McCollin, ¶ 2.) She was even informed that the prosecutor had encouraged a witness to file federal charges against her. (*Id.* ¶ 6.)

93. Law enforcement and the prosecutor threatened and intimidated many witnesses in this case, which resulted in false testimony and an unjust result. (see also Ex. 148, Decl. of Enrique Luna, ¶ 3.) This inappropriate and manipulative activity went on with these and other witnesses and entails prosecutorial misconduct.

94. The prosecutor intentionally concealed the whereabouts of several witnesses that the defense needed to interview or call to testify that would have assisted in Jones's defense. Frankie Cruz was sent to Utah to live for several months before and after the preliminary hearing. All the arguments regarding the benefits provided to Cruz from section A of this Claim are incorporated herein. Those benefits were given to Cruz with the intention that he become less available to interview before trial.

95. Gilbert Leon, Maria Torres and Javier Sierra all offered evidence that was exculpatory. Jones's access to these witnesses was restricted based on the actions of the government. Those impediments to Jones's preparation of his case were misconduct.

9. State Interference Obstructing Jones's Right to Petition the Courts for Redress and to Investigate and Prepare This Habeas Petition

96. The State has interfered with Jones's ability to investigate and prepare this Petition and to seek redress from the state and federal judicial process. In particular, Riverside County law enforcement officials and the California Attorney General's Office have obstructed Jones's efforts to develop claims on habeas corpus by their refusal to allow Jones's current or prior counsel to view and obtain copies of information relating to any agreement with Cruz relating either to his relocation and placement into a witness protection program (or any payments of money to or on behalf of Cruz in connection therewith) or information about any transportation or accommodations that were provided in connection with his testimony.

97. The prosecution called Frankie Cruz as a witness against Jones at his preliminary hearing on April 18, 1990. The government provided Cruz with transportation between Riverside, California and Utah. While in Riverside, Cruz was provided with a hotel room that was paid for by the government as well. At no time before that preliminary hearing did the prosecution disclose that it had an agreement with Frankie Cruz, either orally or in writing, whereby in return for his testimony against Jones, Frankie Cruz was placed in a witness protection program, and either would not be prosecuted for any involvement he might have in the crimes for which Jones was charged, or that he would be permitted to plead guilty to a misdemeanor charge of accessory after the fact.

98. On June 24, 1990, about sixty days after testifying at Jones's preliminary hearing, while in that witness protection program in Utah, Frankie Cruz committed suicide.

99. Thereafter, at Jones's trial on August 12, 1991, the prosecutor sought and obtained court approval to read Frankie Cruz's preliminary hearing testimony to the jury due to his unavailability as a witness as a result of his death. At no time prior or subsequent to Jones's trial has the Riverside County District Attorney disclosed to the defense that it had any agreement with Cruz relating either to relocation into a witness protection program (or any payments of money to or on behalf of Cruz in connection therewith) and other accommodations.

100. Najee Muslim, also a passenger in Cruz's car along with Jones Frankie Cruz, and Eric Bailey at the time of the Domino's robbery-homicide, was a witness against Jones at Jones's preliminary hearing and trial. Muslim was identically situated to Frankie Cruz in terms of potential criminal liability. The prosecution, on March 14, 1990, about a month before Jones's preliminary hearing, in exchange for Muslim's testimony against Jones, permitted Muslim to plead guilty to a misdemeanor charge of accessory after the fact for his involvement in the Weeks murder. The defense was not informed of the prosecution's agreement with Muslim until some presently unknown time after Jones's preliminary hearing.

101. Detective Mark Boyer of the Riverside Police Department, was in charge of the investigation into the Domino's incident. Boyer and Cruz talked "a number of times." No recording of these conversations, except one, has ever been turned over to the defense.

102. In his closing argument to the jury during Jones's trial, the prosecutor told the jury that both Muslim and Cruz were accessories after the fact because they found out about the crime in the car that night and did something to assist getting away.

103. Jones alleges on information and belief that his conviction and death penalty verdict were obtained as a result of the Riverside District Attorney's Office's concealment and failure to disclose to trial counsel, the trial judge, and jury, the benefits, promises, and deals provided to Frankie Cruz by law enforcement officials.

Jones was found guilty about an hour after the jury heard a read back of Cruz's testimony.

104. The Riverside District Attorney's Office, or persons or entities acting under their direction and control, had at the time of Jones's preliminary hearing and trial, and still presently has, material evidence which would impeach the testimony of Frankie Cruz and has failed, and continues to fail to disclose, this evidence to Jones's counsel in violation of it's obligation to do so under the federal Constitution as required by *Brady v. Maryland*, 373 U.S. 83, *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959), and *Kyles v. Whitley*, 514 U.S. at 437.

105. Jones alleges on information and belief that records in the possession of the Riverside District Attorney's Office are essential in determining whether the Riverside District Attorney's Office has concealed and failed to disclose material exculpatory and impeaching evidence in this capital case.

106. Jones has been thwarted in this effort because law enforcement officials, including the prosecutor, have refused, and continue to this day refuse, to provide further requested information.

107. Jones's efforts to demonstrate his innocence and/or the inappropriateness of the judgment of death have been hampered by the refusal of the prosecutor, the Attorney General of California, and other law enforcement agencies, specifically the Riverside Police Department, to provide the information that they are required by law to produce to the defense under the federal Constitution as required by *Brady v. Maryland*, 373 U.S. 83, *Napue v. Illinois*, 360 U.S. at 269, and *Kyles v. Whitley*, 514 U.S. at 437. Because of the State's refusal to provide that information to the defense, and allow counsel access to that information, Jones has been denied his right to effective assistance of counsel, to a reliable review of the judgment, and to due process and fundamental fairness.

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C. Conclusion

108. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993); *see also Weaver v. Bowersox*, 438 F.3d 832, 840 (8th Cir. 2006) (reversible cumulative error where prosecutor committed numerous acts of misconduct); *People v. Hill*, 17 Cal.4th at 828 (cumulative prejudice of multiple errors, including misstatement of facts; misstatements of law; reference to facts not in evidence; and appeals to fears and prejudices warranted reversal); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (cumulative impact of or persecutor's improper argument rendered trial fundamentally unfair); *Bates v. Bell*, 402 F.3d 635, 648-49 (6th Cr. 2005); *United States v. Sanchez*, 176 F.3d at 1219-25 (cumulative misconduct warranted reversal).

109. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. The error undermines the heightened reliability required of the fact-finding process in capital cases under the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Ake v. Oklahoma*, 470 U.S. 68, 87, 105 S. Ct. 1087, 84 L. Ed. 2d (1985) (conc. opn. of Burger, C.J.); *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

EIGHTH CLAIM FOR RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE AND CONFLICT OF COUNSEL

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable

penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because of trial counsel's prejudicial failure to provide effective assistance of counsel at the guilt phase of Jones's trial.

2. An ineffective assistance of counsel claim has two components: the petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Porter v. McCollum*, 130 S. Ct. 447, 452, 175 L. Ed. 2d 398 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471. "To establish prejudice, [the petitioner] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter*, 130 S. Ct. at 452 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

3. Following AEDPA's enactment, the Supreme Court has reiterated that we apply a "case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." *Rompilla v. Beard*, 545 U.S. 374, 393–94, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (O'Connor, J., concurring). The Court has instructed, however, that its pre-AEDPA ineffective assistance of counsel decisions are clearly relevant for the purpose of informing the interpretation and application of the standards originally announced in *Strickland*.

4. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521-22; *Strickland*, 466 U.S. at 690-91; *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments."); *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (counsel is deficient if he "neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so"); *Sanders v. Ratelle*, 21 F.3d

1446, 1456 (9th Cir. 1994) ("counsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client").

5. Reasonableness of counsel's performance is assessed by looking to "[p]revailing norms of practice as reflected in [the] American Bar Association standards." *Strickland*, 466 U.S. at 688; *Rompilla*, 545 U.S. at 375 ("[W]e have long referred [to the ABA Standards for Criminal Justice] as 'guides to determining what is reasonable.'"); *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008); *Brown v. Uttecht*, 530 F.3d 1031, 1039 (9th Cir. 2008). Because adequacy is based upon "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, courts must look to the guidelines then in effect; *Duncan v. Ornoski*, 528 F.3d 1222, 1238 (9th Cir. 2008) (same); *Summerlin*, 427 F.3d at 629 (applying ABA Standards for Criminal Justice (2d Ed. 1980) which were in effect at time of trial); *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005) (same).

6. At the time of Jones's trial, his attorney's obligations were governed by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases issued in 1989 ("1989 Guidelines") and the ABA Standards for Criminal Justice (2d Ed. 1982 Supp.) ("1982 Standards"). "Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed . . . similarly forceful directive[s]." *Rompilla*, 545 U.S. at 387 n.7. Pursuant to the 1989 Guidelines, counsel had a duty to conduct "independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial." ABA Guideline 11.4.1 (1989). Similarly, the 1982 Standards imposed an affirmative obligation "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 ." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Most significantly, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the

accused's stated desire to plead guilty." (*Id.*)

7. The Guidelines state that as competent capital trial counsel completes the necessary pretrial investigation, he formulates a defense theory "that will be effective through both [the guilt/innocence and penalty] phases." ABA Guideline 11.7.1 (1989). Clearly established Federal law dictates that "defense counsel must 'at a minimum, conduct a *reasonable investigation* enabling him to make informed decisions about how best to represent his client.'" *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (emphasis in original) (internal citations omitted).

8. Trial counsel, James Spring (original counsel), Frank Peasley, and David Gunn, rendered ineffective assistance to Jones and denied him his constitutional rights through countless derelictions of their professional responsibility to zealously defend their client. Counsel's actions and omissions fell below an objective standard of reasonableness under prevailing professional norms and infected the guilt phase of Jones's trial. There could be no rational tactical justification for counsel's failures in this regard. Trial counsel unreasonably and prejudicially: (1) failed to determine and develop Jones's version of the facts, or adequately investigate the relevant facts; (2) failed to interview and investigate the relevant witnesses, including the jailhouse informant; (3) failed to utilize available means of discovering exculpatory evidence available to the State, or to discover the State's case; (4) failed to adequately protect Jones from an unknowledgeable or otherwise invalid waiver of his right to silence; (5) failed to make or adequately preserve timely and appropriate objections to the introduction of inadmissible evidence, or to prejudicial conduct by the judge and prosecutor at trial; (6) failed to conduct an adequate voir dire, and thereby failed to assure Jones a trial before an impartial jury; (7) failed to present defensive evidence or theories available to Jones; (8) failed properly to contradict or discredit damaging evidence presented by the State; (9) failed to research and discover the relevant law; (10) failed to preserve issues for habeas corpus and appellate review; (11) failed to properly investigate, prepare, and present mental state defenses including a

diminished capacity defense based on mental disease or defect and drug and alcohol intoxication; (12) failed to investigate, prepare, present, or notify the court of Jones's incompetency to stand trial and to represent himself despite being on notice thereof; (13) failed to interview, investigate, and prepare witnesses adequately prior to trial; (14) presented the harmful testimony of witnesses; (15) failed to timely present necessary pre-trial motions and presented inadequate motions; (16) failed to obtain necessary expert assistance, to provide the experts with the relevant information necessary to reach a reliable opinion, and otherwise failed to utilize and direct expert witnesses adequately; (17) failed to engage in sufficient consultation with their client; (18) failed to make an effective opening statement and closing argument; (19) failed to adequately attack, impeach, and object to witnesses and evidence, and argument of the prosecution, which prejudiced Jones; (20) failed to request appropriate instructions; (21) failed to make a further motion to have the counts alleged tried separately; (22) failed to make other motions, including, but not limited to, motions to change venue, sequester the jury, and challenge the jury venire; (23) failed to try to negotiate a plea agreement instead of going to trial; (24) failed to investigate Jones's actual innocence; (25) failed to investigate other potential perpetrators; (26) failed to request several relevant jury instructions; (27) failed to impeach several witnesses; (28) failed to move to prevent inadmissable prior testimony from being admitted; (29) failed to move to strike or limit the offered gang evidence after the prosecutor limited his theory of the case; (30) failed to interview certain key prosecution witnesses; (31) failed to present evidence or call available witnesses that would have excluded Jones as being the shooter at the Domino's robbery; (32) failed to present any defense whatsoever with regards to the Mad Greek robbery; (33) failed in other respects to take appropriate action as would reasonably competent trial counsel; and (34) trial counsel had a conflict of interest in representing Jones at his trial.

9. But for trial counsel's omissions, it is reasonably probable that the jury would have returned a more favorable verdict eliminating the need for a penalty

phase and/or resulting in a more favorable sentence. Further, trial counsels' conflicts of interest adversely affected their ability to adequately represent Jones and deprived him of his rights to a fair trial, due process, confrontation, cross-examination, effective assistance of non-conflicted counsel, and a fair and reliable determination of guilt, special circumstance, and the appropriateness of sentencing him to death.

10. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

11. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Failure to Locate Andre Davis, the Alternate Suspect Jones Had Informed Counsel Was the Shooter in the Domino's Robbery

12. Jones incorporates herein by reference Claim Four and Claim Twelve section G. Jones denied to the police at the time he was arrested that he was the one who shot Shane Weeks. (RT 3830.) He claimed that Weeks was shot by Andre Davis. (RT 3830.) He said the same thing to his trial counsel from the first time they met, and throughout their representation. (RT 3829.)

13. During his trial testimony Najee Muslim, who was Andre Davis's cousin, testified that Davis was not at Domino's that night in another car. (RT 2500.) Evidence that Davis took part in the Domino's robbery would have discredited Muslim's testimony, including his testimony that Jones confessed to killing Shane Weeks.

14. Evidence existed that Jones was not the shooter but it was not presented to the jury. The defense claimed the reason that evidence was not presented was because they could not find Davis, whom they claimed was necessary for an effective presentation of that evidence. (CT 891, RT 3834.) Christina Kane testified that a law enforcement artist did sketches of what the two Domino's robbers looked like. (RT 2436; Ex. 63, Composite drawings based on Christina Kane's description done by D. Miller on January 25, 1989.) Later, an artist commissioned by Domino's also did

sketches of the robbers in connection with a reward offered by Domino's. (RT 2437; Ex. 64, Composite drawings based on Christina Kane's description done for Domino's Pizza.)

15. Shane Weeks made a dying declaration in which he said that the shooter wore an earring. (CT 949.) Andre Davis wore an earring but Jones did not. (CT 949.) Jones does not have pierced ears. (CT 949; Ex.135, Decl. of Tara Taylor, ¶ 7.) Andre Davis bore an uncanny resemblance to one of the robbers depicted in one of the composite sketches.

16. Grover Trask, the Riverside County District Attorney, dismissed all charges against Eric Bailey after the prosecutor confirmed that one of the composite sketches strongly matched the physical features of Andre Davis and the prosecutor could not conclude that Bailey was involved beyond a reasonable doubt. (CT 948-50; RT 3832, 3835-36.)

17. Trial counsel raised the issue of the discovery of the whereabouts of Andre Davis in a Motion for New Trial. In connection with that motion, the defense set out its efforts to locate Andre Davis before and during trial. (CT 897-98.) Based on the defense showing, the court found that the defense failed to exercise due diligence in its search for Andre Davis. (RT 3836.) The failure to exercise due diligence to find Andre Davis constituted ineffective assistance of counsel.

18. [redacted]

20. [redacted]

22. Judy McCollin, the defense investigator for Eric Bailey, was able to get a photograph of Andre Davis. (Ex. 161, Decl. of Judy McCollin, ¶ 3.) When McCollin interviewed Christina Kane and presented her with the photograph of Andre Davis, Kane spontaneously stated, "That's him," meaning one of the perpetrators of the Domino's robbery homicide. (*Id.*) Trial counsel could have also shown Kane a photograph of Andre Davis, and would have received the same information. Trial counsel also could have asked that Judy McCollin share the fruits of her investigation, which was producing evidence that was helpful to the defense of both Eric Bailey and Jones.

23. Further, Jones's counsel could have simply located a photograph of Andre Davis to present into evidence to show the jurors that he matched the composite drawing. (Ex. 64, 65.)

24. Trial counsel also failed to interview any former friends or associates of Andre Davis in the course of their investigation. [redacted]

25. Many potential witnesses heard that Andre Davis had shot the clerk at the Domino's and could have been interviewed either to provide further information

or to testify. Mario Villarreal had specifically heard Najee Muslim speak about the Domino's robbery:

> Najee would also brag to the same girls about being at the Domino's Robbery and that Dre shot the guy. Najee would also add that Mike didn't do anything during the Domino's robbery.

(Ex. 140, Decl. of Mario Villarreal, ¶ 13.) Tara Taylor was also aware of the fact that Andre Davis was involved with the Domino's robbery:

> I remember that it was known that Andre ("Dre") Davis had been involved in the Domino's crime. Dre was part of the crew. He was real quiet and did not say much. I remember that there was some kind of beef between Dre and Mike at the time. Dre liked to push Mike's buttons a lot. I knew that Dre and Najee were cousins.

(Ex. 135, Decl. of Tara Taylor, ¶ 6.) Information regarding Andre Davis's involvement in the Domino's robbery existed outside of Jones's statements.

26. Andre Davis himself has made spontaneous statements connecting him to the Domino's robbery. Without being prompted, Davis claimed he was not at "the gas station" and if someone had identified him there, it was because they all looked the same back then. (Ex. 114, Decl. of Rick Gentillalli, ¶ 6.) There is a gas station in front of the Domino's restaurant where the incident occurred. (Ex. 70, Photographs of shopping center where Domino's Pizza is located.) Somehow Davis knew that gas station was there, and that Jones had placed him at that gas station.

27. At the hearing on Jones's Motion for New Trial, the prosecutor argued that Andre Davis matched the composite sketch of the non-shooter rather than the person who shot Shane Weeks, so the presence or absence of Andre Davis would have had no impact on Jones's conviction as the shooter. (RT 3885.) However, trial counsel failed to argue that since Muslim had emphatically testified that Davis was

not at Domino's in another car, Muslim's credibility would have been severely impeached. Furthermore, counsel failed to argue that since Jones and Davis have similar builds, Kane easily could have mixed up her identification of the shooter and the non-shooter.

28. The trial court made a factual finding that trial counsel failed to use due diligence in their search for Andre Davis. (RT 3836.) "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). Finding deficient performance with regards to trial counsel in this case was not difficult. A simple comparison of the performance of Jones's counsel to the performance of counsel for the co-defendant, Eric Bailey, reveals a significant deficiency. The aforementioned investigation into the whereabouts of Andre Davis took trial counsel to the doorstep of locating this alternative suspect, but never beyond.

29. Eric Bailey's counsel took the extra step and located Andre Davis. The ability of co-defendant's counsel to find a suspect that Jones's counsel could not find is a clear example of deficient performance. [redacted] Trial counsel also failed to interview any friends of Davis to learn if he made any inculpatory statements. These deficiencies clearly satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

30. Trial counsel has a duty to investigate. As the California Supreme Court has made clear, "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, 822 P.2d 435, 3 Cal. Rptr. 2d 727 (1992); *see also Wiggins v. Smith*, 539 U.S. 510, 526, 123 S. Ct.

2527, 156 L. Ed. 2d 471 (2003) (counsel's failure to conduct a complete investigation was unreasonable in that it resulted from "inattention, not reasoned strategic judgment."). Counsel has a specific obligation to investigate evidence of an alternate suspect. *See Avila v. Galaza*, 297 F.3d 911 (9th Cir. 2002). In *Avila*, the Ninth Circuit found the petitioner met both prongs of ineffective assistance of counsel where counsel failed to investigate or introduce at trial evidence that the petitioner's brother was the shooter. Trial counsel attempted to justify its failure by arguing his investigator told him the "witnesses might not cooperate" or be "good witnesses." *Id.* at 920. However, the court found these are unreasonable bases not to identify or attempt to interview them. *See also Jones (Jerry) v. Wood*, 207 F.3d 557 (9th Cir. 2000) (guilt phase relief where counsel failed to present evidence that someone else committed the crime); *Henderson v. Sargent*, 926 F.2d 706, amended, 939 F.2d 586 (8th Cir. 1991) (guilt phase relief where counsel failed to investigate and present plausible defense theory based on an alternate suspect); *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994) (guilt and penalty phase issues, remanded for evidentiary hearing where counsel failed to investigate the existence of accomplices to the crime). Here, counsel's failure to adequately investigate and develop a defense around Andre Davis's role in the Domino's robbery was similarly unreasonable.

31. Information that Andre Davis was involved with the Domino's robbery at all would have affected the outcome of the trial. Najee Muslim had clearly stated that Andre Davis was his cousin and was not involved with the Domino's robbery. The jury had believed Najee Muslim's testimony and relied on it heavily. (CT 953-80.) Information that showed Andre Davis was involved at all would have severely undercut the testimony of Najee Muslim. Not only because that portion of Muslim's testimony would have been false, but because Muslim would have a motive to fabricate the story about the robbery to protect his cousin.

32. After hearing the jury's verdict, Jones yelled in open court, "Your Honor, I didn't kill him. I did not kill him. I didn't kill him. Andre killed him. I

didn't even kill him." (RT 3814.) A strong indication of the effect evidence of Andre Davis's involvement would have had on the jury is borne out by the jurors' reactions to Jones's outburst after the verdict was read. (CT 963, 965, 967, 976; Ex. 163, Decl. of Elizabeth Layman, ¶ 4.)

33. Thus, a new trial is required because counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 697. Without the jury having an opportunity to consider evidence of Davis's involvement in the Domino's robbery, and the possible perjury of Najee Muslim, there exists a reasonable probability of a different result which is sufficient to undermine confidence in the outcome.

B. Failure to Call Maria Torres as a Witness Despite Knowledge of Her Availability and Willingness to Testify That Michael Jones Was Not the Shooter in the Domino's Robbery

34. Maria Torres was present in the Domino's Pizza when it was robbed on January 21, 1989. (Ex. 136, Decl. of Maria Torres, ¶ 1.) Her name appeared in all the police reports and she told the officers in the reports that she saw the two individuals who committed the robbery. The officers brought her into the station for a lineup. (*Id.* ¶ 4.)

35. [redacted] In a more recent interview, Torres was shown three photographs of the lineups that were viewed by Maria Zuniga, Christina Kane, and Lola Hall. Jones appeared in one of those photographs. Torres then, clearly stated, "I can say for sure that the shooter is not one of the individuals pictured in these photographs." (*Id.* ¶ 5.)

36. [redacted] Torres clearly saw the perpetrators of the Domino's robbery, and even just her physical description of the perpetrators leads to the conclusion that Jones was not the shooter.

37. Torres describes the shooter as "darker" and "heavier" than the non-shooter. (*Id.* ¶ 2.) If the prosecutor's theory were true, that Eric Bailey and Jones entered the Domino's together, then Torres's testimony would clearly exonerate Jones as the shooter. Bailey was both heavier and darker than Jones. (Ex. 140, Decl. of Mario Villarreal, ¶ 22; Ex. 148, Decl. of Enrique Luna, ¶ 4.) Yet, trial counsel failed to call Torres as a witness.

38. One of the two witnesses that trial counsel did call during his case-in-chief was Najee Muslim. (RT 2990-94.) Muslim's testimony was regarding the jacket that Jones was wearing on the evening of the Domino's robbery. While Muslim's statements were not unequivocal at trial, he had made statements regarding the jacket that Jones was wearing. Muslim admitted during his testimony that he had made statements regarding a black and white checkered jacket that Jones was wearing on that evening. (RT 2991.) Torres's testimony would have directly contradicted Muslim's claims that Jones was the shooter. She described the jacket that the shooter was wearing as a "dark blue denim jacket," and failed to identify any checkerboard pattern whatsoever. (Ex. 136, Decl of Maria Torres, ¶ 3.)

39. Trial counsel also failed to investigate and introduce evidence that someone other than Jones or Davis was the shooter. Trial counsel should have investigated Eric Bailey as the shooter, along with other associates of Jones's. *Wiggins*, 539 U.S. at 526 (counsel's failure to conduct a complete investigation was unreasonable in that it resulted from "inattention, not reasoned strategic judgment").

40. There is no logical reason for trial counsel not to have called Torres as a witness. Jones had a right to have this witness of significant probative value testify on his behalf. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Failure to call Torres as a witness was so deficient that counsel's representation fell below the standards set in *Strickland v. Washington*, 466 U.S. 668. Without this omission it is reasonably probable a more favorable outcome would have occurred at trial.

C. Failure to Offer Evidence That the Shooter, Unlike Jones, Wore an Earring, and Had a Darker Complexion than the Non-Shooter

1. The Shooter Wore an Earring

41. Trial counsel was aware that there was evidence that the shooter wore an earring. In their Motion for New Trial, trial counsel observed that Shane Weeks made a dying declaration that the shooter wore an earring. (CT 949.) The defense had a copy of a composite sketch of the shooter depicting the shooter with an earring, and Christina Kane discussed Shane Weeks's declaration in a recorded interview with the Riverside Police Department. Counsel also was aware that Jones did not wear an earring and did not have pierced ears. (CT 949.)

42. Yet trial counsel made no effort to establish those facts. Trial counsel only cursorily asked Christina Kane about the composite sketches. (RT 2436-37.) Counsel did not establish through Kane that the composite sketch of the shooter showed him with an earring. Counsel failed to question Kane regarding her statements to the police that she had heard Weeks claim the shooter had an earring, a statement that would clearly have been admissible as a dying declaration. Counsel did not call the police artist that drew the sketches to establish that the sketch of the shooter had an earring. He did not call the police officer who interviewed Shane Weeks to establish that Weeks said the shooter wore an earring.

43. Trial counsel should have used the composite sketch of the shooter with

an earring to show that Jones was not the shooter. Shane Weeks's dying declaration is even more powerful evidence that the shooter wore an earring. In trial counsel's Motion for a New Trial, the defense referred to Weeks's statement that the shooter wore an earring as "the victim's own dying declaration, which stated the shooter wore an earring." (CT 949.)

44. Trial counsel could have called other witnesses to testify who would have excluded Jones as the shooter, and inculpated others. Andre Davis wore an earring at the time. (CT 949.) Eric Bailey wore an earring at the time. (Ex. 107, Decl. of Erin Burton-Uribe, ¶ 1; Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22; see also Ex. 162.) Jones has never had pierced ears and did not wear an earring at the time. (CT 949; Ex.135, Decl. of Tara Taylor, ¶ 7.)

2. The Shooter had a Darker Complexion Than the Non-Shooter

45. Maria Torres specifically described the shooter: "I remember that the guy with the gun was darker, uglier, heavier, and meaner than the other guy. (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2.)

46. Several witnesses who testified at trial could have provided information regarding Eric Bailey having a darker complexion and being heavier than Jones. Erin Burton testified at trial. She knew both Jones and Eric Bailey and described Eric Bailey as darker than Jones. (Ex. 107, Decl. of Erin Burton-Uribe ¶ 31.) Mario Villarreal, Jr. also was aware of the fact that Bailey had a darker complexion than Jones. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22.)

47. Witnesses could have also testified that Andre Davis had a darker complexion than Jones. (*Id.*)

48. Since the shooter had a darker complexion than the non-shooter and both Davis and Bailey had a darker complexion than Jones, Jones could not have been the shooter with either Davis or Bailey as the other robber. These valuable and substantial pieces of evidence that Jones was not the shooter were never presented to the jury, and failure to present such evidence clearly demonstrates a deficiency on the

part of trial counsel.

D. Failure to Further Impeach the Testimony of Christina Kane

49. Christina Kane, the Domino's assistant manager was the only eyewitness to the shooting who identified Jones as the shooter; however, her testimony is hardly reliable. On November 6, 1989, Kane identified the "gunman" in a lineup which included Jones, however, she picked someone other than Jones. (RT 2408, 2420, 2434.) Kane stated that she was ninety-nine percent positive of her identification and recalled that the shooter's right profile was very distinctive. (RT 2433.)

50. After the lineup, Eric Roland, Kane's supervisor at Domino's who was at the lineup, told her that she had identified the "wrong" person. (RT 2433-34.) Presumably, Roland, or someone from law enforcement or the prosecutor's office, told Kane who the "right" person was, *i.e.*, Jones.

51. On April 17, 1990, at the preliminary hearing, Kane then identified Jones as the shooter and Alan Murfitt as the second robber. (RT 2434-35, 24445, PHRT 1.) Even if Roland had not informed Kane who the "right" person was, she had seen Jones and Murfitt before at the lineups, and her viewing them there clearly influenced her identification at trial. (Ex. 157, Decl. of Kathy Pezdek, ¶¶ 28-29.) At the preliminary hearing, Kane was 99.9% sure that Jones was the shooter. (RT 2445.) Kane was not a reliable identification witness. (Ex. 157, Decl. of Kathy Pezdek, ¶ 34.)

52. Kane's identification at the preliminary hearing was made further unreliable by the circumstances in which it was conducted. The only individual in the courtroom that fit the physical description Kane had previously given of the perpetrator was Jones. The prosecution admitted, outside the presence of the jury, that as their sole eyewitness, Kane's identification of Jones as the shooter was "not that strong." (RT 569.)

53. Furthermore, trial counsel failed to impeach Kane for her false statement at trial that she was not told prior to the lineup that the police had arrested who they

thought to be the shooter. On cross-examination, counsel asked Kane, "Did they tell you something ahead of time? Did Detective Boyer tell you about the lineup, that the person may or may not be in there?" to which she replied, "No." (RT 2432.)

[redacted]

54. Maria Torres, who was also present at the Domino's robbery and witnessed the incident, provided contrasting testimony to that of Kane. She specifically remembered smiling at the perpetrators as they walked into the Domino's restaurant. (Ex. 136, Decl. of Maria Torres, ¶ 2.) Her memory is untainted, and when shown pictures of Jones at the time of the incident, she was able to unequivocally state, "I can say for sure that the shooter is not one of the individuals pictured in these photographs." (*Id.* ¶ 5.) This is powerful evidence of Jones's innocence that counsel failed to offer at trial.

55. Maria Torres's testimony actually directly impeaches the testimony of Christina Kane. Torres witnessed what Kane did at the scene of the crime:

> The girl who was making pizzas almost immediately ran and hid when the two men entered. Neither of the individuals had a handkerchief over their face.

(Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2.) This was clear impeachment evidence against Kane which was not used. Kane had testified that the shooter had a handkerchief over his face, and never admitted to hiding when the robbers came in.

56. Victor Moreno's testimony could have further impeached Christina Kane. Moreno specifically recalled that he did not see Christina Kane until after the robbery and shooting had already occurred. (Ex. 127, Decl. of Victor Moreno ¶ 5.) Moreno specifically recalls a women, presumably Kane, stating at the live lineup, "'I saw what was going on and hid in the back.'" (*Id.*)

57. Additionally, Jones has provided a declaration of an expert on eyewitness identification, Dr. Kathy Pezdek, who has declared that Kane's testimony was unreliable and influenced by her seeing Jones at prior line-ups, even where she was ninety-nine percent sure someone else was the shooter. (Ex. 157, Decl. of Kathy Pezdek, ¶¶ 28-29, 34.) Dr. Pezdek's opinion is based on materials that were available at the time of trial and such evidence should have been presented to the jury.

58. [redacted]

[redacted]

59. Trial counsel failed to impeach the testimony of Christina Kane with information provided by several different witnesses. Kane's statements that she clearly saw the gunman could have been impeached by the testimony of several witnesses. Failure to exploit this available impeachment evidence of a key prosecution witness resulted in the ineffectiveness of Jones's counsel.

E. Failure to Attack the Preliminary Hearing Testimony of the Deceased Frankie Cruz

60. Frankie Cruz testified for the prosecution at the preliminary hearing on April 18, 1990. (PHRT 235.) About sixty days later, he committed suicide in Utah. (RT 502, 503, 562, 596, CT 574.) The defense did not dispute that Cruz was unavailable to testify at Jones's trial. (RT 563.)

61. When the prosecution offered Cruz's preliminary hearing testimony, the defense made no objection to the admissibility of the Cruz testimony. (RT 2527.) Trial counsel did object to Cruz's testimony relating to gang issues. (RT 2527-36.) Frankie Cruz's edited preliminary hearing testimony was eventually read to the jury by the prosecutor. (RT 2585.)

62. Cruz's trial testimony was extremely harmful to the defense case. Cruz was the driver of the car involved in the Domino's robbery. (RT 2594, 2597.) According to Cruz, at Domino's, Jones and Eric Bailey got out of Cruz's car and went around the corner of a building. (RT 2597.) According to Cruz, the following took place: While they were gone, Cruz heard three gun shots. (RT 2598-99.) The two men were gone for about five minutes, and came running back to the car. (RT 2599.) Jones had a .22 caliber revolver in his hand when he returned. (RT 2599.) There was a discussion later that night in the car about a robbery and shooting someone. (RT 2601.) At some later time, Jones told Cruz, "I killed that guy." (RT 2602.) Cruz offered nothing beneficial to the defense. Therefore, no reasonable strategy exists for counsel failing to move to keep Cruz's testimony out of Jones's trial.

63. Frankie Cruz had been cooperating with the police for some time. He had even called Mario Villarreal's house in an attempt to record a conversation with Jones before any arrests regarding the Domino's incident had taken place. In addition, Cruz had received many benefits in exchange for his agreement to testify against Jones. Cruz had been flown to Utah to stay with his cousin. (Ex. 139, Decl. of Alan Vanmeter, ¶ 3; Ex. 110, Decl. of Kimberly Duncan, ¶¶ 2, 3.) Cruz was flown back to Riverside to testify at the preliminary hearing, and had his hotel room payed for during his stay. Cruz was kept in the witness protection program and had informed the people he was staying with in Utah about his involvement in that program. (Ex. 139, Decl. of Alan Vanmeter, ¶ 3; Ex. 110, Decl. of Kimberly Duncan, ¶ 3.) In fact, Alan Vanmeter was supposed to receive compensation for housing Cruz during his stay with him under the witness protection program. (Ex. 139, Decl. of Alan Vanmeter, ¶ 3.)

64. During Cruz's stay in Utah, he began a relationship with Kimberly Duncan and informed her that he was in the witness protection program. (Ex. 110, Decl. of Kimberly Duncan, ¶ 3.) The police report regarding the death of Frankie Cruz also discussed his involvement with the witness protection program, as well as his membership in the "Islander Crypt Gang." Trial counsel should have interviewed Kimberly Duncan and obtained the police report to show that Cruz was in the witness protection program in order to impeach his testimony. Additionally, trial counsel should have known, by interviewing acquaintances of both Jones and Cruz, that the government paid to fly Cruz out for his preliminary hearing testimony, and to put him up in a hotel.

65. Frankie Cruz testified pursuant to a plea agreement, but was never questioned regarding that agreement. An unsigned plea agreement dated March, 1990, and a signed plea agreement dated April 18, 1990 exist. (Ex. 95, Memorandum of Agreement between Frank Cruz and DDA Rodric Pacheco unsigned; Ex. 96, Memorandum of Agreement between Frank Cruz and DDA Rodric Pacheco signed

April 18, 1990.) Frankie Cruz testified at the preliminary hearing on April 18, 1990, but was never questioned regarding any plea agreement. (PHRT 235.)

1. Counsel Was Ineffective for Failing to Object to the Admissibility of Frankie Cruz's Preliminary Hearing Testimony

66. It is well established that trial counsel must fully investigate and research all factual and legal issues in the case. Trial counsel has the responsibility to interpose any valid objection to the admission of prior testimony. *In re Jones*, 13 Cal. 4th 552, 571-73, 917 P.2d 1175, 54 Cal. Rptr. 2d 52 (1996).

67. It is equally well established that the prosecution has a duty to sua sponte disclose evidence which may reflect on the credibility of a material witness, including any inducements made to secure the witness' testimony. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Suppression of evidence, even when it is unintentional or inadvertent, violates federal due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

68. Prior testimony of an unavailable witness is admissible when it is subject to cross examination. *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). However, failure to produce relevant *Brady* material prevents a full and fair cross-examination. Prior testimonial statements that are not subject to cross-examination are inadmissable under the federal constitution. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

69. It is clear that if Jones's counsel had information that Frankie Cruz had entered into a plea agreement with the prosecution, then Cruz would have been questioned regarding that agreement. However, Cruz was never questioned regarding the agreement. It is clear that the plea agreement existed. (Ex. 95, 96.) The only logical conclusion is that Jones's counsel at the preliminary hearing did not have those agreements. The prosecutor's failure to turn over the agreements was a violation of *Brady*.

70. If trial counsel possessed the agreements, and knew that Frankie Cruz

was never questioned regarding them, their failure to object to the admission of Cruz's unchallenged, preliminary hearing testimony is inexcusable. The failure of counsel to object to that testimony is clearly deficient under the standard set forth in *Strickland v. Washington*, 466 U.S. 668.

71. The removal of Cruz's testimony from evidence would have had a significant effect on the outcome of the trial. It cannot be overstated that the jury came back with a verdict after they had heard read back of Frankie Cruz's testimony and deliberated for an additional hour. (CT 777-79.)

72. Furthermore, during the prosecutor's closing argument, the testimony of Frankie Cruz was heavily relied upon. The prosecutor stated in his closing:

> But remember, there is no evidence, and also keep in the back of your mind just in general there is no evidence whatsoever that Frankie Cruz got any deal at all or that Frankie Cruz is a convicted felon. None of that. Nothing whatsoever. He testified at the prelim. You heard his testimony here in court.

(RT 3119.) Adequate investigation by counsel would have prevented the prosecutor from making this blatant lie. Indeed, the prosecutor now admits that the plea agreement was in existence when Cruz testified. (Ex. 98, Decl. of Rodric Pacheco, ¶ 4.)

2. Counsel Was Ineffective for Failing to Present Any Impeachment Evidence or Evidence of Bias on the Part of Frankie Cruz

73. Frankie Cruz had testified at the preliminary hearing that he was not a member of a gang. (PHRT 279.) That testimony was read to the jury. (RT 2610.) However, in the police report regarding Cruz's death, he is clearly identified as a member of the "Islander Crypt Gang." (Ex. 94.) Furthermore, Kimberly Duncan identified Cruz as a member of the "Islander Crip Gang." (Ex. 110, Decl. of Kimberly Duncan, ¶ 3.) This was clear impeachment evidence that was never

presented or sought out by the defense.

74. Frankie Cruz had signed a plea agreement with the prosecutor's office on the day he testified at the preliminary hearing. (Ex. 96.) The prosecutor has admitted that the plea agreement was in existence when Cruz testified. (Ex. 98, Decl. of Rodric Pacheco, ¶ 4.) If trial counsel was aware of the agreement, failure to use it to show bias on the part of Frankie Cruz was clearly incompetent. If trial counsel was never made aware of the agreement by the prosecutor, then that failure by the prosecutor is a *Brady* violation. (See Claim Seven, section A.)

75. These examples of impeachment and bias were never presented to the jury. This failure of trial counsel allowed the prosecutor to argue in closing that Frankie Cruz's testimony was unimpeached and reliable. (RT 3119.) Several jurors clearly stated that they found Frankie Cruz's testimony to be credible. Any impeachment or showing of bias would clearly have affected the outcome of this case.

F. Failure to Move to Strike Gang Membership Evidence When the Prosecution Elected to Proceed Only on a Felony Murder Theory or at the Conclusion of Trial When the Prosecution Rested

76. In a preceding argument, it was shown that the trial court prejudicially erred by admitting irrelevant and highly inflammatory evidence of gang membership and that the prosecutor misused that evidence in his closing final argument to the jury. (See Claim Five, section D.) Jones was denied effective assistance of counsel when trial counsel failed to move to strike that entire body of evidence, or request a limiting instruction, either when the prosecution elected to proceed on only a felony murder theory or when the evidentiary portion of the trial closed at the time the prosecutor announced that he had no rebuttal case.

77. The trial judge admitted evidence of gang affiliation to show intent and planning that would prove premeditation and deliberation in connection with the attempted murders at the Mad Greek and the murder at Domino's. (RT 2193-2194.)

At the conclusion of the trial, while instructions were being settled and after the prosecution had rested its case-in-chief, the prosecutor elected to proceed only on a felony murder theory. (RT 2956-2958.) At the conclusion of the defense case, there was no prosecution rebuttal case. (RT 2998.) The defense made no motion at either time to strike the entire body of gang membership evidence or to request a limiting instruction.

78. When the prosecution elected to proceed solely on a felony murder theory, it was obvious that gang evidence was irrelevant to Shane Weeks's death because evidence of premeditation and deliberation was irrelevant to a felony murder theory. *See People v. Holt*, 15 Cal. 4th 619, 671, 937 P.2d 213, 63 Cal. Rptr. 2d 782 (1997). And, by the time the evidentiary phase of the trial ended, when the prosecution announced that it had no rebuttal case, it was obvious that the prosecution had not presented any evidence pertaining to either the Mad Greek robbery or the Domino's robbery that would have made the gang affiliation evidence relevant to any issue in the case. No evidence had been presented that either of the two charged robberies was planned or conducted as a gang activity. Although there was evidence that all the robbers at the Mad Greek wore blue; however, no evidence was presented in the guilt phase trial that the color blue related to a Crips gang.

79. There was affirmative evidence that the Domino's robbery was not a gang activity because the prosecution's theory was that the spontaneous robbery took place only because the five young men involved did not have enough money to get into a party. Three of the young men involved were not members of the Hard Way Crips. (RT 2592, 2587, 2611, 2606, 2609.) The Domino's robbery was not planned beforehand and no evidence of any planning of the Mad Greek robbery was presented into evidence.

80. The prosecutor's use of the gang membership evidence in his opening and closing final arguments strongly demonstrates just how truly irrelevant that evidence was. In his opening final argument, the prosecutor urged the jury that the

name of the gang, the 211/187 Hard Way Gangster Crips, proved that Jones intended to kill patrons of the Mad Greek before the robbery began. (RT 3066-68.) In his closing final argument, the prosecutor again argued that the name of the gang showed that Jones intended to kill but this time he also told the jury, without any support in the record, that the gang was formed as the 211/187 Hard Way Gangster Crips "immediately before these two crimes occurred," and then asked rhetorically, without any support in the record, "Is it any coincidence they named their gang 211/187 Hard Way Gangster Crips and the next month they go out and commit this crime, a 211 and a 187?" (RT 3126.) There was no support in the record for the prosecutor's argument that the gang was formed as the "211/187 Hard Way Gangster Crips" either "immediately" or "a month before" the crimes involved in this trial. Indeed, there is no evidence whatsoever as to when the gang got that name.

81. The glaring defect in the prosecutor's claim that the name of the gang was evidence of premeditation for the Mad Greek attempted murders and the Domino's murder is that *as a matter of law* the name of the gang was irrelevant to establish premeditation.

82. There was absolutely no probative value of Jones's gang membership because membership in the 211/187 Hard Way Gangster Crips does not have any "tendency in reason" to prove any disputed fact, i.e., the identity of the person who committed the murder or his state of mind. In *People v. Perez*, 114 Cal. App. 3d 470, 477, 170 Cal. Rptr. 619 (1981), the court held that: "Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion."

83. It must always be remembered that the prejudicial effect of inadmissible gang membership evidence lies in its tendency to suggest that a defendant is the type of person predisposed to commit violent acts of the type engaged in by the gang to which he belongs. *People v. Cardenas*, 31 Cal. 3d 897, 905, 647 P.2d 569, 184 Cal. Rptr. 165 (1982); *People v. Perez*, 114 Cal. App. 3d at 477.

84. A defense motion to strike the entire body of gang membership evidence would have precluded the prosecutor from prejudicially inflaming the jury by smearing Jones with the irrelevant gang label and misleading the jury by referring to harmful facts not proved at trial. There was no conceivable tactical purpose for letting the jury consider that evidence in their deliberations because the prejudice to Jones was identical to that suffered by Jones by the trial court's erroneous in limine order admitting that evidence in the first place, because gang evidence uniquely tends to evoke an emotional bias against the party as an individual and that has very little effect on the issues. *People v. Karis*, 46 Cal. 3d 612, 638, 758 P.2d 1189, 250 Cal. Rptr. 659 (1988).

85. Even requesting a limiting instruction would have been helpful. Intent was only an issue as to the Mad Greek incident. The prosecutor's decision to proceed solely on a felony murder theory for the Domino's incident made the gang evidence irrelevant to that charge. An instruction limiting the application of the gang evidence to the Mad Greek incident would have easily gotten in the way of the prosecutor's ability to make the general statements above.

86. The prosecutor went to extreme efforts to place the irrelevant and highly prejudicial gang evidence before the jury, and then misused it to win a conviction. Evidence that was so highly prejudicial cannot be said to have had a harmless effect on the outcome of this trial.

G. Failure to Investigate Whether a Gang Actually Existed, the True Name of the Gang, and When the Gang Was Given its Name

87. In Claim Five, section D the weaknesses of the gang evidence offered by the prosecutor are discussed, and all arguments from that claim are incorporated herein by reference. Trial counsel failed to properly investigate or present evidence that if this gang existed, the name did not include the numbers "211/187." Furthermore, if "211/187" was part of the name of the gang, no evidence was presented regarding when the gang actually was given that name.

88. Not a single police report references that the gang used the numbers "211/187" when naming it. Indeed, several witnesses from the time of the incident clearly state that the group was not really a gang at all. Mario Villarreal states in his declaration that:

> People in the neighborhood began calling us gangsters. This is how the name Hardway Gangsters came about. However, this was never an established street gang. If you go to the area where we lived, there is no such street gang.

(Ex. 140, Decl. of Mario Villarreal, ¶ 10; see also, Ex. 146, Decl. of Luis Villarreal, ¶ 9.)

89. The first instance in which the gang is referred to as the "211/187 Hard Way Gangster Crips" is when Enrique Luna testified regarding such at the preliminary hearing. (PHRT 51.) However, there is significant evidence that this name was fabricated. Prior to claiming the name included "211/187," Luna identified the gang as the "Hard Way Crips." (PHRT 45.) Later, Luna specifically stated ,when questioned about "211 Hard Way," that it "was the name of the gang." (PHRT 50.) Eventually Luna was prompted by the prosecutor with the leading question, "So 211/187 Hard Way was the name of the gang, then?" to which he answered affirmatively. There was no objection to this obviously leading question. Trial counsel failed to attack the issue of the name of the gang in any way.

90. Trial counsel never brought up the fact that Luna had a tattoo which did not include the numbers "211/187" or even the word "crips", but only said "Hard Way." (PHRT 72-73.)

91. At trial, Luna testified that the gang members referred to themselves as 211 Hard Way. (RT 2574.) After hearing this testimony, trial counsel failed to bring a new objection to the admission of the gang evidence. The court had specifically stated, "if the gang was called the 211 Crips, then maybe I have a different viewpoint." (RT 2201.) Here, with evidence of the gang having the name 211 Hard

Way, trial counsel failed to renew their objection to the gang evidence.

92. Luna has subsequently recanted his testimony regarding the statements allegedly made to him by Jones. (Ex. 148, Decl. of Enrique Luna.) Trial counsel should have interviewed Luna prior to his testimony to gather correct information about the gang, and to find out that Luna had fabricated the admissions of Jones.

93. Muslim's testimony at the preliminary hearing further suggests the name of the gang was 211 Hard Way. As discussed in Claim Five, section D, Muslim initially testified at the preliminary hearing that the gang was called the "211 Hard Way Crips." (PHRT 151.) Only after a break in the proceedings when the prosecutor was allowed to reopen his direct, and presumably after a conversation with Muslim, did Muslim testify that the name of the gang was the "211/187 Hard Way Gangster Crips." (PHRT 184.) Yet there was no argument as to the name of the gang made by trial counsel.

94. There was also a complete absence of evidence regarding when the gang was given the name 211/187 Hard Way Gangster Crips. The witnesses who testified that the name of the gang included "211/187" also claimed the gang started with three individuals and a different name, as was discussed in Claim Five, section D. With no information as to when the gang changed its name, this was an issue that needed to be argued by the trial attorneys, but never was.

95. Trial counsel was also ineffective in that he failed to object to the prosecutorial misconduct which occurred when the prosecutor pressured witnesses to incorrectly identify the name of the gang. Jones hereby incorporates all of the arguments from Claim Seven, section E. Failure to object to the blatant prosecutorial misconduct which occurred severely prejudiced Jones.

96. The gang evidence was significant and it is reasonably probable that its exclusion from the trial would have resulted in a different conclusion.

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H. Failure to Request an Instruction under Evidence Code Section 403 Pertaining to the Purported Prior Consistent Statements of Najee Muslim and Enrique Luna

97. As discussed in Claim Five, section D, the trial court erroneously admitted evidence of police interviews with Najee Muslim and Enrique Luna as prior consistent statements. That evidence was put to devastating use by the prosecutor in closing argument, where he used it to negate the impeachment value of these witnesses' prior felony robbery convictions, the favorable plea bargains received by them, and also to enhance their credibility by asserting that they had made prior consistent statements before they had a bias or motive to lie. Jones was denied effective assistance of counsel when trial counsel failed to request instructions under Evidence Code section 403 that before the jury could consider the so-called prior consistent statements of Luna or Muslim to the police on the issue of guilt, the jury had to first find as true the preliminary fact that neither Muslim nor Luna had been threatened by police with prosecution for murder unless they talked to the police before their police interview. Jones was prejudiced by trial counsel's failure to request those instructions because the evidence was uncontradicted that both men had in fact been threatened with being charged with murder unless they talked to the police before they agreed to police interviews. Thus, had appropriate instructions been given and followed by the jury, the jury would not have considered the purported prior consistent statements on the issue of guilt, resulting in a reasonable probability of a more favorable verdict absent this failure.

98. Jones was entitled to jury instructions under the provisions of Evidence Code section 403 to the effect that the jury could not consider in their deliberations evidence of prior consistent statements made by Najee Muslim or Enrique Luna in their police interviews unless the jury found by a preponderance of the evidence that no threats were made by police to prosecute Muslim or Luna for murder unless they talked to the police about the Domino's robbery and the death of Shane Weeks before

the interviews. *See generally*, *People v. Salig*, 7 Cal. 3d 844, 854, 500 P.2d 610, 103 Cal. Rptr. 698 (1972); *People v. Pic'l*, 114 Cal. App. 3d 824, 859, 171 Cal. Rptr. 106 (1981).

99. When the defense claims that a witness' testimony may have been influenced by bias or motive to fabricate, a prior consistent statement is admissible only if it was made before the existence of any bias or motive to fabricate. *People v.* Hayes, 52 Cal. 3d 577, 609, 802 P.2d 376, 276 Cal. Rptr. 874 (1990). Thus, only prior statements made before any bias or motive to fabricate existed were relevant as prior consistent statements. Accordingly, under the provisions of Evidence Code section 403, Jones was entitled to have the jury determine the preliminary fact of whether or not the police interviews occurred before Muslim or Luna were threatened with being prosecuted for murder unless they talked to the police.

100. There was no rational tactical basis for trial counsel not to request that instruction. There was sufficient evidence to support it. Muslim testified that before he talked to police, Officer Horst told him that the perpetrators of the Domino's robbery and murder were going to be picked up "tomorrow or the next day" and "[e]ither you go down with them and get charged with murder or you can come down and talk with us." (RT 2488.) Luna testified that he agreed to the police interview because "they accused [him] of being the murderer." (RT 2573-2574.) Luna agreed to the police interview because "[he] was concerned of [sic] being convicted of murder."[23]

101. By virtue of the trial judge's erroneous evidence rulings, the jury had already heard the devastating prosecution testimony by officers Portillo and Boyer

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[23] Trial counsel made it abundantly clear during his cross-examination of these witnesses that he wanted to elicit that information in greater detail. (RT 2522-24; 2644-45, 2717-19.) Unfortunately, the trial court denied him that opportunity by erroneously sustaining an "asked and answered" objection by the prosecutor. (RT 2503-04.) (See Claim Five, section B.)

about the police interviews with Muslim and Luna. Throwing the admissibility of that evidence into the hands of the jury by appropriate section 403 instructions was the only chance the defense had to prevent that patently inadmissible and highly prejudicial evidence from being considered by the jury against Jones. And the defense could not lose. The evidence was not conflicting; there was only evidence that the police interviews took place after the police threats to charge Muslim and Luna with murder if they did not talk to the police.

102. The prejudice suffered by Jones as a result of trial counsel's failure to request the subject instructions was exactly the same as the prejudice he suffered as a result of the trial court's erroneous evidentiary rulings allowing in the testimony of officers Portillo and Boyer about the police interviews of Muslim and Luna. It allowed the prosecutor to falsely heighten the credibility of these witnesses. The prosecutor in final argument negated the impeachment value of their prior felony convictions, their favorable plea bargains, and enhanced their believability by asserting that Muslim and Luna gave consistent statements before they had any bias or motive to fabricate. (RT 3114-3118.)

103. Prejudice is shown when 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." *In re Harris*, 5 Cal. 4th 813, 832-33, 855 P.2d 891, 21 Cal. Rptr. 2d 373 (1993) (citing *Strickland*, 466 U.S. at 694). A new trial is required where counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 697.

104. Here, the testimony that was improperly considered by the jury had a direct impact on juror Shirley H. In her post-trial interview, when Shirley H. was asked if she found Najee Muslim's testimony truthful, she replied: "It was credible, there is always a doubt when someone has something to gain, but his testimony was

consistent with what he testified to before, he appeared truthful." (CT 965.) Accordingly, Jones's convictions must be reversed and a new trial granted. That false aura of veracity directly and improperly influenced at least one juror.

I. Failure to Object to or Modify Instructions Affecting Weighing of Evidence by the Jury

105. Three jury instructions were given in the guilt phase which individually and collectively could have been understood by a reasonable juror as precluding the jury from considering the benefits Najee Muslim and Enrique Luna received from the prosecution in return for their trial testimony implicating Jones in Weeks' death.[24] In Jones's earlier argument about these three instructions, Jones demonstrated that the trial court had a duty to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the prosecution or the defense was incorrect. Here, in the event that it is determined that trial counsel had an obligation to object to incorrect instructions or to provide correct instructions or modifications, Jones contends that he was denied effective assistance of counsel by trial counsel's failure to do so.

106. One of the defective instructions, CALJIC No. 2.11.5, was requested by the prosecution without defense objection or request for modification or amplification. Two of them, CALJIC Nos. 8.83.2 and 17.42 were requested by the defense without modifications that would have made them constitutionally acceptable.

107. As to CALJIC No. 2.11.5, requested by the prosecutor, Jones was denied effective assistance of counsel by counsel's failure to object that the instruction was incomplete and to request and provide an amplification or clarification. As to CALJIC Nos. 8.83.2 and 17.42, requested by the defense, Jones contends that he was

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[24] Had the prosecution furnished Cruz's plea-testimony agreement to the defense before the preliminary hearing, this argument would also apply to Cruz's testimony.

denied effective assistance of counsel because had counsel diligently researched the issues, he would easily have found existing case authorities pinpointing the constitutional defects in the requested instructions and could have requested appropriate modifications.

108. The manner in which these three instructions were defective has previously been set out in Claim Six and is incorporated herein by reference. In essence, they improperly invaded the province of the jury to assess the credibility of witnesses. CALJIC No. 2.11.5, requested by the prosecution, must be clarified when an accomplice testifies. *People v. Sully*, 53 Cal. 3d 1195, 1218, 812 P.2d 163, 283 Cal. Rptr. 144 (1991). CALJIC No. 8.83.2 and 17.42, requested by the defense without modification were overly broad where the potential penalty facing a prosecution witness may bear on that witness' credibility. *See People v. Pitts*, 223 Cal. App.3d 606, 880-81, 273 Cal. Rptr. 757 (1990).

109. The three instructions should have been corrected by the addition of language that told the jury they could consider and discuss prosecutorial leniency with regard to the testimony of the accomplices and other unsentenced witnesses. Such a modification was essential to ensure that the jury would fully consider the charges pending against Muslim and Luna when evaluating their credibility.

110. There exists a body of law, exemplified by *People v. Jackson*, 13 Cal. 4th 1164, 1228-29, 920 P.2d 1254, 56 Cal. Rptr. 2d 49 (1996), holding that the defendant's failure to request modification of instructions they find incomplete may be invited error. Trial counsel's duty to diligently determine whether or not instructions are defective is of the utmost importance to a fair trial because appellate review of the prejudice caused by woefully defective instructions, such as the ones involved here, may be precluded under the theory that any amplification or clarification of the instructions should have been requested. *See People v. Beardslee*, 53 Cal. 3d 68, 116, 806 P.2d 1311, 279 Cal. Rptr. 276 (1991), and *People v. Medina*, 51 Cal. 3d 870, 900-01, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990).

111. The prejudice resulting from trial counsel's failure to modify the instructions is exactly the same as that resulting from the trial court's failure to modify them to correctly state the applicable law. The core of the prosecution's case was the testimony of Muslim, Cruz, and Luna about what Jones purportedly said to them or in their hearing about having committed the Mad Greek robbery or the Domino's robbery or having shot Shane Weeks. (CT 577, RT 565-76, 592-94, 3113, 3831.) That body of evidence undoubtedly had the same effect on the jury as a confession because, if true, it was an admission of guilt.

112. A new trial is required where counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 697. That is exactly what happened here since the three erroneous instructions could easily have been understood by a reasonable juror as meaning that he or she was not to consider lack of prosecution or punishment in assessing credibility of the prosecution witnesses. Accordingly, habeas relief is warranted.

J. Failure to Request Instructions on Late Joining Aiders and Abettors

113. Jones previously asserted that the trial court had a sua sponte duty to instruct the jury on the principles of law applicable to late-joining aiders and abettors as part of its general instructions about accomplices to cover the factual possibility that the jury might not find Muslim and Cruz to have been accomplices from the beginning of the Domino's robbery because no one specifically mentioned robbing Domino's before the robbery occurred. Jones incorporates herein by reference Claim Six, section A. Jones contends that if the trial court did not have a sua sponte duty to instruct the jury on late joining aiders and abettors then Jones was denied effective assistance of counsel by his counsel's failure to request such an instruction.

114. As in the preceding argument, trial counsel's duty to diligently determine whether or not instructions are defective or incomplete is of the utmost importance to a fair trial. An examination of the evidence in the present case would have led any

reasonable counsel to the possibility that the jury might not find Muslim and Cruz to have been accomplices from the beginning. An instruction on late joining aiders and abettors easily would have covered this possibility. Instead, trial counsel merely requested the standard CALJIC accomplice instructions without consideration that the jury might not find Muslim and Cruz to have been accomplices from the beginning. (CT 631.)

115. There is no conceivable reason, tactical or otherwise, why trial counsel would purposely fail to request instructions on late joining aiders and abettors. His sole final argument relating to Cruz and Muslim was that Muslim and Cruz were accomplices. (RT 3082-3084.) He urged the jury to distrust their testimony because they were accomplices and because Muslim was a convicted felon. (RT 3984.) An instruction on late joining aiders and abetters could only have helped the defense by covering the contingency that the jury might not have found Muslim and Cruz to have been accomplices from the beginning. There was no downside risk to the defense from such an instruction, and counsel clearly wanted the jury to see Muslim and Cruz as accomplices.

116. The prejudice resulting from trial counsel's failure to request this instruction is exactly the same as that resulting from the trial court's failure give it sua sponte. (See Claim Six, section B.) The jury asked for a read back of the testimony of Muslim and Cruz about what Jones purportedly said to them about having committed the Domino's robbery or having shot Shane Weeks. The jury obviously gave this testimony great weight during their deliberations but would not have done so if it could have found Muslim and Cruz to be accomplices either from the inception or under a late joining aider and abettor theory.

117. As previously stated, a new trial is required where counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 697. The trial here cannot be relied on as having produced a just result. It was vitally

important that where evidence tantamount to a confession comes from an accomplice like Muslim or Cruz, the jury must be properly instructed so that they can carry out their duty to view that evidence with distrust. Here the jury was not fully instructed on all of the applicable law pertaining to the accomplice testimony of Muslin and Cruz. Accordingly, habeas relief is warranted.

118. Taken together, the prejudice resulting from trial counsel's failure to request appropriate limiting instructions was overwhelming. *See e.g. Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (guilt phase relief granted where counsel rendered deficient performance in failing to propose or object to any jury instructions in the guilt phase); *White v. McAninch*, 235 F.3d 988 (6th Cir. 2000) (guilt phase relief where counsel failed to seek limiting instruction on introduction of uncharged offense); *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996) (guilt phase relief where counsel failed to request instruction on self-defense and excessive use of force); *Luchenburg v. Smith*, 79 F.3d 388 (4th Cir. 1996) (guilt phase relief for failure to request appropriate jury instructions). Accordingly, the cumulative error resulting from counsel's failure to request instructions mandates relief.

K. Failure to Interview Joe Vargo Before Trial and to Request a Pretrial Evidence Code Section 402 Hearing on the Admissibility of His Testimony about His Press Enterprise Newspaper Article

119. One of the key reasons that the trial judge allowed evidence of Jones's gang membership was because the prosecutor represented that Joe Vargo, a Press Enterprise newspaper reporter, would testify about admissions Jones purportedly made during an interview of gang members Vargo had conducted for a published newspaper article. The prosecutor claimed Jones's statements to the reporter established Jones's complicity in those two robberies, established that the two robberies were gang enterprises, and that there was a larger gang enterprise to commit multiple robberies. (RT 2213-14.)

120. It is clear from trial counsel's argument against allowing mention of

gang membership by the prosecutor in opening statements, or admission of any gang information into evidence, that trial counsel had not interviewed Vargo before trial. The Press Enterprise had a long established and well known policy of resisting subpoenas for its reporters to testify in civil or criminal cases about published articles.

121. Even if trial counsel did not know of this policy before his representation began in this case, he did know from Jones's statements to police after his arrest, both those held admissible and those suppressed in a pretrial motion, that Vargo was an important potential prosecution witness. Had trial counsel interviewed Vargo before trial, he would have learned of the newspaper's general policy to oppose subpoenas to its reporters. Trial counsel then would have been in a position to demand an Evidence Code section 402 hearing on the admissibility of that evidence before the prosecutor was permitted to mention it in opening statements.

122. As it turned out, for obvious tactical reasons, the prosecutor did not adduce evidence of Jones's statements made to police after his arrest and Vargo, the reporter who successfully asserted privilege, did not testify. (RT 2857-60.) Had trial counsel been able to represent to the court, based on his pretrial investigation, that Vargo would assert the "Reporter's Shield" privilege, there is a very strong likelihood that the trial court would not have let the prosecutor mention anything about gangs in his opening statement. And the defense would later have been able to successfully preclude the admission of the gang evidence on the grounds of relevance when the prosecutor offered gang evidence through Muslim, Cruz, and Luna, since none of them established that either robbery was a gang enterprise. Therefore, the name of the gang would have clearly been seen by the trial court as irrelevant.

123. Significant prejudice resulted from the failures of trial counsel to interview Joe Vargo. It was the prosecutor's claim that Vargo would testify that the Domino's and Mad Greek robberies were gang activities that was the foundation for the court to allow in the gang evidence. The gang evidence was highly prejudicial as

discussed in Claim Five, section D and those arguments are incorporated herein.

L. Failure to Offer Evidence That Muslim's Crime Partner Received Three Years in State Prison for the Robbery in Which Muslim Got Straight Probation as a Result of His Agreement to Testify Against Jones

124. Sustaining a prosecution objection under Evidence Code section 352, the trial court denied trial counsel the opportunity to prove that Muslim's sentence of straight probation for an armed robbery was an unusually light sentence. (RT 3866-69.) This evidence was important to the defense because it helped the jury to understand the amount of the benefit Muslim received under his agreement with the prosecution in assessing his credibility. It would also have helped the jury understand Luna's agreement with the prosecution for his testimony against Jones because Luna, who also pled guilty to an unrelated robbery, was also going to receive probation. (RT 2567-68, 2576.)

125. There was available additional evidence that would have helped convey that same understanding to the jury. Muslim's crime partner in that robbery, John Isaacs, received a sentence of three years in state prison instead of the slap on the wrist punishment Muslim received. (PHRT 175, 345, 353-54, 359-60.) Proof of that fact was a simple matter. Muslim, who would have known the sentence his crime partner received, testified for the defense after the court had rejected the previous defense proffer. (RT 2990.) In addition, the court record regarding the sentence of Muslim's partner was available.

126. There was no logical reason for trial counsel's failure to produce that evidence for the jury. Trial counsel had nothing to lose by offering that evidence. At the very worst, the trial court would have sustained another prosecution objection.

127. The error was not harmless. Jones was entitled to present all relevant evidence of significant probative value to his defense. *Chambers v. Mississippi*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. at 23. Here, Muslim was the only live witness at trial who was in Cruz's car with Jones at the time the Domino's Pizza

robbery was committed. His credibility was probably the single most crucial issue in this case. To deprive Jones of the opportunity to present evidence that Muslim's crime partner in the robbery was sentenced to three years in state prison was to deprive Jones of the right to present a defense. In weighing the credibility of Muslim's testimony, Jones was entitled to have the jury hear just how much the prosecution paid for that testimony. Without evidence that Muslim's robbery disposition was unusual, as proved by the fact that his crime partner was sentenced to three years in state prison, the jury had no yardstick against which to measure their knowledge of Muslim's agreement with the prosecution or to properly understand its significance.

M. Failure to Defend Jones in Any Way with Regard to the Mad Greek Robbery and Attempted Murders

128. Trial counsel presented no defense to the Mad Greek robbery and attempted murders. In the closing argument, trial counsel described the Mad Geek as "a much stronger case [than the Domino's case]." (RT 3098.) Counsel told the jury, "You say, 'I don't have a doubt in the world that he shot at Lola Hall. I don't have' – that's fine." (RT 3099.) Counsel essentially gave up the Mad Greek robbery and attempted murders. An "admission by counsel of his client's guilt to the jury, represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *United States v. Williamson*, 53 F.3d 1500, 1510 (10th Cir.1995); *see also United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (guilt phase relief where counsel failure to act as counsel by, inter alia, conceding that the evidence against his client). Trial counsel failed to meet his ethical obligation to "subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

129. Counsel spent merely a half of a page of the transcript of the closing argument arguing the Mad Greek case, and only suggested that Hall and Zuniga "are

mistaken." (RT 3098.) Offering no real argument or evidence to support the claim that Hall and Zuniga may have been mistaken, the argument was completely unsuccessful. However, the evidence to support that argument did exist. By asking questions of the eyewitness identification expert they had already contacted regarding Christina Kane, Dr. Kathy Pezdek, counsel would have found support for the argument that Hall and Zuniga were mistaken.

130. It is clear from the declaration of Kathy Pezdek, PhD. that she had a significant amount of information to offer with regards to the eyewitnesses that testified regarding the Mad Greek incident. (See Claim Five, section C.) Both Maria Zuniga and Lola Hall identified Jones as the individual involved in the Mad Greek robbery. (RT 2263, 2878.) No physical evidence was offered connecting Jones to the robbery.

131. The law regarding the introduction of an eyewitness expert is set forth in Claim Five. When an eyewitness identification of the defendant is a key element of the prosecution's case, but is not substantially corroborated by evidence giving it independent reliability, an expert on eyewitness identification should be allowed to testify. *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

132. Trial counsel's arguments regarding the testimony of an expert on eyewitness identification solely focused on Christina Kane. However, the argument would have been far more effective, and likely successful, if applied to the Mad Greek incident. The eyewitness identifications of Hall and Zuniga were the key elements of the case against Jones in the Mad Greek incident. The only corroborating evidence that was offered was the testimony of Najee Muslim that Jones had told Muslim of his involvement. (RT 2482.) Muslim, however was not a reliable witness and therefore could not offer substantial corroboration. (See Claim Five.)

133. Specifically, as discussed more in depth in Claim Five and incorporated herein by reference, the argument that Jones was present and not the shooter was

viable considering the number of individuals involved. Confusion as to which roles different participants played is an issue that Dr. Pezdek has stated she could have testified to in this particular case. (Ex. 157, Pezdek Decl. ¶ 19.) This evidence would have exonerated Jones from the attempted murder convictions. If Jones was not the gunman, there would be no proof that he had any intent to commit the attempted murders.

134. Furthermore, with regards to Lola Hall, viewing Jones at the lineup and failing to identify him there would significantly influence the identification by Hall at the preliminary hearing. Dr. Pezdek has also stated her ability to testify on this particular point. (*Id.* ¶ 22.)

135. Trial counsel spent only three pages of the trial transcript cross-examining Maria Zuniga and utterly failed to question her regarding any potential for a mix-up between the perpetrators. (RT 2889-91.) The cross-examination of Thomas Chegwidden was also lacking. The examination lasted a little more than three pages and also failed to deal with Chegwidden's inability to identify Jones. (RT 2298-2301.) Chegwidden had essentially the same point of view as Lola Hall, but the questions regarding his inability to identify the perpetrator were never asked.

136. The investigation into Thomas Chegwidden was also lacking. [redacted]

137. But for trial counsel's errors and omissions, it is reasonably probable a more favorable outcome would have occurred at trial.

N. Failure to Lay a Foundation for the Admission of Photographs of Alan Murfitt and Eric Bailey

138. At the close of Jones's case, trial counsel attempted to move two photographs into evidence. (RT 3000.) One was a booking photo of Alan Murfitt and the other was a booking photo of Eric Bailey. (RT 3001.) The prosecutor

objected to the two photographs based on lack of foundation. (RT 3003.) Trial counsel had not laid a foundation for these two photographs at all. The photos were described by counsel as "critical to the defense." (RT 3004.) The significance of the photos is discussed in Claim Five, and the arguments of that claim are incorporated herein. The court excluded the photographs based on the prosecutor's lack of foundation objection.

139. Trial counsel negligently forgot to ask that this evidence be admitted. Trial counsel considered the photographs so important to his case that when they were excluded as evidence he claimed that he was ineffective:

> I think I should move for a mistrial based on my own ineffective assistance of counsel for the way I handled that evidence. I'd be asking for a mistrial at this time.

(RT 3008.) The court denied the motion. However, trial counsel's actions clearly demonstrate the importance of the photographs to his closing argument.

140. It is a reasonable probability that a more favorable outcome would have occurred if trial counsel had been able to get the photographs admitted into evidence.

O. Failure to Request a Change of Venue for the Trial Considering the Significant Media Coverage of Jones's Case

141. Several articles regarding the crimes that Jones was being charged with had been published in the local newspapers in Riverside County. (Ex. 56, Newspaper Articles.) The facts set forth in several of the articles were wrong. The articles suggested that the suspects of the Domino's robbery got away with less than two dollars, and the individuals in the car had no idea what was going to occur. (*Id.*) Moreover, the articles printed contentious and inaccurate information about Jones. This included, inter alia, stating that Jones was a "known" member of "the black street gang the Crips[.]" (*Id.*) These assertions prejudiced the jury pool to assuming Jones was a violent gang member when the facts belie this conclusion.

142. Several articles connecting Jones to the Flats incident were published.

One article specifically identifies Jones as being involved in both the Flats incident and the Domino's robbery. (*Id.*) Jones had pled guilty to the Flats incident prior to trial and any information about his involvement in that incident would not have been allowed because of its prejudicial nature. Any juror could have seen this information and been tainted. However, no motion for a change of venue was brought by trial counsel.

143. The jury has never properly been voir dired as to its exposure to this highly inflammatory publicity. Voir dire by both counsel and the court was wholly inadequate, and failed to eliminate jurors that may have been tainted by this information. Under such circumstances, the failure to request a change of venue deprived Jones of his constitutional right to a fair and impartial jury, to due process of law, and to a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, and analogous provisions of the California Constitution. *Irwin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985); *Jordan v. Lippman*, 763 F.2d 1265 (11th Cir. 1983); *People v. Williams*, 48 Cal. 3d 1112, 774 P.2d 146, 259 Cal. Rptr. 473 (1989). Jones incorporates as if fully set forth herein the facts and allegations contained in Claim Two.

144. It is reasonably probable that a more favorable outcome would have occurred if trial counsel had made a motion for a change of venue.

P. Failure to Request a Limiting Instruction or Renew His Motion to Sever When the Court Decided to Allow the Gang Evidence to Be Presented at Trial

145. The court's decision to allow the gang evidence to be presented at trial was based almost entirely on the claim that the name of the gang would demonstrate intent for both the Domino's and the Mad Greek incidents. While the attempted

murder at the Mad Greek required proving intent, the Domino's homicide was brought under the felony murder rule where intent need not be proven. The California Supreme Court, in their examination of this case, correctly found that intent *did* need to be proven for the felony murder special circumstance. *People v. Jones*, 30 Cal. 4th 1084, 1117-19, 70 P.3d 359, 135 Cal. Rptr. 2d 370 (2003). However, the trial court had refused to instruct on intent, and without that instruction the only counts where intent was an issue were the attempted murders at the Mad Greek.

146. Trial counsel failed to request a limiting instruction on the gang evidence despite its obviously limited application. The gang evidence was extremely prejudicial, and the trial counsel fought its introduction. However, trial counsel failed to ask for a limiting instruction that was necessary and clearly would have been allowed.

147. Trial counsel's failure to renew the motion for severance when the court ruled to allow the gang evidence in at trial was also deficient. The arguments for granting the motion to sever from Claim Five, section D are incorporated herein. The court had denied the motion with prejudice. (CT 443-44.) However, considering the significant changes that had occurred in the facts since the motion, bringing it again was absolutely warranted. The gang allegation had been pled to. The fact that the gang evidence was being admitted only to prove intent made it relevant to only the incident at the Mad Greek. The prejudicial effect of the gang evidence on the charges it was not relevant to warranted a motion to sever. *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000) (counsel, who moved for severance unsuccessfully on one ground, failed to recognize alternative compelling ground for severance).

148. Trial counsel's failure to request a limiting instruction or re-raise its motion to sever allowed the jury to consider this highly prejudicial gang evidence for charges it was not relevant to. Either one of these tactics would have limited the use of the gang evidence against Jones. The prejudicial nature of that evidence is

discussed in depth in section D of Claim Five, and the arguments from that claim are incorporated herein.

149. There is a reasonable probability that bringing these motions would have significantly affected the trial and resulted in a more favorable outcome.

Q. Failure to Object to the Testimony of Diane Harrison

150. Trial counsel failed to object to the prejudicial and damaging testimony of Diane Harrison. On July 31, 1991, Jones withdrew his not guilty plea to Counts I, X, XI, XII, and XIII, and entered a guilty plea to those four counts, admitting the special allegations of personal use of a shotgun and great bodily injury on counts X, XI, and XII. (CT 587.) Jones was informed by the court immediately before he entered his plea on that date that his sentence could be "three consecutive life terms in addition to the other matters that he would be pleading to." (RT 2073.)

151. Diane Harrison testified during Jones's trial that while in court on August 2, 1991, three days after Jones entered his plea, Jones mentioned something about "going away forever." (RT 2685.) Harrison claimed an inmate next to Jones inquired as to whether Jones really thought that was going to happen. Harrison testified that Jones "laughed at that point, and he said, 'Yeah. They got me good.'" (RT 2686.) Trial counsel did not object to the presentation of this evidence at all. Considering the events which had occurred just three days earlier, this statement failed to indicate Jones's guilt on the charged crimes in any way.

152. An objection to this evidence would almost certainly have been successful. The statement, considering the circumstance, was completely irrelevant. Furthermore, even if the court had found the statement to have some shred of relevance, the best explanation for the statement was Jones's change of plea which occurred three days before. That would have entailed the bringing in of highly prejudicial and otherwise irrelevant evidence of Jones's convictions for the Flats incident. Trial counsel's decision not to deal with and challenge the evidence clearly demonstrated ineffectiveness.

153. The strength of this evidence should not be understated. Harrison was a member of the District Attorney's Office. (RT 2683.) She was a Deputy District Attorney for the County of Riverside, and her testimony carried with it all the strength of a government official. It is, in effect, a prosecutor vouching for the guilt of Jones. It also suggested the prosecutor had access to information outside the record. The influence that this testimony had on the jury cannot be underestimated. But for trial counsel's errors and omissions, it is reasonably probable a more favorable outcome would have occurred at trial.

R. Failure to Raise a Voluntary Intoxication Defense

154. Trial counsel had a duty to investigate and present readily available evidence of Jones's intoxication. *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000) (ineffective assistance of counsel for failure to prepare social history, investigate and present evidence of intoxication and impaired mental condition at time of crime).

155. Jones was an alcoholic. However, trial counsel did not seek to determine Jones's state of mind during the Domino's and Mad Greek robberies. It is well-established that once trial counsel has notice of a potential defense to the charged offenses, he must investigate that defense. *See Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998).

156. An investigation of the events leading up to the Mad Greek incident, would have led to the discovery that there was evidence of a potential defense. Under California Penal Code section 21a, regarding attempt crimes, the prosecution would have had to prove "specific intent to commit the crime, and a direct but ineffectual act done toward its commission" with respect to the attempted murder charges at the Mad Greek. Because attempted murder is a specific intent crime, Jones's lawyers could have presented evidence to undermine the prosecution's theory that Jones possessed such an intent. Under California Penal Code section 22(b), Jones could have presented evidence of his voluntary intoxication during the Mad Greek robbery:

> Evidence of voluntary intoxication is admissible solely on

> the issue of whether or not the defendant actually formed a required specific intent . . .

Cal. Penal Code § 22(b).

157. With regard to the Domino's incident, in order to prove felony murder it is necessary for the prosecutor to prove the elements of the underlying felony. For the Domino's incident the underlying felony was a burglary, which required:

> specific intent to steal, take and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property or with the specific intent to commit robbery

CALJIC 14.50 (1990 revision). The jurors were instructed on the requirement of finding specific intent to convict on the burglary. (CT 728.) As discussed above, voluntary intoxication is a defense to any development of specific intent.

158. During the two month period of time during which the Mad Greek and Domino's incidents occurred, Jones consumed large, toxic amounts of alcohol on a daily basis. (Ex. 124, Decl. of Loren Kinney; ¶ 7; Ex. 107, Decl. of Erin Burton-Uribe, ¶ 3; Ex. 135, Decl. of Tara Taylor, ¶ 2; Ex. 144, Decl. of Beatrice Acosta, ¶ 11; Ex. 148, Decl. of Enrique Luna, ¶ 2; Ex. 125, Decl. of Danny Limar, ¶ 2; Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 4-6; Ex. 119, Decl. of Nathan Jones; Ex. 146, Decl. of Luis Villarreal, ¶ 6.)

159. There was substantial evidence that could have been presented at trial that Michael was extremely high and intoxicated at the time of the crimes. (Ex. 115, Decl. of Chemeka Goss-Kater, ¶ 4; Ex. 135, Decl. of Tara Taylor, ¶ 4.)

160. Trial counsel was already aware of Tara Taylor's statement regarding Jones's intoxication on the night of the Domino's incident. (Ex. 69.) There was ample evidence of Jones's drinking and drug use. If trial counsel had conducted a thorough investigation, they would have become aware of this potential defense, and could have presented it.

S. Failure to Object to Egregious Prosecutorial Misconduct in the Guilt Phase

161. In Claim Seven, it was shown that the prosecutor committed misconduct on many occasions throughout the trial, and on some of those occasions trial counsel did not object. Jones was denied effective assistance of counsel by trial counsel's failure to object, cite the actions of the prosecutor as misconduct, request an admonition to the jury, and to move for a mistrial. The applicable rule of law is well established. Trial counsel's failure to object to prosecutorial misconduct constitutes ineffective assistance of counsel if prejudicial prosecutorial misconduct occurred. *People v. Lucas*, 12 Cal. 4th 415, 494, 907 P.2d 373, 43 Cal. Rptr. 2d 525 (1995). The essence of such a claim is the potential injury to the defendant. *People v. Clair*, 2 Cal. 4th 629, 661, 828 P.2d 705, 7 Cal. Rptr. 2d 564 (1992). Jones hereby incorporates all sections of Claim Seven and argues that trial counsel was ineffective for failure to object to all of the prosecutorial misconduct that is cited in that claim.

1. Failure to Object to the Prosecutor's False Statement to Juror Leo W. That He Had Asked Almost Every Previous Juror about His or Her Ability to Impose the Death Penalty for an Accidental Killing During a Robbery

162. In questioning prospective juror Leo W. for cause, the prosecutor misleadingly implied to the six-person voir dire group, of which Leo W. was a member, that the facts of this case involved an accidental killing during a robbery. (RT 2014-16.) Leo W. was the last black prospective juror voir dired and the prosecutor did not ask his "death penalty for accidental death felony murder" question of any other voir dire group in this case.[25] (RT 2038-2108.)

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[25] The prosecutor did ask two previous voir dire groups if they could convict someone of murder based on a felony murder theory where the death was accidental, but, he did not ask them if they could impose the death penalty in such a case. (RT 905, 1004.)

163. The specific misconduct consisted of the prosecutor's falsely telling Leo W.'s voir dire group that he'd "asked everybody, all the jurors before you, or most of them, the same question and no one's ever heard of it [the felony murder rule]. . . . " (RT 2014.) That falsehood set the stage for allowing Leo W.'s voir dire group to mistakenly believe that the prosecutor had also asked all, or substantially all, of the other prospective jurors if they could impose the death penalty for an accidental killing during the course of a robbery. They quite reasonably believed that since the prosecutor asked everyone else about the felony murder rule, he also asked everyone else about imposing the death penalty where the killing was accidental during the course of a robbery. That was incorrect.

164. Jones was prejudiced by the prosecutor's misconduct in this regard because the prosecutor used Leo W.'s response to this question as a basis for a peremptory challenge. As the trial judge noticed, Leo W. turned completely around on his ability to impose the death penalty as a result of the prosecutor's voir dire examination. Leo W. became very equivocal and "[h]e didn't want to make the decision" to sentence a defendant to death based on an accidental murder. (RT 2134.)

165. Trial counsel's failure to object was obviously not a tactical decision because he made a *Batson*/*Wheeler* challenge to Leo W.'s dismissal by the prosecutor. Had trial counsel objected to the prosecutor's misconduct, the trial judge could easily have cleared up the misunderstanding created by the prosecutor and told the jury that this case did not involve an accidental killing during a robbery. That, in turn, would undoubtedly have changed Leo W.'s voir dire responses, which in all likelihood would have kept him on the jury.

2. Failure to Object to Prosecutorial Misconduct Relating to the Admission of Gang Evidence

166. Trial counsel should have objected and cited the prosecutor's misconduct when it became obvious that Joe Vargo, the Press Enterprise reporter, had not agreed to testify for the prosecution.

167. The trial judge allowed the prosecutor to mention gang membership to the jury in his opening statement and allowed witnesses to testify about gang membership and discussions by unspecified people at unspecified times about unspecified robberies which may or may not have actually occurred. Such testimony was deemed admissible based in part on the prosecutor's representation that Joe Vargo, a Press Enterprise reporter would testify about an admission Jones made during an interview with gang members for an article on gangs. According to the prosecutor, Vargo would have testified that Jones admitted that he had killed someone. (RT 2184, 2186-88.) The trial judge said, "[I]f the defendant has admitted to him [Vargo] culpability that he's a member of this gang, it's this particular type of gang that does these particular types of things that should be admissible and is relevant." (RT 2193-94.)

168. It became apparent to everyone that Vargo had not agreed to testify for the prosecution, as the prosecution falsely represented to the trial court to gain admission of the gang evidence, when Vargo resisted testifying by asserting the "Reporter's Shield Law" and the trial judge upheld that claim.[26] (RT 2858, 2812-24.) The prosecutor's later statements in connection with those proceedings revealed that he knew at the time he made that representation to the trial court, that the Press Enterprise had a long-standing policy against its reporters testifying in any case about a published article. (RT 2808.)

169. Although the defense should have interviewed Vargo before trial as an important potential prosecution witness and known that the prosecutor's representation was false at the time he represented that Vargo had agreed to testify for the prosecution, nonetheless trial counsel should have objected and cited the prosecutor for misconduct when the truth became known after the trial judge

[26] By that time, the jury had already heard the irrelevant and highly inflammatory gang membership evidence. (RT 2624-25, 2529, 2539, 2463, 2561, 2586-87.)

sustained the reporter's claim of privilege. That would have been a perfect opportunity to revisit the entire gang membership issue. For all practical purposes, the prosecution's case-in-chief had been completed. Maria Zuniga, a witness to the Mad Greek robbery, was the only witness the prosecution called after the trial court sustained the reporter's claim of privilege. (RT 2872, 2907.) By that time, it had become clear that the prosecutor wasn't going to put on the evidence on which he based the admissibility of the gang evidence.[27] The trial judge could easily have reviewed what the prosecutor promised when he granted the motion to allow the gang membership evidence and what the prosecutor actually proved to make that evidence relevant to any issue in the case. At that point, the trial judge might well have reconsidered his in limine ruling and ordered the evidence stricken and admonished the jury to disregard it and not mention or consider it in their deliberations.

170. Jones was prejudiced for all the reasons set out in Jones's previous arguments Claim Five subsection D relating to the trial judge's failure to sua sponte strike the gang evidence. When the gang evidence was not stricken by the trial judge sua sponte, trial counsel should have moved to strike it. There was no conceivable tactical purpose for letting the jury consider that evidence in their deliberations because the prejudice to Jones was identical to that suffered by Jones by the trial court's erroneous in limine order admitting that evidence in the first place because, gang evidence uniquely tends to evoke an emotional bias against the party as an individual and that has very little affect on the issues. *People v. Karis*, 46 Cal. 3d 612, 638, 758 P.2d 1189, 250 Cal. Rptr 659 (1988).

171. The prosecutor went to extreme efforts to place the irrelevant and highly prejudicial gang evidence before the jury, and then misused it to win a conviction. Since the error was not harmless beyond a reasonable doubt under *Chapman*, there is

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[27] By that time it was also patently obvious that the prosecutor was not going to introduce any evidence about statements Jones made to police officers after he was arrested.

a reasonable probability of a different outcome absent the error under *Strickland*.

3. Trial Counsel's Failure to Object to the Prosecutor's Misuse of Gang Membership Evidence During Closing Arguments

172. As shown in subsection D of this Claim in connection with Jones's claim that trial counsel should have moved to strike evidence of gang membership at the close of the evidentiary part of the trial, there were two instances in which the prosecutor misused the gang membership evidence in his closing arguments to the jury. In his final argument, he told the jury without any support in the record that Jones was the one who named the gang "211/187 Hard Way Gangster Crips." (RT 3067.) Later, the prosecutor told the jury, without any support in the record, that the gang was formed as the "211/187 Hard Way Gangster Crips" either "immediately" before or "a month before" the two robberies involved in this case. (RT 3126.)

173. Had trial counsel objected, cited the prosecutor for misconduct, and requested an admonition, in all probability Jones would not have suffered the same kind of prejudice as that set out above relating to trial counsel's failure to move to strike that entire body of gang evidence.

4. Failure to Object to Claims by the Prosecutor That Najee Muslim Was Not Armed During the Commission of a Robbery for Which He Received a Probationary Sentence in Exchange for His Testimony Against Jones

174. As discussed in Claim Seven, section C, the prosecutor committed misconduct when he falsely argued that Najee Muslim was not armed during the commission of a prior robbery. The arguments from Claim Seven, section C are incorporated into this Claim. The credibility of Najee Muslim was instrumental to the prosecutor's case. Failure on the part of trial counsel to object to this blatant prosecutorial misconduct resulted in ineffective assistance of counsel.

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5. Failure to Object to the Prosecutor's Claims That Enrique Luna Did Not Have a Plea Agreement or the False Testimony of Enrique Luna

175. As discussed in Claim Seven, section B, the prosecutor committed misconduct when he failed to disclose his plea agreement with Enrique Luna. The arguments from Claim Seven, section B are incorporated into this Claim. Enrique Luna testified to having a plea agreement with the prosecutor at a hearing immediately prior to his testimony at trial. (RT 2548.) The prosecutor claimed not to remember having entered into the agreement with Luna. (RT 2553-54.) The failure of the prosecutor to disclose this agreement, whether intentional or not was prosecutorial misconduct. *Giglio v. United States*, 405 U.S. 150; *Brady v. Maryland*, 373 U.S. 83. Trial counsel's failure to object to this prosecutorial misconduct resulted in ineffective assistance of counsel.

6. Failure to Object to the Prosecutor's Failure to Turn over the Composite Drawing Maria Torres Helped to Prepare

176. As discussed in Claim Seven, section D, the prosecutor committed misconduct when he failed to disclose the composite drawing that Maria Torres helped to prepare. The arguments from Claim Seven, section D are incorporated into this Claim. Assuming trial counsel knew that Torres helped to prepare a composite drawing, there is no reason for their failure to object to the prosecutor's failure to provide that drawing. Failure to request this evidence or object to the prosecutor's failure to produce it resulted in the ineffective assistance of counsel.

7. Failure to Object to the Prosecutor's Incorrect Argument That the Felony Murder Rule and the Felony Murder Special Circumstance Had the Same Elements

177. As discussed in Claim Seven, section F, the prosecutor committed misconduct when he claimed that the felony murder rule and the felony murder special circumstance were the same. The arguments from Claim Seven, section F are incorporated into this Claim. The prosecutor's argument was completely incorrect

and should not have been objected to by trial counsel. This misconception was heard by the jury, and was never rebutted or objected to by trial counsel. Failure to rebut or object to this clear misstatement of the law resulted in the ineffective assistance of counsel.

8. Failure to Object to the Prosecutor's Unconstitutional Argument That the Jury Should Convict to Send a Message

178. As discussed in Claim Seven, section G, the prosecutor committed misconduct when he inappropriately argued that the jury should convict Jones to send a message. The arguments from Claim Seven, section G are herein incorporated into this Claim. Trial counsel failed to object to the prosecutors call on the jurors during closing argument to send a message with their verdict. This failure resulted in the ineffective assistance of counsel.

9. Failure to Object to the Prosecutor's Vouching for the Credibility of Witnesses

179. As discussed in Claim Seven, section H, the prosecutor committed misconduct when he inappropriately vouched for the credibility of witnesses during Jones's trial. The arguments from Claim Seven, section H are incorporated into this Claim. The misconduct which occurred when the prosecutor vouched for witnesses significantly prejudiced Jones. Trial counsel's failure to object to this misconduct resulted in the ineffective assistance of counsel.

10. Failure to Object to the Prosecutor's Use of an Informant Who Was Placed in the Jail Cell with Jones and Questioned Jones Regarding the Crimes for Which He Was Charged

180. As discussed in Claim Seven, section I, the prosecutor committed misconduct when he offered testimony of an informant who had been placed in the jail cell with Jones and asked Jones questions regarding the crimes for which he was charged. The arguments from Claim Seven, section I are incorporated into this Claim. To the extent that trial counsel knew that Carlos Hunt had been placed into

the jail cell with Jones, his failure to object to this blatant misconduct resulted in ineffective assistance of counsel.

T. Trial Counsel Made Unreasonable and Harmful Arguments: He Effectively Waived an Opening Statement and His Closing Argument as a Whole Was Short and Entirely Ineffective

181. Trial counsel Frank Peasley effectively waived his opening statement by saying only a few words to the jury. His opening statement takes up less than four pages in the Reporter's Transcript. (RT 2251-54.) Peasley was completely deficient in his presentation of any theme or defense. Counsel basically only discussed evidence that would be presented regarding the Domino's robbery. The brief discussion of witnesses Christina Kane, Najee Muslim, Enrique Luna, Carlos Hunt, and John Isaacs (who did not even testify at trial), lasted less than two pages.

182. Counsel's claim regarding the gang evidence and the name of the gang not including the numbers 211 and 187 was a valid argument. However counsel then failed to offer any evidence to support the argument during trial. Jones hereby incorporates the arguments from section F from this Claim herein.

183. Peasley's suggestion that there would be "a few surprises," was entirely inappropriate, and was eventually used against him by the prosecutor in the closing argument. (RT 2254, 3046.) This statement to the jurors significantly undermined Jones's case.

184. Peasley's closing argument was harmful and utterly ineffective. Counsel again failed to offer any meaningful defense to the Mad Greek robbery. In the closing argument trial counsel described the Mad Geek as "a much stronger case [than the Domino's case]." (RT 3098.) Counsel told the jury, "You say, 'I don't have a doubt in the world that he shot at Lola Hall. I don't have' – that's fine." (RT 3099.) Counsel essentially gave up the Mad Greek robbery and attempted murders. An "admission by counsel of his client's guilt to the jury, represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a

presumption of prejudice." *United States v. Williamson*, 53 F.3d 1500, 1510 (10th Cir.1995); *see also United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (guilt phase relief where counsel failure to act as counsel by, inter alia, conceding that the evidence against his client).

185. Trial counsel further damaged Jones's case when he highlighted Jones's failure to testify. (RT 3074.) While the argument was meant to persuade the jury not to consider Jones's decision not to testify, what, in fact counsel accomplished was a highlighting of Jones's decision, and the jury's desire to hear from Jones. (RT 3074-75.)

186. Counsel's closing argument also failed to highlight the suggestiveness of the in court identification by Christina Kane. While Peasley did suggest that Kane's identification was not reliable, he discussed "the cross-racial or ethnic nature of the identification" far more than the suggestiveness of the in court identification. (RT 3076-79.) Counsel failed to highlight the differences in the physical descriptions of the individuals that were in court with Jones when Kane identified him.

187. The possibility of collusion between Frankie Cruz and Najee Muslim was never brought out during closing argument by trial counsel. The attack of Cruz's testimony was completely ineffective. Counsel admitted that he was not involved in the cross-examination of Cruz, but claims the attorneys who did cross-examine Cruz did an adequate job. Those attacks were so insignificant that they were basically ineffective, and James Spring provided ineffective assistance of counsel during the preliminary hearing.

U. Failure to Adequately Consult with Client

188. Trial counsel rarely, if ever, met with Jones, except in court. [redacted] Counsel has an obligation to form a relationship with his client to gain his trust and to gather important

information. Such lack of consultation constitutes ineffective assistance of counsel. See, *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998), quoting *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *Crandell v. Bunnell*, 144 F.3d 1213, 1217 (9th Cir. 1998); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir.), *cert. denied*, 522 U.S. 907 (1997).

V. Failure to Request Instruction on Jailhouse Informant Unreliability

189. Carlos Hunt was a jailhouse informant who testified at Jones's trial. (RT 2762-83.) The testimony of jailhouse informants has been found on many occasions to be unreliable. An informant who offers testimony to get relief from other charges is so inherently unreliable as to require an instruction which would inform the jury of such. Counsel's failure to request an instruction that would fully describe to the jury the inherent problems with jailhouse snitches prejudiced Jones.

190. Carlos Hunt received a significant benefit for his testimony in Jones's case. (RT 2768.) However, during the preliminary hearing Hunt had testified to receiving no benefit at all for his testimony. (PHRT 360.) Hunt's testimony regarding Jones's admissions were quite damaging. While Najee Muslim's and Frankie Cruz's testimony also provided admissions by Jones, the jury had been instructed to distrust accomplice testimony. (CT 706.) Failure of trial counsel to request CALJIC 3.20 (Cautionary Instruction--in-custody Informant)[28] regarding the inherent unreliability of the jailhouse informant testimony provided by Carlos Hunt

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[28] CALJIC 3.20 reads: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case." ["In-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution.]

resulted in ineffective assistance of counsel.

W. Failure to Investigate and Present Evidence Regarding Gilbert Leon and Javier Sierra

191. There were five individuals in the car with Jones when the robbery of the Domino's restaurant occurred. (RT 2465.) Najee Muslim and Frankie Cruz both testified against Jones. (RT 2462-2520, PHRT 235-303.) Eric Bailey was a co-defendant. (CT 1.) The last individual in the car was identified as "Gilbert," since identified as Gilbert Leon. (RT 2465.) Gilbert Leon was a necessary defense witness. He witnessed the exact same events as Frankie Cruz and Najee Muslim. He would have directly countered their testimony regarding Jones's statements in the car, and his testimony would not have been impeached by a plea agreement.

192. Leon would have been able to describe the incident in full, and identify what was said by all of the participants. Leon could have clarified whether Jones was ever seen with a gun, or if gunshots could even be heard at the car. The absence of those factors that were testified to by Najee Muslim and Frankie Cruz certainly would affect the ability of the jury to reach a verdict. Failure to investigate and present this evidence resulted in the ineffective assistance of counsel.

193. Javier Sierra also had exculpatory evidence to offer Jones's case. Sierra was one of the witnesses to the Mad Greek robbery that managed to stay calm through the incident and whose view of the perpetrator was as good as Maria Zuniga's. (RT 2872.) Sierra was the individual who was able to open the cash register when Zuniga could not. (RT 2881.) He was called to a lineup and identified someone other than Jones as the perpetrator. (RT 2321.) His failure to identify Jones after seeing him in the lineup is a clear indication that Jones was not the gunman. The failure of counsel to investigate and call him as a witness is a sign of ineffectiveness.

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X. Failure to Request Instruction for the Lesser Included Offenses or Regarding Jones's Status as an Aider and Abettor

194. Jones's counsel failed to request instruction on lesser included offenses to those charged in Jones's case. It was possible that Jones could have been found guilty of lesser included offenses. In connection with the argument that Jones was unable to form the specific intent to commit the crimes with which he was charged due to voluntary intoxication, it is possible that Jones would have been found guilty of a lesser included offenses, including second degree murder, manslaughter, etc., and for the Mad Greek, second degree robbery, etc. Failure to request instruction on lesser included offenses by trial counsel resulted in ineffective assistance of counsel.

195. While it appears as though Jones's counsel requested instructions on intent be given as part of the felony murder instruction, it is possible counsel failed to request the intent portion of the instruction be given under the theory of Jones as an aider and abettor. (RT 2973.) Any failure on the part of Jones's counsel to request that the jury be instructed that they must find that Jones was the actual killer or, in the alternative, find that Jones aided and abetted in a felony and had the intent to kill, amounted to ineffectiveness of counsel. Jones incorporates all arguments from Claim Six, section A into this Claim.

196. It is apparent from trial counsel's argument regarding the case of *People v. Anderson*, 43 Cal. 3d 1104, 1142, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), that counsel failed to understand the relevant portions of the case and failed to argue the holding to Jones's advantage. (RT 2973.) *Anderson* requires the prosecution to prove intent to kill if there is evidence that the defendant was an aider and abettor and not the actual killer. There was evidence of the fact that Jones was an aider and abettor during the Domino's robbery-homicide. However, trial counsel failed to adequately argue in favor of the intent instruction under *Anderson*. Trial counsel's failure demonstrates ineffective assistance of counsel.

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Y. Failure to Prove Jones's Actual Innocence and Failure to Raise a Reasonable Doubt With Respect to the Domino's Incident

197. Trial counsel needed to investigate all possible scenarios with respect to the Domino's case. First, Jones could have been the look-out while Andre Davis and Eric Bailey went in for the robbery and shooting. Second, Jones could have been the second non-shooter perpetrator with Eric Bailey. Third, Jones could have been the second non-shooter perpetrator with Andre Davis. Other scenarios would need to be investigated as well.

198. Jones was not the shooter in the Domino's robbery, and has denied being the shooter from the first time he was arrested. He was never reliably identified as the shooter. Christina Kane's testimony is obviously questionable considering she identified someone other than Jones at the lineup. (RT 2408, 2420, 2434.) Indeed, the eyewitness testimony of Maria Torres actually excluded Jones as the shooter in the Domino's robbery. (Ex. 136, Decl. of Maria Torres.)

199. The Najee Muslim and Frankie Cruz both received plea bargains in exchange for their testimony. Due to the plea bargains that they received, their testimony was unreliable. More specifically, Muslim and Cruz had the chance to confer prior to Cruz's arrest. Muslim was the first suspect who confessed, and when, he was released, he had ample opportunity to confer with Cruz prior to Cruz's arrest. The potential involvement of Andre Davis, Muslim's cousin, casts further doubt onto his testimony.

200. Muslim's connection to Enrique Luna certainly taints Luna's testimony. Luna had been involved in an armed robbery with Muslim before the preliminary hearing. (Ex. 82, 88.) To avoid a significant sentence for that robbery Muslim entered into a plea bargain. (Ex. 91, 93.) Certainly Muslim informed Luna of how Muslim was able to avoid charges in his robbery, and Luna pursued the same tactic. The plea agreement that Luna entered was almost identical to Muslim's. (Ex. 83.) Luna's testimony was inconsistent, and has since been recanted. (Ex. 148, Decl. of

Enrique Luna, ¶ 3.)

201. Carlos Hunt testified inconsistently. Hunt had testified at the preliminary hearing that he had no agreement with the prosecutor. (PHRT 360.) That testimony was false. Hunt recited incorrect facts about the incident, claiming that a shotgun was used in the Domino's robbery. (RT 2772.)

202. Jones's statements to Erin Burton and Tara Taylor did not indicate that he was the shooter in any way. In addition, Jones was considered a braggart by many of his associates. (Ex. 146, Decl. of Luis Villarreal, ¶ 8; see also Ex. 135, Decl. of Tara Taylor, ¶ 6 ("Mike . . . was just a lot of talk"); Ex. 107, Decl. of Erin Burton-Uribe, ¶ 3 (" . . . a bunch of macho guys always talking a lot of stuff").)

203. There was no physical evidence connecting Jones to the Domino's robbery, and there was strong evidence suggesting he was not the shooter. There was evidence that the shooter wore an earring. (Ex. 68, 63-64 (CT 949).) Jones did not wear an earring or have pierced ears. (CT 949; Ex.135, Decl. of Tara Taylor, ¶ 7.) However, Andre Davis wore an earring at the time. (CT 949, Ex. 148, Decl. of Enrique Luna, ¶ 4.) Eric Bailey also wore an earring at the time. (Ex. 107, Decl. of Erin Burton-Uribe, ¶ 1; Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22; see also Ex. 162.)

204. Maria Torres specifically described the shooter as having a darker complexion than the non-shooter, "I remember that the guy with the gun was darker, uglier, heavier, and meaner than the other guy. (Ex. 136, Decl. of Maria Torres-Inzunza, ¶ 2.)

205. Several witnesses who testified at trial could have provided information regarding Eric Bailey having a darker complexion and being heavier than Jones. Erin Burton testified at trial. She knew both Jones and Eric Bailey and described Eric Bailey as darker than Jones. (Ex. 107, Decl. of Erin Burton-Uribe ¶ 31.) Mario Villarreal, Jr. also was aware of the fact that Bailey had a darker complexion than Jones. (Ex. 140, Decl. of Mario Villarreal, Jr., ¶ 22.)

206. Witnesses could have also testified that Andre Davis had a darker complexion than Jones. (*Id.*) In examining the facts of the evidence regarding the earring and the defendant's complexion, the only viable conclusions are that Jones was either outside of the Domino's when it was robbed or inside and not the shooter.

207. Jones incorporates herein by reference all of the facts and circumstances pled in Claim Four, Jones's actual innocence and the insufficiency of the evidence to convict Jones. If trial counsel had investigated, interviewed relevant witnesses, and presented some or all of the evidence that was available as outlined in Claim Four, it is reasonably probable that Jones would not have been found guilty.

Z. Conclusion

208. These constitutional violations, individually or cumulatively, warrant the granting of this Petition. Had trial counsel investigated and presented the evidence summarized above, there is a reasonable probability that the jury would not have voted to convict Jones and would have found the special circumstances to not be true. Deficient performance by trial counsel and prejudice – both abundantly present here in the guilt phase – constitutes ineffective assistance of counsel in violation of Jones's constitutional rights. *Strickland v. Washington*, 466 U.S. 668 (1980).

NINTH CLAIM FOR RELIEF FOR TRIAL COURT ERROR DURING THE PENALTY PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the trial court: (1) denied Jones's motion that the jury hear evidence regarding what a day in the life of an inmate serving a sentence of life without the possibility of parole would be like; (2) allowed evidence to be admitted regarding gang affiliation without previewing it under his own order; (3) allowed evidence to be admitted that went beyond showing

Jones's conduct during the Flats incident; (4) denied Jones's request to admit defense exhibits D and E; (5) erroneously allowed the prosecutor to read into evidence the prior testimony of Luis Villarreal; and (6) erred in other regards to Jones's prejudice. Standing alone, and/or cumulatively, the trial court's errors prejudiced Jones.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. The Trial Court Erred When it Denied Jones's Motion That the Jury Hear Evidence Regarding the Conditions Under Which an Inmate Would Serve a Sentence of Life Without the Possibility of Parole

4. Jones moved that the jury hear evidence of the conditions under which prisoners serving life without possibility of parole are incarcerated from James Park, a retired former warden at the California Department of Corrections. (RT 3251, 3381-85.) Park was to testify regarding how an inmate sentenced to life without the possibility of parole would be classified, how they would be housed, and what the person's daily routine would be like. (RT 3381.) The court denied the motion, finding that the evidence was "not relevant to the sentencing proceeding or to this decision-making in the penalty phase." (RT 3385.) This ruling was in violation of the Fifth, Eighth, and Fourteenth Amendments.

5. First, such a ruling is fundamentally unfair, given the fact that the prosecutor was able to argue the future dangerousness of Jones while incarcerated in the California Department of Corrections. In his closing argument, the prosecutor stated that Jones would pose a threat to correctional officers, nurses, doctors, therapists, and other prisoners if life without the possibility of parole was the penalty. (RT 3782, 3789 ("The violence has got to end . . . there is no reason for him not to stab someone or kill someone or hurt someone.").) In fact, there was no evidence of any kind that Jones had engaged in violent conduct while incarcerated, or that he

posed a danger to anyone while in custody. As noted in Claim Eleven, the prosecutor's argument, in the absence of such evidence, constituted misconduct. This argument was particularly egregious, since the prosecutor made arguments that successfully precluded Jones from presenting evidence that he presented no such danger. Moreover, "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain (requires that the defendant be afforded an opportunity to introduce evidence on this point)." *Skipper v. South Carolina*, 476 U.S. 1, 5, n.1, 106 S. Ct. 1669, 1671, n.1, 90 L. Ed. 2d 1 (1986), quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207, 51 L. Ed. 2d 393 (1977) (plurality opinion).

6. Under these circumstances, Jones should have been allowed to rebut the prosecutor's argument by presenting the testimony of Park regarding the safety and security of the prison facilities within the Department of Corrections for a person serving a sentence of life without the possibility of parole. By improperly excluding this defense evidence, and improperly allowing the prosecution to argue that Jones would continue to be dangerous in prison without any evidence and without allowing defense rebuttal, the trial court violated Jones's right to present evidence, to confront the evidence against him, and to a fair trial, free from irrelevant, inflammatory and misleading prosecution argument. *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000); *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993).

7. Additionally, jurors must be aware of and appreciate the nature and seriousness of their sentence. *People v. Linden*, 52 Cal. 2d 1, 27, 338 P.2d 397 (1959); *People v. Friend*, 47 Cal. 2d 749, 766, 306 P.2d 463 (1957). The United States Supreme Court has recognized that related principles are constitutionally mandated. Thus, in *Hicks v. Oklahoma*, 447 U.S. at 346-47, the Supreme Court held

that it is a denial of due process for a judge or jury to impose a sentence without knowing and understanding the discretionary sentencing alternatives available.

8. The exercise of uninformed sentencing discretion is also proscribed under *Woodson v. North Carolina*, where the United States Supreme Court held that, in death penalty trials, the Eighth and Fourteenth Amendments preclude the jury from being vested with a standardless sentencing power. *Woodson v. North Carolina*, 428 U.S. 280, 302, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). Additionally, both the Eighth and Fourteenth Amendments have been construed to emphasize ". . . the special importance of fair procedure in the capital sentencing context. . . . " *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991), citing *Gardner v. Florida*, 430 U.S. at 357; *Woodson v. North Carolina*, 428 U.S. at 305.

9. Because the jury must be adequately informed in order to engage in this "exercise of judgment," related decisions have held that the Eighth and Fourteenth Amendments further require that the jury not be precluded from considering as a mitigating factor any aspect of a defendant's character or record, or circumstance of the offense which the defendant might offer. *Lockett v. Ohio*, 438 U.S.586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Due process also requires that the defendant be given the chance to offer such evidence or testimony. *Lankford v. Idaho*, 500 U.S. at 126, n.22, 127, citing *In Re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948). And, in California, such evidence is also admissible under section 190.3's provision that evidence may be presented " . . . as to any matter relevant to sentence." Cal. Penal Code § 190.3.

10. The foregoing constitutional guarantees, as well as California Penal Code Section 190.3, mandated that Jones's jury be made aware of the reality of execution (as opposed to a life without parole sentence); Jones was also independently entitled to present evidence regarding the same. Without any knowledge of these facts, the jury could not constitutionally exercise its judgment regarding the penalty to be imposed.

11. The jury could not perform its duty, nor reasonably appreciate the nature of the decision to be made or the significance of imposing a sentence of death, as opposed to life without parole, without knowing the details of what life without possibility of parole entailed. The absence of such knowledge also precluded the jury from affording the defendant an individualized consideration in sentencing. The death verdict was therefore constitutionally arbitrary, capricious and unreliable, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment and the guarantees of fair trial, due process, trial by jury, effective counsel, heightened capital case due process and reliability in sentencing, per the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Lockett v. Ohio*, 438 U.S. at 604; *Gardner v. Florida*, 430 U.S. at 357-62; *Chambers v. Mississippi*, 410 U.S. at 294; *Beck v. Alabama*, 447 U.S. at 637-38 and n.13.

12. The Fifth, Sixth, Eighth and Fourteenth Amendments are also violated when the defendant is denied his right to present evidence in mitigation, here regarding the alternative to execution, which is ". . . mitigating in the sense that [it] might serve as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). This information should properly have been considered by the jury in determining whether Jones deserved the penalty of execution.

B. The Trial Court Erred in Failing to Enforce Its Own Order Regarding Gang Affiliation Evidence

13. Jones incorporates herein by reference Claims Eleven and Twelve.

14. The trial court stated on the record that "the People . . . conceded that they were not going to get into the gang activity aspect in the penalty phase . . . " (RT 3254.) That elicited a response from the district attorney, who, while admitting that the People would not introduce his "convictions" on gang charges, wanted to reserve the right to bring up gang evidence "if it becomes relevant on cross-examination because there are a lot of witnesses that talk about the upbringing of the defendant

and his lifestyle, et cetera, where it may become relevant." (RT 3254-55.) The court ruled that, if the district attorney did seek to introduce gang evidence, the district attorney would have to preview such evidence outside the jury's presence before eliciting it on cross-examination. The district attorney agreed to do so. (RT 3255.)

15. Later, the prosecutor cross-examined three defense witnesses and specifically asked witnesses Beatrice Acosta, Glenn Garbot, and Joseph Gueste about Jones's gang affiliation. (RT 3559-62, 3575-76 ("Did you ever notice that he was in a gang called the 211/187 Gangster Crips?"), 3621 (same), 3636-37 (same).) Although trial counsel could have objected to some of the questions, the court generally allowed the prosecutor to ask these questions. The evidence was allowed in despite the fact that it was not relevant to any evidence presented in mitigation, and no rebuttal regarding gang evidence was warranted or appropriate. The trial court erred when it failed to enforce its own order that the prosecutor "preview" any gang evidence before it was to be admitted.

16. The trial court erroneously allowed in aggravating evidence that was not enumerated under the statutory factors of California Penal Code section 190.3. Additionally, the trial court had already decided that allowing such evidence in at the penalty phase had to be carefully considered and previewed beforehand. The trial court knew or should have known that allowing gang affiliation evidence in was highly prejudicial to Jones. *See*, *e.g.*, *O'Neal v. Delo*, 44 F.3d 655, 661 (8th Cir. 1995), citing *Dawson v. Delaware*, 503 U.S. 159, 165-69, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) ("A defendant's membership in a gang cannot be raised as bad character evidence in the penalty phase of a capital proceeding when the evidence is not relevant to the rebuttal of any specific mitigating evidence.")

C. The Trial Court Erroneously Allowed Aggravating Evidence Regarding the Flats Incident that Went Beyond the Conduct of Jones

17. The Flats incident was not considered by the trial court to be an aggravating factor under California Penal Code section 190.3(c) regarding prior

convictions in light of the fact that the criminal activity took place after the conduct relating to the capital crime. (RT 3255.) The trial court further ruled that the prosecutor did not have to prove the Flats incident beyond a reasonable doubt under 190.3(b), and so restricted the prosecutor to calling witnesses who could testify about the conduct of the defense which gave rise to the offenses. (*Id.*) The court ruled: "So to me, that means that you wouldn't be allowed to call the doctors, officers, or other witnesses who cannot testify to the conduct of the defendant which gave rise to the offense." (RT 3255-56.)

18. Later, the trial court reversed itself and allowed the testimony of doctors and officers. With respect to the emergency room doctors, the trial court allowed them to testify "to that limited circumstance of when the victims first came to the hospital." (RT 3262.)

19. The trial court was correct in its analysis of the law to start with. Under *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, Cal. Rptr. 867 (1998), *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987), and *People v. Caro*, 46 Cal. 3d 1035, 1055, 761 P.2d 680, 251 Cal. Rptr. 757 (1988), the court had to limit the testimony to the conduct of the defendant which gave rise to the offense, which would not include doctors or police officers. Three emergency room doctors testified with respect to the injuries related to Brian Wagner, Christopher Swan, and Larry Nave. (RT 3280-86, 3339-41, 3459-61.)

20. The trial court unreasonably allowed the prosecutor too much latitude with the questioning of Dr. Jensen, emergency room doctor for victim Larry Nave, when he asked what would have happened if the bullet had struck Nave in the spine. The doctor answered, "He could have been paralyzed." (RT 3341.) Defense counsel did not object and the trial court did not strike this answer. The prosecutor also elicited from Dr. Heischoeber, emergency room doctor for Brian Wagner, that he did not "give the family much hope" given his critical condition. (RT 3460.) The doctor also spoke about the lengthy surgery and the amount of blood that Wagner was given.

(RT 3461.) Trial counsel did not object and the trial court did not strike this testimony.

21. The trial court erroneously allowed in aggravating evidence that was not enumerated under the statutory factors of California Penal Code section 190.3. The trial court knew or should have known that allowing such evidence in was highly prejudicial to Jones. The arbitrary deprivation of Jones's state law rights constitutes a violation of Jones's due process rights. *Hicks v. Oklahoma*, 447 U.S. at 346-47. Additionally, both the Eighth and Fourteenth Amendments have been construed to emphasize " . . . the special importance of fair procedure in the capital sentencing context. . . . " *Lankford v. Idaho*, 500 U.S. at 126, 114 L. Ed. 2d at 187, citing *Gardner v. Florida*, 430 U.S. at 357; *Woodson v. North Carolina*, 428 U.S. at 305.

D. The Trial Court Erroneously Excluded Relevant Mitigating Evidence

22. A capital defendant must be given the opportunity to present evidence in mitigation. The Eighth Amendment provides that a sentencing authority in a capital case may not constitutionally be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604-05; *see*, *e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); *see*, *e.g.*, *Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995), *cert. denied*, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996), citing *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). In *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993), the Supreme Court reaffirmed this long-established rule:

> A majority of the Court adopted the *Lockett* rule in *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); *accord*, *Hitchcock v. Dugger*, *supra*, 481 U.S. at

> 398-399; *Skipper v. South Carolina*, *supra*, 476 U.S. 1, and we have not altered the rule's central requirement. "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."

Johnson v. Texas, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290, 306 (1993), quoting *McKoy v. North Carolina*, 494 U.S. 433, 456, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Kennedy, J, concurring in judgment); *see also State v. Stevens*, 319 Or. 573, 879 P.2d 162 (Or. 1994) (because introduction of mitigating evidence relating to a defendant's character and background is a mechanism for the jury to provide a "reasoned moral response" to the ultimate question of whether defendant should live or die, only in rare cases will the trial court's improper exclusion of such evidence amount to harmless error).

23. The trial court excluded defense exhibits "D" and "E" from introduction into evidence at the penalty phase trial. (RT 3742-43.) Defense Exhibit "D" was a letter to Jones's grandmother written by Jones. This letter was being presented to rebut the prosecutor's cross-examination of Jones's defense witnesses about the "horrible" crimes committed by Jones. Trial counsel was asking that the evidence be admitted to show Jones's remorse, and that he had grown up and was a different person. (RT 3698-3702.) Additionally, such a letter would have shown that Jones had a close and personal relationship with his grandmother.

24. Defense Exhibit "E" was a picture of Jones with his son, Michael Jones, Jr. (RT 3703-05.) Defense counsel sought to introduce evidence of the fact that Jones has a son, and has a relationship with his son. The trial court disallowed the evidence based upon the notion that "it is abundantly clear [to the jury] that [he] does

have a child" from the child's mother's testimony and from the child being in court. (RT 3705.)

25. Relevant mitigation evidence encompasses the "'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" *McCleskey v. Kemp*, 481 U.S. at 304, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1986). It includes both "mitigating aspects of the crime," *Lowenfield v. Phelps*, 484 U.S. 231, 245, 108 S. Ct. 546, 555, 98 L. Ed. 2d 568 (1988); *see also Roberts v. Louisiana*, 431 U.S. 633, 637, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977), and mitigation that is unrelated to the crime. *Lockett v. Ohio*, 438 U.S. at 605. *See Skipper v. South Carolina*, 476 U.S. at 4-5. In short, the High Court's decisions require that a defendant be given the opportunity to present any reason why the death penalty should not be imposed. *See*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 821, 111 S. Ct. 2597, 2606, 115 L. Ed. 2d 720 (1991); *see also People v. Easley*, 34 Cal. 3d 858, 878, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

26. The proffered evidence was relevant to the issues at trial and was offered for non-hearsay purposes. Unquestionably, the proffered evidence was relevant to the issues at trial. The only issue is whether the evidence was properly excluded. The trial court's conclusion was erroneous.

E. The Trial Court Erroneously Admitted the Preliminary Hearing Testimony of Luis Villarreal

27. The prosecutor sought to admit into evidence the preliminary hearing testimony of Luis Villarreal because he claimed that Villarreal was unavailable and could not be located. A hearing was conducted pursuant to California Evidence Code 402 regarding the prosecutor's due diligence in locating Villarreal. (RT 3388-3408, testimony of Daniel Fredrich). Fredrich was the first and only prosecution witness to be cross-examined by defense counsel during the prosecution's case in aggravation. The trial court found that due diligence had been exercised and the court allowed the preliminary hearing testimony to be read into the record. (RT 3409.) The court erred

in allowing in this testimony. First, due diligence had not been established.

28. Second, trial counsel objected to the admission of the Villarreal testimony because of the fact that he did not have the ability to cross-examine him. (RT 3376-80.) Prior testimonial statements that are not subject to cross-examination are inadmissable under the federal constitution. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

29. As was conceded by the prosecutor, Villarreal:

> was certainly not necessarily cooperative with me or with my office. And he testified inconsistently. And I had to lead him on numerous occasions because of his inconsistent and uncooperative and evasive nature at preliminary hearing.

(RT 3377.) When Gunn accused the prosecutor of testifying for Villarreal at the preliminary hearing, the prosecutor stated, "I had to because he was lying." (RT 3380.) Whatever cross-examination of Villarreal that was done at the preliminary hearing was insufficient to elicit the strong statements made by the prosecutor against his own witness who he was presenting in aggravation.

30. This is certainly not the type of reliable evidence that the trial court should have let in without giving trial counsel an opportunity to cross-examine Villarreal.

31. Further, it is unclear whether or not Villarreal had a deal with the prosecutor. The officers did threaten to charge Villarreal with accessory after the fact regarding the Flats incident. The prosecution has not, to date, turned over any agreement, either oral or in writing, regarding a deal between Villarreal and the District Attorney's Office that the charges would not be brought against Villarreal if he testified at the preliminary hearing. The defense lawyers appointed during the preliminary hearing did not cross-examine Villarreal about any deal that he may have had in exchange for his testimony, and they would have had they known about it.

(Ex. 101, Decl. of Allan H. Sandquist, ¶ 3; Ex. 102, Decl. of James Spring, ¶¶ 4-6.) Given that Villarreal's testimony affected his brother's position with his criminal case, it is likely that Villarreal was either threatened into testifying or had a deal with the prosecutor to testify in exchange for not filing charges against him.

32. It is well-established that the prosecution has a duty to sua sponte disclose evidence which may reflect on the credibility of a material witness, including any inducements made to secure the witnesses' testimony. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Suppression of evidence, even when it is unintentional or inadvertent, violates federal due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

33. Prior testimony of an unavailable witness is admissible when it is subject to cross-examination. *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). However, failure to produce relevant *Brady* material prevents a full and fair cross-examination. Statements that are not subject to cross-examination are inadmissible under the federal constitution. *Crawford v. Washington*, 541 U.S. at 36.

34. The removal of Villarreal's testimony from evidence would have had a significant effect on the outcome of the trial. The trial court erred in allowing the Villarreal testimony to be read into the trial.

35. Finally, the trial court should not have allowed the prosecutor personally to read Luis Villarreal's testimony into evidence. Jones incorporates herein by reference Claim Eleven, section E.

F. Conclusion

36. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the

guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

TENTH CLAIM FOR RELIEF FOR TRIAL COURT ERROR REGARDING JURY INSTRUCTIONS IN THE PENALTY PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: (1) the trial court instructed the jury pursuant to CALJIC No. 8.88.; (2) failed to instruct the jury that a sentence of death meant that Jones would be executed; and (3) failed to instruct regarding Jones's nine other proposed jury instructions;

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Erroneous and Unconstitutional Jury Instruction, Which Defined the Scope of the Jury's Sentencing Discretion and the Nature of Its Deliberative Process

4. The trial court read to the jury a version of CALJIC No. 8.88, which has three fundamental flaws. CALJIC No. 8.88 is derived from Cal. Penal Code section 190.3, which seeks to comply with applicable constitutional requirements by listing factors potentially applicable to the penalty phase weighing process and by circumscribing the scope of the jurors' sentencing discretion. First, the statute provides an exclusive list of factors in aggravation, while permitting the sentencer to consider potentially unlimited factors in mitigation. *See* Cal. Penal Code § 190.3, subd. (k). Second, section 190.3 authorizes but does not require imposition of the death penalty if the factors in aggravation outweigh those in mitigation. *People v.*

Brown, 40 Cal. 3d 512, 541, 726 P.2d 516, 230 Cal. Rptr. 834 (1985).

5. Once death eligibility has been determined, section 190.3 places no limit on the sentencer's discretion in assigning moral weight to each factor that is applicable. There remains, nonetheless, a most significant limitation on the sentencer's authority to impose death: there must be a threshold determination that aggravation outweighs mitigation. Thus, while the jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of the determination, that determination is a precondition to the exercise of discretion to impose death. *People v. Brown*, 40 Cal. 3d at 541.

6. Under CALJIC No. 8.88, Jones's jury was improperly authorized to impose death even if it was "persuade[d]" on the basis of constitutionally relevant mitigation that death was not the appropriate punishment, so long as the aggravating "evidence" was " . . . so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 878.) Thus, although CALJIC No. 8.88 is taken from section 190.3, it does not comply with it.

7. This instruction was fundamentally flawed in three distinct aspects. First, it failed to tell the jurors, per section 190.3, that they could not impose death unless they found that the aggravating factors outweighed the mitigating factors. Second, the instruction also failed to advise the jurors, again pursuant to California Penal Code section 190.3, that if mitigation outweighed aggravation, they were required to impose a life without parole sentence. Instead, the instruction misled the jury to believe that a life without parole sentence also was discretionary under those circumstances, an incorrect standard that also was conducive to arbitrary, capricious decision-making, and created an unconstitutional presumption in favor of death. Third, the "so substantial" standard used here for comparing aggravating and mitigating factors was unconstitutionally vague, conducive to arbitrary, capricious decision-making and created an unconstitutional presumption in favor of death.

8. CALJIC No. 8.88 failed to adequately explain to the jury the

determinations necessary to impose death. A primary purpose of the constitutional limitations on capital sentencing procedures is to insure that the sentencer's judgment reflects a "reasoned moral response to the defendant's background, character and crime . . . " (*Penry v. Lynaugh*, 492 U.S. 302, 319, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)), which itself requires that the jury be provided an accurate account of both the relevant facts and legal constraints on its discretion. *Gregg v. Georgia*, 428 U.S. at 189, 193.

9. Under Cal. Penal Code section 190.3, Jones's jury was not permitted to impose death unless and until it had decided that factors in aggravation outweighed those in mitigation, *People v. Brown*, 40 Cal. 3d at 542; however, Jones's jury was not informed of this requirement. This instructional failure on the key penalty phase standard permitted the imposition of death even if the jury concluded that the aggravating and mitigating factors were equal, or even worse, that mitigation outweighed aggravation. Thus, contrary to the Eighth Amendment, and California Penal Code section 190.3 itself, the jury was not adequately informed of " . . . what they must find to impose the death penalty . . . [which] as a result . . . [left] them and the appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard v. Cartwright*, 486 U.S. at 361-62.

10. Moreover, the absence of such knowledge also precluded the jury from affording Jones an individualized consideration in sentencing. The death verdict was therefore constitutionally arbitrary, capricious and unreliable, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment and the guarantees of due process and heightened capital case due process of the Fifth, Eighth and Fourteenth Amendments. *Lockett v. Ohio*, 438 U.S. at 604; *Gardner v. Florida*, 430 U.S. at 357-62; *Chambers v. Mississippi*, 410 U.S. at 294; *Beck v. Alabama*, 447 U.S. at 637-38 & n.13.

11. CALJIC No. 8.88 creates a presumption in favor of death. The foregoing errors were compounded by the additional error of using the "so

substantial" standard."' (CT 878.) This term is purely subjective, and so unconstitutionally vague that it invited each juror to engage in the standardless, arbitrary and unreliable decision-making condemned under the Eighth and Fourteenth Amendments.[29]

12. Irrespective of the meaning jurors might have given the term "so substantial," the standard does not convey the threshold requirement that aggravation outweigh mitigation. Additionally, by positing the substantiality of the aggravating evidence against mitigating circumstances, the instruction impermissibly skewed the jury's penalty decision in favor of death. As recognized by the California Supreme Court, a defendant at the penalty phase has already been convicted of first degree murder with at least one special circumstance. *People v. Brown*, 40 Cal. 3d at 541 n.13. Both the circumstances of the murder and the existence of the special circumstance will count in aggravation in the weighing process. Under these circumstances, the "aggravating evidence" will always remain substantial. From the starting point, then, it ". . . would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract." *Id.*

13. Penalty phase mitigating evidence is therefore unlikely to make the aggravating evidence appear not "substantial." This is particularly true when, as here, much mitigating evidence may be unrelated to the circumstances of the crime and existence of the special circumstances, per California Penal Code section 190.3, subdivision (a). Consequently, merely being found death-eligible gives rise to an imbalance in which pre-existing aggravating factors will necessarily, from the outset, appear "substantial" in comparison to all but the most extreme showing of mitigating

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[29] The Georgia Supreme Court has found the word "substantial" to be impermissibly vague in the context of determining whether a defendant had a "substantial history of serious assaultive criminal convictions." *Arnold v. State*, 224 S.E.2d 386, 391-392 (1976); *see Zant v. Stephens*, 462 U.S. at 867 n.5; *Gregg v. Georgia*, 428 U.S. at 202.

evidence.

14. Therefore, CALJIC No. 8.88 unconstitutionally misled the jury to conclude that Jones bore the burden of proof that death was not appropriate and that aggravation was insubstantial in comparison to mitigation

B. Refusal to Instruct the Jury That a Sentence of Death Meant That Jones Would Be Executed and Other Refused Instructions

15. The trial court refused to read Jones's proffered instruction advising the jury that a sentence of life without possibility of parole meant Jones would not be paroled at any time, and that a sentence of death meant Jones would be executed, which Jones had submitted in reliance upon *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). (CT 843; RT 3750-51.)

16. Jones's proffered instruction number 6 read: "A sentence of life without possibility of parole means that [Jones] will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that [Jones] will be executed." (CT 843.)

17. There is a common perception that jurors do not believe that persons sentenced to die will be executed or that persons sentenced to serve life without parole will spend their entire lives in prison.[30] Jones therefore had cause to seek the instant instruction. This instruction was a correct statement of the law and the instruction affirmed that the penalty imposed would be carried out. It is all the more important in this case because, during deliberations, the jurors actually did discuss whether life without the possibility of parole actually meant that there was no possibility that Jones would ever get out of prison.

18. This error violated Jones's Fifth, Sixth, Eighth and Fourteenth

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[30] See *People v. Cox*, 53 Cal. 3d 618, 696, 809 P.2d 351, 280 Cal. Rptr. 692 (1991) and *Bruce v. State*, 569 A.2d 1254, 1268-69 (Md. 1990) (It is universally recognized that the literal words of a sentence to imprisonment are generally not an accurate indication of the effect of the sentence . . .").

Amendment rights to liberty, fair trial, trial by jury, due process, notice, effective counsel, heightened capital case due process, reliable guilt determination, and individualized and reliable penalty determination. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); *Gregg v. Georgia*, 428 U.S. 153, 192, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d, 367, 382 (1992); *Zant v. Stephens*, 462 U.S. 862, 865, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). In particular, there was an unacceptable risk that the jury, absent the requested instructions, did not choose the sentence with a full awareness of the gravity of their task, as required by the Eighth and Fourteenth Amendments, and reversal of the death judgment is required. *Caldwell v. Mississippi*, 472 U.S. at 329-30.

19. Furthermore, The trial court erroneously refused Jones's proposed jury instructions, numbers 1 through 10, that would have gone a long way towards adequately instructing the jurors regarding their sentencing discretion and obligations under the law. (CT 837-47.)

20. Proposed jury instruction 1 outlined all of the potential mitigation evidence that had been presented that the jury could consider as mitigation factors. (CT 837.) This instruction was erroneously refused.

21. Proposed jury instruction 2 would have instructed the jury that they could consider any other mitigating evidence, not limited to the factors referred to, and that any one factor could support a decision for life without the possibility of parole. (CT 838.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Lockett v. Ohio*, 438 U.S. at 604-06.

22. Proposed jury instruction 3 would have instructed the jury on exactly what a mitigating circumstance is, i.e., an extenuating circumstance that, although it does not justify or excuse the offense, it may be considered in justifying a sentence

less than death. (CT 839.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Skipper v. South Carolina*, 476 U.S. 1, 3-5, 106 S. Ct. 1669, 90 L. Ed. 2d 1(1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110-16, 102 S. Ct. 896, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-06, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

23. Proposed jury instruction 4, would have instructed the jury on how to weigh and consider aggravating and mitigating circumstances to determine the appropriate penalty. (CT 840-41.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Skipper v. South Carolina*, 476 U.S. at 3-5; *Eddings v. Oklahoma*, 455 U.S. at 110-16; *Lockett v. Ohio*, 438 U.S. at 604-06. Instead the court gave a version of CALJIC 8.88, which was unconstitutional. Jones incorporates herein by reference Claim Ten.

24. Proposed jury instruction 5 would have instructed the jury to give the defendant the benefit of the doubt and impose life without the possibility of parole if they had a doubt as to which penalty to impose. (CT 842.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Skipper v. South Carolina*, 476 U.S. at 3-5; *Eddings v. Oklahoma*, 455 U.S. at 110-16; *Lockett v. Ohio*, 438 U.S. at 604-06.

25. Proposed jury instruction 7 would have instructed the jury to any mitigation evidence standing alone may be a basis for deciding in favor of life without the possibility of parole. (CT 844.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Skipper v. South Carolina*, 476 U.S. at 3-5; *Eddings v. Oklahoma*, 455 U.S. at 110-16; *Lockett v. Ohio*, 438 U.S. at 604-06.

26. Proposed jury instruction 8 was similar and was erroneously refused. (CT 845.)

27. Proposed jury instructions 9 and 10 would have instructed the jury, among other things, that they are allowed to consider sympathy in deciding a

punishment and that sympathy is an emotion. (CT 846-847.) This instruction was erroneously refused, and should have been accepted and read to the jury in accordance with the law. *Skipper v. South Carolina*, 476 U.S. at 3-5; *Eddings v. Oklahoma*, 455 U.S. at 110-16; *Lockett v. Ohio*, 438 U.S. at 604-06.

C. Conclusion

28. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

ELEVENTH CLAIM FOR RELIEF FOR PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and accurate and reliable guilt and penalty determinations as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the prosecutor: (1) knowingly presented perjured testimony and failed to disclose to the defense legally discoverable material that the defense was entitled to; (2) acted as a witness and presented testimony in the guise of argument by continually vouching for the credibility of prosecution witnesses and evidence; (3) engaged in misconduct with law enforcement authorities prior to and during the trial, including concealing the location of Luis Villarreal and Andre Davis; (4) improperly urged the trier of fact to consider victim impact as an aggravating factor and asked the jurors to put themselves in the victim's shoes; (5) improperly argued factors in aggravation

without any basis in the record, and argued the absence of mitigation with respect to mitigating factors as a basis for aggravation; (6) generally sought to curry favor with and influence the witnesses in order to convince them to testify to the prosecution's theory; (7) prosecutorial misconduct for argument regarding Dr. Buckey's testimony; and (8) committed prejudicial misconduct by repeatedly making references and eliciting inadmissible references to Jones's gang affiliation in the penalty phase, in violation of the court's specific order requiring the "previewing" of all such evidence outside the presence of the jury, in derogation of Jones's rights to a fair trial, due process of law, and a reliable penalty determination, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the federal constitution.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Despite a Court Order That Any Gang Evidence Must Be Previewed by the Court, the Prosecutor Committed Misconduct by Introducing Gang Evidence at the Penalty Phase

4. Prior to the start of the penalty phase, the trial court and counsel discussed evidence that would be introduced. Given Jones's guilty plea prior to trial to the "Flats" charges, the court ruled that the prosecution would not have to prove beyond a reasonable doubt in the penalty phase that Jones had committed the Flats crimes, as required for factor (b) evidence (presence of other violent criminal activity).[31]

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[31] The evidence that the People sought to introduce in the penalty phase consisted of the robbery and shootings that occurred at the "Flats" several months after the Domino's robbery-murder and Mad Greek robbery-attempted murder. The Mad Greek incident had been introduced in the guilt phase. Prior to the taking of evidence in the guilt phase, Jones had pleaded guilty to the robbery and attempted

5. Consequently, with the People's burden lessened, the trial court stated its understanding that the evidence introduced would be similarly limited, and expressed its recollection that "the People . . . conceded that they were not going to get into the gang activity aspect in the penalty phase . . ." (RT 3254.) The district attorney, while admitting that the People would not introduce Jones's "convictions" on gang charges, wanted to reserve the right to bring up gang evidence "if it becomes relevant on cross-examination because there are a lot of witnesses that talk about the upbringing of the defendant and his lifestyle, et cetera, where it may become relevant." (RT 3254-55.) The court ruled that if the district attorney did seek to introduce gang evidence, the district attorney would have to preview such evidence outside the jury's presence before eliciting it on cross-examination. The district attorney agreed to this condition. (RT 3255, 8-14.)

6. The defense did not ask what type of evidence would open the door to gang evidence in rebuttal. Jones incorporates herein by reference Claims Five and Twelve. Therefore, with only the above exchange as a guide, the penalty phase went forward. However, only moments into the district attorney's opening statement, the prosecutor unilaterally brought up Jones's gang affiliation, telling the jury that "defendant, along with some of his friends, *fellow gang members*, armed themselves and went to a location in Moreno Valley." (RT 3269 (emphasis added).) The prosecutor also said, "Mario Villarreal, that you heard testimony about, *also in the*

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murder charges encompassed within the "Flats" charges, thereby acknowledging that he had participated in the "Flats" shootings, which represented the bulk of the prosecution's penalty phase evidence. Given Jones's guilty plea and admissions to the Flats charges, the transcript of which was read to the jury, the court ruled that the prosecution did not have to prove beyond a reasonable doubt that the "Flats" incident had occurred. *See, e.g.*, *People v. Coleman*, 46 Cal. 3d 749, 783, 759 P.2d 1260, 251 Cal. Rptr. 83 (1988), cited by the court at RT 3254. Accordingly, with the prosecution's burden thus lessened, the district attorney agreed to limitations on the evidence that would actually be introduced, including the limitation on gang evidence.

gang, was armed with a nine-millimeter handgun." (RT 3271 (emphasis added).)

7. During the penalty phase evidence, the defense called as a witness Beatrice Acosta, the mother of Jones's child. Acosta offered testimony about how much Jones loved his son, including that Jones had fed and taken care of the baby, helped with the bottles and "everything except diapers." Acosta also testified that Jones had told her that he would never hit her because "he saw his father hit his mom when he was younger and he didn't want his son to go through that." (RT 3543.) Acosta's testimony continued in this vein over a couple of pages of transcript, finishing with a statement that Jones would have benefitted from having a father figure. (RT 3553.) At no time did Acosta testify that Jones was in a gang or associated with gangs; to the contrary, she admitted her frustration at Jones's inability to hold a job, and she spoke only in the briefest fashion about Jones's companions, stating that she was aware that Jones "hung out with his friends." (RT 3551.)

8. Despite this relatively innocuous line of testimony, the prosecutor, on cross-examination, immediately launched his cross-examination into pointed questions about Jones's gang activities, in direct violation of his earlier agreement not to get into such matters on cross-examination prior to asking the court's permission to do so. Without warning to the defense or the court, and without any request for a hearing outside the jury's presence, the prosecutor asked:

> When he was in Orange County and when . . . he was 17, he belonged to a gang out there, didn't he, the Trey 57's off the 57 Freeway?

(RT 3559.)

9. Acosta replied that she couldn't say, since she "didn't know much about that." The district attorney pressed on, reading a statement Acosta had previously given to a defense investigator in order to "see if you can recall":

> PACHECO: Miss Levinson [the investigator]: Okay. Do you know if he was involved with a gang? [¶] And this is

you, Miss Acosta: "I heard by the way he dressed . . . "
(RT 3560.)

10. Trial counsel objected, but the court permitted the inquiry as "either an inconsistent statement or something along those lines." (RT 3560.)[32] The prosecutor then continued in this vein, pressing Acosta relentlessly with questions about Jones's gang affiliation, which she obviously knew little about:

> PACHECO: Did you know if he was involved with a gang by the name of the Crips?
>
> A. I don't know the name.
>
> Q. Did you tell Miss Levinson that it was the Crips gang he was involved with?
>
> A. I don't remember what I told her.
>
> Q. Let me see if this refreshes your recollection. Miss Levinson says, "And the blue would be from what gang, if you were to guess?" And you said, "Crips gang."
>
> A. Well, I probably said that. I don't remember. It was over a . . . year ago.
>
> Q. Do you remember that? Well, do you remember that he was in the Crips gang? Did it appear to you that he was in

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[32] When the district attorney attempted to read Acosta's statement to defense investigator Levinson, trial counsel objected on the basis that the prosecutor had the answers and "he knows it's hearsay information." The court responded that it was being offered for the purpose of showing "either an inconsistent statement or something along those lines," and permitted the district attorney to show the statement to the witness or to read it. The prosecutor then asked if Acosta could recall stating, in response to a question as to whether she knew that Jones was "involved with a gang . . . 'I heard and by the way he dressed it kind of looked obvious, but he would never say anything to me.'" (RT 3560.) The defense objected again and moved to strike, but the objection was overruled. The trial court erred; Acosta's out of court statements were not inconsistent with her in court testimony.

the Crips gang?

A. Yes.

Q. Did you ever notice that he was in a gang called the 211/187 Hard Way Gangster Crips?

A. No, I didn't know until now.

Q. Did you ever see any pictures of him flashing gang signs or anything like that?

A. I seen pictures, but I don't really remember . . .

Q. Didn't that seem to strike you as being -- you know, you've seen gangs. Didn't that give you some indication that he was in a gang out there?

(RT 3561-62.)

11. Trial counsel again objected on the grounds of "speculation," and this time the objection was sustained by the court, finally putting an end to the prosecutor's interrogation of Acosta regarding gang affiliation. (RT 3562.)

12. The prosecutor similarly cross-examined Glenn Garbot, Jones's uncle, by asking him, " . . . [D]id you notice whether or not the defendant was in a gang by the name of the 211/187 Hardway Gangster Crips?" (RT 3621.) Garbot answered, "No."

13. Joseph Gueste, a family friend and pastor, also testified during the penalty phase. On direct examination, he said nothing about gangs. Again, the prosecutor launched into a cross-examination centering around gang-related activities, in violation of the court's order to address all gang cross-examination out of the jury's presence.

Q. You didn't know that he started, along with two other people, a gang by the name of 211/187 Hard Way Gangster Crips?

A. Not to my knowledge.

Q. You – you had no knowledge of that at all?

A. No.

Q. The defendant never told you that or you never saw him?

A. No.

Q. Never saw any pictures of him, you know, flashing signs or anything like that?

A. No I never . . . seen that nor never had anyone that knew him to approach me and tell me that he were of such . . .

Q. If you saw pictures of him flashing signs and with the name of their gang underneath that picture, would that change your mind as to whether or not he was in a gang?

[Objection by the defense; sustained with direction to rephrase the question.]

Q. If you knew that he had started this gang with two other people, would that change your mind as to whether he was a leader or a follower?

A. I would have to be certain that he, in fact, did start it. By hearsay I would not believe it was factual.

(RT 3636-37.)

14. Despite his aggressive forays into gang evidence during cross-examination, the prosecutor never asked for the in-chambers preview of gang related evidence that he had promised, nor did he ever attempt to tie gang membership or affiliation to any of the issues in the penalty phase. This constituted gross misconduct which violated Jones's constitutional rights to have the jury's penalty verdict based on relevant, non-arbitrary evidence.

15. Applying constitutional principles, the federal courts have prohibited the introduction of gang evidence at the penalty phase – either in the state's case- in-chief

or in rebuttal – to show a defendant's bad character "where that evidence is not relevant to the rebuttal of any specific mitigating evidence." *See*, *e.g.*, *O'Neal v. Delo*, 44 F.3d 655, 661(8th Cir. 1995), citing *Dawson v. Delaware*, 503 U.S. 159, 165-69, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) ("A defendant's membership in a gang cannot be raised as bad character evidence in the penalty phase of a capital proceeding when the evidence is not relevant to the rebuttal of any specific mitigating evidence.").

16. In death penalty cases, the Eighth and Fourteenth Amendments require that the sentencer's discretion be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Discretion is suitably directed by requiring that the sentencer give individualized consideration to the circumstances of the offense and to the record of the single defendant before it. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). It is suitably limited, in part, by the requirement that aggravating factors be relevant and constitutionally permissible. In *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the Supreme Court observed that a sentence of death violates due process when it rests upon "aggravating" factors which are "constitutionally impermissible or totally irrelevant to the sentencing process, such as. . . race, religion, or political affiliation . . . or conduct that actually should militate in favor of a lesser penalty . . . " *Id.* at 885. If the aggravating factor is invalid for such reasons, due process would require that the jury's death verdict be set aside. *Id.* A defendant therefore has the right to "introduce any sort of relevant mitigating evidence" and the state a corresponding right to "rebut that evidence with proof of its own;" but, the state cannot simply rebut "good character" evidence with evidence of gang membership unless the latter specifically rebuts the former. *Dawson v. Delaware*, 503 U.S. 159, 167, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). Similarly, the California Supreme Court has held that "evidence of defendant's background,

character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation." *People v. Boyd*, 38 Cal. 3d 762, 774, 700 P.2d 782, 215 Cal. Rptr. 1 (1985).

17. Specifically, where gang evidence is sought to be used in rebuttal, it must be excluded unless it is actually relevant to rebut mitigating evidence actually presented by the defendant. Accordingly, a prosecutor's attempts to "set the stage to elicit testimony about gangs" on rebuttal was condemned by a reviewing court on habeas corpus, upon the court's determination that gang membership was not relevant to rebut any specific mitigating evidence offered by the defense, and where there was no credible, admissible evidence that defendant's crime was gang-related, or that gang membership would impeach testimony offered by Jones in mitigation. *Wainwright v. Lockhart*, 80 F.3d 1226, 1234 (8th Cir. 1996). Conversely, gang evidence has been allowed on rebuttal only after the reviewing court was able to link it to the specific issues in the case. *See*, *e.g.*, *O'Neal v. Delo*, 44 F.3d at 661 (gang membership connected to racial hatred, which was motive for the murder in issue during the trial, and also to credibility of witnesses who were gang members but denied that killing was racially motivated).

18. The prosecutor's cross-examination of three defense penalty phase witnesses violated these principles because he bombarded witnesses with questions about gang membership that these witnesses had no knowledge of. These questions were neither relevant nor legitimate rebuttal nor impeachment of the testimony that those witnesses had given. Furthermore, the gang evidence did not fall properly within the scope of any legitimate aggravating factor and therefore was inadmissible as statutory aggravating evidence. Therefore, the use of gang evidence by the prosecution to persuade the jury to sentence Jones to death violated the Eighth Amendment's requirement that the jury consider and base its verdict on admissible and relevant evidence, and that aggravating evidence be limited to the statutory

aggravating factors. *People v. Boyd*, 38 Cal. 3d at 774; *Dawson v. Delaware*, 503 U.S. at 167. Moreover, because gang activity in the abstract is protected by freedom of association, use of the gang evidence by the prosecution invaded Jones's constitutionally protected right of freedom of association. *Zant v. Stephens*, 462 U.S. at 882.

19. Based on the above principles, Jones's constitutional rights were violated by the prosecution's use of gang evidence in "rebuttal," regardless of whether or not the district attorney had abided by the court's order to preview all such evidence. However, had the court's previewing order been honored, trial counsel would have had a chance to object to such evidence outside the jury's presence, and the court could have made rulings which prevented the jury from hearing the gang evidence at all during the penalty phase. By repeatedly flaunting the court's order which he had previously agreed to be bound by, the prosecutor denied trial counsel the opportunity to object to the evidence outside the jury's presence, so that the court could rule on defense objections before the jury had a chance to hear inherently inflammatory "gang" evidence. Accordingly, the prosecutor engaged in particularly egregious misconduct in his attempt to persuade the jury.

20. The California Supreme Court has often recognized that evidence of gang membership has a "highly inflammatory impact," and has therefore "condemned" the offering of gang evidence by the prosecution where it is "only tangentially relevant." *People v. Cox*, 53 Cal. 3d 618, 660, 809 P.2d 351, 280 Cal. Rptr. 692 (1991), citing *People v. Cardenas*, 31 Cal. 3d 897, 904-05, 647 P.2d 569, 184 Cal. Rptr. 165 (1982) and *Williams v. Superior Court*, 36 Cal. 3d 441, 450, 683 P.2d 699, 204 Cal. Rptr. 700 (1984).

21. Jones incorporates herein by reference Claims Five and Twelve. A considerable amount of inadmissible and prejudicial gang evidence was admitted during the guilt phase. Had the court properly excluded such evidence from the guilt phase, the jury would not have heard any evidence of Jones's gang affiliation until the

penalty phase. Recognizing the inherent prejudice to Jones if gang evidence that was either irrelevant or only "tangentially relevant" was heard by the jury in a proceeding in which Jones's life was at stake, the court ordered the prosecutor to preview all gang evidence before attempting to use it in the penalty phase. Upon being relieved of his duty to present the "Flats" evidence beyond a reasonable doubt, the prosecutor agreed to this condition. Having accepted the benefits of this ruling the prosecutor then repeatedly flaunted the order by relentlessly pounding Jones's mother and his child's mother with the "gang interrogation" excerpted above. This interrogation constituted gross prosecutorial misconduct which even further eroded Jones's constitutional rights to a fair penalty determination, free of aggravating evidence that is not narrowly circumscribed within the statutory limits.

22. The gang evidence should have been excluded from the guilt phase and its admission was both erroneous and prejudicial, and it so infected the process that the same jury was unable to apply a fair and reliable sentence in the penalty phase. Moreover, even if, guilt phase gang evidence was appropriately introduced at the guilt phase, its admission was prejudicial in the penalty phase. Finally, in combination with the other errors complained of here, the gang evidence that the jury was erroneously permitted to hear in the penalty phase violated Jones's right to a fair and reliable penalty determination, untainted by inadmissible and inherently prejudicial evidence.

B. The Prosecutor Committed Misconduct When He Introduced Evidence of Jones's Juvenile Record

23. When cross-examining Jones's mother, the prosecutor elicited on cross-examination that Jones had "gotten in a little trouble with the law"; that the mother "had to go to court a couple of times for him"; that Jones "was on probation in juvenile court"; and that "that probation was extended several times because he violated that probation . . . when he was 14, 15 years old." (RT 3515.) None of this evidence related to past acts of violence or prior felony convictions, and it was

therefore inadmissible under any of the exclusive provisions of California Penal Code section 190.3. Inexplicably, trial counsel did not object to any of this evidence, nor was the district attorney required to "preview" any of the People's cross-examination other than gang-related evidence. Nevertheless, introduction of Jones's juvenile probation violation for non-violent activities is indicative of a pattern of "cumulative prejudice" to Jones's right to a fair penalty trial. *People v. Shawn Hill*, 17 Cal. 4th 800, 952 P.2d 673, 72 Cal. Rptr. 2d 656 (1998).

24. Trial counsel was ineffective for failing to object to the admission of factors regarding Jones's juvenile record and should have sought an order from the trial court limiting the prosecutor's ability to cross-examine witnesses based upon this evidence.

C. The Prosecutor Improperly Precluded Jones From Accurately Portraying the Fact That Jones Would Not Present a Danger in Prison and Then Presented Inflammatory, Inaccurate and Irrelevant Argument That Jones Should Be Sentenced to Death Because He Would Pose a Danger in Prison

25. At the penalty phase, trial counsel offered the testimony of James Park, a prison expert and correctional consultant with the California Department of Corrections, to testify about the conditions under which prisoners sentenced to Life Without Possibility of Parole ("LWOP") are housed. (RT 3251, 3381.) When trial counsel announced his intention to call Park, the prosecutor objected to Park's testimony as irrelevant. (RT 3251, 3384-85.)

26. At the prosecutor's request, the court excluded Park's testimony in its entirety. (RT 3385.) As noted in Claim Nine, section B, this restriction on Jones's ability to present relevant evidence regarding the conditions under which he would be housed violated his right to present relevant mitigating evidence, undermining the reliability of Jones's death judgment in violation of the Eighth Amendment to the United States Constitution. *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

27. After successfully obtaining these improper restrictions on the presentation of defense evidence, the prosecutor then strenuously argued that Jones would pose a danger to staff and other prisoners while incarcerated. To a jury that had not heard any description of the rigorous restraints placed on LWOP prisoners, the prosecutor argued that Jones would come into contact with correctional officers, nurses, doctors, therapists, and prisoners, and that he would be housed without any "controls to maintain or restrain his conduct from hurting or killing someone else." (RT 3782.) The prosecutor then urged the jurors as follows: "Don't let this violence continue because of your compassion. Don't let the price of this compassion be another victim or another six victi." (*Id.*) At the end of his closing arguments, the prosecutor again stressed that the death penalty was necessary because "[t]here are going to be no controls on him if you give him life without parole. . . . Don't let your compassion be the price of another victim." (RT 3789.)

28. In fact, the prosecutor had no evidence suggesting that Jones had ever committed a violent act while incarcerated, that he posed any danger in custody, or that, as an LWOP prisoner, he would be housed under circumstances that did not constrain his ability to harm others. The prosecutor's successful preclusion of the presentation of defense evidence regarding the conditions of confinement for LWOP allowed him to falsely suggest that if Jones were not sentenced to death, the conditions under which he would be housed would be insufficient to protect staff and other prisoners. Under these circumstances, the prosecutor's false suggestion that Jones's future dangerousness justified his execution violated Jones's right to a fair trial.

29. Moreover, as noted in Claim Nine, section B, the trial court's restriction of relevant defense evidence regarding Jones's future dangerousness violated his due process rights, his right to a fair and reliable sentencing decision and to confront the evidence presented against him under the Sixth, Eighth and Fourteenth Amendments to the United State Constitution. *Simmons v. South Carolina*, 512 U.S. 154, 161, 114

S. Ct. 2187, 129 L. Ed. 2d 133 (1994). As the Supreme Court recognized in *Simmons*, "[t]he Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." *Id.* (plurality opn.) (citations omitted); *Id.* at 175 ("[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain requires that the defendant be afforded an opportunity to introduce evidence on this point") (citations omitted).

30. The prosecution's arguments on these points were grossly misleading. James Park has testified in a number of capital cases that prisoners sentenced to LWOP terms are automatically assigned to maximum security level four facilities, and about the considerable security provided at this level of classification. *See*, *e.g.*, *People v. Ochoa*, 26 Cal. 4th 398, 422, 28 P.3d 78, 110 Cal. Rptr. 2d 324 (2001) ("James Park, a correctional consultant and former corrections officer, testified that prisoners serving life without possibility of parole terms are automatically sent to maximum security 'level-four' facilities, from which there has never been an escape.").

31. In addition, the prosecution's evidence and arguments were irrelevant and inflammatory and drew the jury's focus away from aggravating factors that could properly be considered under California law, towards irrelevant factors and emotional appeals that have no place in the proper consideration of whether Jones should live or die. *See People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (a prediction of future dangerousness is "at best only marginally relevant to the task at hand" in capital prosecutions in California, and is more prejudicial than probative).

32. The prosecutor's evidence and argument on this issue violated the state statutory scheme by allowing death to be based on a non-statutory aggravating factor

and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *California v. Ramos*, 463 U.S. 992, 1001-03, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).

D. Other Instances of Prosecutorial Misconduct During the Closing Argument

1. Arguing Facts Not in Evidence

33. The prosecutor prejudicially argued that Jones "enjoyed" shooting people on at least four occasions. (RT 3775-76.) There was no evidence presented in the trial that Jones had "enjoyed" shooting people.

34. In arguing that no evidence supported factor (h), the prosecutor argued that there was evidence that "they were going to a party, that they had *not* had alcohol at that point." (RT 3778.) There was no such evidence presented at the trial.

35. The prosecutor also argued that Jones enjoyed shooting people because he was a "sociopath" and that the jury had "heard" this from defense psychologist, Dr. Buckey. (RT 3775-76.) The prosecutor erroneously and prejudicially argued that Dr. Buckey had concluded this despite the fact that Dr. Buckey had made no formal diagnosis of sociopathy.

36. As noted above in section C, the prosecutor also argued the future dangerousness of Jones, telling the jury that Jones would pose a threat to correctional officers, nurses, doctors, therapists, and other prisoners if sentenced to life without the possibility of parole. (RT 3782; 3789 ["The violence has got to end . . . there is no reason for him not to stab someone or kill someone or hurt someone."].) The prosecutor had no evidence to show that Jones would be dangerous while incarcerated. In fact, at the time of the prosecutor's argument, Jones had been a model prisoner for two years in the Riverside County Jail.

37. The jury must face its obligation soberly and rationally and should not be given the impression that emotion may reign over reason. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Prosecutors should not

purport to rely in jury argument on their outside experiences or personal beliefs on facts not in evidence. *People v. Edelbacher*, 47 Cal. 3d 983, 1030, 766 P.2d 1, 254 Cal. Rptr. 586 (1989); *People v. Bandhauer*, 66 Cal. 2d 524, 529-30, 426 P.2d 900, 58 Cal. Rptr. 332 (1967). In addition, these false and factually unsupported claims that Jones posed a future danger to his fellow inmates and staff, was a sociopath, and enjoyed violence, are not statutory aggravating factors, and such arguments violated California law and Jones's due process rights under *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

2. Arguing Lack of Mitigation as Aggravation

38. In support of his argument for a death sentence, the prosecutor went through each of the mitigating factors, including youth, accomplice status, and intoxication, and told the jury that they did not apply in Jones's case because there was "no evidence," or words to the same effect. The prosecutor also argued the absence of certain mitigation factors as evidence in aggravation. First, factor (i), the age of the defendant at the time of the crime, should have only been applied in mitigation in this case. Jones was 18 and one half at the time of the Domino's incident. Trial counsel failed to argue Jones's age as a mitigating factor at all. The prosecutor seized upon this factor to argue in aggravation that "his age is nothing more than a chronological statement of how long he's been here on this earth . . . And certainly he has accomplished quite a lot in the years that he's been here." (RT 3778.) The prosecutor was referring to Jones's criminal conduct. Alternatively, the prosecutor went on to mock youth as a valid mitigating factor, comparing it to something as insignificant as one's appearance saying, "will his age, his looks prevent you from imposing the death penalty?" (*Id.*) A defendant's youth is an important mitigating factor that a jury can consider in deciding whether to impose a death sentence. In fact, the U.S. Supreme Court has emphasized this factor, stating:

> [S]entencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding

whether to assess the death penalty.

Roper v. Simmons, 543 U.S. 551, 606, 125 S. Ct. 1183; 161 L. Ed. 2d 1 (2005) (O'Connor, J., dissenting). Even a dissenting Justice in the *Roper* Court found that the prosecutor's use of "respondent's youth as an aggravating circumstance in this case is troubling." *Id.* at 603. In Jones's case, the prosecutor here prejudicially turned the mitigating factor of Jones's youth at the time of the crime, into aggravating evidence.

39. Also, the prosecutor improperly argued that the lack of mitigating evidence under factor (h), intoxication at the time of the crimes, when, in fact, there was evidence that "[Jones and the other suspect] had *not* had alcohol" before going to Domino's. (RT 3778.)

40. The prosecutor essentially argued that the lack of mitigation was a non-statutory aggravating factor, in violation of California law. *People v. Boyd*, 38 Cal. 3d 762, 773-74, 700 P.2d 782, 215 Cal. Rptr. 1 (1985). More precisely, the prosecutor violated Jones's rights under state law when he argued that the jury could consider the absence of mitigating factors as an aggravating factor. *People v. Davenport*, 41 Cal. 3d 247, 286-87, 710 P.2d 861, 221 Cal. Rptr. 794 (1985). This arbitrary violation of important state law procedural protections further deprived Jones of due process under *Hicks v. Oklahoma*, 447 U.S. at 343. Further, arguing the lack of mitigation as aggravation violated Jones's rights to an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. Victim Impact

41. Contrary to state law, the prosecutor improperly urged the jury to consider victim impact as an aggravating factor and asked the jurors to put themselves in the victim's shoes. (RT 3784.) The prosecutor improperly argued facts not in evidence, inviting the jurors to speculate about the feelings, thoughts and experience of the victims, Shane Weeks, Brian Wagner, Christopher Swan, and Larry

Nave, and to base their penalty decision on that speculation. The record is devoid of evidence regarding the impact on the victims or evidence providing any insight into their feelings and thinking at the time.

42. The jury heard no victim impact evidence, and there was no evidence supporting the prosecutor's portrayal of Jones as someone who enjoyed shooting people. Thus, the prosecutor's arguments were inflammatory and unrestrained speculation, not mere inference. Such arguments constitute prosecutorial misconduct.

43. In making the argument that the jury could consider victim impact evidence as aggravating, the prosecutor clearly sought to capitalize on the possibility of outright racial prejudice or more subtle fears possibly attending the specter of cross-racial violence. In making that argument, the prosecutor improperly urged the trier of fact to consider an irrelevant and non-statutory aggravating factor.

44. In California, the prosecutor is statutorily forbidden from utilizing non-statutory aggravation in the sentencing process. Cal. Penal Code § 190.3; *People v. Boyd*, 38 Cal. 3d at 775-76. The prosecutor's only purpose in making these irrelevant and inflammatory arguments was to appeal to passion and prejudice of the jury, and thereby to obtain a capital sentence. *See People v. Haskett*, 52 Cal. 3d 210, 247, 801 P.2d 323, 276 Cal. Rptr. 80 (1990). Jones's liberty interest in the trial court's proper exercise of discretion and Jones's concomitant Fourteenth Amendment due process rights against such arbitrary state deprivations were violated. *Hicks v. Oklahoma*, 447 U.S. at 346.

4. Victim Larry Nave

45. Finally, the prosecutor prejudicially argued that Jones shot Larry Nave, saying, "And we know from Brian Wagner and Chris Swan and Larry Nave he didn't care . . . he not only shot these young boys, he not only did everything he could to kill them . . . he shot the truck tire." (RT 3786.) Jones incorporates herein by reference Claim Two. Jones did not shoot Larry Nave, and in fact the prosecutor himself decided before the penalty phase began that he could not put on any evidence relating

to Nave because "Jones' admission to that particular charge I think is inadmissible in that he did not cause that particular injury, someone else did." (RT 3244.) The prosecutor's false and improper argument prejudiced Jones by depriving him of his right to an accurate and reliable penalty determination.

E. Vouching for the Credibility of a Witness

46. During the close of opening and closing arguments, the prosecutor repeatedly vouched for the credibility of witnesses and evidence. In so doing, the prosecutor testified in the guise of argument without permitting Jones to cross-examine him. In particular, at both the guilt and penalty phases, the prosecutor read the testimony of unavailable witnesses into evidence. During the penalty phase, the prosecutor read into evidence the testimony of Luis Villarreal. (RT 3412.) It was inappropriate for the prosecutor to essentially vouch for the credibility of an unavailable witness by posing as the witness himself. An unbiased person who was not an advocate or party to the proceedings should have read the Villarreal testimony in. This misconduct so infected the trial with unfairness as to make the resulting conviction and sentence a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

F. The Prosecutor Committed Misconduct in Presenting the Preliminary Hearing Testimony of Luis Villarreal into Evidence

47. The prosecutor sought to admit into evidence the preliminary hearing testimony of Luis Villarreal because he claimed that Villarreal was unavailable and could not be located. A hearing was conducted pursuant to California Evidence Code section 402 regarding the prosecutor's due diligence in locating Villarreal. (RT 3388-08, testimony of Daniel Fredrich.) The trial court found that due diligence had been exercised and the court allowed the preliminary hearing testimony to be read into the record. (RT 3409.)

48. Second, trial counsel objected to the admission of the Villarreal

testimony because of the fact that he did not have the ability to cross-examine him. (RT 3376-80.) Prior testimonial statements that are not subject to cross-examination are inadmissible under the federal constitution. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

49. As was conceded by the prosecutor, Villarreal:

> was certainly not necessarily cooperative with me or with my office. And he testified inconsistently. And I had to lead him on numerous occasions because of his inconsistent and uncooperative and evasive nature at preliminary hearing.

(RT 3377.) When trial counsel Gunn accused the prosecutor of testifying for Villarreal at the preliminary hearing, the prosecutor stated, "I had to because he was lying." (RT 3380.) Whatever cross-examination of Villarreal was done at the preliminary hearing was insufficient to elicit the strong statements made by the prosecutor against his own witness who he was presenting in aggravation. The prosecutor's presentation of this unreliable evidence to the jury violated Jones's rights to a reliable penalty phase determination.

50. Further, Villarreal may have had a deal with the prosecutor that was not disclosed to trial counsel. The officers who investigated the Flats incident did threaten to charge Villarreal with accessory after the fact. The prosecution has not, to date, turned over any agreement, either oral or in writing, regarding a deal between Villarreal and the District Attorney's Office that charges would not be brought against Villarreal in exchange for his testimony at the preliminary hearing. The defense lawyers appointed during the preliminary hearing did not cross-examine Villarreal about any deal that he may have had in exchange for his testimony, and they would have had they known about such a deal. (Ex. 102, Decl. of James Spring.) Given that Villarreal's testimony affected his brother's criminal case, it is likely that Villarreal was either threatened into testifying or had a deal with the

prosecutor to testify in exchange for not filing charges against him.

51. It is well-established that the prosecution has a duty to sua sponte disclose evidence which may reflect on the credibility of a material witness, including any inducements made to secure the witnesses' testimony. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Suppression of evidence, even when it is unintentional or inadvertent, violates federal due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

52. Prior testimony of an unavailable witness is admissible when it is subject to cross-examination. *Barber v. Page*, 390 U.S. 719; 88 S. Ct. 1318; 20 L. Ed. 2d 255 (1968). However, failure to produce relevant *Brady* material prevents a full and fair cross-examination. Statements that are not subject to cross-examination are inadmissable under the federal constitution. *Crawford v. Washington*, 541 U.S. at 36.

53. The removal of Villarreal's testimony from evidence would have had a significant effect on the outcome of the trial.

G. The Prosecutor Asked Questions That Elicited Inadmissible Evidence

54. The prosecutor elicited evidence that was unreliable and inadmissible when he asked Dr. Jensen, the emergency room doctor who treated victim Larry Nave, what would have happened if the bullet had struck Nave in the spine. The doctor answered, "He could have been paralyzed." (RT 3341.) Trial counsel did not object and the trial court did not strike this answer. The prosecutor also elicited from Dr. Heischoeber, emergency room doctor for Brian Wagner, that he did not "give the family much hope" given his critical condition. (RT 3460.) The doctor also spoke about the lengthy surgery and the amount of blood that Wagner was given. (RT 3461.) The defense attorney did not object and the trial court did not strike this testimony.

H. Conclusion

55. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations

substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

TWELFTH CLAIM FOR RELIEF FOR DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE AND CONFLICT OF COUNSEL

1. Jones's sentence was rendered in violation of his rights to due process and equal protection, to a fair trial, to the effective assistance of counsel, to present a defense, to confrontation and cross-examination, his right against self-incrimination, and to a fair, reliable and non-arbitrary guilt and penalty determination, because of trial counsel's prejudicial failure to provide the effective assistance of counsel at the penalty phase of Jones's trial, as well as his right to counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. Trial counsel, James Spring (original counsel), Frank Peasley, and David Gunn, rendered ineffective assistance to Jones and denied him his constitutional rights through countless derelictions of their professional responsibility to zealously defend their client. Counsel's actions and omissions fell below an objective standard of reasonableness under prevailing professional norms and infected the penalty phase of Jones's trial. There could be no rational tactical justification for counsel's failures in this regard. Counsel, unreasonably and ineffectively, (1) failed to determine and develop Jones's version of the facts, or adequately investigate the relevant facts; (2) failed to identify, locate, interview, and investigate relevant and available mitigation witnesses, or to obtain available records; (3) failed to utilize available means of discovering mitigating evidence available to the state, or to discover the state's case; (4) failed to present evidence regarding or argument concerning the concept of

lingering doubt; (5) failed to properly contradict or discredit damaging evidence presented by the state; (6) failed to research and discover the relevant law; (7) failed to preserve issues for appellate and habeas corpus review; (8) failed to properly investigate, prepare, and present mental state defenses and the mitigation of mental disease or defect and drug and alcohol intoxication; (9) failed to identify, locate, and investigate available mitigation witnesses and rebuttal witnesses, or to obtain available records about these witnesses; (10) failed to interview, investigate, and prepare mitigation/rebuttal witnesses adequately prior to trial; (11) failed to timely present necessary pre-trial motions and presented inadequate motions; (12) failed to try to negotiate a plea agreement instead of going to trial; (13) presented harmful evidence, including harmful evidence through an expert; (14) failed to obtain necessary expert assistance, to provide the experts with the relevant information necessary to reach a reliable opinion, and otherwise failed to utilize and direct expert witnesses adequately; (15) failed to engage in sufficient consultation with their client; (16) failed to adequately attack, impeach, and object to witnesses and evidence, and argument of the prosecution, and conduct of the judge which prejudiced Jones; (17) failed to request appropriate instructions for the trier of fact to follow; (18) failed to adequately represent Jones on the motion for modification of the death sentence; (19) failed to make an effective opening statement or an effective closing argument; (20) failed to argue relevant statutory factors in mitigation such as age; (21) failed to conduct an adequate and timely penalty phase investigation, which, in this case, included investigation of guilt phase issues, and failed to properly prepare for trial in order to be able to make rational and informed decision on strategy and tactics; (22) failed to effectively examine defense witnesses and cross-examine the prosecution's witnesses; (23) failed to file a motion to sequester the jury; (24) failed to investigate, prepare, present, or notify the court of Jones's incompetency to stand trial and to represent himself despite being on notice thereof; (25) failed to present evidence on rehabilitation and lack of future dangerousness; (26) failed in other respects to take

appropriate action as would reasonably competent trial counsel; and (27) trial counsel had a conflict of interest in representing Jones at his trial because he breached his duty of loyalty by acting against Jones's interests.

3. But for trial counsel's omissions, it is reasonably probable that the trier of fact would have returned a more favorable verdict eliminating the need for a penalty phase and/or resulting in a more favorable sentence. Further, counsel's conflicts of interest adversely affected their ability to adequately represent Jones and deprived him of his rights to a fair trial, due process, confrontation, cross-examination, effective assistance of non-conflicted counsel, and a fair and reliable determination of the appropriateness of sentencing him to death.

4. Trial counsel's theory in the guilt phase was untenable on both the facts and the law. Trial counsel failed to investigate and uncover the truth. They instead relied on theories of remorse in repeatedly conceding Jones's guilt of all crimes, suggesting that there was no lingering doubt whatsoever. Even this presentation of remorse was inadequate since it suggested that Jones refused responsibility for acts for which he was convicted.

5. At the penalty phase, trial counsel failed to object to the prosecutor's inadmissible evidence and improper argument because trial counsel had no theory at all. Worse, he introduced evidence that was extremely adverse to Jones.

6. Trial counsel chose to pursue a legally and factually insupportable theory at the guilt phase, conceding key issues and waiving Jones's rights. Likewise, at the penalty phase, trial counsel failed to advocate for his client, and he introduced evidence of an extremely aggravating nature.

7. Trial counsel rendered constitutionally inadequate assistance, because, as in the guilt phase, trial counsel's complete ineffectiveness rendered the proceedings non-adversarial. *United States v. Cronic*, 466 U.S. 648, 653-56, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Alternatively, "the representation fell below an objective standard of reasonableness under prevailing professional norms"; Jones was

prejudiced because "absent [defense] counsel's failings, a more favorable result would have been probable."

8. Jones can in no way be charged with responsibility for his counsel's derelictions. The state is required to provide indigent defendants with counsel, *Gideon v. Wainwright*, 372 U.S. 335, 340, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); counsel are required to perform adequately, *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); and the state, not defendant, must bear responsibility for ensuring that adequate counsel is provided, *Johnson v. Zerbst*, 304 U.S. 458, 467-68, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

9. Instead of acting as an advocate, trial counsel abandoned his role of protecting his client and introduced inflammatory and inadmissible evidence which even the prosecutor would not have been able to introduce in the face of an objection. In so doing, trial counsel breached his duty of loyalty to his client. Trial counsel's failings were so pervasive and so serious that the constitutional guarantee of the right to counsel was violated.

10. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

11. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

12. To establish constitutionally inadequate representation, Jones must show: (1) that counsel's performance "fell below an objective standard of reasonableness;" and (2) that counsel's performance was prejudicial. In order to show prejudice, Jones "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter*, 130 S. Ct. at 452; *Strickland*, 466 U.S. 688, 694; *Jennings v. Woodford*, 290 F.3d 1006, 1012 (9th Cir. 2002). A habeas petitioner "does not have to show by a preponderance of the evidence that the result in his case would have been different but for counsel's errors," but rather, only that "counsel's errors

undermine confidence in the outcome." *Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998); *Strickland*, 466 U.S. at 694. "The bar for establishing prejudice is set lower in death-penalty sentencing cases than in guilt-phase challenges and noncapital cases." *Raley v. Ylst*, 470 F.3d 792, 802 (9th Cir. 2006).

13. Jones's trial counsel conducted an insufficient investigation and presented only a small portion of the available mitigation evidence at the penalty phase of Jones's trial. The prevailing and well-established standards of capital defense practice at the time of Jones's trial required trial counsel to conduct an investigation into the facts of Jones's life, family, and social history. *See, e.g., Porter*, 130 S. Ct. at 453 (prejudicial error for failure to collect life history records and interview family members); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (defense counsel in a capital case has an "obligation to conduct a thorough investigation of the defendant's background," citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)); *Hamilton v. Ayers*, 583 F.3d 1100, 1113 (9th Cir. 2009) (counsel "has an obligation to present and explain to the jury all available mitigating evidence") (*citing Correll v. Ryan*, 539 F.3d 938, 946 (9th Cir. 2008)); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) ("To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'"); *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) ("[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase"); Stouffer v. Reynolds, 168 F.3d 1155, 1167 (10th Cir. 1999) ("[i]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed"); *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978).

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A. Failure to Investigate, Develop, and Introduce Mitigating Evidence on Factors Under California Penal Code Section 190.3 (d) (Defendant Laboring Under the Influence of Extreme Mental or Emotional Disturbance) and California Penal Code Section 190.3 (h) (The Capacity of the Defendant to Appreciate the Criminality of His Conduct or Conform His Conduct to the Requirements of Law Was Impaired as a Result of Mental Disease or Defect or the Effects of Intoxication)

14. The defense called one expert to testify at the penalty phase, Dr. Steven Buckey, a clinical psychologist. However, Dr. Buckey, whose primary field of expertise was evaluation of the Navy's drug and alcohol treatment programs, offered no testimony or evidence suggesting that Jones was suffering from any mental disease or defect at the time of the offenses, or that his mental capacity was impaired at the time the offenses were committed. Dr. Buckey did testify that Jones had started drinking when he was 11 and had become an alcoholic by age 13; that his father was an "abusive alcoholic"; that as a result Jones had "difficulty with anger"; that his ability to have committed relationships was "somewhat impaired"; and that his commitment to education was "problematic." However, Dr. Buckey never related Jones's drinking or alcoholism to his mental state at the time of any of the charged crimes; and trial counsel never made Dr. Buckey aware of readily available evidence that Jones had drunk copious amounts of alcohol daily over an eleven month period during which the incidents occurred. Consequently, and notwithstanding Dr. Buckey's testimony, the prosecutor was able to argue that evidence supporting mitigating factors (d) and (h) was totally absent. (RT 3778.)

15. Thus, despite calling Dr. Buckey as an expert, the defense offered no evidence that, at the time of the offenses, Jones was laboring "under the influence of extreme mental or emotional disturbance" (factor (d)) or that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the

effects of intoxication" (factor (h)).

1. Readily Available Evidence That Was Not Introduced by the Defense in the Penalty Phase Establishes That Jones Was Under the Influence of Extreme Mental or Emotional Disturbance, and That His Capacity to Appreciate the Criminality of His Conduct Was Impaired as a Result of Mental Disease, Mental Defect, and the Effects of Intoxication

16. Trial counsel had an obligation to investigate and present evidence on Jones's mental impairments. *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) (counsel ineffective for failing to present mitigating evidence of defendant's mental impairment); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (petitioner entitled to evidentiary hearing on claim that counsel ineffective in penalty phase for failure investigate, develop, and present mitigating evidence of impaired mental state at time crimes were committed); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir.2002) (finding prejudice where counsel failed to investigate defendant's childhood, mental illnesses, organic brain disorders, and substance abuse); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1996) (ineffective assistance of counsel for failure to investigate and present mitigation connected to statutory factors).

a. Jones Suffers From Organic Brain Damage

17. Jones was born on June 13, 1970. When he was an infant he had lots of colds, allergies, and suffered from bronchitis.

18. [redacted]

[redacted]

19. When Jones was young and growing up in New Jersey (prior to his fifth birthday) he was very excitable and had a very difficult time focusing on any task for any period of time. He seemed not to know what was okay to say and what was not okay to say; he was always very watchful, looking to see who was looking at him, sneaking, and jumpy; Jones was always running, could not listen very well, was very hyperactive, and constantly interrupted adults in their conversations. Dr. Natasha Khazanov has diagnosed Jones with Attention Deficit/Hyperactivity Disorder (ADHD). (Ex. 154, Decl. of Natasha Khazanov, ¶ 34 n.4.)

20. After a thorough evaluation, Dr. Khazanov concluded that Jones suffers from organic brain damage:

> My clinical findings and observations, confirming the presence of significant organic brain damage, including profound frontal lobe deficits, are extremely relevant to several specific factors set forth in Penal Code § 190.3 to be

[33] It is noteworthy that a good-quality copy of this record was first obtained by original state habeas counsel. The copy found in trial counsel's file was barely legible.

considered in determining Mr. Jones' penalty.

(*Id.* ¶ 115.) Jones incorporates herein by reference, section D, *infra.*

b. Jones has a Family History of Serious Alcoholism, Drug Abuse, Blackouts, and Mental Illness

21. Jones's father, grandfather, and uncle were all chronic alcoholics. Virtually every one of Jones's aunts, uncles, and grandparents were alcohol abusers. There is a history of excessive drinking and alcoholism on the mother's side of the family as well.

22. Jones's brother Rocky was very sickly as a baby and was diagnosed as having "emotional asthma"; the attacks were most serious when he was under stress, and they decreased markedly after Jones's abusive father left home.

23. Jones's father, Willie Jones, was a serious and chronic abuser of drugs and alcohol, suffered from acute and chronic depression, had several documented incidents of blackouts and loss of consciousness, and was diagnosed as clinically depressed and "psychotic." Willie Jones has had a history of blackouts dating back to the 1970's. Some blackouts lasted hours and some for days. Once he was leaving Orange in California to go to Fullerton, but a couple of days later found himself in Santa Monica. In 1989, while working in Manhassett (Long Island, NY), he left at 10:00 p.m. and was gone for an entire day, missing work and nearly getting fired for failing to show up or call.

24. On Christmas Day, 1973, Willie Jones was involved in a car accident, caused by drinking and driving. He left New Jersey shortly after this accident but continued to drink and drive.

25. In February of 1982, Placentia Police responded to a report that Willie Jones was beating his wife (Jones's mother) and abusing his son (Jones). Willie Jones was arrested for attempted murder, assault with a deadly weapon, spouse beating, and willful cruelty to a child.

26. On July 19, 1983, Willie Jones robbed the Ancient Mariner Restaurant at

gunpoint and was charged with armed robbery. (Ex. 122, Decl. of Willie Jones, ¶ 34; Ex. 24, Willie Jones California Prison records, including medical and psychiatric records.) On Oct. 11, 1983, he was convicted of drunk driving in Orange County and jailed. (Ex. 24.) Parole records for 1983 reflect that Willie Jones admitted to a $300 per day cocaine habit in 1980 that continued to his arrest in 1983. (RT 3278; Ex. 24.)

27. In December of 1983, Willie Jones was arrested for failing to complete his probation commitments (non-support) and sentenced to 11 months in custody. Meanwhile, he was charged with the Ancient Mariner armed robbery and auto theft and was sentenced to prison, where he served almost four years. He admitted to robberies on July 31, 1982, August 15, 1993, and September 14, 1983, which were committed to support his $500 per day cocaine habit. On December 9, 1983, the probation report for Willie Jones reflects that he had been using cocaine daily since 1980 and had a serious drinking problem since 1976. The probation officer determined that he was in need of drug rehabilitation. (Ex. 24.)

28. In a § 1203.03 study on Willie Jones, dated February 8, 1984, Willie stated to the probation officer that he had started drinking when he was twelve years old, and it was recommended that he participate in a narcotics program. (*Id.*)

29. [redacted]

30. Prison records dated July 19, 1984, state that Willie Jones requested psychiatric treatment for depression in prison. He gave a history of his relationship with his wife (Jones's mother) going downhill, followed by drug abuse, followed by a feeling of "not caring." His mood was one of sadness and the impression was "major depression." He was treated with the anti-depressant Aiprazolam. (*Id.*)

31. On June 11, 1986, Willie Jones was seen at the Orange County Mental Health Center for problems sleeping, difficulty with anger management, insomnia, and blackouts, during which he became "violent." He reported "anger blackouts"

which had started as much as five years ago. He had no recollection of his behavior during the blackouts, and it was during one of those blackouts that he was arrested for assault and attempted murder of Jones's mother. He also reported a history of "acting out impulsively" and stated that over the past three years his blackouts had begun to occur even when he was not under the influence. (Ex. 25, Willie Jones 1986 Orange County Health Care Agency Mental Health Services records.)

32. An entry from the Orange County Health Care Agency dated June 13, 1986, states that Willie Jones had "black-out spells" during which he "would become violent . . . like a temporal lobe epileptic attack." (*Id.* at 522.) His differential diagnosis was "Temporal Lobe Epilepsy (psychomotor seizures) [¶] Intermittent Explosive Disorder." (*Id.*) He signed a consent to receive "major tranquilizers," and was medicated with Haldol. An entry dated June 20, 1986, further states that Willie Jones often perceived others as "the enemy" and that he would "get angry when I feel people don't respect me or treat me bad." (*Id.* at 520.)

33. On July 1, 1986, Willie Jones was released from prison and moved back in with Jones and his mother for a few months. During this time, on August 2, 1986,

[redacted]

[redacted]

34. On August 18, 1986, records from the Orange Center for Mental Health indicated that Willie Jones had difficulty controlling anger, temper outbursts, and that his "behavior was out of proportion to stresses . . . feeling extremely angry and agitated at minor incidences such as being interrupted while talking." On Aug. 26, 1986, Willie was diagnosed with "Intermittent Explosive Disorder, Personality Disorder, and Schizoid Personality." He stated that "I can feel my body get tensed up when I start to get angry," and was medicated with Alprazolam.

35. An entry in the Orange Center for Mental Health medical records dated September 20, 1986 states that Willie Jones had a "history of mental illness," which was treated with psychotherapy. The diagnosis was "atypical psychosis." A further entry on October 14, 1986 so confirmed, and reflected a plan to see Willie Jones once a week for individual psychotherapy, and that he would "continue to see the psychiatrist as needed for medication." (Ex. 25.)

36. On October 1, 1986, Willie Jones left home and was sent to a halfway house for drinking, abusing his medication, and attempting to overdose. On October 19, 1986, Willie Jones left the halfway house and had an acute psychotic episode. He was admitted for treatment at Orange County Mental Health after being found wandering about, going in to unknown houses, and attempting to strangle Jones's mother. Willie was crawling on the ground at a movie theater. The police talked to him and let him go. Then, fifteen minutes later he walked into a residence without permission, and police came and took him into custody. "His wife said she is afraid because he said he was going to kill her and had tried to choke her . . . is scared to death. She can't get control of him." The diagnosis was: "Bizarre behavior. Psychotic. Responding to internal stimuli. Confused. Disoriented." Willie was placed in restraints and medicated with Haldol. The note goes on to say: "Patient is confused, he picks at unseen objects. Unable to give any history and unable to cooperate with staff in any manner. Impossible to assess memory, judgment at this

time. Worried about TV cameras watching him." The nurses' notes state: "Threatens to hurt wife by trying to choke her. Actively hallucinating, unable to answer questions. Thought he was at 'Suzie's'. Mumbling incoherently. Confused, disoriented, and *psychotic*." (Ex. 25.)

37. A progress note dated October 29, 1986, states that Willie Jones had been diagnosed as a danger to himself and others. It further states that he had "another blackout. I can't remember what happened"; that he was threatening others without remembering and had become "aggressive"; and that he "needs to rule out neurological disorder." (*Id.*) There is no indication that Willie Jones had any treatment for his psychosis, and soon thereafter he moved permanently back east. (Id.; Ex. 122, Decl. of Willie Jones, ¶ 40.)

38. Willie continues to have problems with drug and alcohol dependency, and with violence. [redacted] ([redacted]; Ex. 122, Decl. of Willie Jones, ¶ 45.) He continues to struggle with domestic violence, and has threatened to kill his most recent domestic partner. (Ex. 23.)

39. Jones's mother, Cyndy Jones, also had mental and emotional problems. As a result of Willie Jones leaving home, she had a nervous breakdown, was depressed, and talked about killing herself in 1977 because of Willie's being in the streets and his relationship with other women. She gave up her religion and started drinking heavily. (Ex. 122, Decl. of Willie Jones, ¶ 41; Ex. 159, Decl. of Carole Kelly, ¶ 65.)

40. Cyndy often talked about walking off and just leaving the kids. She became depressed and talked about killing herself. She went through periods of time when she would just stay up in bed or sleep and not get up for days. When the children were gone, such as in the summer, she would perk up and spend much of the time out partying. (Ex. 122, Decl. of Willie Jones, ¶ 42.)

41. Sheila Barcus, Cyndy's sister, has an adopted child, David, who was

learning-disabled. David was in therapy since he was nine years old, became a sexual offender (pedophile), and was incarcerated. David himself was molested by one of his cousins when he was nine years old. David interacted often with Jones when they were both growing up.

42. Cyndy's step-father, Solomon Garbot, tried to kill her mother, Carmen, with an ice pick and was forced to leave the house. (Ex. 116, Decl. of Christina James, ¶ 6.)

43. All of this information concerning substance abuse, mental illness, and health problems for Jones's family was readily available at the time of trial. Yet counsel was ineffective for failing to present this information to the jury to give them an accurate portrayal of Jones's background that would have properly informed their sentencing decision.

c. Jones's Social History Reflects Abuse, Neglect, and Severe, Untreated Psychological Trauma, Which Would Have Exacerbated Any Mental Disease or Defect Caused by Organic Brain Disease

44. For a factual recitation of Jones's social history, Jones incorporates herein by reference Section II.B, *supra*. Dr. Khazanov has found:

> In individuals like Michael Jones, who suffer multiple disabilities, mental state can deteriorate quickly, particularly in response to changes in environment, physical illness or medical conditions, external stressors, changes in psychiatric or other medications, or even the passage of time. Mr. Jones' history includes a family history of mental illness, episodes of severe depression, and a range of self-destructive behaviors.
>
> [¶] . . . He suffered the cumulative effects of longstanding brain damage, learning disabilities reflecting severe

impairments in attention and concentration and a serious psychiatric disorder characterized by depression and long-term alcohol abuse.

(Ex. 154, Decl. of Natasha Khazanov, ¶¶ 114, 115.)

d. Jones Prominently Exhibited Physical Symptoms and Behavior Consistent with Schizophrenia, Bi-Polar Disorder and other Mood Disorders, or Multiple Personality Disorder

45. Jones incorporates herein by reference section II.B.4, *supra*. Jones showed signs and symptoms of mood disorders, schizophrenia, and multiple personality disorder. Friends stated that, most of the time, Jones had an engaging personality and people loved to be around him because he was funny and caring. (Ex. 125, Decl. of Danny Limar, ¶ 4.) However, Jones was "like Jekyll and Hyde: Sometimes he would change into another person." (*Id.*) Others who knew Jones well during this time similarly confirm that he would exhibit a "Jekyll and Hyde" type of personality, with the "Hyde" state brought on most acutely by excessive drinking.

e. Jones Was an Alcoholic and Consumed Large Amounts of Alcohol on a Daily Basis and Jones Was in Fact Drunk at the Time of the Domino's Robbery

46. Danny Limar lived with Jones after Jones was thrown out of his mother's home in early 1988, the period leading up to the Mad Greek and Domino's robberies later that year. As Limar states, they would drink beer together all day long and do whatever drugs were available. (*Id.*) In a typical day, they would each drink five or six 40-ounce cans or bottles of Old English 800. For a period of time, they also consumed large amounts of cocaine on a daily basis, with each consuming one-half to one ounce in a single day. Danny Limar was not called as a witness at the trial.

47. Loren Kinney was Jones's girlfriend when Jones was sixteen years old, and lived him with him during this same time period that led up to the robberies in 1988. Kinney and Jones got drunk every day, starting in the morning. Each day, they

drank about three 40-ounce beers by noon and then drank another dozen or so 40-ounce beers between them during the rest of the day. In addition, they drank cheap hard liquor, mostly "Cisco." They drank to excess every day, without exception. (Ex. 124, Decl. of Loren Kinney, ¶ 7.) Loren Kinney was not called as a witness at trial.

48. An investigative report prepared by investigators retained by Domino's Pizza following the shooting of Shane Weeks, contains an interview with Tara Taylor, who spoke with Jones about the Domino's robbery and killing shortly after it occurred. In the interview, Taylor states to the investigator: "I heard Mike say something like, 'I was drunk and I just wanted to shoot a couple of holes in the wall, but then the guy got in the way. I feel sort of bad but that's the way it goes down in hard way.'" (Ex. 69; Ex. 135, Decl. of Tara Taylor, ¶ 4.) Tara Taylor was called as a witness at the trial by the prosecutor for the purpose of eliciting a statement to Taylor by Jones to the effect that he had admitted shooting Weeks and had showed no remorse. However, the defense in cross-examination did not elicit or attempt to elicit from Taylor that he had been "drunk" when the manager was shot and that the shooting was accidental, or that he felt badly about it, nor did the lawyers recall her as a witness in the penalty phase.

49. Eric Bailey was never called as a witness for the defense. Bailey was present at the scene of the Domino's robbery. He was interviewed after the trial and told an investigator that he was present at the crime scene, had not seen Jones with the gun, and had not gone inside. (Ex. 115, Decl. of Chemeka Goss-Kater, ¶ 4.) With respect to intoxication, "He [] stated that on the day of the Domino's robbery, he and Mike had been drinking beer heavily all day." (*Id.*)

50. Taken together, these statements could and should have formed the basis for specific and consistent testimony at the penalty phase suggesting that Jones was both acutely and chronically intoxicated at the time of the Domino's shooting. However, and even though counsel's expert witness was called solely to testify about

the "alcoholic family" not specifically related to Jones, trial counsel introduced no mitigating evidence whatsoever that Jones was experiencing the "effects of intoxication" when the killing occurred. The evidence of Jones's daily use of copious amounts of alcohol would have constituted substantial evidence that Jones was intoxicated on the day of the Domino's shooting. (Ex. 115, Decl. of Chemeka Goss-Kater, ¶ 4; Ex. 135, Decl. of Tara Taylor, ¶ 4; Ex. 69.) Further, Jones was intoxicated on a daily basis, which would tend to show that he was intoxicated during all of the crimes in question. (Ex. 147, Decl. of Mario Villarreal, Jr., ¶ 6; Ex. 144, Decl. of Beatrice Acosta, ¶ 11; Ex. 146, Decl. of Luis Villarreal, ¶ 6; Decl. of Danny Limar, ¶ 4.) Further, evidence shows that Jones was intoxicated on the day of the Flats incident and the Mad Greek incident. (*Id.*; Ex. 147, Decl. of Mario Villarreal, Jr., ¶¶ 16, 18.) Jones incorporates herein by reference Section II.B.4 and Section II.B.5. This evidence was readily obtainable by trial counsel; and it would not necessarily have not been inconsistent with any of the other trial testimony. Thus, trial counsel could and should have tendered it as evidence of intoxication under factor (h).

51. Just as significantly, whether Jones may have been acutely intoxicated at the very moment of the Domino's shooting is not the sole question to be asked in determining whether to investigate and present available evidence regarding the chronic "effects of intoxication." Expert testimony should and could have been presented to emphasize the highly toxic effects which chronic alcohol abuse has on the brain that "do not abate when the substance leaves the body"[34]:

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[34] Combined with Dr. Khazanov's findings regarding organic brain damage, the facts indicating that Jones was suffering from chronic and acute effects of intoxication at the time of the offenses, have significant implications for the guilt phase as well. Among the primary questions raised as to the guilt phase are whether Jones may have been incompetent to stand trial; incompetent to plead guilty to the attempted murders; that his mental impairments made it impossible for him to form the specific intent to commit robbery; and, therefore, that the felony-murder special circumstance finding may be constitutionally infirm. See, Claim One, incorporated

> Alcohol is considered a neurotoxin and can cause cortical atrophy of brain tissue which can result in a range of debilitating and irreversible impairments, including severe memory loss, mental inflexibility, learning deficits, or exacerbation of pre-existing deficits, and a marked tendency to perseverate. The effects of alcohol can be both acute (transient) and chronic, i.e., producing lasting effects which persist whether or not the patient continues to drink. The behavioral effects of acute intoxication tend to be psychiatric in nature (hallucinations, paranoia, depression, or euphoria, depending on the substance), or neuro-cognitive (impaired attention, memory and motor coordination). The latter manifestations, following extended use and/or addiction, arise from structural damage to the brain itself causing cognitive deterioration, attentional disorders, permanent memory impairments and sometimes motor coordination deficits. These conditions do not abate when the substance leaves the body.

(Ex. 154, Decl. of Natasha Khazanov, ¶ 99.)

52. Trial counsel had a duty to investigate and present readily available evidence of Jones's intoxication. *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000) (ineffective assistance of counsel for failure to prepare social history, investigate and present evidence of intoxication and impaired mental condition at time of crime).

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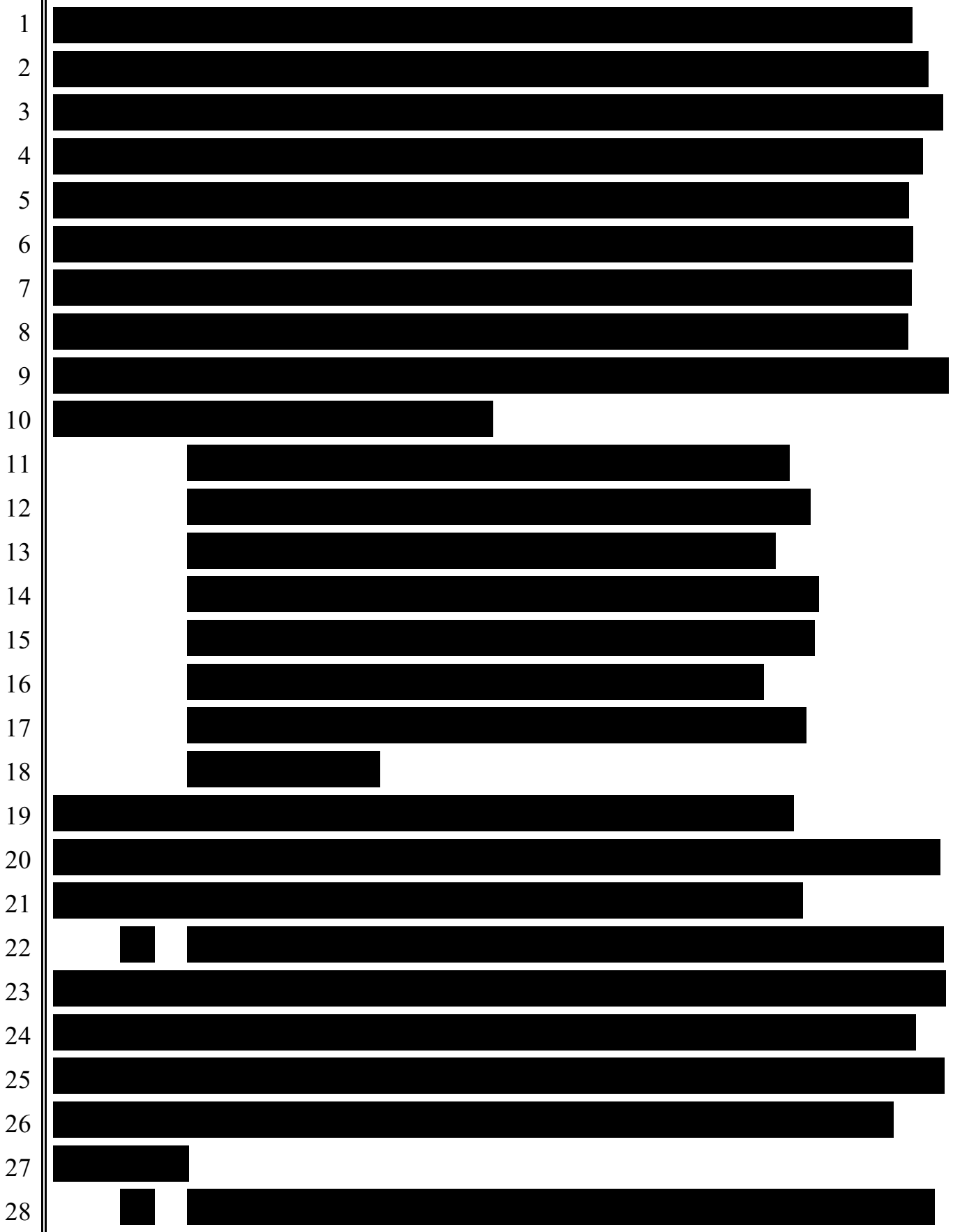
herein by reference, and Claim Eight, section Q.

B. Failure to Obtain and Use Expert Witnesses to Develop Crucial Mitigation Factors (d), (h), and (k) Despite Overwhelming and Available Mitigation Evidence

53. Dr. Isabel Wright, an expert with a Ph.D. in social anthropology and expertise in developing social histories for use in death penalty cases, was retained by chief counsel Frank Peasley in September of 1990.

54. [redacted]

55. [redacted]



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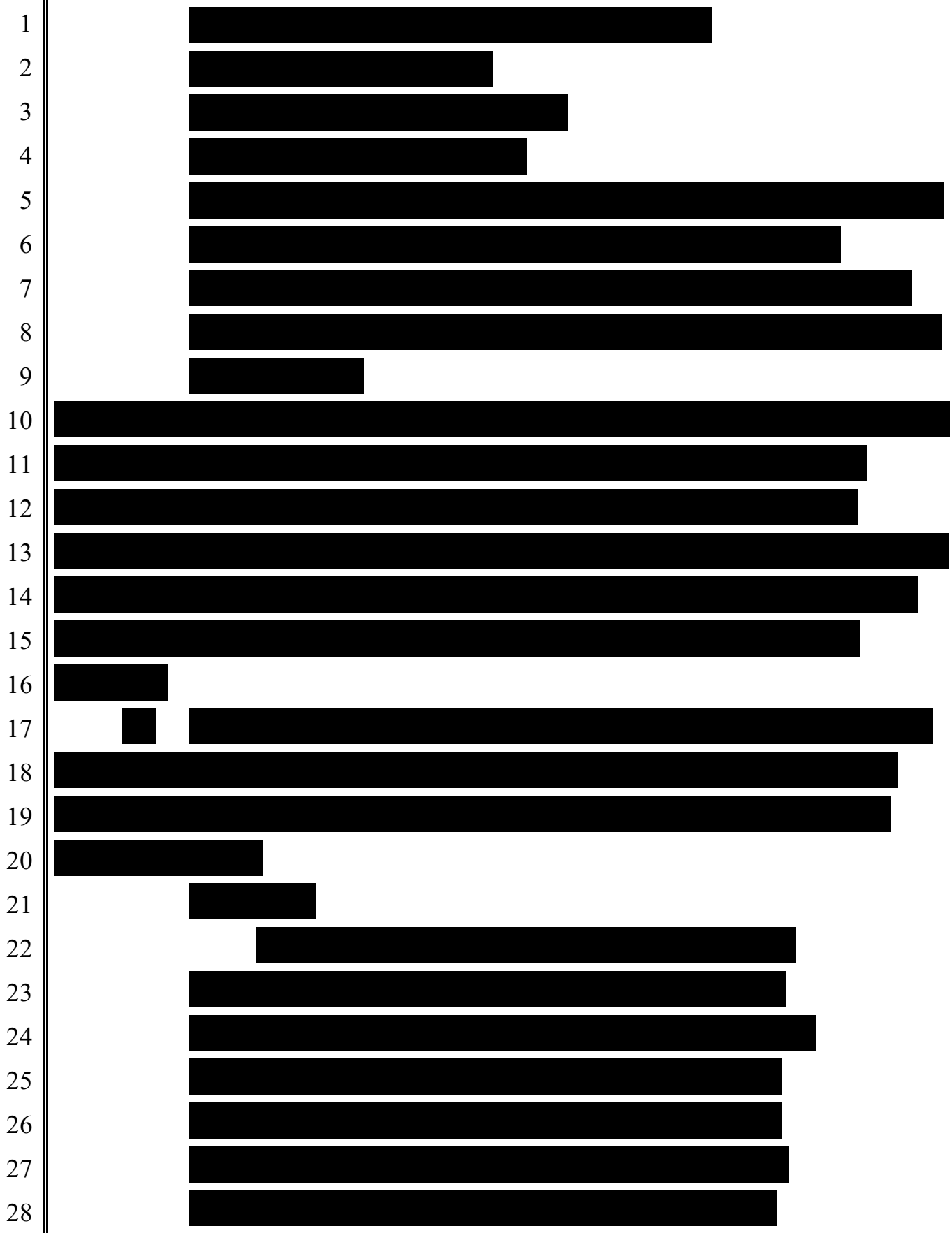


[redacted]

62. [redacted]

63. [redacted]

[redacted]

64. [redacted]

65. There was abundant evidence indicating the existence of multiple risk factors for mental illness, mental and emotional disturbance, and other mitigation themes requiring counsel to conduct the investigation and to retain the experts

necessary to ensure 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). This counsel failed to do. Indeed, all of the following appeared in trial counsel's file, and all combine to constitute powerful and obvious signs that Jones was at high risk for mental illness and/or dysfunction:

(a) a virulent episode of meningitis, an acute viral infection of the brain, at age eight months, in which Jones suffered advanced stages of febrile convulsions, respiratory distress, and rigidity of the limbs, and required a five day hospitalization;

(b) a family history of seizures, blackouts, Temporal Lobe Epilepsy, schizophrenia, depression, nervous breakdown, alcoholism, psychosis, and imprisonment for uncontrolled violent behavior;

(c) a personal history of multiple closed head trauma, including loss of consciousness;

(d) childhood addiction to alcohol, including "getting drunk every day";

(e) copious ingestion of cocaine over significant periods of time;

(f) child abuse of Jones, his father's attempted murder of Jones's mother, and threats to kill Jones when he attempted to defend his mother against his father's attacks;

(g) school records showing untreated Attention Deficit Hyperactivity Disorder at an early age, followed by failing school grades, followed by punishment for minor acts of violence; and,

(h) neurological testing by trial counsel's expert, Dr. Hall, which, albeit grossly incomplete, nevertheless suggested brain dysfunction.

Despite what defense counsel may now say, as is made clear in *Strickland* itself, "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. In this case, defense counsel did not have a strategic decision for failing to investigate and present mitigation; they simply failed to develop the issues mentioned above and pursue reasonable avenues of presenting a defense as reasonably competent counsel would have. The Supreme Court has held that "[i]n light of what the records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527; *see also Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).

C. Trial Counsel Was Incompetent for Presenting Harmful and Unhelpful Expert Testimony

1. Dr. Buckey's Unhelpful Testimony

66. No expert witness was called at the penalty phase except for Dr. Steven Buckey, an expert in alcohol abuse and the alcoholic family. Dr. Buckey never met with Jones's mother or father in person. Dr. Buckey met with Jones only briefly, just a few days before testifying. Trial counsel provided Dr. Buckey no information at all regarding the specific violent acts Jones had allegedly committed, nor did he ask Jones anything about these acts of violence to try and determine why they had occurred. Therefore, Dr. Buckey was unable to suggest to the jury any mitigating reasons to explain why Jones committed the violent acts which the jury relied upon to return a verdict of death. Most importantly, Dr. Buckey's testimony did not present compelling mitigation evidence under factor (k) or any other statutory factor in mitigation.

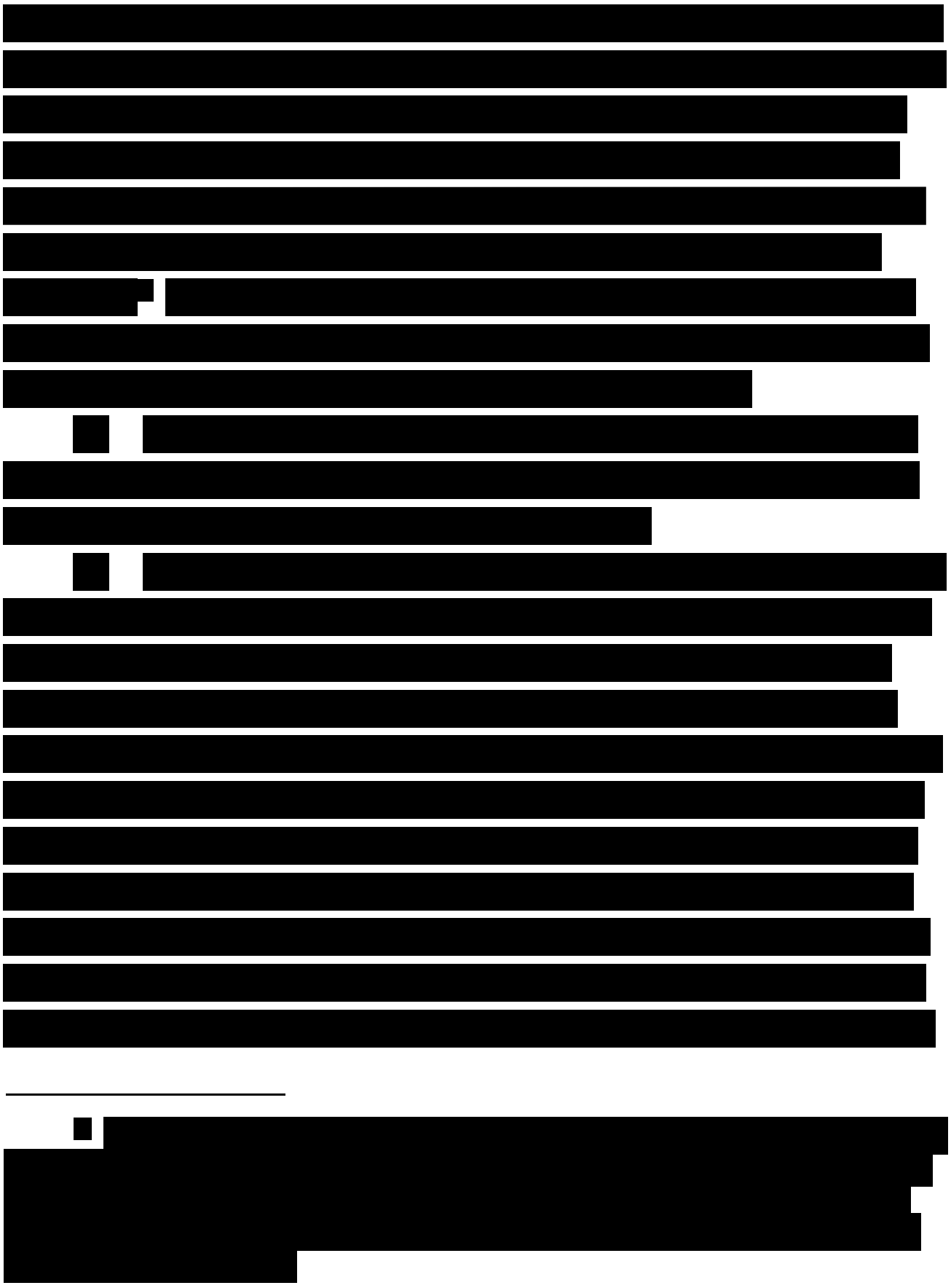
67. Dr. Buckey was a clinical psychologist whose expertise lay in the evaluation of alcohol treatment programs and "the alcoholic family." (RT 3716.) On direct examination, the defense elicited testimony that Jones had started drinking alcohol when he was 11 and was an "alcoholic" by age 13; that Jones's father was an "abusive alcoholic" and failed to provide a positive role model; and that, as a result of

having grown up in an "abusive alcoholic home," Jones lacked adult supervision and "was left on his own a lot as a child." (RT 3729.)

68. [redacted] Consequently, Dr. Buckey was unable to testify that, at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct was "impaired as the result of . . . the effects of intoxication." Jones incorporates herein by reference Section II.B.4 and Section II.B.5 regarding the facts and evidence surrounding Jones's chronic drug and alcohol intoxication and his drug impairment and alcohol intoxication at the time of the crimes.

69. The above facts regarding Jones's alcoholism as well as the chaotic violence and "alcoholic" environment in which he was raised, should have provided a strong foundation for Dr. Buckey's testimony to be tied to specific factors in mitigation. However, that was not done. Rather, Dr. Buckey testified only in vague generalities about alcoholism, had no knowledge at all of the specific offenses with which Jones was charged, and offered no evidence to suggest, nor did he himself opine, that Jones was under the influence of alcohol or drugs at the time any of the offenses were committed.

70. [redacted]



prosecutor was able to argue: "What mitigating circumstances have you heard about? Nothing. Those factors that I've just discussed are the mitigating and aggravating circumstances. There are no mitigating circumstances in this case." (RT 3780.)

73. Trial counsel failed to adequately investigate Jones's complete life history; to retain and present testimony by competent mental health experts; and to provide experts with adequate guidance and information (see *infra*, Claim Thirteen), which resulted in an incomplete and ineffective penalty phase presentation. *Ake v. Oklahoma*, 470 U.S., 68, 76-77, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Bloom v. Calderon*, 132 F.3d 1267, 1270-71 (9th Cir. 1997) (counsel ineffective for failing to provide psychiatric expert with necessary and available data which would have assisted his evaluation and testimony); *Bean*, 163 F.3d at 1078-89 (counsel ineffective for failing to investigate penalty phase issues and provide mental health experts with necessary information); *Clabourne v. Lewis*, 64 F.3d 1373, 1385-87 (9th Cir. 1995) (counsel failed to provide expert witness with materials needed to provide an accurate profile of defendant's mental health; this "deficient performance was decidedly prejudicial").

2. Dr. Buckey's Testimony Was Harmful

74. By calling Dr. Buckey, the defense presented harmful testimony in favor of the prosecution. The duty to fully investigate the facts before deciding which witnesses to call fully applies to the decision to call expert witnesses, and where experts are called "counsel's failure to adequately prepare his expert and then present him as a trial witness was constitutionally deficient performance." *Bloom v. Calderon*, 132 F.2d 1267, 1277 (9th Cir. 1997) (counsel ineffective in failing to prepare psychiatric expert witness); *see also Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) (counsel ineffective in opening up the defense to "devastating cross-examination"); *Osborn v. Schillinger*, 861 F.2d 612 (10th Cir. 1988) (Although counsel called a psychiatrist, he did nothing to prepare this witness."); *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010) ("A lawyer who knows of but

does not inform his expert witnesses about essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment.") (citing *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999); *Rompilla*, 545 U.S. at 382-83 (finding counsel's performance unreasonable in spite of counsel consulting a "cadre of three mental health witnesses" because counsel had failed to follow red flags that "merited further investigation"). Further, "that a [mitigation] theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" the defendant. *Sears v. Upton*, 130 S. Ct. at 3265, 177 L. Ed. 2d 1025 (2010).

75. Given the failure of Dr. Buckey's direct examination to provide the defense with any useful mitigating evidence, Dr. Buckey's testimony on direct was of no value to the defense. Indeed, Dr. Buckey's direct examination was so devoid of any connection to any mitigating factors in favor of the defense, that even after Dr. Buckey had testified, the district attorney was able to review the aggravating and mitigating factors and credibly argue to the jury that, "There are no mitigating circumstances in this case." (RT 3780.) Accordingly, if the defense had not called Dr. Buckey at all, it would have lost nothing in the way of mitigating evidence that could have been used by the jury to justify sparing Jones's life.

76. Furthermore, Dr. Buckey was not merely a defense witness who turned out to be useless to the defense. Rather, by calling Dr. Buckey, the defense handed the district attorney one of its strongest penalty phase witnesses. With just a few eminently foreseeable questions, the district attorney was able to convert Dr. Buckey into a powerful prosecution advocate in its efforts to get Jones sentenced to death.

77. Predictably, the prosecutor questioned Dr. Buckey on cross-examination about the established clinical elements of the diagnosis of "antisocial personality." He then asked, in rapid succession, whether the fact that Jones had been suspended numerous times in school fighting and stealing, had never held a job, and had abused

alcohol and drugs were not "indicators of an antisocial personality," and Dr. Buckey answered "yes" to each question. Similarly, Dr. Buckey gave a simple "yes" to the following question, posed by the district attorney without objection by the defense:

> Q. [District Attorney]: And also the fact that he would be violent, shoot people, for example, with sawed-off shotguns, try to shoot people in the head, kill someone, that would also be, in fact, a very good indicator that he is an antisocial person, isn't that correct?
>
> A. [Dr. Buckey]: Yes.

(RT 3733.)

78. Dr. Buckey also agreed with the prosecutor that people having such an "antisocial personality" were "very dangerous in our society" (RT 3735); and that the same "alcoholism" that Dr. Buckey had testified to was itself "an indicator of their antisocial personality." (RT 3735.)

79. In a concluding sequence that can only be described as devastating to the defense, the following exchange occurred:

> Q. Alcoholism doesn't cause you to go up to someone and shoot and kill them, does it?
>
> A. No.
>
> Q. Antisocial behavior or sociopath, on the other hand, that type of behavior is more indicative of a sociopath; isn't that true? Shooting people? Robbing them? No moral constraints whatsoever? [¶] If you learned that someone had shot two young boys in the stomach, point blank range with a shotgun . . . and killed another person before that and tried to shoot three other people before that, wouldn't you say that that is more indicative of an antisocial personality or a sociopath, someone with no moral constraints

whatsoever?

A. Yes.

Q. If he repeats the . . . violent conduct over and over and over, that would be some indication that he knows what he is doing, and he doesn't care, isn't that true?

A. Yes.

Q. Someone who doesn't have a conscience; isn't that true?

A. Yes.

Q. Someone who is very difficult, if not impossible, to treat in any setting; isn't that true?

A. Yes.

(RT 3741.)

80. Based on the foregoing testimony by Dr. Buckey, the prosecutor was able to use Dr. Buckey as an advocate for a death verdict:

DISTRICT ATTORNEY: [Jones] was not suffering from any mental or emotional disturbance other than his own lust for violence, other than his own joy that he had for these particular crimes. There was nothing that spurred him to that except possibly you heard from a defense psychologist, Dr. Buckey that he is a sociopath, that he has no conscience. [Defense objection overruled]. You learned from the doctor that there are indicators in [Jones's] life that pointed to him being a sociopath. That occurred on cross-examination. Dr. Buckey told you a sociopath is a person without a conscience, is a person without moral constraints. Certainly the defendant is such a person.

(RT 3775.)

81. This kind of cross-examination is something that qualified capital trial counsel should have been prepared for. However, as Dr. Buckey now recognizes, and as his trial testimony reveals, Dr. Buckey was totally unprepared by trial counsel for any cross-examination in general, and wholly unprepared in particular for cross-examination about whether Jones was just a "sociopath" acting entirely out of a "lust for violence." Had Dr. Buckey been properly prepared for cross-examination, as reasonably competent capital counsel would have certainly done, Dr. Buckey could and would have testified that one cannot diagnose a person as a "sociopath" without reviewing details of the person's medical, social, and family history, none of which Dr. Buckey had reviewed.

82. Further, before making a diagnosis of anti-social personality disorder, it is necessary to rule out frontal lobe damage because " . . . symptoms and behaviors associated with frontal lobe dysfunction often mimic symptoms associated with anti-social personality disorder." (Ex. 154, Decl. of Natasha Khazanov, ¶ 108.) Any trial expert also could have ruled out antisocial personality disorder by looking at Jones's adjustment while incarcerated, because people with anti-social personality disorder will normally do poorly amidst the rigors of strict prison discipline, whereas persons suffering from brain damage often become "model prisoners." (Ex. 108, Decl. of Natasha Khazanov, ¶ 108.) Jones was a model prisoner in county jail before and during trial, and he continues to be a model prisoner.

83. On cross-examination, the prosecutor asked Dr. Buckey about the Diagnostic and Statistical Manual ("DSM-3R"), a fundamental tool used by mental health experts to diagnose patients. (RT 3732-33.) The prosecutor left the jury with the false belief that, based upon the DSM-3R, that Dr. Buckey had diagnosed Jones as having antisocial personality disorder. Gunn was apparently not familiar with the DSM-3R and could not rehabilitate Dr. Buckey on redirect. The prosecutor used Dr. Buckey's testimony to argue to the jury that a death verdict was necessary. The prosecutor asked Dr. Buckey on cross- examination:

Q: You, as psychologists, use a book called "DSM-3"?
A: Presently "DSM-3R."
Q: 3R. Right. What is that?
A: That's our Diagnostic and Statistical Manual.
Q: And what does that mean?
A: It has the list of the different diagnostic categories that we would be asked to use and describes the criteria we would need to make the various diagnoses.
Q: For example, schizophrenia is in that -- it's a very large book; is that correct?
A: Yeah, about that thick (indicating).
Q: Schizophrenia would be in there, and that would be a diagnosis of someone who suffers a mental illness or a personality disorder, and it would have criteria under what to look for, so to speak, if someone has schizophrenia. Is that fair to say?
A: Yes.
Q: And it lists quite a number of problems in that book; isn't that true -- or diagnosis -- diagnoses?
A: Yes.
Q: One of those things that are listed in the book is sociopath -- is that correct? -- or antisocial behavior?
A: I think the label is antisocial personality disorder right now.
Q: What is that?
A: That's somebody who is not brought into society's norms and behaves in antisocial ways, doing illegal kinds of things, also having difficulty with relationships, as we

> talked about earlier, having difficulty learning from past experiences."

(RT 3732-33.)

84. Had trial counsel been familiar with, or properly prepared for the penalty phase, he would have known that the proper use of the DSM-3R required a multi-axial assessment and a diagnosis which cannot be made without consideration of all of the criteria. Thus, the jury was misled into believing that Dr. Buckey was making a diagnosis that Jones had an antisocial personality disorder from mere consideration of the symptoms listed in the DSM-3R. That misconception skillfully created by the prosecutor could easily have been dissipated on redirect by simply asking Dr. Buckey about the DSM-3R's requirement of a multi-axial assessment, and then following up with a question asking Dr. Buckey if he intended his earlier testimony on cross-examination about antisocial personality disorder as a diagnosis that Jones suffered from such a disorder. Because Dr. Buckey had not conducted the required multi-axial assessment of Jones, Dr. Buckey could only have responded in the negative.

85. The prosecutor, in his cross-examination of Dr. Buckey, first got the witness to admit repeatedly that Jones had an "antisocial personality," and then suggested that "people that have this personality" were "sociopaths." Dr. Buckey did not object to the prosecutor's linking of "antisocial personality" with "sociopaths," and simply answered "Yes" when asked if "these people" were "devoid of moral constraints that others have." (RT 3736.) The United States Supreme Court has referred to antisocial personality as a "condition that is not a mental disease and that is untreatable." *Foucha v. Louisiana*, 504 U.S. 71, 75, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). California courts have adopted this characterization (*see*, *e.g.*, *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 969 P.2d 584, 81 Cal. Rptr. 2d 492 (1999)), and have recognized that expert witnesses testifying about antisocial personality disorder must be careful to "not open any doors on cross examination that would introduce

adverse evidence." *People v. Barnett*, 17 Cal. 4th 1044, 74 Cal. Rptr. 2d, 121 n.43 (1998); *In re Gay*, 19 Cal. 4th 771, 968 P.2d 445, 80 Cal. Rptr. 2d 765 (1998) (ineffective assistance of counsel for multiple instances of deficient performance in penalty phase, including calling of expert who was poorly prepared and who testified to petitioner having a "psychopathic personality"). Therefore, antisocial personality disorder is not a "diagnosis," but rather is a term used to describe someone who commits acts of violence without any reason other than hatred for society, and therefore has "been treated on appeal as insufficient to justify mitigation." *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998); *People v. Thomas*, 687 N.E.2d 892, 904-05 (Ill. 1997) (trial judge considered defendant's diagnosis of antisocial personality disorder as aggravating evidence); *Guinan v. Armontrout*, 909 F.2d 1224, 1228 (8th Cir. 1990) (counsel not ineffective for failing to present evidence of antisocial personality disorder); *Foster v. Schomig*, 223 F.3d 626 (7th Cir. 2000) (same); *People v. Stankewitz*, 51 Cal. 3d 72, 115, 793 P.2d 23, 270 Cal. Rptr. 817 (1990); *Brown v. State*, 663 So. 2d 1028, 1032 (Ala. 1995) (antisocial personality disorder does not constitute mitigating evidence). Thus, although Dr. Buckey could not have been reasonably expected by the defense to offer mitigating testimony based on Jones having an antisocial personality, he certainly should have been ready to be cross-examined about whether Jones had such a disorder and have been prepared to suggest that Jones was not a "sociopath" because there were clinical explanations for his behavior that were mitigating. That Dr. Buckey was not so prepared but instead readily acquiesced to the prosecutor's characterization of Jones as a "sociopath" demonstrates either that Dr. Buckey should never have been called as witness in the first place, or that trial counsel utterly failed to prepare him for predictable and damaging cross-examination. Either way, trial counsel was ineffective in calling Dr. Buckey and failing to adequately prepare him.

86. As the cases cited demonstrate, competent trial counsel at the time of Jones's trial in 1991 would have known that a diagnosis of antisocial personality

disorder is an incredibly harmful piece of information to present to a penalty phase jury. This jury was left with the impression that such a diagnosis had been made by Dr. Buckey. Counsel should have undertaken a reasonably conscientious investigation into what an expert witness could be expected to say before calling that witness. Counsel must make an informed choice as to whether the anticipated "up-side" of the witness' testimony is sufficient to counter the expected "down-side" on cross-examination. That either was not done in the present case, or it was done in such a way as to defy any reasonable tactical stratagem for calling Dr. Buckey as a witness.

87. A diagnosis of antisocial personality disorder or sociopathy practically ensures a death sentence because it describes the defendant as self-centered, remorseless and difficult, if not impossible, to rehabilitate. In Jones's case, counsel could and should have sought an additional opinion. Competent counsel would not have called an expert to testify with harmful opinions. *Pawlyk v. Wood*, 248 F.3d 815, 823 (9th Cir. 2001) (when the only mental health expert for which funding is provided reaches harmful conclusions, "competent counsel would want to refrain from introducing harmful [psychiatric] testimony to the fact finder").

88. Dr. Buckey readily agreed that Jones was a violent "sociopath" who was "very dangerous in our society;" that Jones operated with "no moral constraints whatsoever;" that Jones "doesn't have a conscience;" and that Jones was someone who was "impossible to treat in any setting." With the defense having failed to prepare Dr. Buckey for such devastating cross-examination, the defense was able to use nothing elicited from Dr. Buckey in its final argument, and the district attorney was able to credibly argue that nothing Dr. Buckey testified to amounted to mitigation. At the same time, the district attorney was able to argue that "you learned from the doctor that there are indicators in [Jones's] life that pointed to him being a sociopath;" and that "Dr. Buckey told you a sociopath is a person without a conscience, is a person without moral constraints." (RT 3775.)

89. In light of the negligible value of the direct testimony of Dr. Buckey, and the overwhelmingly harmful, predictable cross-examination testimony, trial counsel's decision to use this witness was devoid of any tactical justification and "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Bloom v. Calderon*, 132 F.3d at 1277, quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Smith v. Stewart*, 140 F.3d 1263, 1269 ("When the grounds [for counsel's decisions] have not been based upon tactical considerations, we have not hesitated to find deficient performance."). Jones's trial counsel was ineffective for recklessly allowing the presentation of damaging testimony of an antisocial personality diagnosis that would have a devastating impact on the jury. Had trial counsel obtained a correct diagnosis, such as those presented in Exhibits 154 and 159, it is reasonably probable that Jones would not have received a death sentence. Thus, the defense's decision to call Dr. Buckey as a witness constituted ineffective assistance of counsel and, given Dr. Buckey's devastating testimony on cross-examination, "is sufficient to undermine confidence in the outcome." *Bloom*, citing *Strickland*, at 694.

D. Experts Should and Could Have Testified in Mitigation that Jones Suffers from Organic Brain Damage and Other Disorders

[redacted]

[redacted]

91. As a result of counsels' failure to investigate and to present experts with the proper information, Jones was denied his right to a valid mental health evaluation that would have established the mitigation which counsel failed to present.

92. Counsel knew or should have known that the reliable assessment of mental health issues required that counsel assist mental health professionals evaluating their client in adhering to the procedures necessary to render an accurate diagnosis, and that trial counsel insist that consulting experts exercise the proper level of care and skill in their assessment. On the basis of generally agreed-upon principles, the standard of care for both general psychiatric and forensic psychiatric examinations reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric, neurological, or psychological dysfunction.[36]

93. Thus, it is critically important to place the psychiatric examination within the framework of a comprehensive examination of the whole patient. Failure to conduct a thorough and accurate investigation not only impairs the expert's ability

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[36] Because "it is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior" (Strub & Black, *Organic Brain Syndromes*, p. 42 (1981)), an accurate and complete medical and social history is essential to a reliable assessment of mental health issues. This history must include not only the patient's present symptoms, but his or her past psychiatric history, medical history, developmental history, and history of adult development. *See*, *e.g.*, Kaplan & Sadock, *Comprehensive Textbook of Psychiatry/VI* at pp. 524-26, 601, 709 (William and Wikins 1995).

The history is supremely important to an accurate assessment of the patient's functioning over time: The patient's history is an essential feature of neuropsychiatric evaluation, as it provides the clinician the opportunity to develop the equivalent of a serial mental status examination across the patient's life course and to identify target symptoms that may respond to treatment. . . . (Kaplan & Sadock, at 710.) A comprehensive clinical evaluation must be founded on "thorough acquisition of the current and past medical history, family history, developmental and social history, and a review of personal habits." (*Id.* at 709.)

to render a reliable evaluation, but also precludes trial counsel from relying on the expert's unreliable evaluation as a shield against an allegation of ineffective assistance. The failure of trial counsel to conduct an adequate and competent investigation meant that their decision to proceed as they did was neither "informed" nor "tactical." Merely presenting certain categories of evidence or, as in this case, merely talking to several experts, is just not enough.

94. "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert . . . A lawyer who knows of but does not inform his expert witnesses about . . . essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment." *Caro v. Calderon*, 165 F.3d 1223, 1226, 1228 (9th Cir.1999); *accord*, *Smith v. Stewart*, 189 F.3d 1004, 1012 (9th Cir. 1999); *Wallace v. Stewart*, 184 F.3d 1112, 1117-1118 (9th Cir.1999). Trial counsel had an obligation to investigate and bring to the attention of mental health experts useful information, even if the expert did not request those facts. *Id.* at 1116; *Turner v. Duncan*, 158 F.3d 449, 456-57 (9th Cir. 1998); *Bloom v. Calderon*, 132 F.3d 1267, 1277-78 (9th Cir. 1997).

95. Moreover, counsel must sufficiently investigate and prepare the case, including providing experts with the information necessary to support their conclusions, so that the defense can be effective. *See Wallace v. Stewart*, 184 F.3d at 1116; *Bean v. Calderon*, 163 F. 1073, 1078-81 (9th Cir 1998); *In re Gay*, 19 Cal. 4th 771, 803 ("The mental health evaluation provided at the trial level was grossly inadequate, because it failed to take into account Mr. Gay's history and the importance of clinical symptoms, failed to incorporate appropriate testing, and failed to consider the importance of his impairments to issues relevant to the penalty determination."); *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010) ("A lawyer who knows of but does not inform his expert witnesses about essential pieces of

information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment.") (citing *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999); *Rompilla*, 545 U.S. at 382-83 (finding counsel's performance unreasonable in spite of counsel consulting a "cadre of three mental health witnesses" because counsel had failed to follow red flags that "merited further investigation"). Counsel failed in this regard as well. Although the information in trial counsels' possession pointed to the existence of readily available mitigation evidence which should have been presented on Jones's behalf, counsel neglected to transmit this information to the experts they had retained. As a result, they lacked the appropriate information to render a valid and reliable evaluation of Jones's functioning and behavior. Consequently, Jones was deprived of the meritorious defenses he could have raised to the capital charge, as well as of his right to present all available mitigation in support of his effort to persuade the jury that he was deserving of a punishment less than death.

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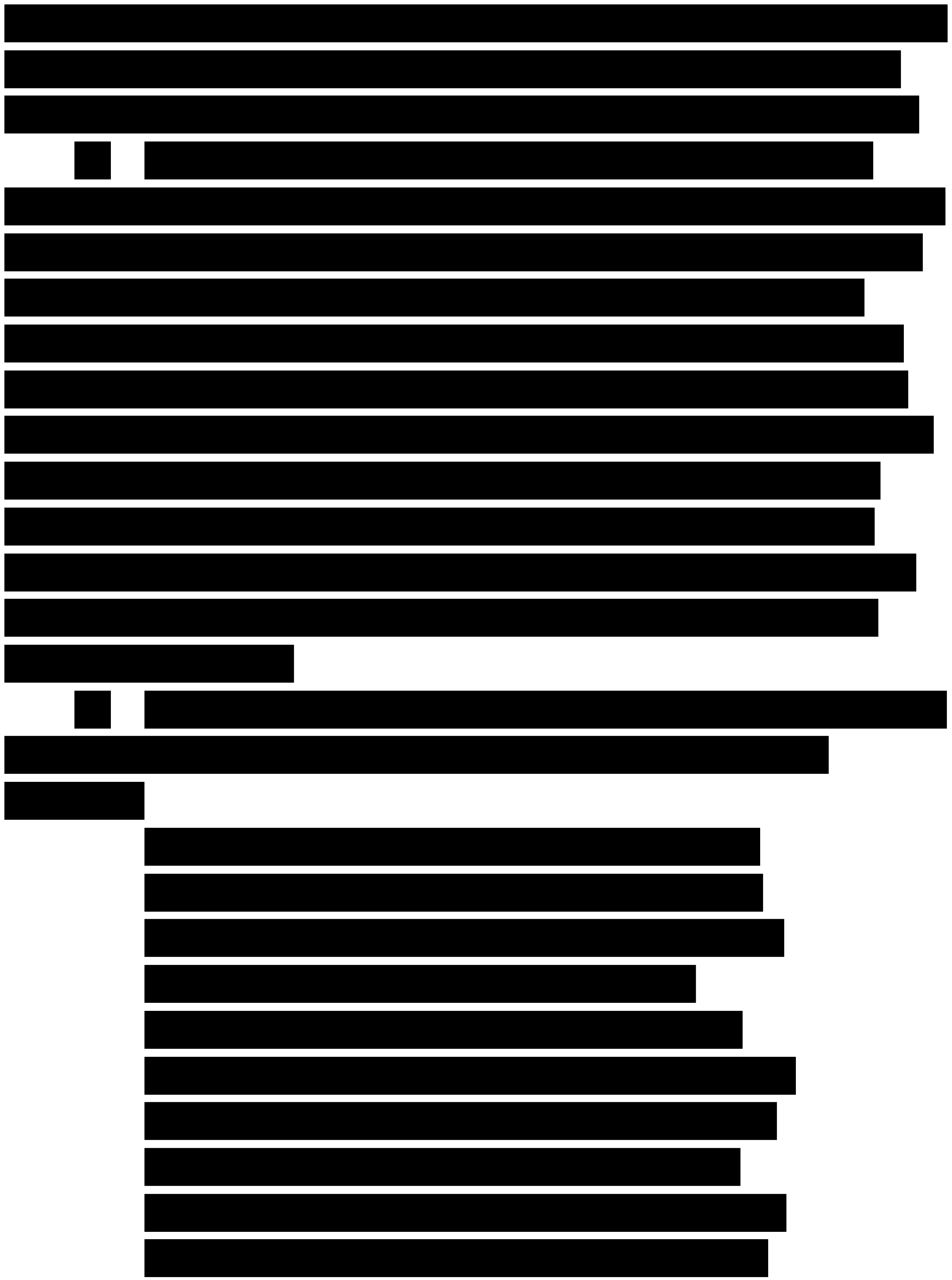

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100. Another expert, Dr. William D. Pierce has concluded that the testing did indicate some signs of organic brain damage. Dr. Pierce therefore concluded: "These preliminary findings do support Samuel Benson, M.D., in his conclusion that Mr. Jones 'does suffer from some kind of brain anomaly or damage.'" (Ex. 156, December 29, 2000 report from William D. Pierce, Ph.D.)

101. Dr. Natasha Khazanov is a qualified clinical psychologist who specializes in the practice of clinical neuropsychology and neuropsychological assessment. Dr. Khazanov was able to conduct all the tests necessary in reaching a confirmed diagnosis of organic brain damage (OBD). Her findings and conclusions substantiate the findings of Dr. Benson, who also indicated the existence of a brain disorder. (See Ex. 154, Decl. of Natasha Khazanov, ¶¶ 115, 117.)

102. Dr. Khazanov conducted a comprehensive neuropsychological evaluation of Jones at San Quentin Prison. The purpose of the evaluation was to determine the existence, severity, and effect of brain damage in Jones; and to analyze Jones's mental state and behavior in light of relevant historical and social factors.

103. Dr. Khazanov reviewed medical, educational, and family history records from trial counsel's file, including all previous assessments of Jones by experts retained by trial counsel. In addition she reviewed habeas declarations in support of the Petition by Dr. Samuel Benson, M.D., Ph.D.; Dr. William D. Pierce, Ph.D.; and Carole Kelly, M.S.W. She then conducted a thorough neuropsychological

assessment, consisting of "a comprehensive battery of neuropsychological tests assess[ing] a broad spectrum of cognitive and sensorimotor abilities dependent on the overall integrity of the brain." (Ex. 154, Decl. of Natasha Khazanov, ¶ 18.)[37] Dr. Khazanov also assessed for malingering on Jones's part but found "no indications of any effort by Mr. Jones to malinger or intentionally perform poorly" and that diversity of the test results themselves confirmed "that the test results provide a valid estimate of his neuropsychological functioning." (*Id.* ¶ 21.)

104. The specific tests administered to Jones by Dr. Khazanov assessed intelligence and achievement, memory, overall organic brain dysfunction, motor functioning, and visuo-spatial abilities. These results were then compared with the previous testing results obtained by trial counsel's expert, Dr. Hall.

105. The results of Dr. Khazanov's neuropsychological tests confirmed that Jones had suffered significant brain damage, primarily of the frontal lobes. In particular, the broad battery of test results showed "clear and consistent evidence of brain dysfunction on several measures"; and "significant signs of overall brain damage" with "particularly strong indicators of frontal lobe damage." (*Id.* ¶ 47.) Dr. Khazanov summarized her testing results as follows:

> The results of the neuropsychological tests clearly and consistently point to the presence of neuropsychological dysfunction (i.e. brain damage) localized predominantly to the frontal lobes. Evidence of brain damage was confirmed in both qualitative and quantitative analyses, including Mr. Jones' impaired performance on several measures particularly associated with frontal lobe functioning. For example, there were significant performance discrepancies

[37] The actual tests given are enumerated at ¶ 19, of Exhibit 154, Decl. of Natasha Khazanov.

> between specific aspects of his verbal comprehension, when compared with speed of processing, visual and working memory. There was also severe impairment on several measures testing short-term memory, concentration and attention. Significant discrepancies between IQ and scores on other neuropsychological tests is considered a sign of neuropsychological impairment.

(*Id.* ¶ 22.)

106. Dr. Khazanov reviewed the previous testing done by Dr. Richard E. Hall, a clinical psychologist retained by trial counsel to test Jones prior to trial. First, it is unclear whether Dr. Hall was a qualified expert in this field. Second, regarding Dr. Hall's testing, Dr. Khazanov explained that, on the one hand, Dr. Hall omitted critical tests absolutely necessary to a valid neuropsychological assessment; but that, despite these omissions, many of the tests that Dr. Hall did undertake tended to support Dr. Khazanov's findings of organic brain damage. Summarizing the significance of the prior testing by Dr. Hall, Dr. Khazanov explained:

> First, although Dr. Hall's testing was not comprehensive, some of his conclusions substantiate the current findings indicating brain dysfunction. Secondly, to a limited extent, Dr. Hall's testing demonstrates that Mr. Jones' neuropsychological deficits and dysfunction predated the findings described here and likely reflect a life-long condition.

(*Id.* ¶ 62.)

107. Moreover, Dr. Hall's testing was incomplete, due in part to trial counsels' failure to conduct an adequate investigation and to present the information to Dr. Hall. It is Dr. Khazanov's opinion that Dr. Hall relied on tests that were of little or no value in evaluating brain damage. Dr. Hall administered and relied on

several "projective personality tests" that "are not considered reliable tools for detecting the presence of brain damage or dysfunction" Specifically relating this general concept to Dr. Hall's testing, Dr. Khazanov explained that the limited battery of tests administered by Dr. Hall were "of no real value" in evaluating whether Jones suffered from organic brain dysfunction.

108. Dr. Khazanov also explained that the testing performed by Dr. Hall "was not comprehensive, particularly as it relates to neuropsychological assessment." In particular, Dr. Hall's testing battery "did not include memory assessment, which is essential to a valid neuropsychological evaluation." Moreover, Dr. Hall "failed to explore frontal lobe functioning or to perform a number of neuropsychological tests, then readily available, which were particularly sensitive to brain damage and were the primary assessment tools used for this purpose at the time Dr. Hall tested Mr. Jones." (*Id.* ¶ 58.) Dr. Hall's clinical interview with Jones, which revealed Jones's childhood alcohol use, indicated a need to conduct specific tests which were "an essential evaluative tool for determining the presence of brain damage" and "particularly sensitive to brain damage and were the primary assessment tools used for this purpose at the time Dr. Hall tested Mr. Jones."[38]

109. [redacted]

[38] The specific tests referred to by Dr. Khazanov were the MAS and the Weschler Memory Scale, both available in 1991. (Ex. 154, Decl. of Natasha Khazanov, ¶ 59.)

[redacted]

[redacted]

110. In sum, the medical records and social history documents in trial counsel's own file and other information that was available at the time, was sufficient to put counsel on notice of the need to do a comprehensive neuropsychological assessment of a defendant facing a penalty phase prosecution in a capital case, and that the brain dysfunction noted by Dr. Khazanov has been present for quite some time, including at the time of the trial. (*Id.* ¶¶ 109-10.)

111. Dr. Khazanov found that "frontal lobe damage and dysfunction" was indicated by all of the test results. Dr. Khazanov explained that frontal lobe disorders "may have the most extreme and far-reaching implications for behavior and functioning"; and that the frontal lobes are at particular risk for damage from falls, blunt head trauma, and exposure to neurotoxins such as alcohol and drugs. In particular, while symptoms of frontal lobe syndrome are varied, typical behavioral effects include "problems of stopping," particularly "impulse control problems." Finally, Dr. Khazanov indicated that individuals with frontal lobe damage who are otherwise of normal intelligence can appear to the untrained observer to be "cognitively intact," creating expectations to function at a higher level than they are able to. Nevertheless, "proper functioning of the frontal lobes is fundamental to meeting the daily challenges of motivation, control, and self- regulation." (*Id.* ¶¶ 63-66.)

[redacted]

112. Having made and confirmed the diagnosis of frontal lobe brain damage based on comprehensive testing, Dr. Khazanov also reviewed the social history factors in Jones's background to determine whether there were, indeed, signs and indicators in these records which were consistent with organic brain damage and which therefore should have alerted trial counsel and their expert to the likelihood that Jones himself was so afflicted.

113. Dr. Khazanov firmly concludes that "Mr. Jones' history, as indicated by the documents I reviewed, as well as my clinical interview with him, fully supports the test results." (*Id.* ¶ 68.) Noting that brain damage is a "cumulative process," Dr. Khazanov lists the specific factors from Jones's history which were "very strong indicators of possible brain damage":

> There are numerous very strong indicators of possible brain damage in Mr. Jones' history, including experiences and situations that put him at a very high risk for neurological injury. Among the most significant are: Mr. Jones' affliction with meningitis, a life- threatening viral infection of the brain, at eight months old; a family history of mental illness, including alcoholism and drug abuse; multiple head traumas, beginning in early childhood, some of which resulted in loss of consciousness; long-term alcohol and polysubstance abuse, beginning at a very early age; and domestic violence, including parental physical and emotional abuse and neglect.

(*Id.* ¶ 69.)

114. Connecting these known risk factors for brain damage to the specific events in Jones's social history, Dr. Khazanov notes that all of the following should have been recognized as strong indicators of OBD: a history of alcoholism on both sides of Jones's family, providing "powerful 'genetic loading' for drug and alcohol

dependency on Michael's behalf;" the medical history of Jones's father, revealing that he suffered from "anger blackouts," during which he attempted to kill Jones's mother and threatened to kill Jones; that Jones's father was diagnosed as having Temporal Lobe Epilepsy, Multiple Personality Disorder, Paranoid Schizophrenia, and "intermittent explosive disorder"; that the father was hospitalized and treated for depression with Haldol, a drug used in the treatment of mental disorders such as schizophrenia, and one that itself causes side effects such as seizures, which are exacerbated by use of alcohol; the father's "terrorizing" of Jones's family, including a documented history of physical abuse of Jones, his mother, and little brother, and incidents in which the father pointed a gun at Michael and his mother and threatened to shoot them; and that Jones's mother also had emotional and mental problems, including a nervous breakdown, heavy drinking, depression, and suicidal ideation. Stressing that these factors from Jones's social history were fully operative when he was in the critical formative years, and connecting them up as major risk factors for brain damage, Dr. Khazanov explained that evaluation of these factors by trial counsel and their expert was absolutely essential to a valid neuropsychological assessment of Jones:

> While this recitation of troubling episodes in Mr. Jones' life is not meant to be exhaustive, it is nevertheless indicative of the pervasive level of family violence, trauma and victimization that characterized his upbringing and home environment. Neuropsychological assessment is indicated when a patient has a known history of physical victimization, especially chronic violence in early childhood. The need is particularly great when the violence sustained was repeated, chronic, or experienced at critical developmental periods in a patient's life. While there is still some debate regarding cause and effect, numerous clinical

> studies support "previous observations that there is a significant correlation between childhood abuse and evidence of neurobiological abnormalities."

(*Id.* ¶ 88.)

115. Having identified and discussed the major risk factors for brain damage in the social history, Dr. Khazanov specifically explained how Jones's history of having suffered a virulent meningitis at age eight months, followed by a history of head trauma caused by sports activities and automobile accidents, had a "cumulative effect" on brain injury. (*Id.* ¶ 98.)

116. Dr. Khazanov also discussed how chronic drug and alcohol abuse beginning in childhood and early adolescence -- a factor clearly known to trial counsel but developed only as a "sympathy" factor – is known to cause "cognitive deterioration, attentional disorders, permanent memory impairments and sometimes motor coordination deficits." Significantly, "[t]hese conditions do not abate when the substance leaves the body." (*Id.* ¶ 99.) Moreover, the effects of childhood alcohol addiction will "exacerbate the effects of impairments in other areas, including major psychiatric disorders." (*Id.* ¶ 100.)

117. Based upon her review of Jones's school and educational records which, as early as third grade, reflected Jones's cognitive impairments, Dr. Khazanov also concluded that Jones demonstrated the classic signs of Attention Deficit/Hyperactivity Disorder (ADHD), resulting in "patterns of impulsivity and inattention [that] should have prompted teachers to refer Michael for educational testing." (*Id.* ¶ 103.) Referencing similar findings by expert Carole Kelly, Dr. Khazanov opined that educational intervention "could have prevented the handicapping and compounding effect of this disability on Michael's functioning throughout his life." (*Id.*) She noted that the school system utterly failed to either identify or address these problems, resulting in "enormous implications for Michael's cognitive, psychological and social development." (*Id.* ¶ 104.) As a result, Jones

failed consistently in school, and as his grades plummeted to all D's and F's, the first recorded incident of minor violence occured, resulting in a suspension of Jones that completed the predictable cycle of failure:

> Thus, the educational system failed him repeatedly, first by failing to provide appropriate intervention and then, by punishing him for behavior that resulted from his impairments rather than offering alternatives such as counseling and/or special education services suited to his particular cognitive and educational deficits.

(*Id* ¶ 104.)

118. Dr. Khazanov summarized her conclusions as follows:

> [¶] Michael Lamont Jones suffers from serious organic brain damage. The neuropsychological testing I conducted identified both localized dysfunction – primarily in the frontal lobes – and diffuse damage in both the left and right hemispheres, affecting his overall cognitive and neurological functioning. As a result of these impairments, his abilities to plan or carry out a specific course of action, to act independently or make informed decisions, to interpret social or interpersonal cues (verbal or nonverbal), to assess his environment or specific situations and respond rationally or thoughtfully, are severely and chronically impaired. These impairments, debilitating in themselves, are likely to be exacerbated both by the presence of alcohol and drugs and by the residual long-term effects of chronic alcohol abuse, which is essentially a form of repeated exposure to highly damaging neurotoxins and a prominent factor in Mr. Jones' history.

> [¶] My clinical findings and observations, confirming the presence of significant organic brain damage, including profound frontal lobe deficits, are extremely relevant to several specific factors set forth in Penal Code § 190.3 to be considered in determining Mr. Jones' penalty. It is my opinion that, at the time of the offense, Mr. Jones was seriously mentally impaired. He suffered the cumulative effects of longstanding brain damage, learning disabilities reflecting severe impairments in attention and concentration and a serious psychiatric disorder characterized by depression and long-term alcohol abuse. As a consequence, his ability to conform his conduct to the requirements of the law, to control his behavior, or the comprehend the consequences of that behavior was severely impaired, especially when he was under the influence of alcohol. [¶] Additionally, at the time of the offenses, Mr. Jones was only 18 years old and quite immature.
>
> [¶] It appears that his participation in the crimes for which he has been convicted and sentenced to death was a consequence of his many impairments and reflected the dysfunction which he continues to exhibit to the present.

(*Id.* ¶¶ 106; 115-17.)

119. There is evidence that Jones was mentally ill by Dr. Khazanov's comprehensive recounting of the major, multiple risk factors for brain damage; and the contention that trial counsel's experts ruled out brain damage is belied by the files themselves. Thus, trial counsel's decision not to investigate the likelihood that Jones suffered from brain dysfunction – based upon their assertion that none of the experts found any indicia of brain damage or psychological or psychiatric impairment – was

based upon ignorance arising from a failure to investigate. Had trial counsel properly investigated and presented the available statutory mitigation, they would have been able to shown that Jones was suffering from organic brain damage resulting in impulse control deficiencies, which would have explained to the jury his otherwise senseless, violent outbursts in the very terms embraced by factors (d), (h) and/or as evidence under factor (k).

120. Trial counsel's failure to obtain a reliable mental health assessment of Jones, in the face of a constellation of classic risk factors for mental illness, brain dysfunction, and emotional illness, clearly fails the test for determining whether counsel was effective at the penalty phase of this capital case. *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (petitioner entitled to evidentiary hearing on allegations that he suffered brain damage not developed by trial counsel); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000) (ineffective assistance of counsel for failing to investigate petitioner's mental state, psychological problems, blackouts, family troubles, psychological abnormalities); *Evans v. Lewis*, 855 F.3d 631 (9th Cir. 1988) (ineffective assistance of counsel for failure to investigate or present mitigating evidence regarding defendant's mental condition).

E. Failure to Investigate, Develop and Introduce, Through the Testimony of Qualified Experts and Lay Witnesses, Mitigating Evidence That Jones Suffered from Child Abuse, Neglect, Abandonment by His Father and Mother, Acute Alcohol Abuse, Exposure to Domestic Violence, Undiagnosed Mental Illness, and Institutional Neglect

121. Trial counsel did not introduce mitigation evidence in any of the statutory categories other than California Penal Code section 190.3(k), the catch-all factor. The factor (k) evidence that was introduced in the penalty phase consisted, as trial counsel admitted, of "sympathy" evidence which sought to present Jones as the product of a loving family in general and a loving mother in particular, and evidence that Jones was acting out of character in committing the crimes. (RT 3276.) This is

not particularly helpful evidence under the law. *Allen v. Woodford*, 395 F.3d 979, 1004 (9th Cir. 2005) ("we find that potential mitigation evidence that amounted to testimony that Allen could be pleasant is simply insufficient to outweigh all of the aggravating evidence.").

122. In his opening statement in the penalty phase, trial counsel, Gunn, admitted that the mitigation evidence would be:

> a form of a plea for sympathy. I mean what you're going to have is evidence of family members . . . people that know him better than you and I know him, people who, I think, will tell you that . . . they would be shocked to have heard he could have done something like what has been described in this court; that he wasn't that type of person.

(RT 3276-77.)

123. Trial counsel failed to investigate and present all relevant social history and seemed not to know that historical information about the family could come into evidence through a social historian expert witness. When the prosecutor expressed concern that defense witnesses would testify regarding their own background, events that occurred before Jones was born, Gunn stated, "I don't know what relevance that would have either . . . I don't intend to be asking that type of information, I don't believe." (RT 3230.) Gunn stated more specifically:

> My inclination is to only ask them those things they know personally about the defendant or about the activities of his mother or father during the formative period that he was growing up.

(RT 3223.)

124. It is clear, however, that family history information is indeed relevant and important to investigate and to present. The United States Supreme Court, in *Wiggins v. Smith*, 539 U.S. 510, stated that, among the topics counsel should

investigate are "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences. . . . " *Id.* at 524 (emphasis in original) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6 at 133 (1989); *see also Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004) (counsel has a duty to conduct a thorough investigation and counsel's duty is not discharged merely by presenting some limited evidence).

125. Later on in the defense's opening statement for the penalty phase, trial counsel painted an idealized picture of a loving and nurturing mother-son relationship in which the mother did nothing wrong and did the best she could:

> You may have seen [his mother] in court or you may have guessed who she was. She's going to testify and tell you a little about his upbringing and about his life up until that point . . . that he's incarcerated, and I think you'll be impressed by her. She's an impressive woman. She's a nice woman. Nobody is going to paint a Mommy Dearest picture here that she somehow cause [sic.] these terrible things to happen. She did the best she could.

(RT 3277.)

126. As a result of the defense evidence portraying Jones's family in general and his mother in particular as loving, caring, and nurturing, the prosecutor was able to argue effectively that Jones must have committed his acts of violence solely as the product of a conscious and sadistic lust for violence:

> These people are very nice people, Mrs. Pitts, the defendant's mother, very nice lady. His aunt, his grandmother, his uncle, they seemed like very good people. [¶] And they seemed . . . that they tried to give the defendant an opportunity in life, many opportunities . . . They paid for

> his upbringing. They paid for schools. They sent him money, et cetera, et cetera, et cetera. He had all these opportunities.
>
> [¶] What did he do with these opportunities? What did he do when his mother was working to provide for him? He disregarded it. He cast them aside. Says, I don't want that kind of life. I don't want to be an upstanding member of society . . . I want to go out and rob people. I want to go out and shoot people. I want to arm myself. I want to load those weapons and I want to use them on other human beings in society.
>
> [¶] And that was a conscious decision on his part. Not just once . . . He made those choices . . . His mother didn't make those choices for him. He made those choices. And he, ladies and gentlemen, has to live with the consequences.

(RT 3781.)

127. Because trial counsel decided to ignore evidence of parental neglect by Jones's mother without first following up on Dr. Wright's recommendation to filter the case through a "child abuse expert" and suggested as a major theme in the case "inadequate parenting by a very young mother," trial counsel's so-called "sympathy" strategy was a choice made after a less than complete investigation. *See Wiggins*, 539 U.S. at 527; *Rompilla v. Beard*, 545 U.S. 374.

128. Counsel was ineffective in the penalty phase for failing to investigate, develop, and present mitigation evidence admissible under factor (k). And, to the extent that any of the mitigation evidence described in the preceding sections of the Claim, sections A, B, C, and D would not have qualified under other statutory factors, that information still could have been presented under factor (k). Merely presenting "sympathy" evidence was inadequate and ineffective. The presentation of mitigation

evidence allows counsel to individualize a defendant by humanizing him and explaining his behavior, background, and character outside the constraints of the normal rules of evidence. *Williams v. Taylor*, 529 U.S. 362, 393, 399, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (to perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to "present and explain the significance of all the available [mitigating] evidence."); *see also Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (the need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in noncapital cases."); *In re Gay*, 19 Cal. 4th 771 (1998); *Mayfield v. Woodford*, 270 F.3d 915, 929 (9th Cir. 2001) ("even in the face of strong evidence, however, we must reverse [a] death sentence if we cannot conclude with confidence that the jury would unanimously have sentenced [defendant] to death if [counsel] had presented and explained all of the available mitigating evidence."); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1993) (ineffective assistance of counsel for failure to present "humanizing evidence" regarding background, family relationships, cultural dislocations that might have affected his behavior); *In re Marquez*, 1 Cal. 4th 584, 822 P.2d 435, 3 Cal. Rptr. 2d 727 (1992) (ineffective assistance of counsel for failure to investigate or present mitigating evidence at trial); *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995) (counsel ineffective in failing to adequately prepare and present case for mitigation); *Deutscher v. Angelone*, 16 F.3d 981 (9th Cir. 1984) (ineffective assistance of counsel for failure to investigate and present mitigating evidence during sentencing phase).

129. The defense's portrayal of Jones as having come from a loving and nurturing family environment was false, misleading, and counter-productive. Trial counsel portrayed Jones's mother as loving, caring, and nurturing. Jones incorporates herein by reference Section II.B, and citations to exhibits therein, above. That portrayal is inconsistent and irreconcilable with the following facts:

130. Jones's mother was an unmarried teenager when she had Jones, as was Jones's father, Willie Jones. At age eight months, Jones's mother and father took so long to get Jones to a hospital after he was stricken with meningitis that the disease had gone on to a highly advanced stage, with rigidity of the limbs, convulsions, and likely brain damage.

131. Jones's mother wanted a girl and not a boy, and oftentimes treated him as a girl. She would do this by washing his hair, rolling it in curlers, and picking it out so it was perfectly round. She also braided his hair, and gave him manicures. Despite having very little money she would take Jones out shopping frequently and buy him expensive clothes and would have him model the clothes in front of family members. They would watch television together and she would make him practice doing television commercials. She turned Jones into a little performer, always having to be the best dressed, and never letting him get dirty or sweaty in any way. She was always dressing Jones up like a doll and wanted him to become famous. Jones's mother's inappropriate treatment of Jones was confusing at its most benign, and was likely humiliating; resulting in debilitating impairments to Jones's development of an identity and sense-of-self as a young adult male.

132. During Jones's critical early years, Jones's mother failed to protect him from the mental trauma of witnessing domestic violence between his grandparents. Nothing changed when Jones moved in with his paternal uncle, Henry Fells, in California who beat up his girlfriends. She did not protect him from witnessing her being beaten up by his father, and from his father beating and chasing him. Jones's mother did not protect him when he tried vainly to intervene to protect her from her father.

133. When Jones was a little child, and all throughout his upbringing, his mother put him last, opting to go out partying, leaving him at home with various substitutes, and sometimes unreliable, caregivers. The intense neglect by his mother continued. She would not feed him or look after him in any way. Jones became the

primary caretaker of his little brother, Rocky. Jones's mother favored Rocky over Jones in an obvious and hurtful way.

134. Jones's mother was the primary disciplinarian because Jones's father did not trust himself. Jones's mother spanked him and slapped him. If the children attempted to cover up, they were beaten. Jones's mother also called him derogatory names.

135. When Jones was in the early grades of school, his mother failed to respond to frequent notices from the school that Jones was having "convergence" and trouble reading. The failure to get Jones the eye-care he needed likely caused him to do poorly in reading and to have an even harder time catching up due to the deficiencies caused by moving several times a year to new school districts.

136. When Jones started getting all D's and F's in high school, his mother did not have or make time to help Jones with his schoolwork or do anything to help him deal with the social challenges of being one of the only black students in predominantly white, middle-class schools. As a result, his grades and adjustment rapidly spiraled downward to the point where he soon ranked among the poorest students statewide. Still, his mother did nothing to help and instead continued to move from place to place numerous times each year, which made it even harder for Jones to adjust to the demands of school. His mother rationalized this behavior to family members as "moving up" in society, but sometimes she moved to worse neighborhoods. She constantly lived beyond her means and spent money that she did not have.

137. Jones's father was put in prison when Jones was only twelve years old and left the family for good shortly after his release in 1986. At that time, Jones was in his mid-teens, was hanging out with juvenile delinquents, and was especially in need of parental authority to set a positive example for him and to keep him in line. However, at this critical time, his mother let Jones do anything he wanted, allowing him to stay out until 3:00 or 4:00 in the morning. Meanwhile, because her expensive

tastes exceeded her poverty level income, Jones's mother chose to take a "better" job that required such a long commute she had to get up before dawn and return after dark. In addition, she made time to go to the gym in the morning and to have drinks with her co-workers when the workday ended. Consequently, just as Jones was failing at school and starting to get into trouble, Jones was left all alone at home, allowed to cut school, and spent the entire day drinking, idling, and sleeping.

138. Jones's mother recognized that Jones was in need of a strong male role model to replace his father as a legitimate authority figure. In 1984, she and the family moved in with a male friend of hers, Larry Sepulveda. Larry was good to Jones and his brother, supported Jones in baseball, at which Jones excelled, and they got along very well. Jones's mother used Larry for money, jewelry, and babysitting. She cheated on Larry and eventually moved out. Jones told Larry that his mother did not want him anymore and he tried to stay with Larry. Jones did not want to leave. His mother responded by calling the police. Eventually, she made Jones move with her and he ran away from home. Jones's relationship with his mother was never the same again.

139. Jones's mother threw him out of the house on several occasions, even when she was still legally responsible for him. She threw him out of the house with no job, no skills, no money, no education to speak of, and no place to live.

140. Jones's mother would never admit that he had done anything wrong, so as not to reflect badly on her as a mother. As a result, after Jones was arrested for murder and awaiting trial, Jones's mother concealed this from family members, lying to them about Jones having left home rather than being in jail awaiting a trial for his life. As a result, family members who could have helped in the penalty phase were kept in ignorance that there were any court proceedings pending, and most did not even find out about the case until just weeks before the penalty phase began, when they were contacted by a case investigator. By this time, it was too late to have them work effectively with counsel, and even those who testified, were not prepared

individually.

141. [redacted]

142. Jones's mother maintains a separate post office box and telephone line so that she can receive letters and calls from her son without anyone knowing that he is incarcerated. Her current husband does not know the truth about her son's circumstances.

143. Trial counsel failed to introduce evidence showing that the social institutions that were charged with the responsibility of educating and socializing Jones neglected or failed in that duty. Instead of giving attention to Jones's educational needs as he began to slip sharply in schoolwork and attendance, they kept promoting him from grade to grade so that he continued to fall farther behind and, as he result, he was continually confronted with failure.

144. Jones's abandonment by his father, his mother, and the institutions charged with his education and development, in combination with other factors such as child abuse, poverty, domestic violence, acute alcohol abuse, undiagnosed mental illness, and lack of crucial social support systems, should have been presented to the jury in mitigation, but it was not.

145. What little evidence the defense did introduce which bore on Jones's life path, ending at the Domino's crime scene, was disjointed, unfocused, and

incompetently presented through the testimony of Dr. Buckey, whose testimony was limited to the effects of chronic alcohol abuse. The testimony neither presented the complete story of Jones's life history and experiences nor did it relate to themes consistent with mitigation of the crimes themselves. Moreover, Dr. Buckey was so utterly unprepared for predictable cross-examination that he readily admitted that Jones was a sociopath and killed solely out of a lust for violence.

146. Trial counsel did not call an expert in child abuse, youth violence, or any related field, and therefore failed to elicit the expert testimony that was necessary to explain to the jury the mitigating factors which played a significant role in Jones's commission of the charged offenses. This failure was prejudicial, in that such expert testimony would likely have persuaded the jury to impose life without parole instead of death.

147. [redacted]

148. [redacted]

[redacted]

150. Kelly could have been given the following information at the time of trial, which was available to trial counsel. These incidents occurred when Jones was a child during his critical formative years:

(a) witnessing domestic violence from very early on, including his grandparents, uncle, and parents.

(b) the father's repeated beatings of Jones's mother, which included strangling her and an arrest for attempting to murder her;

(c) physical abuse of Jones by both of his parents and grandparents;

(d) persistent, extreme, and consistent neglect;

(e) The father's reckless endangerment of the family by leaving loaded guns around, driving drunk over the speed limit with his family in the car; and pointing a gun at Jones and his mother and threatening to shoot them;

(f) abuse of Jones's little brother Rocky, which caused Rocky to have "emotional asthma" which only abated after the father left home;

(g) the father openly expressing his hatred for Michael, chasing Michael down the street while threatening to beat him, and attempting to push Michael out a window when Michael attempted to come to his mother's aid during a beating;

(h) the father's pattern of failing to support the family, taking their money, and leaving the family to live with other women, then returning and "terrorizing" the family, then leaving and returning again and again until finally abandoning the family when Michael was an adolescent;

(i) Michael's mother suffering a nervous breakdown after the father left the family, after which she began drinking heavily, became depressed, and spoke of suicide;

(j) Michael's mother's pattern of neglect of Michael: working long hours away from home, leaving Michael alone and with unreliable babysitters, leaving him to be on his own as an adolescent; and then failing to intervene when Michael spent his days getting drunk, missing school, and failing all his classes; and,

(k) Michael's mother's initiation of a relationship with a new boyfriend, followed by her throwing Michael out of the family home before he was 18, leaving him no place to live and no money for necessities.

151. In light of the pervasive abuse, witnessing domestic violence, and neglect summarized above, trial counsel's presentation at the penalty phase of an isolated incident of Willie Jones' abuse – offered solely in the context of a plea for "sympathy" and totally devoid of any explanation as to its effects on Jones's functioning and behavior – falls woefully short of counsel's duty to unearth and present all available mitigation evidence and to explain its significance. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 393, 399, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir 2001).

152. As Kelly concludes, Jones was indeed suffering from serious mental impairments throughout his life and leading up to the offenses he was accused of after

barely reaching his 18th birthday:

> In spite of the fact that Michael displayed resiliency, played baseball, tried to protect his mother from his father and look out for his little brother, the aforementioned number of risk factors were not just a sum of the total risk factors. They were in fact, exponential in their impact. It is apparent to this writer that the combined effects of poverty, child abuse (physical and emotional), neglect, abandonment, failure of mother to protect, constantly witnessing domestic violence, intergenerational alcoholism and drug abuse, instability in his home life (continual moves), inadequate, very young parents, diagnosed mental illness (Organic Brain Damage), ADHD and institutional neglect by the hospital, schools and courts, are mediating factors on Michael's social and psychological development.

(Ex. 154, Decl. of Carole Kelly, ¶ 324.)

153. At Jones's penalty phase, the jury heard a superficial version of Jones's life. Disturbing yet powerful mitigating evidence that was readily available was never developed or presented, and the jury instead heard superficial testimony about Jones's upbringing that presented a misleading version of Jones's life to the jury. Both Jones and members of his family have exhibited symptoms indicative of mental illness, and a social history that reflects poverty, violent abuse, witnessing domestic violence, neglect, drug and alcohol abuse, abandonment, and hopelessness. In the end, the jury never heard what it most wanted to hear and what any reasonably competent attorney would have presented: A reason to spare his life. As Kelly concludes, testimony like the kind provided in her declaration would likely have been the difference between a verdict of life and death:

> It is my strong professional opinion that the analysis and

> findings contained in this declaration were absolutely necessary for the jury to hear through the testimony of an expert such as myself, in order for the jury members to get some idea of why Michael Jones committed the charged crimes, and to give them a firm basis for finding the mitigating factors necessary to impose a judgment of life without parole instead of death. Unfortunately, that did not occur, because no competent expert such as myself was used by the defense at trial to so testify at the penalty phase.

(Ex. 154, Decl. of Carole Kelly, ¶ 327.)

F. Failure to Investigate, Personally Interview Witnesses, and Present Available Evidence in Mitigation

154. An essential element of competent representation is the lawyer's duty to undertake a reasonably competent investigation in order to make an informed "strategic decision" on which witnesses to call. *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994); *Strickland*, 466 U.S. at 690-91; *Wiggins*, 539 U.S. at 527; *Rompilla*, 545 U.S. 374. In order to make such an informed decision, counsel must at least "obtain[ ] the facts on which such a decision could be made", and must engage in a "real probing for information that legal praxis assumes and even demands." *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998). At one point, the prosecutor had information regarding the number of witnesses that the defense would be presenting at the penalty phase: "And there are – I have a sheet that indicates there are 13 [defense] witnesses." (RT 3223.) Trial counsel only presented eight lay witnesses, and one expert witness, Dr. Steven Buckey.

155. Trial counsel met with witnesses in a group before presenting their testimony. (Ex. 104, Decl. of Sheila Barcus, ¶ 55; Ex. 144, Decl. of Beatrice Acosta, ¶ 15.) There was no individualized preparation of witnesses. (*Id.*) The defense team interviewed at least one witness for the first time the night before his testimony. (RT

3468 (Nathan "Rocky" Jones).)

156. Trial counsel called only eight lay witnesses to testify during the penalty phase: Cyndy Jones, Rocky Jones, Beatrice Acosta, Sheila Barcus, Glenn Garbot, Joseph Gueste, Willie Jones, and Minnie Nixon. Of the witnesses who did testify at trial, none of them testified to the kind of detailed information that was necessary for a full and complete picture of Jones's life and life history, and that would have made a difference to the jury under the relevant mitigating factors. Their testimony was superficial and devoid of relevant information. For example, Rocky Jones merely testified that his brother helped him write a rap song for a school project and that Jones cared about how Rocky was doing. Rocky Jones had much more pertinent information to testify to than that, given that he is Jones's only sibling, and witnessed the chaotic circumstances that the family lived in. (See Ex. 119, Decl. of Nathan Jones.) As can be deduced by reviewing their declarations submitted with this Petition, these same witnesses who counsel presented at the penalty phase, could have provided a great deal more relevant and helpful information had trial counsel adequately investigated, interviewed, and prepared them for their testimony. (Ex. 104, Decl. of Sheila Teresa Barcus; Ex. 112, Decl. of Glenn Eldon Garbot; Ex. 117, Decl. of Cyndy Jones; Ex. 119, Decl. of Nathan C. Jones; Ex. 122, Decl. of Willie Frank Jones; Ex. 128, Decl. of Minnie Lee Nixon; and, Ex. 144, Decl. of Beatrice Acosta.)

157. Trial counsel failed to present, and the jury never heard, available evidence at the penalty phase. The jury was not given the opportunity to hear from a number of other witnesses who could have provided valuable information regarding Jones, and who would have been willing to testify, including additional members of Jones's family, his friends, and his teachers. Many of these witnesses had relevant and compelling information that could have been presented through their testimony at trial. These witnesses include: David Barcus, Marjorie Bruner, Christopher Eugene Bunn, Verna Cameron, Minnie Frank Dennis, Carmen Thobourne Garbot, Linda

Garbot, Christina Suyapa James, Ivey Frank Jones, Robert Jones, Willie Clyde Jones, Timothy Keels, Loren Kinney, Danny Limar, Jackie Rodriguez, Beverly Sendgikoski, Larry Sepulveda, Mary Shackford, Donnie Starks, Tara Taylor, Freddie Merida Turner, Willis Turner, Cathy Washington, Lajay Washington, Lejay Washington, Milton King, Tammie Washington, Luis Villarreal, Mario Villarreal, Jr., Mario Villarreal Sr., Enrique Luna, and Erin Burton-Uribe. (Ex. 103, 105-09, 111, 113, 116, 118, 120-21, 123-25, 130-35, 137-38, 140-48, 160.)

158. Trial counsel called only one expert witness during the penalty phase, Dr. Steven Buckey. [redacted]

159. As previously mentioned in this Claim, expert testimony could have been presented on Jones's behalf such as the testimony of Dr. Samuel Benson, M.D., Ph.D. (Ex. 155), the testimony of William D. Pierce, Ph.D (Ex. 156), the testimony of Carole Kelly, M.S.W. (Ex. 159), and the testimony of Natasha Khazanov, Ph.D. (Ex. 154.)

160. During the penalty phase, trial counsel sought to introduce only five exhibits: Exhibit A was Jones's JTP certificate; Exhibit B was Jones's GED certificate; and Exhibit C was the anti-smoking rap song that Jones had helped his brother create for a school project. The trial court did not allow defense exhibits D and E into evidence, a letter from Jones to his grandmother ("D") (RT 3697-3702) and a picture of Jones with his son ("E") (RT 3703-05). Defense exhibits D and E were not admissible. (RT 3742-43.)

161. Although trial counsel knew that they could submit other pictures of

Jones in childhood, and they had such pictures, they were not submitted. Peasley stated that, "I think pictures of kids when they're little kids, of the defendant himself, those things are admissible." Gunn followed up by saying, "which we haven't done, I might add. We haven't shown pictures of him as a little kid and that type of thing. We had some of those available." (RT 3686.) Gunn later said, "I would note that we haven't introduced a lot of photographs of the defendant as a young man, photographs I think have in the past been held to be admissible, school photographs from the second grade, third grade, fourth grade. Those types of things were available to us. It was just a feeling that that type of evidence wasn't extremely probative in some ways." (RT 3704.) (*See* Ex. 4 and 5, pictures of Jones and family members.)

162. Additionally, trial counsel did not submit documents in their possession which would have corroborated witness testimony. Willie Jones testified about the domestic violence incident for which he was arrested for the attempted murder of Cyndy Jones and for child endangerment, for threatening to throw Jones out of a second story window. (RT 3647-48, 3651-52.) Cyndy Jones also testified regarding the same incident. (RT 3481-84.) Counsel had in their possession a document which would have corroborated the incident, a copy of Placentia Police Dept. Report # 2-04-0490, dated June 14, 1982, which was certified for court use. (Ex. 14.) Trial counsel did not seek to introduce the report into evidence.

163. Willie Jones also testified as to his time in prison, time during which he was away from his family for three years, but during which his family continued to visit him. (RT 3655-66.) Counsel was in possession of Willie Jones's criminal court records and prison records, which would have corroborated his testimony. (Ex. 20, 24.) Counsel did not seek to introduce the records into evidence.

164. Cyndy Jones testified regarding the family's frequent relocations and the numerous schools Jones was forced to attend because of the moves. (RT 3492-97.) Counsel was in possession of Jones's school records, which would have corroborated

the family relocations and the schools attended by Jones, as well as Jones's low grades and poor academic performance. (Ex. 3, Michael Jones school records; Ex. 6, Michael Jones 10th grade school report, "The Budget".) Counsel did not seek to introduce the records into evidence.

165. Trial counsel also had in their possession additional information and supporting documentation which could have been introduced in mitigation. [redacted]

166. A number of additional records which could have been presented in mitigation were readily available to trial counsel, but counsel did not obtain them, including: [redacted]; Cyndy Jones's and Willie Jones's Social Security records (Ex. 11, 18); a record from Placentia-Linda Hospital where Cyndy Jones was treated for injuries sustained during the domestic violence incident on June 14, 1982 (Ex. 15); Cyndy Jones's INS records (Ex. 10); an additional court case regarding Willie Jones (Ex. 21); Willie Jones's New Jersey driver history record (Ex. 19); a personal injury complaint filed by Nathan Jones, a minor, against the Moreno Valley Unified School District (Ex. 30); naturalization and citizenship records regarding Jones's family from Honduras (Ex. 43-45); [redacted] and numerous other vital records which have subsequently been obtained. (Ex. 17, 31-34, 38-42, 48, 50-54.)

167. Trial counsel failed to call one critical witness who could have told his life story, and who could have told what really happened the night of the Domino's

shooting: Michael Jones. Jones certainly wanted to tell his story given his outburst after the penalty verdict was read. Jones incorporates herein by reference Claim Four, Claim Eight, Claim Fourteen, and above section G in this Claim. Jones had been telling his lawyers all along that Andre Davis was the shooter. (CT 948; RT 3829.) Trial counsel admitted that they would have had Jones testify "with corroboration" regarding the Andre Davis as the shooter defense theory. (CT 948; RT 3834; 3838 ("had we located Andre Davis and able to bring him in, . . . show how he fit the description, I think [Jones's testimony] would have been pretty significant.").) Jones also could have corroborated the information that the lay witnesses had provided at the penalty phase, by further expanding upon those stories already presented and other life events, and their effect upon him.

168. When a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he had personally interviewed the witness. *Lord v. Wood*, 184 F.3d 1083, 1094 n.8 (9th Cir. 1999) (more deference for a lawyer who interviews the witness personally because he can rely on his assessment of their articulateness and demeanor-factors first hand).

169. Trial counsel did not interview or screen any potential mitigation witnesses; [redacted] Additionally, trial counsel spent very little time speaking to testifying witnesses prior to calling them to testify. (Ex. 117, Decl. of Cyndy Jones, ¶ 106; Ex. 119, Decl. of Nathan C. Jones, ¶ 23; Ex. 144, Decl. of Beatrice Acosta, ¶ 15; Ex. 104, Decl. of Sheila Teresa Barcus, ¶ 104; Ex. 112, Decl. of Glenn Eldon Garbot, ¶ 21; Ex. 122, Decl. of Willie Frank Jones, ¶ 46; Ex. 128, Decl. of Minnie Lee Nixon, ¶ 31.)

170. As mentioned previously, these witnesses were only spoken to in a group setting, with no individualized preparation or discussion, and the witnesses felt unprepared to testify. (Ex. 104, Decl. of Sheila Barcus, ¶ 55 ("When I got there, we met at the lawyers' office on a Sunday afternoon and they spoke to us as a group. I never was talked to one on one and was never really prepared for the testimony.");

Ex. 144, Decl. of Beatrice Acosta, ¶ 15 ("Before I testified, the defense lawyers got all of the witnesses for Mike together and they told us some things about the trial. The defense lawyers never talked to me individually before I testified. I was unsure what I was supposed to talk about and felt unprepared."); Ex. 112, Decl. of Glenn Garbot, ¶ 21 ("Mike's lawyer did not talk to me before I testified"); Ex. 122, Decl. of Willie Jones, ¶ 46 ("I . . . talked to lawyers for about ten minutes and never received any preparation for testifying"); Ex. 128, Decl. of Minnie Nixon, ¶ 31 ("I was never really prepared to testify. I did not know what questions the lawyer was going to ask, and didn't know what kind of information they were looking for."); Ex. 119, Decl. of Nathan Jones, ¶ 23 ("his attorney did not talk to me about anything else [other than my song/poem]").)

171. The reason that Gunn did not interview these witnesses is perhaps partially explained by the fact that he was too ill at the time. Jones incorporates herein by reference Section Q, below.

G. Failure to Argue and Present Evidence of Minor Participation and Lingering Doubt

172. Jones incorporates by reference Claim Four, and Claim Eight. It is well-established that under California Penal Code section 190.3(k) (CALJIC 8.85), the jury may "consider lingering doubt in reaching its decision." *People v. Osband*, 13 Cal. 4th 622, 716, 919 P.2d 640, 55 Cal. Rptr. 2d 26 (1996); *People v. Memro*, 11 Cal. 4th 786, 881, 905 P.2d 1305, 47 Cal. Rptr. 2d 219 (1995). In the instant case, counsel presented no evidence of lingering doubt and never argued lingering doubt as a mitigating circumstance. In particular, the defense never presented evidence in the penalty phase showing that Jones may not have been the shooter but only an accomplice to the robbery in which the victim was killed. This information would have also been relevant mitigating evidence under California Penal Code section 190.3(j): "Whether or not the defendant was an accomplice to the offense and his participation in the crime was relatively minor." The relative culpability of

co-defendants is a well-recognized mitigating circumstance. *Rupe v. Wood*, 93 F.3d 1434, 1441 (9th Cir.1996); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir.1992). Under the facts and circumstances of the instant case, this constituted ineffective assistance of counsel. *See*, *e.g.*, *Sanders v. Ratelle*, 21 F.3d 1446, 1456 et seq. (9th Cir. 1994) (ineffective assistance of counsel to fail to investigate and present evidence that defendant was not the "shooter").

173. As developed on the defense's unsuccessful motion for new trial, Jones had "contended [to his defense team] from the very first . . . that Andre Davis was the shooter." (RT 3829.) Nevertheless, the defense never put on any evidence in either the guilt or penalty phase to suggest that Davis *was* the shooter instead of Jones. According to what was said during the hearing on the defense motion for new trial, the defense attorneys made a decision not to call Jones as a witness to this fact because "without corroboration . . . we could not put forward Mr. Jones' account of what had taken place." (RT 3833.) Meanwhile, the defense was unsuccessful in its attempts to locate Andre Davis, and after the jury returned its death verdict, Jones spontaneously blurted out in open court: "Your honor, I didn't kill him. I did not kill him. I didn't kill him. Andre killed him. I didn't even kill him." (RT 3814.)

174. Jones's outburst did cause the defense to re-double its efforts at finding Davis. The defense *did* locate Davis after Jones's trial had concluded, and Davis was found in the Riverside County Jail. In the course of the proceedings on the new trial motion, the trial court found that the defense had lacked due diligence in finding Davis. (RT 3836.) When the defense finally located and interviewed Davis, they realized that Davis strongly resembled the second robber depicted in the composite drawing that had been prepared by Christina Kane, the eyewitness to the shooting at Domino's. (RT 3833-34.)

175. According to the facts submitted in support of the motion for new trial, based on the similarity between Davis and Christina Kane's composite drawing, the prosecution had dropped all the charges against Eric Bailey, whom the prosecution

contended throughout Jones's trial to have been the second robber. (RT 3829 ["Mr. Jones has always contended from the very first that Mr. Peasley and I first met with him that Andre Davis was the shooter."].) In other words, the same eyewitness who had testified in the guilt phase that Jones shot Herman Weeks had also caused a composite drawing of one of the robbers to be prepared which did not match Eric Bailey – the person the prosecution contended throughout Jones's trial to have been the second robber – but did match the description of Andre Davis – the same person whom Jones had insisted from the very start to have been the "shooter" in the Domino's robbery-murder.

176. Counsel has an absolute duty to fully investigate and present evidence that someone else was the shooter, especially, as in this case, when the client tells his lawyer so. The failure to investigate and present such evidence constitutes ineffective assistance of counsel. *Sanders v. Ratelle*, 21 F.3d at 1457 (ineffective assistance of counsel to fail to investigate and present evidence that "Xavier was the shooter"). Counsel's duty to present evidence that another person did the shooting applies as well at the penalty phase, where the Eighth and Fourteenth Amendments require that the jury be able to consider, as a mitigating factor, any "residual" or "lingering" doubt they may have as to the defendant's guilt or role in the crime. *People v. Cox*, 53 Cal.3d 618, 676, 809 P.2d 351, 280 Cal. Rptr. 692 (1991) (recognizing right to present lingering doubt evidence at penalty phase).[40] Evidence that Jones himself claimed from the beginning that Davis was the shooter, or that Davis resembled the composite drawing of one of the suspects that eyewitness Christina Kane had prepared, clearly could have raised a lingering doubt as to whether Jones had been the

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[40] According to the U.S. Supreme Court, a sympathy strategy instead of traditional mitigation is not inconsistent with a presentation on lingering doubt about the defendant's guilt of the underlying crime. *See Wiggins*, 539 U.S. 510 at 535 (the presentation of third-party culpability theory with a more traditional mitigation presentation are not mutually exclusive).

shooter. There is no plausible tactical reason for not doing so here.

177. First, as counsel stated at the hearing on the new trial motion, they believed that putting Jones himself on the stand to say that Davis was the shooter was ill-advised because of a lack of "corroboration." However, the defense could have "corroborated" Jones's claim that Davis was the shooter even without calling Davis himself. As argued by defense counsel on the unsuccessful motion for new trial, Davis "match[ed] the description of a composite drawing that was prepared by [Christina Kane], the witness that testified . . . " and identified Jones as being one of those present in Domino's at the time; and the composite drawing based on Kane's identification "so strongly matches the description of Andre Davis that . . . that is the reason why Eric Bailey's case was dismissed." (RT 3827.) In other words, Christina Kane, the same (and sole) eyewitness to the Domino's robbery who identified Jones as the "shooter" herself gave a description of the second robber that matched – not Eric Bailey, whom the prosecution maintained was the second robber – but rather Andre Davis, whom Jones had always maintained to have been the shooter.

178. Moreover, Andre Davis so closely matched the composite drawing prepared by Kane that the prosecution completely dismissed the charges against Bailey, who had been severed from Jones and was being tried separately for the same Domino's robbery-murder. Thus, even without producing Davis himself, the defense could have called Christina Kane to lay a foundation for the composite photo and then called Najee Muslim, the prosecution's key co-conspirator witness against Jones, to identify photos of Bailey and Davis. According to the representations made by trial counsel at the motion for new trial, that would have resulted in a direct conflict between the eyewitness testimony of Kane – who had effectively identified Andre Davis as the second robber – and that of the prosecution's co-conspirator Muslim, who flatly denied that Davis was present and insisted that Eric Bailey was the second robber. Such a dramatic conflict between the prosecution's sole eyewitness and their chief co-conspirator witness would have certainly aided the defense, the principal

thrust of which was to cast doubt on Kane's identification testimony and to argue that Muslim had lied with regard to Jones's alleged admissions to him after the Domino's killing, and would certainly have "corroborated" Jones's statements to his attorneys that Andre Davis was the shooter.

179. Although there is no suggestion of a conceivable tactical justification for counsel's failure to introduce the Kane composite drawing and the Bailey and Davis booking photos to impeach her identification testimony, there is a strong suggestion that trial counsel simply *forgot* to have the necessary booking photos introduced in court when counsel had the opportunity to do so. In particular, after the defense had rested, trial counsel specifically asked the court for permission to introduce the booking photos of Eric Bailey and another individual (Alan Murfitt), even though counsel had failed to elicit any foundation at all for the photos or show them to any witnesses during the presentation of the defense case. Counsel tried to convince the court to admit the photos anyway because they had been "sub ID'd," and when that argument failed to impress the court, counsel urged that the photos were "critical to my closing argument and to impeach the . . . in-court identification of Christina Kane," and asked for permission to re-open. (RT 3003.) The court denied the admission of the photos and denied the motion to re-open on the basis that "there has been no testimony in this trial whatsoever, no foundation for those booking photos whatsoever." (RT 3005.) Counsel, clearly taken aback, then "move[d] for a mistrial based on my own ineffective assistance of counsel for the way I handled that evidence." Although the court denied the motion for mistrial, in so doing the court acknowledged that the proffered evidence "would help you in argument . . . to try and to show some kind of misidentification." (RT 3005.)

180. Thus, the record demonstrates a *lack* of any tactical justification for counsel's failure to introduce the booking photos of Bailey and others to directly impeach Christina Kane, the prosecution's sole eyewitness to the Domino's shooting, and at the same time an express *admission* by counsel that it was solely his own

ineffectiveness which produced this "critical" lack of evidence on Jones's behalf. Further, the defense's failure to locate Andre Davis, despite his being housed in the Riverside County Jail while Jones was being tried in the Riverside County Courthouse, resulted in the court's express finding that the defense failure to locate Davis resulted from a lack of due diligence. (RT 3840.)

181. The defense's failure to find Davis and present him to show lingering doubt was the result of an unreasonable lack of due diligence as the trial court found. (RT 3840.) Additionally, the defense failed to argue lingering doubt based on what they *did* have available, and in the process furnish "corroboration" for Jones's consistent claims to his counsel that "Dre" had been present at the Domino's robbery and had been the shooter. When Davis was found by the defense and he actually matched the composite of one of the suspects prepared by the only eyewitness who identified Jones as one of the robbers, that itself would have furnished further "corroboration" of Jones's claim by demonstrating to the jury that Davis matched the composite photo of one of the Domino's robbers which Christina Kane had prepared.

182. This equates to ineffective assistance of counsel: a lack of any tactical justification for the defense's failure to corroborate Jones's insistence that Andre Davis was present at the scene combined with an unusually forthright admission by counsel that this failure was occasioned solely by counsel's own ineffectiveness.

183. Moreover, although defense lawyers might legitimately decide not to risk antagonizing the jury by putting on evidence that the defendant was not the shooter in the penalty phase after the jury had already decided to the contrary in the guilt phase, that consideration did not apply here, since the jury had only found Jones guilty of the killing and the special circumstance on a felony-murder theory. Because the felony-murder instructions permitted the jury to convict Jones without necessarily finding that he shot and killed the Domino's victim, the defense could have put this evidence on to establish "lingering doubt" in the penalty phase without necessarily contradicting the findings the jurors had made in the guilt phase. In short, using the

Andre Davis evidence would have greatly assisted the defense in arguing lingering doubt, and could at the same time have been harmonized with the jury's findings in the guilt phase. Instead, however, the defense did not argue lingering doubt at all, failed to use the Andre Davis evidence to demonstrate lingering doubt, and failed to call Jones himself as a witness or obtain an on-the-record waiver of his right to testify, all of which apparently prompted Jones to blurt out in open court that "Dre did it" after the jury gave him the death penalty.

184. The potentially powerful effect of "lingering doubt" evidence in the penalty phase is apparent. *People v. Terry*, 61 Cal.2d 137, 146, 390 P.2d 381, 37 Cal. Rptr. 605 (1964) ("The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment . . . ").

185. In the instant case, trial counsel had important evidence that could and should have been used to establish "lingering doubt" as to whether or not Jones shot the victim – an issue necessarily left open by the jury instructions on felony-murder and the felony-murder special circumstance – and yet the defense failed to use it, not because of any tactical decision, but rather because they failed to use "due diligence" to discover it, or simply failed to present it through guilt-phase witnesses.

186. Furthermore, evidence that Andre Davis was effectively identified as one of the robbers by Christina Kane, the prosecution's eyewitness to the Domino's robbery, would have cast a substantial shadow over the prosecution claims during the guilt phase, the principal one being that Jones was, in fact, the shooter.

187. The juror interviews demonstrate that at least some of the jurors were even troubled by Jones blurting out in open court that "Dre did it," despite the defense's failure to tender any evidence suggesting that Andre Davis had been the

shooter.[41] Moreover, because the jury had been instructed in the guilt phase on felony-murder, the Andre Davis evidence could have been presented to establish lingering doubt in the penalty phase without necessarily contradicting the jury's findings in the guilt phase. Thus, had the defense reasonably and properly presented the Andre Davis evidence as lingering doubt in the penalty phase, it is reasonably probable that such evidence would have caused the jury to have returned a verdict of life without parole rather than death.

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[41] These jurors were really bothered by Jones's outburst and wanted to know the entire story. Each of the jurors was asked in a post-verdict interview the same set of questions. (CT 953-79.) The first question referred to the defense's locating Andre Davis the day after the verdict and later finding that Davis matched the composite drawing done by Christina Kane, and then asked the juror if "this information would have made a difference in your verdict."

Juror Helen O. said the following: " . . . When he jumped up and yelled that about Andre Davis, I thought "Oh my God, he didn't do it! How could things have gone this far? It cast a lot of doubt for me . . . " (CT 977.) She also stated: " . . . During the trial it would have made a difference. I remember thinking "Who the hell is Andre Davis?" at the beginning of the trial. I was wondering if they were sure they had the right guy. And where was Andre Davis the night of the Pizza Parlor thing? I would have liked to have known. But I still didn't have doubts it was Mike Jones." (*Id.*)

Juror Diane M. said: "Yes, it would have [made a difference]. After the verdict this threw me for a loop (when the defendant yelled about Andre Davis) . . . this information would bring doubts." (CT 967.)

Juror Larry W. said: " . . . I was one of the hold outs, anything that would have been brought up I would have taken into consideration." (CT 963.)

Juror Shirley H. said: "I would have given it strong consideration, just knowing that would have made a great difference. I was shocked to hear that after the verdict. There just was not any evidence presented." (CT 965.)

Juror Elizabeth L. was interviewed recently and stated: "I don't remember hearing any evidence during the trial about Dre. Consequently having Mr. Jones yell that out in open court really bothered me. While the jurors knew Mr. Jones was not alone during the commission of the crime, I wanted to know the complete story of the robbery and murder at Domino's." (Ex. 163, Decl. of Elizabeth L., ¶ 4.)

H. Failure to Present an Identification Expert

188. Although trial counsel had sought to introduce identification expert Kathy Pezdek at the guilt phase, the trial court disallowed her testimony. Jones was not prohibited, and would not have been prohibited, from presenting such testimony in mitigation to further a very viable theme of lingering doubt regarding Jones's role as the shooter, and evidence under the mitigating factor (j) under California Penal Code section 190.3(j): "Whether or not the defendant was an accomplice to the offense and his participation in the crime was relatively minor." Jones incorporates herein by reference Claim Five, section C.

I. Failure to Argue That Jones's Youth Was a Mitigating Factor

189. Jones was only eighteen years old at the time of the offenses that were presented to the jury in aggravation. The basic tenet of American jurisprudence that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult" is premised on the notion that:

> . . . inexperience, less education and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult.

Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 2698-99, 101 L. Ed. 2d 702 (1988); *See also Graham v. Collins*, 896 F.2d 893, 897 (5th Cir. 1990).

190. The Supreme Court abolished the juvenile death penalty for those who commit a capital offense before their eighteenth birthday:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with

> those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson*, *supra*, at 368, 113 S. Ct. 2658; *see also* Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Roper v. Simmons, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

191. Even before the decision in the *Simmons* case, the California legislature had already come to the same conclusion. In California, a defendant who was under eighteen years of age at the time of the "commission of the crime" was statutorily ineligible for the death penalty. Cal. Penal Code § 190.5. Similarly, a person who is between the ages of 16 and 18 when the crimes were committed which gave rise to special circumstances findings can be sentenced to a maximum of life without parole or, in the discretion of the court, 25 years to life. In the present case, Jones was born on June 13, 1970 (RT 3472) and the Domino's robbery-murder occurred in January of 1989 (RT 2237), when Jones was just eighteen and a half years old. Had it occurred only six months earlier, Jones would have been ineligible for any penalty more severe than life imprisonment and could have received 25 to life. Accordingly, California Penal Code Section 190.3 factor (i)'s reference to "the age of defendant at the time of the crime" should only have been mitigating as applied to Jones.

192. In 2010, the Supreme Court extended the principles announced in

Thompson and *Roper* to sentences of life imprisonment without the possibility of parole for juvenile who committed non-homicide crimes. In *Graham v. Florida*, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010), the Court held that the Eighth and Fourteenth Amendments forbid the "second most severe penalty permitted by law" to be imposed upon a juvenile offender who neither killed nor intended to kill. In its findings, the Court relied upon scientific data showing that "parts of the brain involved in behavior control continue to mature through late adolescence" and thus the actions of juveniles are less likely to be evidence of a "irretrievably depraved character than are the actions of adults." *Id.* at 2026 (citing *Roper*, 543 U.S. at 570.)

193. Trial counsel did not present any information on Jones's youth in mitigation. Trial counsel did not argue Jones's youth as a mitigating factor under California Penal Code Section 190.3(i). Trial counsel could have, but did not, inform the jury regarding the age cut-off for death eligibility under Penal Code section 190.5 and ask that the court instruct the jury regarding 190.5. Trial counsel should have also presented evidence regarding the fact that, if they were to sentence Jones to death, he would become the 312th and youngest inmate on California's death row, and that, of the death row inmates from Riverside County at the time, none were younger than Jones when they were sentenced to death. Jones was twenty-one years old when sentenced to death. (Ex. 56.)

194. Further, an expert could have testified that science shows that the development of the brain is not fully achieved until an individual reaches 21 or 22 years of age, and that the frontal lobes are the last to develop, which are responsible for executive functioning, impulse control, and foresight of consequences. Late adolescents are less able than adults to control their impulses and exercise self-restraint in refraining from aggressive behavior. The ability to gauge risks and benefits accurately, the ability to envision the future, and the ability to resist impulses and control emotions, even in the face of environmental or peer pressures, are critical components of psychosocial maturity, necessary in order to make mature, fully

reasoned decisions. Late adolescents have not fully developed these abilities and therefore lack an adult's capacity for reasoned judgment. (Ex. 154, Decl. of Natasha Khazanov, ¶¶ 116, 117.)

195. Further, the evidence demonstrated that Jones was barely eighteen years old when the crimes he was convicted of were committed (RT 3499, 3523); that Jones had no history of felonious conduct or violent behavior prior to the crimes for which he was tried in the present case;[42] and that in 1989, just before the subject crimes occurred, Jones had been abandoned by his parents, thrown out of the family home, and forced to fend for himself. (RT 3499-3503.) Nevertheless, trial counsel never presented evidence on or argued that Jones's youth, inexperience, lack of education, lack of actual brain maturation, and peer pressure were mitigating factors in terms of "the age of the defendant at the time of the crime." Cal. Penal Code § 190.3(i). Rather, when trial counsel did allude to his client's age it was only to say: "I mean, *no one can ever justify the things that Petitioner Jones did when he was 18*." (RT 3792 [emphasis added].) This is hardly the kind of invocation of Jones's youth as a mitigating factor that counsel could, and should, have accomplished through the presentation of testimony or in argument illustrating how and why, at eighteen years of age, Jones was vulnerable to succumbing to negative influences that, had he been more mature, Jones could have overcome.

196. Moreover, with trial counsel having abdicated the critical youth-as-mitigation issue by default, the prosecution was able to argue that Jones's age was at best a neutral factor: "His age is nothing more than a chronological statement of how

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[42] The prosecution never introduced any prior felony convictions of Jones, nor any evidence of specific acts of violence by Jones prior to the Domino's and Mad Greek robberies occurring in 1989, either in the guilt or the penalty phases. In the post-verdict motion to modify, the court found that there were no prior felonies and that Jones was eighteen at the time of the commission of the charged offenses, both of which factors the court found to be mitigating. (RT 3850.)

long he's been here on this earth. That's all it is. It doesn't mean anything other than that." (RT 3779.) And, at worst, the prosecution was able to argue that Jones's failure to distinguish himself was actually a factor in aggravation: "And certainly he has accomplished quite a lot in the years that he's been here." (*Id.*) Nor did trial counsel in rebuttal or in the penalty evidence attempt to use Jones's age to mitigate some of the youthful braggadocio that the prosecution had introduced to show Jones's callousness. Again, all that trial counsel did do was to suggest that there was *no* explanation for why his eighteen-year old client had slipped into alleged gang activity and violence, conceding: "No one can ever justify the things that Petitioner Jones did when he was eighteen. No one can ever justify those things. We're not trying to do that." (RT 3792.)

197. The defense could have argued that Jones's age was clearly a mitigating factor and they could have presented expert testimony regarding brain maturation in late adolescence. Such testimony, together with the brain damage and psychosocial history and risk factors described by experts such as Dr. Samuel Benson, Dr. Natasha Khazanov, and social historian Carole Kelly, would have had a profound impact on the jury. (Ex. 155, Decl. of Samuel Benson; Ex. 154, Decl. of Natasha Khazanov; Ex. 159, Decl. of Carole Kelly.) Absent a tactical justification to the contrary, counsel certainly should have argued Jones's youth as mitigation, since the fact Jones was barely eighteen when the offenses were committed lent itself naturally to an argument that Jones acted to some extent out of a vulnerability to peer pressure that he would have been able to fight off had he been more mature. Especially because Jones's age was so close to the lower limit imposed by California Penal Code section 190.5, and in light of the evidence adduced by the defense – *i.e.*, parental abandonment that would have had a far more negative and destabilizing impact on a youngster than on a mature adult – arguing age as mitigation would have fit perfectly within the parameters of the defense, and was not amenable to prosecution exploitation. In other words, there was every reason for the defense to argue age as mitigation in this case

and no conceivable tactical reason for not having done so.

198. Nevertheless, trial counsel failed to argue youth as a mitigating factor and allowed the prosecution to claim, unrebutted, that Jones's age was actually a neutral or even an aggravating factor, despite the fact that, prior to the crimes which Jones was convicted of in the present case, Jones had no felony record and no juvenile record of violence, and had been thrown out on the street by his mother just before the subject violence occurred. Under these circumstances, and lacking any tactical justification for such a decision, the defense's failure to argue youth as mitigation was ineffectiveness of counsel.

199. The jury was, of course, instructed on the aggravating and mitigating factors which they were required to consider in determining whether their sentence would be death or life imprisonment without parole. Although the prosecution introduced aggravating evidence in several categories, the defense offered so little in the way of specific mitigating factors that the prosecutor was able to argue:

> What mitigating circumstances have you heard about?
>
> Nothing. Those factors that I've discussed are the mitigating and aggravating circumstances. There are no mitigating circumstances in this case.

(RT 3870.)

200. The fact that Jones was barely eighteen, poorly schooled, out on the streets, and heavily dependent upon a criminally-oriented peer group when the subject offenses occurred, presented an important opportunity for the defense to present the jury with powerful mitigating evidence that clearly fit within category (i), "the age of the defendant at the time of the crime." Yet this opportunity was utterly missed by the defense, without any tactical gains in return. The fact that trial counsel did not argue youth as a mitigating factor is all the more prejudicial given that trial counsel put on nothing else in their case in mitigation, which allowed the prosecutor to argue that "there are no mitigating circumstances in this case." (RT 3780.)

201. Thus, trial counsel's failure to argue youth as mitigation in this particular case was a missed opportunity to present evidence in mitigation, and a forfeiture of the defense's best opportunity to tender powerful mitigation evidence within the context of the factors that the jury was required to consider in deciding whether or not to sentence Jones to death. Trial counsel's failure to urge the jury to spare Jones's life because of his extreme youth and immaturity at the precise time when the offenses occurred effectively tipped the scales against Jones by depriving the jury of what amounted to the most available mitigation evidence available. But for trial counsel's errors and omissions, it is reasonably probable a more favorable outcome would have occurred at trial.

J. Failure to Specifically Object to Gang Rebuttal Evidence or to Request an in Limine Hearing Before Opening the Door to Damaging Gang Evidence in Rebuttal

202. Jones incorporates herein by reference Claim Nine, section B, and Claim Eleven, section A. Before the start of the penalty phase, the trial court and counsel engaged in discussions relative to "gang evidence" that the prosecutor might elicit in the penalty phase. The trial court first indicated its belief that the prosecution was "not going to get into the gang aspect in the penalty phase," whereupon the district attorney stated that the People wanted to reserve the right to bring up gang evidence "if it becomes relevant in rebuttal." The court then ordered the district attorney to preview all potential gang evidence outside the jury's presence, which the prosecutor agreed to do. (RT 3254-55.) Nevertheless, on several occasions, the prosecution went ahead and, without any "previewing," asked questions on cross-examination that elicited substantial gang evidence from defense witnesses who had not said anything about gangs in their testimony on direct. The effect was to get before the jury in the penalty phase evidence that Jones was "involved with the Crips gang," had been photographed while flashing "gang signs" and wearing "gang clothing"; and that Jones was "in a gang called the 211/187 Hard Way Gangster Crips," a chapter of

the Crips gang that Jones had allegedly "started." (RT 3560-62; RT 3636.)

203. Trial counsel was ineffective in failing to ask for a hearing in limine to address the evidence that might come in, and in failing to object to the prosecution's gang questions on cross-examination on the basis that the district attorney was violating the court's order to preview all such evidence. Both of these failures amounted to ineffective assistance of counsel.

204. Trial counsel failed to request an in limine hearing regarding what would "open the door" to gang rebuttal evidence. The pretrial discussions about potential gang evidence in the penalty phase revealed that the prosecutor was not going to be offering gang evidence in its case-in-chief, but nevertheless was going to tender it if any defense witnesses "opened the door" to such evidence. At the same time, the court did not specify just what evidence would open the door to gang rebuttal and which evidence would keep the door closed. Accordingly, although it was possible that the court would narrowly limit the prosecution in this area and prohibit gang rebuttal unless the defense asked questions about gangs on direct, the court might also rule that even general questions by the defense about Jones's lifestyle and activities would allow the prosecution to freely "rebut" this testimony in cross-examination with "gang evidence."

205. With the issue of what would open the door to gang evidence unresolved, the defense called as witnesses, Beatrice Acosta, the mother of Jones's child; Glenn Garbot, Jones's uncle; and Joseph Gueste, a family friend and pastor. On direct examination, these witnesses testified in general terms about Jones's lifestyle and activities, and offered no evidence at all about gangs or Jones's involvement with gangs. Nevertheless, on cross-examination the prosecutor was permitted to confront each of these mitigation witnesses with a barrage of questions about gangs. (RT 3559-62; 3575-76 ("Did you ever notice that he was in a gang called the 211/187 Gangster Crips?"); 3621 (same); 3636-37 (same).) As a result, and even though none of the witnesses had any knowledge at all about gangs, the

prosecutor was permitted to ask questions which produced information not only that Jones belonged to a gang called the "Crips," but also that this gang chapter, which Jones and others had started, was known as the "211 [robbery] 187 [murder] Hard Way Gangster Crips."

206. Although trial counsel could have reasonably hoped that the court would exclude gang rebuttal evidence if the defense witnesses did not testify about gangs on direct, it was foreseeable to trial counsel that the court would take the view that it did, which effectively threw the door to this evidence wide open even though the witnesses knew nothing about gangs or Jones's involvement in gangs. Therefore, before calling any witnesses and taking the chance of opening the door to damaging gang rebuttal evidence in the penalty phase, it was incumbent on the defense to find out what questions of its witnesses might open the door and which would not. The only way for trial counsel to effectively accomplish this was to demand a hearing in advance, outside the jury's presence, to precisely address the issue of what defense mitigation evidence might open the door to gang evidence in rebuttal.

207. Such a hearing would have given the defense a chance to argue to the court that, unless the court were to narrowly limit gang rebuttal in the first place, the defense would be stymied in its efforts to put on mitigation evidence – *i.e.*, the more latitude the prosecution was allowed for gang rebuttal, the more the defense would have to hold back in its efforts to provide the jury with perfectly legitimate mitigating evidence. Because the court's failure to narrowly define the limits of what would open the door to gang rebuttal would cause the defense to have to limit otherwise admissible mitigation evidence, the court would likely have been more favorably disposed to limiting gang rebuttal in advance than it was when the issue came up spontaneously in the jury's presence. At the very least, raising the issue in limine would have preserved the "chilling effect" issue for appeal, an opportunity that was lost on the present record.

208. Second, even if the trial court would have decided to allow broad gang

rebuttal evidence after being made aware of the potential chilling effect such an approach would have upon the defense's introduction of mitigating evidence, it was necessary for the defense to be aware of the dangers of gang rebuttal before – not after – defense witnesses were called. Trial counsel should have known before a witness was called what questions might open up the door to gang rebuttal. That way, the defense could have steered clear of such questions in direct examination. Indeed, with the risks of gang rebuttal out in the open at the start of the penalty phase, the defense might well have decided not to call certain witnesses at all, on the basis that whatever mitigation evidence they offered would be far outweighed by opening the door to inherently prejudicial gang evidence.

209. Third, once the trial court had clearly set out the parameters of what would open the door to gang rebuttal, the defense could have been prepared to make offers of proof as to what a particular defense witness would have testified to in mitigation, but which evidence was not introduced because of the danger that gang rebuttal evidence would have done Jones more harm than the good that would have come from the mitigation testimony.

210. There was no conceivable harm to the defense for requesting such a hearing, and no conceivable tactical advantage for failing to do so. Because the defense was unable to know what it could safely ask its witnesses on direct in the absence of such a hearing, counsel was ineffective in failing to request an in limine hearing to determine what would and would not open the door to gang rebuttal evidence.

211. Trial counsel also failed to specifically object to the prosecutor's questions regarding gang evidence in rebuttal. The prosecutor's actions amounted to misconduct. However, trial counsel failed to make a timely objection to the prosecutor's questions, which amounted to prosecutorial misconduct. Failure to raise a contemporaneous objection can amount to a waiver on appeal.

212. In the instant case, when the prosecutor flaunted the trial court's order to

preview gang rebuttal evidence outside the jury's presence, the defense did not interpose any objection at all when the cross-examination regarding such evidence began. Trial counsel's objections lodged during the examination itself failed to specifically invoke the ground that the court's previewing order was being violated. Having gained a favorable ruling from the court requiring the prosecution to preview all gang rebuttal evidence outside the jury's presence, counsel had nothing to gain and everything to lose in failing to invoke that ruling when it was time to do so. To the extent that counsel's failure to do so constitutes a "waiver" of Jones's right to reap the benefits of the court's order requiring the previewing of all gang rebuttal evidence, the waiver is without any tactical justification and is therefore a species of ineffectiveness of counsel.

213. During questioning, the prosecutor was able to introduce evidence that Jones was allegedly a founder of a "Crips" gang named after the penal code sections for robbery and murder, the same crimes for which Jones had been found guilty of during the guilt phase. Gang evidence connecting Jones to any gangs is aggravating. Evidence that Jones founded a chapter of one of those gangs whose very name invoked and lauded robbery and murder, the crimes for which the prosecution was seeking the death penalty, effectively invited the jury to sentence Jones to death based on his gang affiliation rather than on the weighing of legitimate aggravating and mitigating factors.

214. The trial counsel was well aware of the dangers of prejudice from the introduction of gang evidence, having argued throughout the guilt phase that gang evidence had nothing to do with the charges against Jones. Despite this awareness, trial counsel failed to take reasonable measures during the penalty phase to elicit from the court what would open the door to gang rebuttal evidence and, armed with this knowledge, to select and question its witnesses so as to avoid opening this very dangerous door. Meanwhile, trial counsel offered mitigation evidence that was itself inherently weak and devoid of any connection to specific mitigating factors. Then,

when the prosecutor launched into "gang rebuttal" on cross-examination without abiding by the court's order to preview all such evidence, the defense failed to object on the specific basis that the prosecutor was violating the court's preview order. The effect of all these errors by trial counsel was to allow into evidence inherently prejudicial gang evidence that the jury never would have heard if counsel had acted competently. But for trial counsel's errors and omissions, it is reasonably probable a more favorable outcome would have occurred at trial.

K. Failure to Make Appropriate Objections During the Defense Case in Mitigation

215. Jones incorporates herein by reference Section J, above, regarding counsel's failure to object to the prosecutor's failure to preview questions that might elicit gang affiliation testimony.

216. Trial counsel was also ineffective for failing to object to the admission of factors regarding Jones's juvenile record, and should have sought an order from the trial court limiting the prosecutor's ability to cross-examine witnesses based upon this evidence. The prosecutor elicited during the cross-examination of Cyndy Pitts that Jones had "gotten in a little trouble with the law"; that the mother "had to go to court a couple of times for him"; that Jones "was on probation in juvenile court"; and "that probation was extended several times because he violated that probation . . . when he was 14, 15 years old." (RT 3515.)

217. None of this information was relevant to any statutorily aggravating factor and was not admissible at the penalty phase. Trial counsel should have known this and should have objected and asked for a limiting instruction.

218. Trial counsel also failed to object to the prosecutorial misconduct during the entire penalty phase, including the prosecutor's prejudicial remarks during opening statement and closing argument. Jones incorporates herein by reference Claim Eleven, prosecutorial misconduct in the penalty phase. Trial counsel failed to appropriately object to each of these instances of misconduct.

L. During the Case in Mitigation, Trial Counsel Presented Harmful Evidence and Failed to Rehabilitate Witnesses

1. Presentation of Harmful Evidence

219. During trial counsel's case in mitigation, Gunn continuously admitted his own client's guilt in all of the underlying offenses, including Domino's, the Mad Greek, and the Flats.

220. When Jones's aunt, Sheila Barcus, was testifying, she expressed doubt about Jones's guilt by stating that she didn't feel that Jones was the type of person who could commit the crimes in this case. Gunn immediately shot back: "But you know that he did though, correct? You've been told that these things happened [presumably by Mr. Gunn]?" (RT 3592.) Gunn stuck to his theme of trying to get the witnesses to say that Jones had changed for the better. Barcus then stated that Jones seemed like the person she used to know; not the violent one described in court. Again, Gunn admitted his client's guilt by asking her: "He's told you when he's talked to you on the phone that he's sorry about what's happened?" (*Id.*)

221. When Jones's uncle, Glenn Garbot, testified, Gunn asked the same types of questions admitting Jones's guilt: "Q: And you've heard about some of those things have you not, about killing a young man, about shooting other young men?" (RT 3617.) Garbot responded that he was aware, but that he couldn't believe that Mike could have been involved in something like that. Gunn asked: "But you knew he was, right?" and Garbot answered, "Yes." (RT 3617.)

222. When Joseph Gueste testified, Gunn prefaced questions with the following: "you've heard of some terrible things that [Jones] did . . . [y]ou've heard that [Jones] shot and killed somebody during a robbery. You've heard that he shot two other teenagers, shot at some other people during the course of another robbery." (RT 3633.)

223. When Jones's paternal grandmother, Mini Nixon, testified, she expressed that it was hard to believe that Mike had done these things and she couldn't accept it.

The following exchange with Gunn took place: "Q: But you know he did these things. You understand that? A: I understand that they say he did it. But, for me, knowing in my heart, I don't know that." (RT 3682.)

224. Gunn's constant admission of his client's guilt did not advance the case in any manner. An "admission by counsel of his client's guilt to the jury, represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *United States v. Williamson*, 53 F.3d 1500, 1510 (10th Cir.1995), *cert. denied sub nom.*, *Dryden v. United States*, 516 U.S. 882, 116 S. Ct. 218, 133 L. Ed. 2d 149 (1995).

2. Failure to Rehabilitate Witnesses

225. As mentioned in section C.2, above, trial counsel failed to rehabilitate the testimony of Dr. Steven Buckey after the prosecutor cross-examined him and elicited an opinion that Jones was a sociopath and other such damaging testimony. Trial counsel could have rehabilitated Dr. Buckey on redirect by referring him to the Diagnostic and Statistical Manual ("DSM-3R"), and asking him if evidence existed to support each factor listed therein that is necessary to diagnose a patient with antisocial personality disorder. Trial counsel did not ask these specific questions, and never asked if Dr. Buckey had indeed made such a diagnosis. The prosecutor used Dr. Buckey's testimony to argue to the jury that a death verdict was necessary.

226. When Willie Jones testified, the prosecution attempted to impeach his testimony regarding the day that the police were called during a domestic violence dispute between Jones's parents. (RT 3672.) Jones had testified on direct examination that he had pushed Jones part way out of the window after Jones had attempted to protect his mother from Jones. The prosecutor cross-examined him by suggesting that the screen had not been pushed out when Jones pushed Jones backwards; that it actually occurred when Jones threw the Christmas tree out the window. The prosecutor used a transcribed interview that investigator Robin Levinson had taped of Jones wherein he stated that "I just walked [Jones] to the

window . . . So instead I threw the Christmas tree out the window." (RT 3672.)

227. Trial counsel failed to rehabilitate Jones on redirect examination by pointing out that the incident regarding pushing Jones out the window had occurred on June 24, 1982, which is certainly not close to the Christmas holidays. A Christmas tree would not have been in the house during that same incident. Trial counsel had a certified copy of the police report taken from June 24, 1982, that would have corroborated the date. (Ex. 14, Placentia Police Department Report regarding attempted murder of Cyndy Jones by Willie Jones on June 24, 1982.) Trial counsel did not rehabilitate his witness by referencing the document, and he did not offer the police report into evidence.

M. Failure to Object to the Prosecutor's Improper Argument Regarding Future Dangerousness and Failure to Move to Re-Open the Evidence to Elicit Contrary Evidence

228. As noted in Claim Nine, section A, the trial court erred in refusing to allow trial counsel to present the testimony of James Park, a former correctional official who was prepared to testify regarding the circumstances under which prisoners sentenced to Life Without Possibility of Parole ("LWOP") are housed. As noted in Claim Eleven, the prosecutor improperly moved for the exclusion of this evidence. In the absence of such evidence, the prosecutor then made the improper, misleading, and unsupported argument that if sentenced to LWOP, Petitioner would be incarcerated without any "controls to maintain or restrain his conduct from hurting or killing someone else." (RT 3782; *see also* RT 3789 ("There are going to be no controls on him if you give him life without parole . . . . Don't let your compassion be the price of another victim.").)

229. Trial counsel should have, but failed to, object to these improper, inflammatory and misleading arguments and requested a mistrial. Moreover, trial counsel should have, but failed to, request that the court reopen penalty phase evidence to allow the presentation of testimony that would have shown that Jones had

not engaged in violent acts while incarcerated, and that he did not pose a danger while in custody. James Park has testified in a number of capital cases that prisoners sentenced to LWOP terms are automatically assigned to maximum security, "level-four" facilities, and about the considerable security provided at this level of classification. *See*, *e.g*, *People v. Ochoa*, 26 Cal. 4th 398, 422, 390 P.2d 381, 37 Cal. Rptr. 605 (2001) ("James Park, a correctional consultant and former corrections officer, testified that prisoners serving life without possibility of parole terms are automatically sent to maximum security 'level-four' facilities, from which there has never been an escape.").

In addition, trial counsel should have, but failed to, prepare Park to testify about Jones's potential for a non-violent adjustment to life in prison, based upon Jones's relative youth and his lack of any history of violence in prison. As a long-time administrator at California prisons, Park was in a unique position to dispel the prosecutor's improper and misleading arguments that Jones presented a grave threat to the safety of other inmates and staff and that his execution was "necessary" to lessen the risk to others in prison.

230. In the face of the prosecutor's improper and unsupported evidence on future dangerousness, Jones was unquestionably entitled to present such evidence. As the Supreme Court recognized in *Simmons v. South Carolina*, "The Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." 512 U.S. 154, 161, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) (plurality opn.) (citations omitted); *Id.* at 175 ("[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain requires that the defendant be afforded an opportunity to introduce evidence on this point") (citations omitted).

231. Jones had nothing to lose from the presentation of such evidence and

much to gain. The prosecution's arguments regarding Jones's future dangerousness presented a powerful, although wholly misleading, reason to sentence Jones – who was barely eighteen years old at the time of the crime for which he was convicted – to death. Absent proper refutation, the jury was left with the false impression that they had to sentence Jones to death to safeguard the life and safety of others.

232. Trial counsel's failure to object to these arguments and to reopen the evidence to properly respond to them fell far outside the range of representation expected of competent counsel in capital cases. Had counsel properly objected to these arguments or refuted them through the presentation of competent evidence, there is a reasonable probability that Jones would not have been sentenced to death.

N. Failure to Investigate and Mitigate Evidence Introduced by the Prosecution in Aggravation, Failure to Object, and Failure to Cross-Examine Witnesses Regarding the Flats Incident

233. Jones incorporates herein by reference Claim One, section C. Although Jones should not have pleaded guilty to the Flats allegations, once he did, and the defense knew that the prosecutor would bring in the Flats incident in aggravation, trial counsel should have continued to investigate and mitigate facts of the crime. Trial counsel has an ethical obligation to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

234. Even the prosecutor did not think much of his case against Jones:

> One of the problems with the – with the Moreno Valley shooting is that while there were several people there, only, I think, one of them can identify the defendant as the perpetrator of that particular crime. Other ones misidentified him, for example at the in-person lineup. The people that were present at the Flats were also present at the lineup. A couple of them misidentified him, were unable to identify anyone, things like that.

(RT 3243.)

1. Failure to Cross-Examine Witnesses Brought in Aggravation

235. Trial counsel failed to cross-examine any core prosecution witnesses at the penalty phase. The witnesses who were present at the Flats incident who testified in the penalty phase were: Jason Waltz, Lance Peeples, Christopher Shumate, Christopher Swan, and Brian Wagner. Trial counsel did not cross-examine any of these witnesses regarding their misidentifications or inability to identify Jones. Trial counsel did not even cross-examine Christopher Shumate who was the only one who did identify Jones as a perpetrator at the Flats robbery.

236. Lance Peeples testified that the person holding the shotgun during the robbery was not a black male. (RT 3301.) Gunn did not cross-examine Peeples or follow up on information that would potentially exculpate Jones.

237. Gunn did cross-examine one witness in connection with the California Evidence Code section 402 hearing, Daniel Fredrich. Fredrich was the first and only prosecution witness to be cross-examined by defense counsel during the prosecution's case in aggravation. Gunn failed to show that the prosecutor had not exhibited due diligence in locating Luis Villarreal, and the trial court let the testimony in. (RT 3388-3408, testimony of Daniel Fredrich; RT 3409.)

2. Luis Villarreal

238. Trial counsel appropriately objected to the admission of Luis Villarreal's testimony because of the fact that he did not have the ability to cross-examine him. (RT 3376-80.) Prior testimonial statements that are not subject to cross-examination are inadmissible under the federal constitution. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

239. Trial counsel failed to object to the prosecutor reading his testimony into the record. This should have been done by an objective person, not connected with the parties.

240. Trial counsel's investigator interviewed Villarreal in August of 1990.

Trial counsel should have kept themselves informed as to Villarreal's whereabouts. Further, trial counsel's investigator had the opportunity to ask Villarreal what benefit he had received in exchange for his testimony against his brother and Jones, but failed to do so.

241. Additionally, James Spring, the attorney representing Jones at the time of his preliminary hearing, failed to question Villarreal regarding any promises or threats made to him by the prosecutor or law enforcement that prompted his testimony at the preliminary hearing, which constitutes ineffective assistance of counsel.

242. An effective in person cross-examination of Villarreal during the penalty phase would have discredited this prosecution witness who, as the prosecutor stated, was uncooperative, evasive, and a liar. (RT 3379-80.) The removal of Villarreal's testimony from evidence would have had a significant effect on the outcome of the penalty phase.

3. Evidence of Intoxication and Domination by Another

243. However, trial counsel should have made it a priority to find and bring Luis Villarreal in to testify because he could have testified to the fact that Jones was "wasted" after coming home from the Flats incident. (Ex. 146, Decl. of Luis Villarreal, ¶ 11.) Evidence would have been admissible to show that Jones was extremely intoxicated on the night of the Flats incident and therefore could not form the specific intent for the attempted murders. Cal. Penal Code §§ 21(a) & 22(b). Luis would have testified that Jones was extremely intoxicated on the night of the Flats incident and that he remembered nothing about it the next morning. (*Id.* ¶¶ 6, 11.) Luis's brother Mario Villarreal, a co-defendant in the case, could have testified similarly.[43] (Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 16, 18.) Jones incorporates

[43] Mario Villarreal could have been a helpful defense witness. On June 4, 1991, Mario Villarreal pleaded guilty to the allegations arising out of the Flats

herein by reference Claim One, section C.

244. Additionally, Jones's counsel could have brought in evidence to show that Patrick Hunt was the instigator of the robbery and exerted influence over Jones, who was extremely intoxicated at the time. (*Id.* ¶ 18.)

245. Jones was advised erroneously by trial counsel to plead guilty to the attempted murders. The prosecutor was allowed to bring in evidence regarding the prior criminal activity during the penalty phase. Trial counsel could have presented evidence in mitigation of the Flats incident by presenting the testimony of Luis and Mario Villarreal to show that Jones lacked the specific intent required under the law to actually commit the attempted murders. Instead, trial counsel did nothing at all to mitigate the Flats incident, failing even to cross-examine witnesses.

246. A thorough investigation into the Flats incident and a thorough interview by trial counsel of both Luis Villarreal and Mario Villarreal could have resulted in a presentation of testimony that would have undercut the prosecution's theory of the Flat's incident.

4. Limitation of the Evidence Regarding the Flats

247. Trial counsel never asked that the testimony at the penalty phase regarding the Flats incident be limited to the facts surrounding the two victims who Jones pleaded guilty to shooting, Brian Wagner and Christopher Swan. In fact, he stated before the penalty phase began, that he would stipulate to the presentation of "the three victims of the three attempt murders testifying as to what happened to them," which includes Larry Nave. (RT 3242.) The prosecutor did not see it the

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incident. (Ex. 71, RT 147-88; transcript of proceedings on June 3,1991 and June 4, 1991 (plea transcripts of Alan Murfitt and Mario Villarreal, Jr.).) The defense could have interviewed him thereafter, and obtained this evidence before Jones pleaded guilty to the same offenses on July 31, 1991. (CT 587-615; RT 3462-63.) At the very least, trial counsel could have used the evidence of intoxication and domination by another person to mitigate the Flats incident brought in aggravation at the penalty phase.

same way:

> there was an attempted first degree murder that the defendant pled to that involved a shooting by another individual. That's Mario Villarreal. He shot a guy by the name of – I think it's Larry Nave, in the back. Now that evidence I think is admissible. However, Mr. Jones' admission to that particular charge I think is inadmissible in that he did not cause that particular injury, someone else did. But his admission to that is – is probably – could probably – be improperly construed by the jury as some kind of prior conviction.

(RT 3244.) The prosecutor ultimately went to great lengths to keep out the evidence of Jones's guilty plea with respect to the attempted murder of Larry Nave. In fact, he omitted any reference to Count XIII when reading the plea into the record. (RT 3462-63.)

248. Trial counsel failed to object to the admission of Dr. Curtis Jensen's testimony. Dr. Jensen was the emergency room doctor for Larry Nave, the person shot in the back by Mario Villarreal. Trial counsel should have objected to the physician's testimony regarding Larry Nave's injuries given that Jones "did not cause that particular injury."

249. Further, during the questioning of Dr. Jensen, the prosecutor asked him what would have happened if the bullet had struck Nave in the spine. The doctor answered, "He could have been paralyzed." (RT 3341.) Trial counsel did not object. The prosecutor also elicited from Dr. Heischoeber, emergency room doctor for Brian Wagner, that he did not "give the family much hope" given his critical condition. (RT 3460.) The doctor also spoke about the lengthy surgery and the amount of blood that Wagner was given. (RT 3461.) Trial counsel did not object. These questions were clearly beyond the scope of what the trial court had ruled were admissible – *i.e.*,

the extent of the injuries caused by Jones.

5. Other Failures

250. Trial counsel failed to object in other instances, including to the testimony related to a letter from Beatrice Acosta to Jones found in the engine compartment of the car where weapons were found at the Villarreal house. (RT 3456.)

251. But for trial counsel's errors and omissions, it is reasonably probable that a more favorable outcome would have occurred at trial.

O. Trial Counsel Made Unreasonable and Harmful Arguments: He Effectively Waived an Opening Statement and His Closing Argument as a Whole Was Short and Entirely Ineffective

252. Trial counsel David Gunn effectively waived his opening statement by saying only a few words to the jury. His opening statement takes up only five pages in the Reporter's Transcript. (RT 3274-79.) Gunn's statement is replete with harmful statements and admissions, such as: "Not that you're neutral, or – I mean you've heard some horrible things here. You've convicted Mr. Jones of some horrible things . . . So, we have some horrible things here, no question about it." (RT 3275.) And, "All of these things happened, all three of these horrible, horrible crimes took place in about a ten - or twelve month period of time." (RT 3277.) Gunn also stated, "Again, we're not offering that evidence to excuse his conduct here, to say it's not horrible what he did." (RT 3278.)

253. Gunn also told the jurors in his opening statement that he knew they would " . . . like to know why [the crimes] happened, what the motivations are, and I want to tell you at the outset I don't know that we'll be able to answer all of your questions about that." (RT 3279.)

254. Gunn outlined a few tepid areas of mitigation for the jury, and said that the prosecutor was correct, "that evidence is – there's no question about it – a form of a plea for sympathy." (RT 3276.) Gunn also stated that Jones's mother and father

would testify and that there was an incident of child abuse. He stated that they would not be "painting a Mommy Dearest picture," and that some people would testify that Jones was not the type of person to do these things. (RT 3277.)

255. Gunn's closing argument was short, harmful, and utterly ineffective. His closing argument takes up only ten pages of the Reporter's Transcript. (RT 3790-3801.) During his closing argument, Gunn continued to advance the mitigation theories that Jones's mother is a "good person" who did the best that she could "under the circumstances" (RT 3793), some comments on Jones's upbringing, that he would not pose a future danger if imprisoned for life, and that he was not the type of person who anyone "believ[ed] was capable of doing these things." (RT 3800.)

256. In keeping with his opening statement, Gunn stuck to the theme that Jones had committed horrible crimes during his closing argument:

> When we talk about mitigating evidence, certainly the types of evidence that we give at this stage of the proceeding in this penalty phase can't compare to the horror of some of the crimes that have been talked about in this case, can compare to the violence of those episodes, but it's a different kind of evidence . . .

(RT 3791.) Gunn went on to argue that "[Jones] didn't do any of these horribly violent things when he was [living] with his mom and brother." (RT 3796.) And asked the jury to "think about the evidence that you've head, think about the horrible circumstances of these crimes . . . " (RT 3800.)

257. Gunn also argued that there was no justification for any of the things that Jones had done: "Yet he's done some terrible things. You've heard about those things in this courtroom. There's no excusing it. There's no justifying it ever, ever." (RT 3798.) Gunn said again, "I mean, *no one can ever justify the things that Petitioner Jones did when he was 18*." (RT 3792 [emphasis added].)

258. There is a class of cases where counsel's conduct is "so likely to

prejudice the accused that the cost of litigating their effect in a particular case is unjustified" and prejudice is presumed. *Cronic*, 466 U.S. at 659-62. Trial counsel has an ethical obligation to "subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. An "admission by counsel of his client's guilt to the jury, represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *United States v. Williamson*, 53 F.3d 1500, 1510 (10th Cir.1995), *cert. denied sub nom.*, *Dryden v. United States*, 516 U.S. 882.

P. Trial Counsel Did Not Adequately Consult With His Client

259. Trial counsel rarely, if ever, met with Jones, except in court. [redacted] Counsel has an obligation to form a relationship with his client to gain his trust and to gather important information. Such lack of consultation constitutes ineffective assistance of counsel. *See*, *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998), quoting *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *Crandell v. Bunnell*, 144 F.3d 1213, 1217 (9th Cir. 1998); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997).

Q. Trial Counsel Frank Peasley Was Ineffective at the Penalty Phase for Delegating the Entire Penalty Phase Presentation to an Attorney Who Had Not Prepared the Case and Who Failed to Notify the Court That He Was Seriously Ill and Unable to Function Effectively; Trial Counsel David Gunn Was Ineffective for Failing to Withdraw as Counsel, Given His Health Problems

260. Frank Peasley and David Gunn were appointed to represent Jones at trial. Peasley was lead counsel. In that role, he handled virtually all the pretrial preparation and all initial contacts with potential lay and expert witnesses.

261. Peasley brought in David Gunn as associate counsel. David Gunn and Frank Peasley were close friends. According to Peasley, there are no time records for

Gunn because he was paid a "flat fee" of $10,000 to handle the penalty phase of the case.

262. Even though almost all of the pretrial preparation of the case was done by Peasley, he delegated the entire responsibility for the penalty phase of the case to Gunn. Nevertheless, after the jury returned its death verdict, Peasley took over the motion for new trial for Gunn because the latter was too ill to handle the motion.

263. During jury selection in the guilt phase, and during the penalty phase itself, Gunn was seriously ill. According to Peasley, Gunn was afflicted during that period with an illness similar to multiple sclerosis, with symptoms of extreme mental and physical weakness which were extremely debilitating. Peasley was at a seminar with Gunn shortly before the trial at which Gunn was not even able to walk or move without assistance.

264. Gunn was treated by local physicians for his illness and originally agreed to provide authorizations to state habeas corpus counsel so that his medical records could be obtained. (Ex. 99, Decl. Of Kent Russell, ¶ 4.) However, Gunn later changed his mind and refused to provide the authorizations.

265. There are some indications in the record that Gunn was ill at certain times during the trial, but no indication that he ever notified the court that the illness was serious and had a major debilitating effect on him which made it impossible for him to effectively represent Jones; or that, based on his serious and debilitating illness, it would have been appropriate for the court to replace Gunn with new counsel.

266. Before trial, Peasley told the trial judge: "[Mr. Gunn] is pretty sick. It is like he is better. He still has some problems. He is going to see a neurologist today." (RT 154-55.)

267. During voir dire, after Gunn had been absent for one or two court sessions, Peasley told the trial judge:

> Yesterday afternoon, after court, sometime between I think

> 5:00 or 6 o'clock or so, 6:30, I talked to Mr. Gunn. And he was still ill, but he thought that he would try his best to make it today. And he felt like he probably would make it today to court. [¶] And as of about 9 o'clock this morning I find out -- I found out that he did not come in today. He's still sick. I talked to his secretary.

(RT 1153-54.)

268. After both the guilt and penalty phases of the trial had concluded, and a death verdict returned, Peasley told the trial judge:

> He's -- I think the Court is aware he's very ill, taken a real turn for the worse. He's only been able to come into his office an hour or two a day. He's not making most of his court appearances. I may end up having to take that over. I don't know. Friday we'll find out more. He is going to get some results back.

(RT 3823.)

269. The record shows that Gunn was *not* present during the guilt phase. (CT 619-24, 633-36, 665, 780-83.) When both Gunn and Peasley were present, the record reflected that fact. (CT 825.) The record showed that only Peasley was present at the guilt phase and only Gunn present at the penalty phase.

270. The record establishes that Peasley made several representations to the trial judge about the state of Gunn's illness before, during and after Jones's trial.

271. Jury selection for both the guilt phase and the penalty phase began on July 15, 1991. (RT 639.) On June 28, 1991, about two weeks before jury selection began, Peasley advised the trial court:

> There's one thing I should bring up. I think the Court maybe is already aware. Just in case, I'm sure it is not going to be a problem now, Mr. Gunn, as you know, has

> been out two weeks. He is pretty sick. It is like he is better. He still has some problems. He is going to see a neurologist today.
>
> [¶] If something unforeseen should happen where he's got six months of bed rest or something unusual, then I think that would really change the -- change things. But as of now I think he's going to be okay, too.

(RT 154-55.)

272. Gunn missed four days of jury selection due to his illness. After jury selection began on July 15, 1991, the trial court recessed from July 15, 1991, to July 22, 1991. (RT 772.) Gunn was not present on July 15, 1991, the first day of jury selection. (RT 633.) July 22, 1991, was the second day of jury selection. On July 23, 1991, the third day of jury selection, Peasley advised the court:

> MR. PEASLEY: As the Court is aware, Mr. Gunn is not here today, and I expected him to be here, and I didn't know that he wouldn't be here. Had I -- you know, had -- I knew he was sick, but I never got a call that said he couldn't be in or something like that, so I thought he might kind of come in during the first session. Other- wise, I would have asked for a day's continuance. I've tried to call today to find out whether he can be here tomorrow, and I haven't been able to get through. His office can't tell me, and I just got through to his wife. She said she unplugged the phone in his bedroom, so he must be asleep because I've tried at home to get a hold of him.
>
> [¶] The upshot of all of this is that I'm concerned that if he's not here tomorrow -- I don't know that he won't be here, but if he's not here, we'll have gone through 48 jurors,

and he's never spoken to a single juror.

[¶] I anticipated during this process that we'd be kind of both talking to the jurors, and especially since he's going to be handling the penalty phase, and about 80 percent of this voir dire really deals with penalty phase, I've got a real concern, and what I'm going to request is that if he's not here tomorrow, that we not have jury selection and we reschedule these jurors either for the first or -- 31st and the 1st or something like that.

[¶] I just feel like, you know, maybe one day isn't so bad, but we virtually will be halfway through, and he's never talked to a single juror. It's a real concern of mine, considering his role in the case. It's not some subordinate role here where he's doing some motions or something. It's for months now, he's been geared to handle the penalty phase.

[¶] And I've left the Court's number so if his wife can tell me, you know, that she can call directly here to Patti and let us know if he is going to be here or he isn't, to give me time to reschedule.

[¶] Anyway, I just want to let the Court know that if he can't be here, I'll let the Court know, even if it's tonight or something, if somebody will give me a number I can reach, but I really don't want to keep going without him even being here. . . .

And I wish I could give the Court more of a prognosis, but I haven't been able to reach him. . . .

THE COURT: I'll be honest. I'm not inclined to continue

> it at all, but I'm also not prepared to make that decision today without knowing more of what Mr. Gunn's condition is. Certainly I want to know that before I would reach any decision.
>
> [¶] I'd indicate to both counsel, plan on being here tomorrow and continuing with the selection process. As I recall, I think Mr. Gunn's only been here the one day, and that was yesterday.
>
> MR. PEASLEY: Yesterday. He wasn't feeling well. And our plan was that he would do some of the voir dire yesterday, but because he wasn't feeling well, I did it all, and now today I'm doing it. He's not even here. That's you know.
>
> [¶] THE COURT: I appreciate that. He sat here all day yesterday and looked longingly at the jurors. I don't know, you know.
>
> [¶] MR. PEASLEY: I expect if he's going to be here, he would participate in it, your Honor, not just sit there like yesterday.

(RT 1108-11.)

273. The following day, July 24, 1991, the fourth day of jury selection, Gunn did not appear either. Peasley unsuccessfully moved for a continuance, stating in support of his motion:

> THE COURT: . . . Was there anything that you need to bring to my attention, Mr. Peasley? I think Mr. Gunn's not here again today; is that right?
>
> [¶] MR. PEASLEY: Yes. Yes, Mr. Gunn isn't here. Yesterday afternoon, after court, sometime between I think

5:00 or 6 o'clock or so, 6:30,1 talked to Mr. Gunn. And he was still ill, but he thought that he would try his best to make it today. And he felt like he probably would make it today to court.

[¶] And as of about 9 o'clock this morning I find out -- I found out that he did not come in today. He's still sick. I talked to his secretary. And as I indicated to the Court yesterday, I've got a real concern, considering his role in this trial, that if we go through another group of-- of potential jurors and he hasn't questioned them, hasn't even been present -- And his role is a very significant one here since he's handling the penalty phase. It's been planned for months. And he's contacted the various witnesses.

[¶] And, you know, the way we envisioned doing this was that we would both be questioning jurors as we went through this thing. And he would be very highly involved in the process, because in many respects I think his role is more significant in terms of if you look at what the odds are and so forth. And the only reason I did all of them on Monday was because he wasn't feeling well, plus he's never done this process before. So I was going to start -- start out and he would step into it. So he wasn't feeling well and I did them all. Two days in a row he isn't here. He is going to walk in as a pure stranger, not having dealt with these jurors at all.

[¶] And also, I mean, I think his input is important, particularly in his role. So I would request that we continue it to tomorrow. I mean, I wish I could give you a prognosis.

> I can't. But he said he felt he would be able to come in today, which means there was some progress. Apparently, he didn't feel good this morning.

(RT 1152-53.)

274. Gunn was not in court on July 25, 1991, the fifth day of jury voir dire. (RT 1366.) After the conclusion of the court session on July 25, jury selection did not begin again until July 29, 1991. (RT 1566.)

275. Jury selection continued on July 29, 1991 (RT 1566), July 30, 1991 (RT 1762), July 31, 1991 (RT 1968), and concluded on August 1, 1991 (RT 2100, 2160.) Gunn was present in court on each of those dates but did not ask any questions of the prospective jurors. Peasley did all of the voir dire and merely introduced Gunn to the prospective jurors as the defense counsel responsible for the penalty phase. (Ju1y 29, 1991: RT 1580-82, 1587, 1631, 1638, 1680,1725; July 30, 1991: RT 1766, 1781, 1886, 1928; July 31, 1991: RT 1793; August 1, 1991: RT 2110.)

276. Gunn began the defense penalty phase case with his opening statement on September 5, 1991, and concluded with a death verdict on September 18, 1991. (RT 3274, 3741, 3814.) The sentencing was originally set for October 17, 1991, but was continued to November 7, 1991. (RT 3820, 3823.)

277. On November 7, 1991, Peasley appeared and requested a continuance of sentencing proceedings for a month, telling the court:

> MR. PEASLEY: The status is we'd be requesting a continuance of the sentencing. We're -- Mr. Gunn is working on a new trial motion. He has not completed it. [¶] He's -- I think the Court is aware he's very ill, taken a real turn for the worse. He's only been able to come into his office an hour or two a day. He's not making most of his court appearances. I may end up having to take that over. I don't know. Friday we'll find out more.

He is going to get some results back.

[¶] We're asking for the date of December 6th, I think.

Give him one month.

(RT 3823.)

278. Jones was sentenced to death on Friday, December 13, 1991. (RT 3856.) Gunn was there and took part in arguing the defense new trial motion, which was denied. (RT 3839.)

279. On April 2, 1996, state habeas counsel, Russell and Flenniken, interviewed Peasley at his office in Riverside. During the course of that interview, Peasley was asked about the nature and severity of Gunn's illness. Peasley replied that the illness suffered by Gunn had not been identified, but that attacks came on quite suddenly without notice and left Gunn utterly debilitated and without strength. (Ex. 99, Decl. of Kent A. Russell, pp. 2-3.)[44]

280. Gunn's illness may have been the cause of his ineffective assistance of counsel in the penalty phase. Significant evidence and issues were not presented to the jury during the penalty phase in mitigation. The lay witness testimony was inadequate, and in some instances, damaging. The lay witnesses and expert were not prepared to testify, and added little to the case in mitigation. Powerful mitigation evidence existed that could have been presented through documentary evidence, lay witnesses, and expert witnesses. Jones's organic brain damage was not presented to the jury. Gunn failed to present evidence or argument regarding lingering doubt and Jones's youth. Gunn's decision to call Dr. Buckey as a penalty phase witness was unreasonable and ineffective under the circumstances. Additionally, Gunn failed to prepare Dr. Buckey to testify, failed to present useful mitigation evidence through Jones's testimony, and, instead, presented harmful evidence.

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[44] The state court failed to allow Jones's counsel discovery and subpoena power to access Gunn's medical records so that this sub-claim can be proven.

281. Gunn also failed to present available evidence at the penalty phase that Jones was intoxicated at the time of the offense and that he intended to fire at the wall at Domino's and accidentally hit Weeks.[45] Although there was information available to Gunn, which could have been developed into admissible evidence, which would have showed that Jones was intoxicated at the time of the shooting, that Weeks was hit by accident, and that someone other than Jones was the shooter, that evidence was not investigated, developed or presented.

282. Gunn's dramatic illness explains these and other major flaws in the defense investigation and presentation during the penalty phase. *See People v. Ledesma*, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987) (trial counsel incompetent because of drug addiction which affected his performance); *Smith v. Ylst*, 826 F.2d 872, 877 (9th Cir. 1987) (a hearing is required when there is substantial evidence that an attorney is not mentally competent to conduct an effective defense); *United States ex rel. Pugach v. Mancusi*, 310 F. Supp. 691, 716 (S.D.N.Y. 1970) (trial counsel was ineffective because he was mentally incapacitated and of unsound mind).

283. Additionally, the fact that Gunn had been paid in advance for his services may have been a factor in Gunn's reluctance to disclose the nature of his illness to the court and/or to request that he be replaced. If so, that created a conflict of interest with his client. Gunn asserts that he what he was paid in excess of $10,000 to handle the penalty phase of Jones's case.

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[45] This argument does not concede that Jones was the shooter. The jury should have had the opportunity to evaluate any evidence of Jones's various statements in light of evidence similar to that of Dr. Khazanov's findings discussed in connection with the preceding argument, that Jones was not an accurate reporter of events due to his multiple cognitive and neuropsychological impairments, particularly when exacerbated by drugs and alcohol. The jury during the guilt phase heard from Muslim, Cruz, and Luna, that Jones shot Weeks. Trial counsel should have presented the evidence in the penalty phase that Jones was intoxicated and the shooting of Weeks was accidental.

284. Gunn's illness alone, and in conjunction with the other failures and omissions by trial counsel, constitutes ineffective assistance of counsel and undermines the reliability of the penalty determination.

R. Conclusion

285. Trial counsel breached his duty of loyalty to his client resulting in a conflict of interest. He should not have represented Jones because he overtly caused harm to Jones. Trial counsel rendered constitutionally inadequate assistance, because trial counsel's complete ineffectiveness rendered the proceedings non-adversarial. *Cronic*, 466 U.S. at 653-56. Alternatively, the representation fell below an objective standard of reasonableness under prevailing professional norms and there was a reasonable probability that, but for counsel's failings, a more favorable result would have been obtained.

286. Based on the foregoing, trial counsel's acts and omissions were below the minimal standard of care, and deprived Jones of the right to effective assistance of counsel, the right to a fair penalty trial, and a reliable determination of punishment, all in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth amendments to the federal constitution and the correlative provisions of the California Constitution.

287. These constitutional violations, individually or cumulatively, warrant the granting of this Petition. Had trial counsel investigated and presented the evidence summarized above, there is a reasonable probability that the jury would have returned a penalty verdict of life without parole instead of death. Deficient performance by trial counsel and prejudice – both abundantly present here in the penalty phase – constitute ineffective assistance of counsel in violation of Jones's constitutional rights. *Strickland*, 466 U.S. 668.

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THIRTEENTH CLAIM FOR RELIEF FOR DENIAL OF ASSISTANCE OF COMPETENT MENTAL HEALTH PROFESSIONAL AND OTHER EXPERTS

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Jones was denied his right to experts, including competent mental health examinations and evaluations by defense experts. Trial counsel failed to obtain and present competent mental health expert testimony, and trial counsel failed to give the mental health professionals appointed by the court the information required to make an accurate and reliable diagnosis of Jones's mental illnesses and impairments, including but not limited to episodes of severe clinical depression, post-traumatic stress disorder, attention deficit hyperactivity disorder, short-and long-term effects of substance dependence and abuse, organic brain damage, and other psychiatric illnesses. In addition to a mental health expert, Jones was also denied his right to a competent criminal defense investigator, an identification expert, and a capital defense expert. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein, specifically section II, above, and Claim Twelve.

4. [redacted]

[redacted] Although trial counsel consulted with experts, he presented only one, Dr. Steven Buckey, who testified only theoretically regarding alcohol abuse, and who classified Jones as a sociopath.

5. The conclusions of the court-appointed evaluators who did examine Jones, moreover, were fundamentally flawed. These court-appointed examiners lacked, and therefore did not consider, a vast quantity of readily available, reliable information concerning Jones's family and personal history and the signs and symptoms of his mental impairments.

6. The failure of the court-appointed experts to request and consider historical information from sources other than Jones was below the standard of care for mental health professionals. The failure of trial counsel to provide the court appointed examiners with available evidence concerning Jones's history – because, in part, he also failed to investigate and obtain it – was below the standard of care for criminal and capital defense lawyers.

7. At the time of trial, trial counsel ignored and failed to pursue information regarding Jones's personal and family history which was readily available to him. Jones's family has a multi-generational history of mental illness; rampant substance abuse; poverty; abandonment; physical, educational, and medical neglect; physical and emotional abuse; racial victimization; and inadequate community resources to effectively overcome any of these barriers. Jones has acute mental and emotional disturbances including, but not limited to substance dependence and abuse, depression, post-traumatic stress disorder, attention deficit hyperactivity disorder, organic brain damage, and other psychiatric illnesses.

8. Had trial counsel conducted the necessary and appropriate investigation as reasonably required of criminal and capital defense lawyers under the facts of this case – particularly in light of information offered by and readily available from Jones's family members and friends – he would have learned that in the period

leading up to the time of the crimes, Jones experienced severe psychological stressors, and that he was heavily abusing alcohol in an effort to self-medicate his symptoms.

9. Consultation with mental health professionals by the defense was essential to permit trial counsel to assess intelligently the factual foundation for, and relative strengths and weaknesses of, various potential defenses to guilt and penalty. It was essential for trial counsel to inform themselves of the additional investigation and expert consultation needed to develop and present a reliable assessment of Jones's mental health, and to relate facts about Jones's mental state to the legal issues in the case.

10. Jones was denied consultation with appropriate experts in support of his defense, despite the many indications set forth below that there were serious mental health issues in the case. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The California Supreme Court has held that an indigent defendant in a capital murder trial is entitled to the services of a competent mental health expert. *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 319, 682 P.2d 360, 204 Cal. Rptr. 165 (1984). The *Ake* Court defined the federal right, "at a minimum," as "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. The failure of Jones's court-appointed lawyer to retain and use such defense experts, particularly after funding was made available by the trial court, was inexcusable. Trial counsel was ineffective in failing to pursue mental health defenses to guilt and penalty at the trial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (penalty phase relief where counsel failed to investigate and present substantial mitigating evidence to the sentencing jury); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995) (ineffective assistance of counsel where failure to prepare psychologist for trial testimony and provided only scant information); *Evans*

v. Lewis, 855 F.2d 631, 636 (9th Cir. 1988) (penalty phase relief where counsel failed to investigate or present mitigating evidence regarding defendant's mental condition); *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing where counsel failed to investigate and present evidence of Lambright's psychiatric condition and social history at sentencing).

11. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice

FOURTEENTH CLAIM FOR RELIEF FOR DENIAL OF MOTION FOR NEW TRIAL AND MOTION FOR MODIFICATION OF THE DEATH SENTENCE

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable guilt and penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the trial court erred in denying Jones's Motion for a New Trial and Jones's Motion for Modification of the Death Sentence, and trial counsel provided ineffective assistance of counsel on these motions.

2. The facts in support of this claim, which will be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. The Trial Court Erred in Denying Jones's Motion for New Trial and Motion for Modification of the Death Sentence

4. On December 13, 1991, the trial court heard Jones's Motion for New Trial, pursuant to Cal. Penal Code Section 1385, and Motion to Modify the Death Sentence, pursuant to Cal. Penal Code Section 190.4(e). (RT 3826-56.) With respect to the Motion for New Trial, trial counsel presented facts and evidence of someone other than Jones being the actual shooter in the Domino's. The basis for the motion was that trial counsel had not been able to locate Andre Davis prior to the penalty phase verdict. (RT 3826-40.) Jones incorporates herein by reference Claim Eight, section A; Claim Twelve, section G; and Claim Four. In the interests of justice and due process, the trial court should have granted the Motion for a New Trial. The trial court erred by failing to do so. The trial court further failed to adequately explain the basis for his denial, which further violated Jones's constitutional rights and precludes effective appellate review. *See*, *e.g.*, *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 312, 111 S. Ct. 731, 740 (1991).

5. The trial court heard Jones's Motion to Modify the Death Sentence on the same date. (RT 3840-56.) The trial court erroneously denied this motion as well. Given the lingering doubts about whether Jones was the actual shooter at the Domino's, Jones's age, Jones's obvious rehabilitation, and Jones's potential positive future influence on his brother and son, the trial court should have granted this Motion and sentenced Jones to life without the possibility of parole.

6. The hearing on the Motion to Modify was short and there were few materials presented on behalf of Jones. However, the failure of the trial court to explain the basis for its decision violates Jones's rights and precludes effective appellate review. *See*, *e.g.*, *Parker v. Dugger*, 498 U.S. 308. A trial court must provide a sufficient record for appellate review of its decision to deny a modification pursuant to Penal Code section 190.4. *See*, *e.g.*, *People v. Allison*, 48 Cal. 3d 879, 911, 771 P.2d 1294, 258 Cal. Rptr. 208, 230 (1989); *People v. Heishman*, 45 Cal. 3d

147, 200, 753 P.2d 629, 246 Cal. Rptr. 673, 709 (1988). Under the federal constitutional standard of harmless error, Jones is entitled to a full and fair 190.4(e) determination.

7. In *People v. Crittenden*, 9 Cal. 4th 83, 150, 885 P.2d 887, 36 Cal. Rptr. 2d 474, 513 (1995), the state court reaffirmed the principle that, pursuant to Penal Code section 190.4, "the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict." It is clear from the record that the trial court below did not understand its obligation as an independent sentencer.

8. Jones's sentence of death was rendered in violation of his rights to due process and equal protection, to a fair trial, and to a fair, reliable and non-arbitrary determination of the appropriateness of a death sentence because in the court's consideration of Jones's Penal Code Section 190.4 modification hearing, the court improperly and erroneously considered false aggravating evidence, considered inadmissible aggravating evidence and failed to consider properly admitted mitigation evidence. First, the trial court considered crimes that could have occurred as a result of conduct that the court attributed to Jones instead of the crimes Jones was actually charged with:

> I'm not sure what kept this from being a double or triple homicide. Only God knows, I supposed, what caused that not to happen. . . . Without question the court could just as easily be talking about six additional murders instead of six attempted murders.

(RT 3849.) The court relied on a factor that was not an appropriate or enumerated factor in aggravation under Cal. Penal Code section 190.3.

9. The trial court also erroneously considered the decline of society in ruling on this Motion. He said: "This is really violence of unbelievable proportion,

unfortunately which we're seeing more and more of in our society." (RT 3849.) This also was not an appropriate or enumerated factor in aggravation under Cal. Penal Code section 190.3. Jones incorporates herein by reference Claim Seven, section G.

B. Trial Counsel Rendered Ineffective Assistance of Counsel With Respect to the Motion for New Trial and the Motion for Modification of the Death Sentence

10. On December 13, 1991, the trial court heard Jones's Motion for New Trial, pursuant to Cal. Penal Code Section 1385, and Jones's Motion to Modify the Death Sentence, pursuant to Cal. Penal Code Section 190.4(e). (RT 3826-56.) Trial counsel's arguments on behalf of Jones had to do mostly with the Motion for New Trial regarding the confirmation of the existence of Andre Davis, the co-perpetrator named by Jones as the shooter at the Domino's. Jones incorporates herein by reference Claim Eight, section A; Claim Twelve, section G; and Claim Four.

11. Gunn, in arguing the Motion for New Trial, expressed doubts about whether Jones had been prejudiced by the failure to present the evidence that Andre Davis was the shooter, in contradiction of his own motion. "And again, I–I–I agree we don't know if the jury's verdict would have been different. Mr. Pacheco indicates he doesn't think it would have been. I can't dispute that." (RT 3834.)

12. Peasley and Gunn were ineffective in preparing and arguing the Motion for New Trial, and the trial court denied the motion. The defense should have asked that Davis be brought into the courtroom, along with the composite drawings, so that the court could see for himself the strong resemblance that Davis had to the composite drawing. Barring that, counsel had an obligation, at least at that point, to attach as exhibits both the composite drawings and the booking photo of Andre Davis. (Ex. 63, Composite drawings based on Christina Kane's description done by D. Miller on January 25, 1989; Ex. 64, Composite drawings based on Christina Kane's description done for Domino's Pizza; and Ex. 65, Booking photo of Andre Davis.)

13. Moreover, counsel failed to introduce Jones's arrest report that lists Jones's clothing and jewelry at the time of his booking. Absent from this report was any reference to an earring, and all boxes for "jewelry" and "other" items recovered from Jones were left blank. (Ex. 180 at 1792.) Counsel also failed to introduce a January 22, 1989 supplemental police report stating that the victim told an officer that the shooter wore an earring. (Ex. 181 at 1843.) Given the fact that Jones never had his ears pierced, that Andre Davis's ears were pierced, and the composite photograph resembled Davis, effective counsel would have demonstrated a high likelihood of third party culpability warranting a new trial. The trial court erred in failing to find prejudice from trial counsel's deficient performance and in failing to grant a new trial.

14. The trial court found that the Motion for New Trial was defective given the fact that it was "based upon evidence that the defense was aware of from the very beginning . . . " (RT 3839.) The court also found that there was not "sufficient due diligence even to try to locate this witness." (*Id.*)

15. Trial counsel completely failed to argue matters strongly supporting a request for a new trial, such as trial court error, prosecutorial misconduct, and trial counsel's own ineffectiveness for failing to further investigate and corroborate the theory of Andre Davis as the shooter, and to present the theory of lingering doubt at the penalty phase.

16. With respect to the Motion to Modify the Death Sentence, trial counsel did not put forth his best efforts after having just argued the Motion for New Trial. Gunn argued for less than two pages of the transcript, and said very little. (RT 3841-43.) Just as he had done during the penalty phase, trial counsel did not argue Jones's youth at the time of the crime as a mitigating factor. Gunn also abandoned the lingering doubt arguments that he had just made in the previous Motion for a New Trial. Also, just as he had done in the penalty phase, he made prejudicial statements about his client: "He's been convicted of very serious crimes, extremely serious crimes, the most serious crime I guess that we have before us in the Penal Code."

(RT 3842.)

17. But for trial counsel's errors and omissions, it is reasonably probable a more favorable outcome would have occurred at trial.

C. Conclusion

18. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

FIFTEENTH CLAIM FOR RELIEF FOR UNCONSTITUTIONAL SENTENCING STATUTE AND INSTRUCTIONS

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Jones's capital sentence was imposed under a sentencing statute that, on its face and as applied in general and to Jones, does not comport with constitutional standards, which permitted the trial court to rely upon unconstitutionally vague and unreliable information to reach a decision in an arbitrary, unreliable and unfair manner without sufficient guidance, and which contravened the state law requirements necessary for a reliable death judgment. Specifically, Jones's rights to put the state to its proof, to due process, and to reliable death sentencing determinations were violated because: (1) the statute requires the sentencer to consider a list of factors without any explanation as to aggravation and mitigation; (2) the statute did not require that the state prove beyond a reasonable

doubt that aggravating circumstances outweigh mitigating circumstances and that the death penalty was justified under the circumstances; (3) the statute in the case did not require that the prosecution prove the existence of aggravating circumstances beyond a reasonable doubt; (4) the statute in the case was unconstitutionally vague; (5) the California capital punishment statutes fail to narrow rationally the class of death-eligible defendants; (6) the same guilt phase jury was used for the penalty phase; (7) unanimity was not required in the findings; (8) the California capital punishment scheme fails to require written findings on the aggravating factors selected by the jury, depriving Jones of his constitutional rights to meaningful appellate review of his case; (9) lethal injection is cruel and unusual punishment; and (10) requiring a person to spend many years under sentence of death constitutes cruel and unusual punishment. Additionally, (11) Jones's charging, prosecution, trial and sentence were tainted by arbitrary, impermissible and/or discriminatory factors including, but not limited to political considerations, pressure from victims' families and organizations, prosecutorial vindictiveness, and race and gender. *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). Finally, (13) the death penalty statute erroneously excludes consideration of youth, potential for rehabilitation, and a death row inmate's exemplary behavior in prison as factors in considering the basis for a sentence of life without parole as opposed to the death penalty. Further the court erred in not instructing the jurors to consider these factors, and counsel was ineffective for not presenting evidence and arguing these factors as a basis for mitigation evidence under California Penal Code Section 190.3(k).

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. The California Death Penalty Statute Fails to Narrow the Class of Offenders Eligible for the Death Penalty and Thus Violates the Eighth Amendment

4. The Eighth Amendment to the United States Constitution requires that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987), *citing Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). If a state enacts a death penalty, it "must . . . rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). To this end, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers from whom the ultimate penalty may be exacted:

> "[T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold."

McCleskey v. Kemp, 481 U.S. at 305 (1987).

5. This narrowing function must be accomplished by the Legislature through defining those categories of murderers eligible for the most severe penalty. Thus, in response to the *Furman*/*Gregg* mandate, "the States have adopted various narrowing factors that limit the class of offenders upon which the sentencer is authorized to impose the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 341, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Special circumstances were intended to define death eligibility in this state "for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." *People v. Green*, 27

Cal. 3d 1, 61, 609 P.2d 468, 164 Cal. Rptr. 1 (1980). Whether the special circumstances in the 1977 statute in fact performed the constitutionally-required narrowing function was never decided by the courts. In finding the 1977 law constitutional, the United States Supreme Court assumed that the special circumstances narrowed the class of those eligible for the death penalty, but left open the possibility that additional evidence might be presented to show that the law did not comply with the *Furman*/*Gregg* mandate. *Pulley v. Harris*, 465 U.S. 37, 53-54, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

6. Under the California death penalty scheme, the special circumstances, enumerated in California Penal Code section 190.2 and interpreted by the California Supreme Court and United States Supreme Court, are the mechanism designated to serve the function of narrowing the class of those convicted of murder to those for whom the death penalty is most appropriate. The 1977 law was superseded in 1978 by the enactment of Proposition 7 (the "Briggs Initiative"). According to its author, the initiative "would give Californians the toughest death-penalty law in the country." California Journal Ballot Proposition Analysis, 9 Calif. J. (Special Section, November 1978), at 5. The Briggs Initiative greatly expanded the number of special circumstances. At the time of Jones's prosecution, there were twenty-seven special circumstances.

7. With respect to these special circumstances, under Penal Code Section 190.2, the California Supreme Court has, on several occasions, addressed the constitutionality of particular individual special circumstances;[46] neither the

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[46] *See*, *e.g.*, *People v. Superior Court* (*Engert*), 31 Cal. 3d 797, 657 P.2d 76, 183 Cal. Rptr. 800 (1962) (holding unconstitutional subsection (a) (14) ["heinous, atrocious, or cruel"]); *People v. Coleman*, 46 Cal. 3d 749, 759 P.2d 1260, 251 Cal. Rptr. 83 (1988) (upholding subdivision (a)(17) [felony-murder]); *People v. Edelbacher*, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586, (1989) (upholding subdivision (a) (15) ["lying in wait"]); *People v. Raley*, 2 Cal. 4th 870, 830 P.2d 712, 8 Cal. Rptr. 2d 678, (1992) (upholding (a)(18) ["torture"]).

California Supreme Court, nor the United States Supreme Court, has addressed whether the California scheme as a whole complies with the *Furman*/*Gregg* mandate.[47]

8. Jones was convicted of first degree murder and sentenced to death under California Penal Code sections 187, 190.2(a)(17)(i) and (vii), and sections 190.1-190.4. The sole special circumstance rendering Jones eligible for imposition of a sentence of death was the felony-murder special circumstance, as alleged and found true under Penal Code sections 1 190.2(a)(17)(i) 7)(i) and (vii).

1. Penal Code Section 190.2 on Its Face Fails to Narrow the Class of Death-Eligible Defendants

9. In enacting the precursor of the present California Penal Code section 190.2, the voters came close to achieving their stated purposes: they gave California one of the broadest death penalty statutes in the country and assured that a substantial majority of first degree murderers (and a majority of all murderers) would be death-eligible. Because of the substantial overlap between the special circumstances listed in section 190.2 and the factors listed in Penal Code section 189 defining which murders are first degree murders, at the time of Jones's conviction, most first degree murderers were death-eligible. Further, the sweeping nature of section 189 made

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[47] In *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), Justice Blackmun emphasized that the Court has never given the California system "a clean bill of health." 114 S. Ct. at 2646, dis. opn.

> "[T]he Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first degree murder and the jury finds the existence of one "special circumstance. By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because Joness mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing."

(*Id.* [footnote omitted]; *see also*, *id.* at 2641, Stevens, J. concurring in the judgment.)

most murders first degree murders. As written and applied, the California death penalty statute potentially sweeps the great majority of murders into its grasp. More than eighty-four of adults convicted of first degree murder are potentially factually death-eligible under this scheme. At the same time, only 9.6% of those statutorily eligible were actually sentenced to death, thereby giving California a death sentence ratio of 11.4%

10. As it read at the time of Jones's conviction, section 189 created three categories of murders which were first degree murders: murders committed by one of five listed means, killings committed during the perpetration of one of twelve felonies, and murders committed with premeditation and deliberation. The overlap between the special circumstances listed in section 190.2 and the three groups of factors listed in section 189 varies according to whether the murder is intentional or unintentional.

11. In the case of intentional killings, four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances. Cal. Penal Code § 190.2, subds. (a)(4), (a)(6), (a)(15), (a)(18), (a)(19). Only a first degree murder committed by means of "knowing use of ammunition designed primarily to penetrate metal or armor" would not automatically have led to death eligibility, but Jones has been unable to locate a single case where that means was the basis for a first degree murder conviction. Five of the six felonies listed in section 189 (arson, rape, robbery, burglary and violations of section 288(a)) were also special circumstances. Cal. Penal Code § 190.2, subds. (a)(17)(i), (a)(17)(iii), (a)(17)(v), (a)(17)(vii), (a)(17)(viii). Only mayhem could have been the basis for a first degree felony-murder conviction without at the same time making the murderer death-eligible, and Jones is not aware of any reported mayhem felony-murder convictions since the passage of the Briggs Initiative.

12. The only intentional first degree murders not expressly qualifying for the death penalty were those where the first degree murder was established by proof of

premeditation and deliberation. Some such murders would have been capital murders because the defendant committed another murder (Cal. Penal Code § 190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (Cal. Penal Code § 190.2, subds. (a)(1), (a)(5), (a)(16)), or the defendant killed a particular victim (Cal. Penal Code § 190.2, subds. (a)(7)-(a)(13)). Virtually all of the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders are done while the defendant is lying in wait. Cal. Penal Code § 190.2, subd. (a)(15).

13. While there will be occasional premeditated murders not done with any of the other listed means or during the listed felonies, it would appear that the overwhelming majority of intentional first degree murderers would be death-eligible.

14. The situation is similar with regard to unintentional first degree murders. Since an unintentional killing cannot be done with premeditation and deliberation, virtually all unintentional first degree murders were such because of the first degree felony-murder rule, and, even an unintentional killing during one of the listed felonies (except mayhem) made the actual killer death-eligible. While there are occasional unintentional first degree murders based on the listed means or based on vicarious liability for a felony-murder – neither of which situations invokes the death penalty – such prosecutions are rare in comparison with ordinary felony-murders.

15. Most murders in California are first degree murders. Most murders are first degree murders primarily because of the broad interpretation of lying in wait and because of the felony-murder rule. The expansive sweep of the felony-murder rule is a product of three factors. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which are defined exceedingly broadly by statute and court decision. With regard to robbery,

the courts have given the broadest interpretation to the "force or fear " element[48] and the "immediate presence" element. With regard to burglary, California makes any (even minimal) entry into virtually any enclosed space with the intent to commit any felony or theft a burglary. Cal. Penal Code § 459.

16. Second, the felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape or as a "natural and probable consequence" of the felony. Third, the felony-murder rule is not limited in its application by normal rules of causation and applies to altogether accidental and unforeseeable deaths.

17. California's statutory scheme is particularly death-biased in felony-murder cases, such as Jones's case, because: the California felony-murder rule itself is exceedingly broad; all first degree felony-murder cases are special circumstance cases; and after rendering a first degree murder conviction and special circumstance finding based on felony-murder, the penalty jury is instructed to weigh the same felony-murder "crime circumstances" and the same felony-murder special circumstance(s) as factors in aggravation.

18. California Penal Code section 190.2's failure to genuinely narrow the class of death-eligible murderers is neither corrected nor ameliorated by California Penal Code section 190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. In practice and as a result of interpretation by the state's high court, the Section 190.3 factors have been used in ways so broadly arbitrary, capricious, and contradictory as to violate due process of law. The state court's interpretation of the Section 190.3 factors has created a process biased in favor of death that does not

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[48] *See People v. Mungia*, 234 Cal. App. 3d 1703, 286 Cal. Rptr. 394 (1991) (forceful purse snatch).

genuinely narrow the pool of murderers to those most deserving of death, and allows any conceivable circumstance of a crime – even circumstances diametrically opposite (e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was killed at home as well as the fact that a decedent was killed outside the home) – to justify the imposition of the death penalty.

2. Penal Code Section 190.2 in Practice Does Not Narrow the Class of Death-Eligible Defendants

19. The breadth of section 190.2 is more than just theoretical. An examination of the published decisions on appeals from murder convictions during the five-year period 1988-1992 confirms what is apparent from the face of the statute – section 190.2 performs no real narrowing function. Jones has identified 300 published decisions in murder cases during that period. The California Supreme Court published decisions in 153 capital cases, and that Court and the Court of Appeal published decisions in 84 other first degree murder cases and 63 second degree murder cases. In the 153 capital cases decided by the California Supreme Court during the five year period, on only one occasion did that court reverse, in whole or in part, because of insufficient evidence to support the finding of special circumstances. *People v. Morris*, 46 Cal. 3d 1, 22, 756 P.2d 843, 249 Cal. Rptr. 119 (1988).

20. An overwhelming number of first degree murder cases are, or could be, special circumstances cases, and most murders in California are first degree murders. Even without consideration of the capital cases, in ninety percent of the cases where first degree murder was found or could have been proved, special circumstances were found or could have been proved. Again, without consideration of the capital cases, in sixty-four percent of all murder cases, first degree murder with special

circumstances was, or could have been, proved.[49] When the capital cases are included in the calculation (weighted according to their overall proportion of first degree murder cases), the percentages are of course higher: based on the facts of the published murder cases, ninety-three percent of first degree murderers, and sixty-six percent of all murderers, were death-eligible. *See Shatz and Rivkind*, "The California Death Penalty Scheme: Requiem for Furman?" (1997) 72 N.Y.U.L. Rev. 1283.

3. Section 190.3, Subdivision (a)'s Specification of Special Circumstances as Factors in Aggravation Grants the Penalty Phase Jury Unbridled Discretion, Weighted in Favor of Death, in Violation of the Eighth and Fourteenth Amendments

21. In addition to the above general statutory failures, the statutory provision that a felony murder special circumstance finding may be used at the penalty phase as a factor in aggravation is another Eighth and Fourteenth Amendment violation.

22. A California penalty phase jury is instructed to weigh in aggravation of sentence any special circumstance which it found true at the guilt phase. Cal. Penal Code § 190.3, subd. (a); CALJIC 8.85. A defendant convicted of first degree murder under a felony murder theory is therefore automatically eligible for a duplicating special circumstance (Cal. Penal Code § 190.2, subd. (a)(17) et seq.) and a duplicating penalty phase aggravating factor (Cal. Penal Code § 190.3, subd. (a)), by the simple nature of the charge and prosecutorial theory underlying the original

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[49] If anything, these figures for the non-capital murder cases understate the number of first degree murder with special circumstances cases. Where the prosecution did not charge first degree murder or did not charge special circumstances, it had no incentive to offer proof which might have been available and adequate to prove the higher charge. Further, juries which refused to find special circumstances (*see*, *e.g.*, *People v. Boyd*, 222 Cal. App. 3d 541, 271 Cal. Rptr. 738 (1990)) or which rejected a first degree murder charge in favor of second degree murder (*see*, *e.g.*, *People v. Rhodes*, 215 Cal. App. 3d 470, 263 Cal. Rptr. 603 (1989)) may have simply been exercising the very unchecked discretion challenged here.

substantive offense.

23. By contrast, a defendant accused of a premeditated killing does not automatically have a built-in special circumstance. Even though premeditated murder, involving deliberation resulting in an intent to kill, is more serious than felony murder,[50] premeditated murder alone does not automatically give rise to both a special circumstance and an aggravating factor. This disparity between premeditated and felony murder is both "highly incongruous" (*State v. Cherry*, 257 S.E.2d 551, 567 (N.C. 1979); *State v. Middlebrooks*, 840 S.W.2d 317, 345 (Tenn. 1992)) and a violation of the due process clauses of the Eighth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

24. Where the homicide is felony murder, the narrowing fails to pass constitutional muster because no narrowing takes place: the special circumstances found under section 190.2, subd. (a)(17) et seq., duplicate the elements of the crimes themselves. *Furman v. Georgia*, 408 U.S. at 313 (1972) (White, J., conc.). The error is then re-emphasized, by having the jury consider the special circumstance finding as a penalty phase aggravating factor (Cal. Penal Code § 190.3, subd. (a)), creating a death-biased process, contrary to the Eighth and Fourteenth Amendments. *Stringer v. Black*, 503 U.S. 222, 233, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

4. More Particular Statistics on the Failure to Narrow

25. Interpretations of California's death penalty statute by the California Supreme Court and the United States Supreme Court have placed the burden of narrowing the class of murderers to those most deserving of death on California Penal Code section 190.2, the "special circumstances" section of the statute. Yet that statute contained twenty-six crimes punishable by death at the time of Jones's crime and, according to the voter's pamphlet describing the statute, was specifically enacted

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[50] A defendant's intent and therefore moral guilt (*Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)) are critical to a determination of death penalty suitability. *Id.* at 800-01.

for the purpose of making every murderer eligible for the death penalty.[51]

26. In California, during the thirteen year period from 1980-1992 (a period including the year of the capital offense charged against Jones), approximately 9.6% of convicted first degree murderers were sentenced to death. (Ex. 158, Decl. of Stephen F. Shatz, ¶ 6 [originally filed as an exhibit in the case of *In Re Isaac Gutierrez, Jr.*, Cal. Sup. Ct. No. S106745 (petition for writ of habeas corpus filed May 15, 2002)].) Under the California scheme, the class of first degree murderers is narrowed to a statutorily death-eligible class by the special circumstance provisions set forth in California Penal Code section 190.2. *People v. Bacigalupo*, 6 Cal. 4th 457, 467-68, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993).[52] There are, however, so many special circumstances, so broadly construed, that the special circumstances accomplish very little narrowing.

27. Under the death penalty scheme in effect in 1986, approximately eighty-three percent of first degree murder cases were special circumstance murders. (Ex. 158, Decl. of Stephen F. Shatz, ¶ 28.)[53] Thus, only 11.6% of the statutorily death-

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[51] Section 190.2's all-embracing special circumstances were created with an intent to make the death penalty apply to nearly every murderer. Such intent directly violates the constitutional requirement that capital sentencing legislation define and circumscribe the class of persons eligible for the death penalty. In fact, section 190.2 neither defines nor circumscribes, thereby catching within its net almost every person who has committed a first degree murder.

[52] There is some slight additional narrowing as a result of the exclusion of minors. Cal. Penal Code § 190.5. Professor Shatz's analysis takes into account this slight additional narrowing. (Ex. 158, Decl. of Stephen F. Shatz ¶ 28.)

[53] Professor Shatz's data and analysis in the Gutierrez declaration are based on the statutory listing of special circumstances and the statutory definition of first degree murder in 1986, the year of the crime charged against Gutierrez. (Ex. 158, Decl. of Stephen F. Shatz, ¶ 9.) The changes to the relevant statutory provisions, Penal Code sections 189 and 190.2, between 1986 and 1990 (which includes the year of the capital crime charged against Jones) in no way undermine the applicability of

eligible class of first degree murderers were in fact being sentenced to death. (Ex. 158, Decl. of Stephen F. Shatz, ¶ 29.) A statutory scheme under which eighty-three percent of first degree murderers are death-eligible does not "genuinely narrow." *See Wade v. Calderon*, 29 F.3d 1312, 1319 (1993). Further, since only 11.6% of those statutorily death-eligible are sentenced to death, California's death penalty scheme permits an even greater risk of arbitrariness than the schemes considered in *Furman*, and, like those schemes, is unconstitutional.

28. Empirical evidence shows that this goal of making every murderer eligible for the death penalty has largely been achieved. A survey of published and unpublished decisions from 1988 through 1992, establishes that 84 percent of first degree murder cases are factually special circumstance cases under the present version of section 190.2, thus rendering such murderers death-eligible. (Ex. 158, Decl. of Stephen F. Shatz.)

29. The real breadth of the special circumstance categories is not in the number of categories alone or in the number that produce death sentences, but in two factors which, in combination, make California's scheme exceptional. First, California, along with only seven other states (Florida, Georgia, Maryland,

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Professor Shatz's data and analysis to Jones's case. The statutory definition of first degree murder was expanded to include murders in the perpetration of, or attempt to perpetrate, kidnapping, train wrecking, or acts punishable under Penal Code section 286, 288a, or 289 (see § 189), but as to each of these new categories of first degree murder there either already existed, or there was added a new corresponding special circumstance. (*See* Penal Code sections 190. 2, subd. (a)(17), (ii) [kidnaping], (iv) [§ 286], (vi) [§ 288a], (ix) [train wrecking]; and (xi) [§ 289]; added in 1990). Further, a new special circumstance covering a previously existing category of first degree murder was added (Penal Code § 190.2, subd. (a)(17)(x) [mayhem]) and the "intent to kill" requirement for felony-murder accomplices was eliminated (Penal Code § 190.2, subd. (d)). Thus, the overlap between the statutory definitions of first degree murder and the special circumstance provisions was even more complete in 1990 (and by implication, in 1989, the year of the capital offense in Jones's case) than in 1986, and even less narrowing was likely to occur.

Mississippi, Montana, Nevada, and North Carolina) makes felony-murder *simpliciter* a narrowing circumstance. *See People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987). Although the felony-murder language of California Penal Code section 189 is not identical to the special circumstance language, in application there is no difference. *See People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874, (1990). Second, California, along with only three other states (Colorado, Indiana and Montana), makes "lying-in-wait" a "narrowing" circumstance. Cal. Penal Code § 190.2(a)(15). As interpreted by the California Supreme Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony-murder and lying in-wait death-eligibility circumstances and, unlike California's numerous and broad felony-murder special circumstances, Montana's felony-murder narrowing circumstances encompass only two felonies aggravated kidnaping and sexual assault on a minor. *See* Mont. Code Ann. § 46-18-303(7), (9) (1995).

30. The breadth of California Penal Code section 190.2 is more than just theoretical. Empirical evidence confirms what is evident from the face of the statute: a survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappealed murder conviction cases filed during the same period in three counties (Alameda, Kern, and San Francisco), demonstrates that California Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. (Schatz and Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L.Rev. 1283, 1328-35 (1997); Ex. 158, Declaration of Steven F. Shatz.) As Professor Shatz's declaration shows, the results were essentially the same for 1989, the year in which Jones's capital offense occurred.

31. The results of this study of published appeals from first degree murder convictions make clear the following points: (1) The overwhelming majority (ninety-

two percent) of non-death judgment first degree cases are also factually special circumstance cases. (2) The felony-murder special circumstances play the predominant role in defining death-eligibility in the California scheme. One or more of the felony-murder special circumstances was proved in almost three-quarters (seventy-four percent) of the death judgment cases and in sixty percent of the other actual or potential special circumstance cases. (Ex. 158, Decl. of Stephen F. Shatz.)

32. The results of this study of unpublished appeals from first degree murder convictions generally confirm the data for the published cases. Again, the overwhelming majority (eighty-five percent) of first degree murder cases are factually special circumstance cases, with the majority of the special circumstance cases being felony-murder cases. The distribution of special circumstances closely tracks the distribution in the published non-death judgment first degree murder cases. (Ex. 158, Decl. of Stephen F. Shatz.)

33. The published case sample indicates that ninety-two percent of non-death judgment first degree murder cases are factually special circumstance cases, while the unpublished case sample puts the number at eighty-five percent. When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases, and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately eighty-seven percent of first degree murder cases are factually special circumstance cases. Thus, approximately seven out of eight first degree murder cases are factually special circumstances cases, the majority of first degree murders are felony murders, and felony murders are virtually all special circumstance murders. Accordingly, California's felony murder special circumstances alone defeat any possibility of genuine narrowing. (Ex. 158, Decl. of Stephen F. Shatz.)

34. The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of section 190.2, but also by California Penal

Code section 190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime. When juvenile first degree murderers are excluded from the calculation, the result is that more than eighty-four percent of first degree murderers are statutorily death-eligible under California Penal Code section 190.2. (Ex. 158, Decl. of Stephen F. Shatz.)

35. Professor Shatz' study demonstrates that California Penal Code section 190.2 fails to genuinely narrow the group of murderers who may be subject to the death penalty and does not address the risk of arbitrariness prohibited by the Eighth and Fourteenth Amendments. According to this study, only 9.6 percent of those statutorily death-eligible under California's death penalty scheme are actually sentenced to death. If eighty-four percent of first degree murderers are statutorily death-eligible, and only 9.6 percent are sentenced to death, California has a death sentence ratio of 11.6 percent. This ratio is significantly below the assumed percentage of death judgments at the time of *Furman* (fifteen to twenty percent), a percentage impliedly found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment. That is, the California scheme under which Jones was convicted and sentenced to death imposed death sentences in cases where it was authorized even more infrequently than in *Furman*, and therefore, in violation of the Eighth Amendment. (Ex. 158, Decl. of Stephen F. Shatz.)

36. Professor Steven F. Shatz has completed an even more recent study that confirms the conclusions of his prior research showing that California's death penalty scheme fails to meaningfully narrow the class of murderers who are death-eligible. His latest study covered murder conviction cases in Alameda County involving murders committed during the period of November 8, 1978 to November 7, 2001. (Ex. 182, Decl. of Steven F. Shatz.) Looking at over 803 murder conviction cases, Professor Shatz found that the death sentence rate for convicted first degree murderers who were death-eligible "was approximately 12.6% during the study

period." (*Id.* at ¶¶ 11-12.) The death sentence rate for defendants, like Jones, convicted of first degree murder with a robbery special circumstance, was only 4.5%. (*Id.* at ¶ 16.) This is similar to the rate of 5.5% found in the statewide study conducted by Professor Shatz and detailed in the Petition. (*See* Ex. 158.) As explained in the Petition, a statutory scheme where death-eligibility is so broadly defined that fewer than fifteen percent of death-eligible murderers are actually sentenced to death fails to genuinely narrow and creates an unconstitutional risk of arbitrariness.

37. Because almost all first degree murders in California fall within the special circumstances enumerated in California Penal Code section 190.2, the death penalty statute fails to genuinely narrow the class of death-eligible murderers in violation of the Eighth and Fourteenth Amendments. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. Under California's death penalty scheme, there is no meaningful basis to distinguish the cases in which the death penalty is imposed. California's scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes.

38. California Penal Code section 190.2's failure to narrow the death-eligible class is neither corrected nor ameliorated by controls at other points in the process.

39. For instance, California Penal Code section 190.2's failure to genuinely narrow the class of death-eligible murderers is neither corrected nor ameliorated by California Penal Code section 190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. The purpose of this statute, according to its language and interpretations by both the California and United States Supreme Courts, is to inform the jury of what

factors it should consider in assessing the appropriate penalty. In actual practice, it has been used in ways so arbitrary and contradictory as to violate due process of law.

B. Section 190.3 and the Related Penalty Phase Instructions, as Read at Jones's Trial, Violated His Constitutional Rights

1. Unconstitutionally Vague Sentencing Statute

40. A capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. *Furman v. Georgia*, 408 U.S. at 239-40, 255-57, 309-10, 314 (1972). The jury must be " . . . given guidance about the crime . . . that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. at 196, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). *Furman* and *Gregg* require that " . . . the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case . . . " justify the sentence. *McCleskey v. Kemp*, 481 U.S. at 305, 107 S. Ct. 1756, 95 L. Ed. 2d 282 (1987).

41. It follows that a sentencing statute or jury instructions which, as here, merely instruct the sentencer to look at vague categories, without attempting any further limitation or guidance, are unconstitutionally vague. *See*, *e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 363, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 429-33, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Stringer v. Black*, 503 U.S. at 245, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) (prohibition on vagueness also applicable to aggravating factors that are weighed by the jury in making its penalty decision in "weighing states" like California). In this case, the trial court failed its constitutional duties by reading instructions which left the jurors unguided and untethered in their penalty adjudication.

42. At Jones's penalty trial, the court instructed the jury with standard jury instructions to explain the capital sentencing task. These instructions were constitutionally flawed for the same reasons as the statutory provisions on which they

were based, and because of other reasons.

2. Factor (a): Circumstances of the Crime

43. Factor (a) failed to identify any aspect of the underlying offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited each juror to personally determine why he or she was most offended by the crime, and use that perception as a reason for aggravation, without any reference to any objective standard. A sentencer may not impose a death sentence merely by looking at the circumstances of the crime with no guiding principles whatsoever.

44. Factor (a) of the statutory scheme contains an inherent bias and presumption in favor of death, is vague and ambiguous and creates a standardless sentencing process in violation of a capital defendant's rights under the Sixth, Eighth and Fourteenth Amendments to have a jury determine his or her penalty and to an individualized and reliable sentence. The inclusion of both the "circumstances of the offense" and the "existence of special circumstances" as factors to be considered in aggravation means that aggravation is automatically present in every case, creating a presumption and bias in favor of death. The absence of a limiting instruction to factor (a) results in those phrases, and factor (a), being unconstitutionally vague under the Eighth Amendment and authorizes an utterly standardless penalty deliberation process, rendering the entire sentencing scheme invalid under *Furman v. Georgia*, 408 U.S. 238.

45. The "circumstance of the crime" aggravating factor is broad enough to include a defendant's purported "hatred of religion,"[54] or evidence that three weeks

[54] *People v. Nicolaus*, 54 Cal. 3d 551, 581-82, 817 P.2d 893, 286 Cal. Rptr. 628 (1991).

after the crime defendant sought to conceal evidence,[55] or threatened witnesses after his arrest,[56] or disposed of the decedent's body in a manner that precluded its recovery.[57]

46. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

(a) Because the defendant struck many blows and inflicted multiple wounds,[58] or because the defendant killed with a single execution-style wound.[59]

(b) Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[60] or because the defendant killed the victim without any motive at all.[61]

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[55] *People v. Walker*, 47 Cal. 3d 605, 639 n.10, 765 P.2d 70, 253 Cal.Rptr. 863 (1988).

[56] *People v. Hardy*, 2 Cal. 4th 86, 204, 825 P.2d 781, 5 Cal. Rptr. 2d 796 (1992).

[57] *People v. Bittaker*, 48 Cal. 3d 1046, 1110 n.35, 774 P.2d 659, 259 Cal. Rptr. 630 (1989).

[58] *See*, *e.g.*, *People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, Cal. Sup. Ct. No. S004762, RT 36-38 (same); *People v. Lucas*, Cal. Sup. Ct. No. S004788, RT 2997-98 (same); *People v. Carrera*, Cal. Sup. Ct. No. S004569, RT 160-61 (same).

[59] *See*, *e.g.*, *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, Cal. Sup. Ct. No. S004761, RT 3026-27 (same).

[60] *See*, *e.g.*, *People v. Howard*, Cal. Sup. Ct. No. S004452, RT 6772 (money); *People v. Allison*, Cal. Sup. Ct. No. S004649, RT 968-69 (same); *People v. Belmontes*, Cal. Sup. Ct. No. S004467, RT 2466 (eliminate a witness); *People v.*

(c) Because the defendant killed the victim in cold blood[62] or because the defendant killed the victim during a savage frenzy.[63]

(d) Because the defendant engaged in a cover-up to conceal his crime,[64] or because the defendant did not engage in a cover-up and so must have been proud of it.[65]

(e) Because the defendant made the victim endure the terror of anticipating a violent death[66] or because the defendant killed instantly without any

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Coddington, Cal. Sup. Ct. No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, Cal. Sup. Ct. No. S004309, RT 2553-55 (same); *People v. Brown*, Cal. Sup. Ct. No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, Cal. Sup. Ct. No. S004379, RT 31 (revenge).

[61] *See*, *e.g.*, *People v. Edwards*, Cal. Sup. Ct. No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, Cal. Sup. Ct. No. S005233, RT 3650 (same); *People v. Hawkins*, Cal. Sup. Ct. No. SO 14199, RT 6801 (same).

[62] *See*, *e.g.*, *People v. Visciotti*, Cal. Sup. Ct. No. SO04597, RT 3296-97 (defendant killed in cold blood).

[63] *See*, *e.g.*, *People v. Jennings*, Cal. Sup. Ct. No. S0O4754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[64] *See*, *e.g.*, *People v. Stewart* No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, Cal. Sup. Ct. No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, Cal. Sup. Ct. No. S004464, RT 4192 (defendant did not seek aid for victim).

[65] *See*, *e.g.*, *People v. Adcox*, Cal. Sup. Ct. No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, Cal. Sup. Ct. No. S004365, RT 3030-31 (same); *People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3093 (defendant failed to engage in a cover- up).

[66] *See*, *e.g.*, *People v. Webb*, Cal. Sup. Ct. No. S006938, RT 5302; *People v. Davis*, Cal. Sup. Ct. No. S014636, RT 11125; *People v. Hamilton*, Cal. Sup. Ct. No. S004363, RT 4623.

warning.[67]

(f) Because the victim had children,[68] or because the victim had not yet had a chance to have children.[69]

(g) Because the victim struggled prior to death,[70] or because the victim did not struggle.[71]

(h) Because the defendant had a prior relationship with the victim,[72] or because the victim was a complete stranger to the defendant.[73]

47. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

(a) The age of the victim. Prosecutors have argued, and juries were

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[67] *See*, *e.g.*, *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, Cal. Sup. Ct. No. S004767, RT 2959 (same).

[68] *See*, *e.g.*, *People v. Zapien*, Cal. Sup. Ct. No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[69] *See*, *e.g.*, *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16752 (victim had not yet had children).

[70] *See*, *e.g.*, *People v. Dunkle*, Cal. Sup. Ct. No. SO 14200, RT 3812 (victim struggled); *People v. Webb*, Cal. Sup. Ct. No. S006938, RT 5302 (same); *People v. Lucas*, Cal. Sup. Ct. No. S004788, RT 2998 (same).

[71] *See*, *e.g.*, *People v. Fauber*, Cal. Sup. Ct. No. SO05868, RT 5546-47 (no evidence of struggle); *People v. Carrera*, Cal. Sup. Ct. No. S004569, RT 160 (same).

[72] *See*, *e.g.*, *People v. Padilla*, Cal. Sup. Ct. No. S014496, RT 4604 (prior relationship); *People v. Waidla*, Cal. Sup. Ct. No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal. 3d 648, 717, 802 P.2d 278, 276 Cal. Rptr. 788, (1990).

[73] *See*, *e.g.*, *People v. Anderson*, Cal. Sup. Ct. No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, Cal. Sup. Ct. No. S004712, RT 4264 (same).

free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[74]

(b) The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[75]

(c) The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[76]

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[74] *See*, *e.g.*, *People v. Deere*, Cal. Sup. Ct. No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, Cal. Sup. Ct. No. S004565, RT 10075 (victims were adolescents, ages 14, 15, and 17); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16752 (victim was 20); *People v. Phillips*, 41 Cal. 3d 29, 63, 711 P.2d 423, 444 (1985) (26-year-old victim was "in the prime of life"); *People v. Samayoa*, Cal. Sup. Ct. No. S006284, RT 49 (victim was an adult "in her prime"); *People v. Kimble*, Cal. Sup. Ct. No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, Cal. Sup. Ct. No. S0045 18, RT 4376 (victim was 77); *People v. Bean*, Cal. Sup. Ct. No. S004387, RT 47 15-16 (victim was elderly).

[75] *See*, *e.g.*, *People v. Clair*, Cal. Sup. Ct. No. S004789, RT 2474-45 (strangulation); *People v. Kipp*, Cal. Sup. Ct. No. S004784, RT 2246 (same); *People v. Fauber*, Cal. Sup. Ct. No. S005868, RT 5546 (use of an ax); *People v. Benson*, Cal. Sup. Ct. No. S004763, RT 1149 (use of a hammer); *People v. Cain*, Cal. Sup. Ct. No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, Cal. Sup. Ct. No. SO 1723, RT 8075-76 (use of a gun); *People v. Reilly*, Cal. Sup. Ct. No. S004607, RT 14040 (stabbing); *People v. Scott*, Cal. Sup. Ct. No. S01O334, RT 847 (fire).

[76] *See*, *e.g.*, *People v. Howard*, Cal. Sup. Ct. No. S004452, RT 6772 (money); *People v. Allison*, Cal. Sup. Ct. No. S004649, RT 969-70 (same); *People v. Belmontes*, Cal. Sup. Ct. No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, Cal. Sup. Ct. No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, Cal. Sup. Ct. No. S004309, RT 2553-55 (same); *People v. Brown*, Cal. Sup. Ct. No. S004451, RT 3544 (avoid arrest); *People v. McLain*, Cal. Sup. Ct. No S004370, RT 31 (revenge); *People v. Edwards*, Cal. Sup. Ct. No. S004755, RT 10544

(d) The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[77]

(e) The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[78]

48. The foregoing examples of how the factor (a) aggravating circumstance is applied in practice make clear that every prosecutor relies upon it in every case without limitation. Juries consider, and prosecutors have been permitted to turn entirely opposite facts, or facts that are inevitable variations of every homicide, into aggravating factors which the jury is urged to weigh on death's side of the scale.

49. Additionally, pursuant to California Penal Code section 190.3(a), a California penalty phase jury is instructed to weigh in aggravation of sentence any special circumstance which it found true at the guilt phase. Cal. Penal Code § 190.3(a); CALJIC No. 8.84.1. And, after a first degree murder conviction and special circumstance finding based on felony-murder, the penalty phase jury is instructed to weigh the same felony-murder "crime circumstances" and the same

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(no motive at all).

[77] *See*, *e.g.*, *People v. Fauber*, Cal. Sup. Ct. No. SO05868, RT 5777 (early morning); *People v. Bean*, Cal. Sup. Ct. No. S004387, RT 4715 (middle of the night); *People v. Avena*, Cal. Sup. Ct. No. S004422, RT 2603-04 (late at night); *People v. Lucero*, Cal. Sup. Ct. No. S012568, RT 4 125-26 (middle of the day).

[78] *See*, *e.g.*, *People v. Anderson*, Cal. Sup. Ct. No. S004385, RT 3167-68 (victim's home); *People v. Cain*, Cal. Sup. Ct. No. S006544, RT 6787 (same); *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, Cal. Sup. Ct. No. S004723, RT 7340- 41 (city park); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16749-50 (forested area); *People v. Comtois*, Cal. Sup. Ct. No S0171 16, RT 29760 (remote, isolated location).

felony-murder special circumstance(s) as factors in aggravation. Thus, a defendant convicted of first degree murder under a felony-murder theory is therefore automatically eligible for a duplicating special circumstance (Cal. Penal Code § 190.2(a)(17), et seq.) and a duplicating penalty phase aggravating factor (Cal. Penal Code § 190.3(a)) by the nature of the charge.

50. By contrast, a defendant accused of a premeditated killing does not automatically have a built-in special circumstance. Something more must be found to make that defendant eligible for death, and to support a sentencer's decision to impose death. This disparity between premeditated and felony-murder is incongruous, and violates the due process guarantees of the Eighth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

51. California's effort to comply with the Eighth Amendment's narrowing requirement by special circumstances findings fails because the special circumstance of a felony-murder. Cal. Penal Code § 190.2(a)(17), et seq. duplicates exactly the elements of the underlying crime. The effect of this flaw is augmented by having the jury consider the special circumstance finding as a penalty phase aggravating factor. Cal. Penal Code § 190.3(a). This triple use of facts in a capital felony-murder case violates the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourteenth Amendment's due process clause, and the enhanced capital case due process protection of both. This is a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

52. This portion of the instructions also violated the Eighth Amendment's reliability requirements,[79] state and federal constitutional guarantees of due process,

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[79] Factor (a) was also unconstitutionally vague under the less rigorous due process clause standards, which require that state statutes give clear notice of the conduct prohibited so that the parties can prepare to meet the charge. *See*, *e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939). When a state statute contains terms not "susceptible of objective measurement," with

the requirement that a jury be given clear and objective standards so that it may have proper guidance in its capital sentencing determination, the requirement that the jury not engage in arbitrary or capricious decision-making, the requirement that said process be designed so as to be rationally reviewable and the prohibitions against cruel and/or unusual punishments.

3. Factor (b): The Presence or Absence of Criminal Activity by the Defendant Which Involved the Use or Attempted Use of Force or Violence

53. In addition to the CALJIC No. 8.85's instruction on "the circumstances of the crime" under factor (a), the penalty jury was directed to consider "criminal activity by the defendant" as aggravation, under factor (b). This instruction was unconstitutionally vague in the same ways as the factor (a) instruction. The instruction afforded the jurors no guidance or limitations as to how to evaluate the evidence and was standardless, arbitrary, subjective and weighted toward death. The Eighth Amendment requires death penalty statutes to provide objective, specific guidelines which control the sentencer's discretion. *Maynard v. Cartwright*, 486 U.S. at 356; *Godfrey v. Georgia*, 446 U.S. at 420.

54. At Jones's trial, factor (b) allowed the jury to impose death, at least in part, on the basis of " . . . criminal activity by the defendant which involved the use or attempted use of force or violence . . . " The trial court did not give guidelines or place limits on this factor, or instruct the jury on the elements of the potentially relevant crimes, or define violence or force. Absent such directions, the jurors could

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no reference to a "specific or definite act," it is unconstitutionally vague under the due process clause. *See*, *e.g.*, *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961). Here, the phrase "circumstances of the crime" gives no notice as to what "specific or definite acts" to rebut in order to forestall a death sentence. Indeed, the phrase is so broad and incapable of definition that it is impossible to rebut this aggravating factor.

not have determined whether Jones's conduct constituted a violation of a particular penal statute. Rather, without guidance, the uninstructed jurors were free to impose the death penalty on the basis of whether the conduct struck them subjectively and individually as "criminal" and "violent."

55. Therefore, factor (b) did not constitute the "objective standard" that properly channels the sentencer's discretion. Factor (b) necessarily allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what constitutes criminal and/or violent conduct and how serious that conduct. This is arbitrary and capricious sentencing forbidden by the Eighth and Fourteenth Amendments. Absent instructions defining the elements of the relevant criminal activity and the meanings of "force" and "violence," and guidance and limitations in evaluating the same, reliance on factor (b) as a basis for imposing the death sentence was unconstitutional.

4. The Trial Court Refused to Define Youth, Factor (i), and Absence of Prior Felony Convictions, Factor (c), as Mitigating Factors

56. Jones was born June 13, 1970 (CT 998) and was barely eighteen years old at the time of Weeks's death. Factor (i), therefore, could only refer to Jones's youth at the time of the crime. The Supreme Court has held that, per the Eighth and Fourteenth Amendments, " . . . one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age . . . " *Stanford v. Kentucky*, 492 U.S. 361, 375 n.5, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

57. The California Supreme Court has held that age is a metonym for any age-related matter and may be used either in aggravation or mitigation, because age alone is not a factor over which a defendant may exercise control. *People v. Lucky*, 45 Cal. 3d 259, 302, 753 P.2d 1052, 247 Cal. Rptr. 1 (1985); *People v. Edwards*, 54 Cal. 3d 787, 839, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991) (age can mitigate or aggravate in the same case, depending on the jurors' personal perspective).

58. As a matter of constitutional law, the youth of Jones should not have

been viewed as anything other than mitigating. In *Roper v. Simmons*, 125 S. Ct. 1183, 2005 WL 464890 (2005), the Supreme Court exempted defendants from execution for crimes committed as juveniles, citing their "lack of maturity and underdeveloped sense of responsibility" (*id.* at 1195) and their increased vulnerability and susceptibility "to negative influences and outside pressures, including peer pressure." *Id.* The Court concluded that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* (quotation omitted.) The Court rejected the argument that juveniles should have to litigate the propriety of capital punishment in individual cases, noting that:

> In some cases, a defendant's youth may even be counted against them. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address out larger concerns.

Id. at 1197.

59. In this case, the trial court should have adopted "a particular rule to ensure that the mitigating force of youth is not overlooked." *Simmons*, 125 S. Ct. at 1197. However, the court failed to do so. As a consequence, the prosecutor was able to argue that "[Jones's] age was at best a neutral factor . . . age is nothing more than a chronological statement of how long he's been here in this earth. That's all it is. It doesn't mean anything other than that." (RT 3779.) This "sort of overreaching", which was condemned by the Supreme Court in *Simmons*, 125 S. Ct. at 1997, deprived Jones of his constitutional right to have the jury consider his young age as a mitigating factor. *Stanford v. Kentucky*, 492 U.S. at 375 n.5.

60. Although it might be argued that Jones's very young age of eighteen and

lack of sophistication should be self-evidently mitigating to any reasonable person, and could not be considered aggravating, the failure to limit consideration of age to mitigation, particularly regarding an eighteen year old, invited the jury to impose death based on a constitutionally vague factor in a constitutionally arbitrary, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. at 192; *Stringer v. Black*, 503 U.S. at 237; *Zant v. Stephens*, 462 U.S. 862, 865, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

5. In Accordance With the 1978 Death Penalty Law, the Trial Court Refused to Define Mental Illness as a Mitigating Factor: Factors (d), (e), and (h)

61. The version of CALJIC 8.85 which the court used, instructed the jury that factor (d) could be considered either aggravating or mitigating. This aspect of the instruction has three constitutional deficiencies.

62. First, the California Supreme Court has previously defined factor (d) as purely a mitigating factor. *People v. Davenport*, 41 Cal. 3d 247, 288, 710 P.2d 861, 221 Cal. Rptr. 794 (1985). The threshold problem with the standard CALJIC instruction is that, absent an explicit limitation of factor (d) to mitigation, jurors may well consider it in aggravation. Mental or emotional instability is not a factor which jurors will automatically or intuitively understand as mitigating in nature; they may well conclude that it is indicative of defendants future dangerousness and therefore aggravating. This aspect, standing alone, violates the Eighth Amendment.

63. The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. *Stringer v. Black*, 503 U.S. at 237. Such terminology permits an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and those in which it is not. *Maynard v. Cartwright*, 486 U.S. at 361-62. A

sentence based on such vague instructions is unreviewable, in violation of the Eighth and Fourteenth Amendments.

64. The second problem with the standard CALJIC instruction, assuming the jury understood factor (d) to be mitigating, is its specification that only "extreme" mental illness may be considered. The same is true for the use of the term "substantial" for factor (e). Such a term acts as a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and provisions of the state constitution. *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); *Lockett v. Ohio*, 438 U.S. 586, 608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

65. A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. *Mills v. Maryland*, 486 U.S. at 374; *Lockett v. Ohio*, 438 U.S. at 604. The "extreme" adjective preceding "mental or emotional disturbance" created a barrier to the jury's full consideration and assignment of mitigating weight to Jones's evidence, in violation of these authorities.

66. The third problem with factor (d) is that "extreme" requires the sort of subjective, vague, arbitrary, unreviewable determination by each juror as to what level of mental illness is adequate for consideration that has consistently been found constitutionally unacceptable. *Maynard v. Cartwright*, 486 U.S. at 363-64 ("especially"); *Shell v. Mississippi*, 498 U.S. 1, 4, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). For a capital sentencing scheme to be consistent with Eighth Amendment mandates, "the jury must be able to consider and give effect to *any* mitigating evidence relevant to a defendant's background and character or the circumstance of the crime." *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (emphasis added). By requiring that mental or emotional disturbance be "extreme" before it can be considered as a factor in mitigation, factor (d) improperly limited the jury's ability to consider as a mitigating factor evidence that Jones was suffering from mental or emotional disturbance other than an "extreme" disturbance.

It is reasonably likely that factor (d) was applied by the jury in a way that prevented the consideration of constitutionally relevant evidence.

67. The jury instructions on factor (d) alone and considered together with the penalty instructions as a whole, constituted a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. at 192; *Godfrey v. Georgia*, 446 U.S. at 428-29; *Stringer v. Black*, 503 U.S. at 237; *Zant v. Stephens*, 462 U.S. at 865.

6. The Factors Listed in Section 190.3 and CALJIC No. 8.85 are All Unconstitutionally Vague and Arbitrary

68. All of the factors in California Penal Code section 190.3 and CALJIC No. 8.85 as read to the jury fail constitutional scrutiny, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness. Both on its face and in the context of Jones's case, section 190.3's factors provided the jury the same unguided, limitless, unreviewable discretion held constitutionally inadequate in *Furman v. Georgia*, 408 U.S. at 295. This conclusion is reinforced by *Stringer v. Black*, 503 U.S. at 237, where the United States Supreme Court held that, in a weighing state (such as California), vague aggravating factors create a risk of randomness in sentencing decision making and create a bias in favor of death. The factors listed in section 190.3 and CALJIC No. 8.85, as read at Jones's trial, failed to guide or limit the jury's discretion, made the jury death-biased, created the impermissible risk that vaguely defined factors resulted in the arbitrary selection of Jones for execution, and afford no meaningful basis on which this Court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

69. For example, sentencing factor (k) impermissibly limited the jury's ability to consider evidence in mitigation. The factor (k) instruction directed the fact finder to consider only these additional types of mitigation evidence: "Circumstances that extenuate the gravity of the" capital offense even if the circumstance would not

be a defense; mitigation evidence offered by the defendant concerning his character; and mitigation offered by the defendant concerning his record.

70. A fact finder may not be limited in the evidence it may consider in mitigation. *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). Because the trial court did not state that it could and did consider all additional mitigation evidence, the factor "K" instruction unconstitutionally limited the types of mitigation evidence that the jury could consider, in violation of Jones's constitutional rights guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

7. The Trial Court Failed to Delete Inapplicable Mitigating Factors in Violation of the Eighth and Fourteenth Amendments

71. If the jury is to base its decision on all relevant sentencing factors raised by the evidence, then it must be instructed which relevant factors are raised by the evidence and that those are the only factors to be considered. To the contrary, the jurors here were essentially instructed that all factors were mandatory, but each juror was nonetheless left on his/her own to determine whether said factors were aggravating or mitigating. These instructions essentially, improperly told the jurors to consider mitigating factors which were clearly inapplicable, giving rise to the equally clear message that the absence of evidence regarding a mitigating factor equaled aggravation. These instructions violated the requirement that rational, objective criteria guide the sentencer's discretion and created an impermissible risk of arbitrary and capricious decision making. *McCleskey v. Kemp*, 481 U.S. at 301-03.

72. Furthermore, by the instruction's encouraging abstract, irrelevant considerations of the inapplicable factors in sentencing, Jones was deprived of his constitutional rights to an individualized sentencing determination (and meaningful appellate review of that sentence) based only on the factors about the crime and the defendant . . . [that are] particularly relevant . . ." *Gregg v. Georgia*, 428 U.S. at 192, and the Eighth and Fourteenth Amendment's heightened level of due process and

requirement of heightened reliability in capital case. *Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

73. Finally, the language of the statute and instruction could lead a reasonable juror to conclude that the "whether or not" language preceding factors (d), (e), (f), (g), (h) and (j) as read means either of two equally erroneous propositions: (1) that those factors are always applicable and must be either aggravating or mitigating, or (2) that said factors are always irrelevant, as "whether or not" is commonly used as "irrespective of . . . " a given matter. Furthermore, because this phrase precedes some factors which can only properly be considered in mitigation, interpretation (1) erroneously transformed mitigating factors into aggravating ones. Vagueness in the statute and instruction undoubtedly lead to such erroneous interpretations and impermissibly tilted the sentencing decision toward death, based on entirely irrelevant factors, in violation of the Eighth and Fourteenth Amendments. *Stringer v. Black*, 503 U.S. at 237.

8. California's Capital Sentencing Statute Requires the Sentencer to Consider a List of Factors Without Any Explanation as to Whether They are Aggravating or Mitigating Factors

74. California's capital sentencing statute requires the sentencer to consider a unitary list of factors without any explanation as to which factors, if any, are aggravating or mitigating. As a whole, the statute thus allows the sentencer complete discretion to decide whether and for what reasons a defendant should die. In the present case, the failure to label each factor as aggravating or mitigating by the sentencer as it applied to Jones rendered the statute as applied unconstitutionally vague, arbitrary and capricious, because the sentencer was left without meaningful or principled guidance as to the meaning and application of the factors. *Maynard v. Cartwright*, 486 U.S. at 359; *Godfrey v. Georgia*, 446 U.S. at 427-28. It also allowed the sentencer to consider, in aggravation, factors such as age, mental or emotional disturbance and drug use or impairment which may constitutionally be considered

only in mitigation. *Zant v. Stephens*, 462 U.S. at 885. The statutory procedure rendered the sentencing process unreliable, in contravention of the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 17 of the California Constitution.

75. The listing of all aggravating and mitigating factors for a jury, rather than identifying the aggravating circumstances for which there was evidentiary support in the particular case, results in the inclusion of irrelevant factors without evidentiary support, and directs the jury's attention from the individualized assessment which a death judgment requires.

76. The unitary list of factors permits the sentencer to consider, as aggravating factors, such circumstances as mental disease or intoxication [factor (h)], and the level of defendant's participation in the crime [factor (j)], which properly should count only as mitigating, resulting in a denial of due process and a reliable sentence.

77. The provision of the statutory sentencing scheme that the sentencer "shall take into account . . . if relevant . . . " certain enumerated factors, including "whether or not" factors (d) through (h) and/or (j) exist, fails to provide the detailed guidance required by the Constitution, since in every capital trial each of the factors to be considered either exists or does not.

78. The use of a unitary list also improperly allowed the jury to consider the absence of statutory mitigating factors as aggravating factors, and, per the prosecutor's argument, the presence of two mitigating factors (alcohol usage and family relationships/life history) as aggravating, and the presence of a third mitigating factor (youth) as canceling out a fourth (lack of prior felonies).

79. The unconstitutional vagueness of section 190.3 and CALJIC No. 8.85's unitary list therefore gave the jury no guidance whatsoever, permitted and encouraged the prosecutor to manipulate the putatively mitigating factors to suit his own ends (including the conversion of mitigating evidence to aggravating evidence), and

allowed the penalty decision process to deteriorate into a standardless, confused, subjective, arbitrary and unreviewable determination for each juror, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

80. Additionally, California Penal Code section 190.3 and CALJIC No. 8.85 are unconstitutionally vague in failing to limit the jury to consideration of specified factors in aggravation; they fail to guide the jury, permit the prosecutor to argue non-statutory matters as evidence in aggravation and allow the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable enterprise manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. at 192; *Godfrey v. Georgia*, 446 U.S. at 428-29; *Stringer v. Black*, 503 U.S. at 237; *Zant v. Stephens*, 462 U.S. at 865.

9. The Failure to Require Proof of Aggravating Factors Beyond a Reasonable Doubt and the Failure to Require that Aggravating Factors Outweigh Mitigating Factors Beyond a Reasonable Doubt

81. The failure to require that all aggravating factors be proved beyond a reasonable doubt, that aggravation must be weightier than mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt, violates federal principles of due process (*see Santosky v. Kramer*, 455 U.S. 745, 765-67, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Woad*, 648 P.2d 71 (Utah 1982)), equal protection and the Eighth and Fourteenth Amendment requirement of heightened reliability in the death determination (*Ford v. Wainwright*, 477 U.S. at 414; *Beck v. Alabama*, 447 U.S. 625, 637, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)) as well as the analogous provisions of the state constitution. In this case, the prosecutor introduced evidence of uncharged and improperly alleged offenses, as well as other non-statutory aggravation.

82. Cal. Penal Code section 190.3 defines in mandatory terms how the jury is to decide in the penalty phase whether the defendant will be sentenced to life

without parole or to death. Section 190.3 provides, in pertinent part, that the jury "shall take into account" the factors listed in subdivisions (a) through (k); and that, after hearing evidence and argument relating to these factors, the jury must consider these aggravating and mitigating circumstances, and "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Cal. Penal Code, §190.3.

83. The jury in the present case was instructed to "consider," "take into account," and "be guided by" the factors specified in section 190.3. (RT 3807.) Furthermore, consistently with the holding of *People v. Brown*, 40 Cal. 3d 512, 544, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), the jury was further instructed that, to return a judgment of death, they had to consider the "totality" of the aggravating and mitigating circumstances and were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (RT 3811.) Nevertheless, the jury was not told that the prosecution had any particular burden of proof to demonstrate that the aggravating circumstances outweighed the mitigating, and the trial court refused a proposed defense instruction that would have required the jury, if they had doubts about the penalty to be imposed, to "give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole." (Defense Proposed Jury Instruction No. 5 [CT 842].)

84. The United States Supreme Court has not squarely addressed whether or how the beyond-a-reasonable-doubt standard applies to the penalty determination in a capital case. Although the Supreme Court has never squarely decided whether the beyond-a-reasonable-doubt standard applies to penalty phase determinations, the Court has strongly suggested that the most exacting standard applies to the decision to sentence a defendant to death rather than life without parole.

85. Finally, even assuming that the due process does not require that the prosecution bear the burden of persuading the jury beyond a reasonable doubt that

aggravation outweighed mitigation and that death was the appropriate penalty, Ninth Circuit authority makes clear that the Constitution at the very least requires that the burden of persuasion on these issues be placed on the prosecution, if only by a preponderance of the evidence. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). In *Adamson*, the Ninth Circuit held, inter alia, that a death penalty statute that creates a "presumption of death" violates the Eighth and Fourteenth Amendments. *Id.* at 1041-44. Nevertheless, section 190.3 places *no* burden on the prosecution; on the contrary, the jury is required to "consider" the aggravating and mitigating circumstances, "weigh" them by their own devices, and they are told that they "shall" impose the death penalty if the "aggravating circumstances outweigh the mitigating circumstances." Cal. Penal Code, § 190.3; *People v. Jackson*, 28 Cal.3d 264, 315, 618 P.2d 149, 168 Cal. Rptr. 603 (1980). In practice, aggravation is automatically present at the beginning of every penalty trial, so the defendant must assume the burden of proving mitigating circumstances sufficient to persuade the sentencer that death is not the appropriate punishment.[80] By requiring the sentencer to weigh as an aggravating factor that which has made the defendant death-eligible (the facts underlying his commission of first degree murder with special circumstances), and to determine the sentence by weighing aggravation against mitigation, the California statute, like the Arizona law in issue in *Adamson*, "presumes that death is the appropriate penalty unless defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution." *Adamson v. Ricketts*, 865 F.2d at 1042.

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[80] As one commentator has observed: "It is . . . form over substance to say that the defendant 'bears no burden of proof' with respect to mitigating circumstances when he will be put to death if these circumstances are not found." Silverman, *The Burden of Proof and Procedural Fairness in Capital Cases*, 3 American Journal of Trial Advocacy 75, 81 (1980).

86. To impose the most rigorous standard of proof upon the most critical life-and-death decisions jurors are required to make in the penalty phase, to require the constitutional minimum in California as a hedge against potential juror confusion inherent in section 190.3, and to overcome the unconstitutional "presumption of death" created by the California statutory scheme, the prosecution should be required to shoulder the burden of proving beyond a reasonable doubt that death is the appropriate punishment. Because the prosecution in the instant case had no such burden, Jones's death verdict is constitutionally suspect and should be set aside.

10. Unconstitutional Use of the Guilt Phase Jury in the Penalty Phase and Considerations of Unanimity and Burden of Proof

87. By allowing the same jury which has convicted a capital defendant to determine whether he committed alleged unadjudicated prior criminal acts to be considered in aggravation, the statutory scheme violates the defendant's rights to a fair trial by an unbiased jury and to a reliable sentence as guaranteed by the Sixth, Eighth and Fourteenth Amendments.

88. The statutory scheme violates a capital defendant's rights to a fair jury trial, due process, equal protection and a reliable sentence because it fails to require jury unanimity and separate findings of prior unadjudicated crimes. The principle of unanimity to preserve the substance of the jury trial right and assure reliability of the verdict, as well as the heightened need for reliability in the sentencing phase of a capital trial, requires that the jury must agree unanimously that a capital defendant has committed a particular prior unadjudicated crime before it may consider such an act as aggravation in its penalty phase deliberations.

89. When a criminal defendant in a non-capital case has been charged with special allegations which increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. The failure to require such separate, unanimous findings in capital cases violates the principle that a capital defendant is entitled to more rigorous procedural protections than non-capital

defendants and constitutes a denial of equal protection of the law, due process and the right to a trial by jury as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

90. The statutory provisions under which Jones was sentenced to death violate his rights to due process, a fair jury trial and a reliable sentence as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, fails to apply a standard or burden of proof, fails to require a standard of proof beyond a reasonable doubt, and fails to require jury unanimity for the penalty verdict. The prosecution has a burden of proof beyond a reasonable doubt based on the due process clause of the Fifth and Fourteenth Amendments. Because the Eighth and Fourteenth Amendments require the highest level of reliability in the process of sentencing a defendant to death, the jury in a capital case must be instructed that, before it may return a verdict of death, it must find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty.

91. Because the standard of proof beyond a reasonable doubt has been applied in proceedings with less serious consequences than a capital penalty trial, as well as to the determination of guilt in all non-capital cases, the failure to require the same standard in capital sentencing proceedings constitutes a denial of equal protection of the law under the Eighth and Fourteenth Amendments. Jones's jury was not instructed that the aggravating factors must be proved beyond a reasonable doubt, that death could be imposed only if the jury unanimously found beyond a reasonable doubt that the circumstances in aggravation outweighed those in mitigation, or that death must be unanimously found to be the appropriate penalty beyond a reasonable doubt. The jury's failure to apply the standard of proof beyond a reasonable doubt violated Jones's rights to due process, a fair penalty trial, equal protection and a reliable determination of sentence.

92. In *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556

(2002), the United States Supreme Court held that:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.

Id. at 602, citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83, 120 S. Ct. 2348, 2358-59, 147 L. Ed. 2d 435 (2000).

93. This principle applies with equal force to capital, as well as non-capital, sentencing schemes. *Ring*, 536 U.S. at 609. As the Supreme Court noted in *Ring*, this right is an important one:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered . . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but less sympathetic reaction of a single judge, he was to have it.

Id., quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 1451, 20 L. Ed. 2d 491 (1968).

94. Jones was sentenced to death rather than life based upon determinations that: (1) he had committed specified, unadjudicated offenses; (2) certain aggravating factors existed in his case; and (3) that these aggravating factors outweighed the factors presented in mitigation. Under the principles enunciated in *Ring*, Jones was entitled to have the following determinations made by a unanimous jury, beyond a reasonable doubt. The trial court's failure to require these jury findings violated Jones's Sixth Amendment jury trial rights.

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11. The California Capital Punishment Scheme Fails to Require Written Findings on the Aggravating Factors Selected by the Jury, Depriving Jones of His Constitutional Rights to Meaningful Appellate Review of His Case

95. The lack of a record of the sentencing factors relied on by the jury and of the jury's reasons for imposing the death penalty violated Jones's rights to equal protection, due process, and a reliable sentence as provided by the Fifth, Eighth, and Fourteenth Amendments. In order to provide for meaningful appellate review, California law requires in all non-capital felony proceedings that the court state the reasons for its sentence choice. In capital cases, the primary sentencing authority is the jury.

96. The denial of Jones's right to have the reasons for his sentencers choice of an enhanced penalty stated on the record, when non-capital defendants have that right, constitutes a denial of equal protection of the law, heightened reliability, and appellate review as guaranteed by the Eighth and Fourteenth Amendments.

97. In a capital sentencing proceeding where the defendant's life is at stake, the sentencing process is highly subjective, and there is a risk that an erroneous sentence will result in the defendant's death. Because a statement of findings and reasons would make it possible to prevent such error, yet would create only a minimal burden on the state, due process requires the sentencer to make such a record in Jones's case.

C. The Prosecutor Has Complete Discretion to Determine Whether to Seek the Death Penalty in Violation of Jones's Constitutional Rights

98. In derogation of his state and federal constitutional rights, and under Cal. Penal Code section 1473, Jones was selected for capital prosecution, convicted and sentenced based on arbitrary, constitutionally irrelevant, impermissible, and discriminatory factors, including but not limited to, class, ethnicity and racial considerations. Jones's convictions, sentence and confinement were also unlawfully

obtained in that the constitutional rights to due process, heightened capital case due process, a fair trial, counsel, liberty, trial by unbiased jury, equal protection, reliable and reviewable guilt determination, individualized, reliable and reviewable penalty determination, fairness in capital case sentencing, and the prohibition against cruel and unusual punishments all prohibit racial discrimination and reliance on inaccurate, arbitrary and unreasonable considerations in the imposition of the death penalty, as well as application of the capital sentencing statute. In addition, Jones's convictions, sentence and confinement were unlawfully obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution because Jones was denied his right to effective assistance of counsel by that counsel's failure to object to use of these impermissible considerations.

99. Jones's charging, prosecution, trial and sentence were tainted by arbitrary, impermissible and/or discriminatory factors including, but not limited to, political considerations, pressure from victims' families and organizations, prosecutorial vindictiveness, and race and gender. *McClesky v. Kemp*, 481 U.S. 279; *Turner v. Murray*, 476 U.S. 28; *Yick Wo v. Hopkins*, 118 U.S. 356. California Penal Code Sections 190 through 190.5 afford the individual prosecutor complete discretion to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments.

100. The prosecutorial agencies of the several counties are given extensive discretion to choose the individuals to be selected for capital punishment, allowing the exercise of discretion in an arbitrary and capricious manner, based upon inconsistent and undisclosed criteria. In *People v. Adcox*, 47 Cal. 3d 207, 275-76, 763 P.2d 906, 253 Cal. Rptr. 55 (1988), Justice Broussard dissented on this ground, noting that it creates a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion. Some offenders, under the California statutory scheme, will be chosen as candidates for the death penalty by

one prosecutor, while others with similar factors in different counties will not. These arbitrary choices can be made at the charging stage, prior to trial by accepting a plea to a non-death sentence, after the guilt phase and during or after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, sexual orientation, or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory, *People v. Morales*, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (1989), or a felony murder theory.

101. Under the California death penalty scheme, an individual prosecutor has complete discretion to determine: (1) whether to charge a special circumstance in almost any murder case; and (2) whether to seek the death penalty in a case in which one or more special circumstances are charged. This creates a substantial risk of county-by-county arbitrariness. *See People v. Adcox*, 47 Cal. 3d at 275-76 (Broussard, J., dissenting). There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race, gender, and economic status. Further, under *People v. Morales*, 48 Cal. 3d at 572-73, the prosecutor is free to seek the death penalty in almost every first degree murder case.

1. Impermissible Factors, Including Race, Affected the Prosecution's Decision to Seek Death and the Sentencer's Imposition of Death

102. In a homicide case, the race of the defendant influences the likelihood of a defendant being capitally charged and capitally sentenced. Racial minorities are prosecuted far beyond their proportion in the general population and in the population

of criminal offenders. For example, eighty-nine percent of defendants selected for federal capital prosecution from 1988 through 1993 have been African-American or Mexican-American which is additional evidence that race continues to play an unacceptable role in the application of capital punishment in the United States. *See* Note, "Racial Disparities in Federal Death Penalty Prosecutions, 1988-94," Staff Report by the Subcomm. on Civil and Constitutional Rights," Comm. on the Judiciary, 103d Cong., 2d Sess., March 1994. As set forth more fully below, eighty percent of the defendants sentenced to death in Riverside County between 1978 and 1990 were African-American.

103. California District Attorney offices must establish guidelines to distinguish, based on constitutionally permissible factors, those cases in which the death penalty is sought from the many in which it is not. However, any such guidelines and practices vary so greatly from county to county that there are, in effect, different death penalty laws in each county, and in many cases this determines whether a defendant who would not receive the death penalty in one county actually gets the death penalty – i.e., is capitally charged and sentenced – in another. *See People v. Adcox*, 47 Cal. 3d at 275-76 (Broussard, J., concurring).

104. At the time Jones was charged, tried, convicted and sentenced to death, the Riverside District Attorneys Office had no meaningful guidelines or policies to distinguish cases in which special circumstance allegations were brought, and the death penalty sought, from potential capital cases in which it was not sought. Acting without meaningful guidelines, all such decision making is unconstitutionally arbitrary, particularly so when the race of the defendant or other impermissible considerations become a factor.

105. The Riverside District Attorneys Office, as an agency and entity, made special circumstance charging decisions, including the decisions to charge Jones with a capital offense, prosecute the case and seek a death sentence.

106. Jones is an African-American male who suffered from poverty,

alcoholism, drug abuse, child neglect, child abandonment, physical abuse, emotional abuse, witnessing domestic violence, organic brain damage, and diagnosed and undiagnosed mental illness.

107. Jones was convicted and sentenced to death for shooting a young Caucasian man in the course of a robbery. The Riverside County District Attorney did not prosecute other cases with facts similar to the prosecution's version of the facts against Jones as capital cases because of the ethnicity, gender, race, socio-economic class of the defendants versus the victims, and other impermissible considerations.

108. The Riverside County District Attorneys Office, law enforcement agencies in Riverside County, and Riverside judges and juries have a history of racially biased decision-making in capital and non-capital cases. Racial disparity exists in sentencing defendants to death in Riverside County. Although African-Americans only constituted about five percent of the population in Riverside County during 1978-90, and were accused of committing only about eighteen percent of the homicides in those years, African-Americans received eighty percent of the death sentences imposed in Riverside during that period, as the following chart illustrates:

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Race of Defendant	% of Cnty Population[81]	% of Cnty Homicides[82]	% of Death Sentences[83]
African-American	5.1	18.72	80.0
White	64.4	42.0	13.3
Hispanic	26.3	31.7	6.7

109. These statistics also reveal that African-American adult homicide defendants in Riverside County had a six percent chance of receiving a death sentence during the years 1978-90, while white and Hispanic adult homicide defendants had less than a one percent chance (0.45 percent and 0.298 percent, respectively). Of 198 adult African-American homicide defendants in Riverside County between 1978-90, twelve received death sentences (six percent), while only two of 444 adult white homicide defendants (.013%) and only one of 335 (.003%) Hispanic adult homicide defendants were sentenced to death. Thus, only three of 860 (.003%) non-black adult homicide defendants received a death sentence in Riverside County during 1978-1980.

110. Consequently, in Riverside County during the years 1978-1980, substantially the period during which Jones was charged, tried, convicted and sentenced to death, adult African-American homicide defendants were 17.5 times

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[81] Based on 1990 census figures. See Dept of Finance, California State Census Data Center, Report C90.PL-l, Table I (Population and Percent Distribution by Race), 1990 Census, P.L. 94-17 1 (Redistricting) File.

[82] Based on California Department of Justice statistics for the years 1978-90. See California Dep't of Justice, Bureau of Criminal Statistics, Adult and Juvenile Arrests Reported 1978-90, Race/Ethnic Group by Specific Offense, Riverside County.

[83] Based on information obtained from American Civil Liberties Union in 1991, which showed that fifteen death sentences imposed in Riverside County from 1978-90, twelve were given to African-American defendants, two to white defendants and one to an Hispanic defendant.

more likely to receive a death sentence than were non-black homicide defendants.

111. Capital charging and sentencing decisions are not made in a vacuum, but are influenced by broader social and cultural biases and practices. Discrimination in Riverside County against African-Americans has been prevalent historically, and remains a significant problem to this day. For example:

(a) Prior to World War II, officially condoned and enforced segregation was rampant throughout the county. Signs displayed outside restaurants warned that "dogs, Mexicans, and blacks" were not allowed inside. *See*, *e.g.*, "Victory: Hispanics Went to War, Won a Battle at Home," *Riverside Press-Enterprise*, January 5, 1992, at B-3.

(b) While the school system was officially desegregated after World War II, there was no active integration until the mid-1960s. *See* "Riverside's Brown People have Tasted Discrimination," *Riverside Press-Enterprise*, October 31, 1972, at C-1.

(c) White supremacists have actively and publicly demonstrated against equal rights for non-white members of the community. In 1924, for instance, the Ku Klux Klan staged a cross-burning in front of 5,000 spectators at a Riverside high school stadium, with the school board's approval. *See* Irving G. Hendrick, "The Development of a School Integration Plan in Riverside California: A History and Perspective," *The Riverside School Study*, State McAteer Project Number M7-14, September 1968, at 29.

(d) In a publication issued by the Riverside Municipal Museum as part of an exhibit devoted to African-American heritage in Riverside from 1898 to 1950, the extended history of segregation in Riverside is noted. "The Western Canaan [Riverside] remained a segregated society until the coming of the great civil rights crusade of the 1950's and 1960's." *See* Whiteneck, "Westward to Canaan: African American Heritage in Riverside", 1890 to 1950 (1996), *Riverside Museum Associates*, p. 1. An open induction of some 200 new Ku Klux Klan members took

place in Riverside on July 23, 1924. (*Id.* at 2.) Riverside also had a Klan-backed mayor, elected in 1927. (*Id.*)

(e) Racial tensions and Klan activities have continued well beyond the end of official segregation. In 1980, a black employee of Pacific Telephone Company was shot in the back by a suspected Klansman. The victim was working in a lift bucket when he was shot. On the same day, four Klansmen marched in front of Fontana City Hall, near Riverside, in an effort to recruit members and collect donations. *See* "Black Man Shot, Critically Hurt; Suspected Klansman is Arrested," *The Riverside Press-Enterprise*, Wednesday, July 2, 1980.

(f) A 1988 Riverside Press-Enterprise article detailed instances of housing discrimination in Riverside County against blacks and Hispanics, and reported that about 100 complaints of housing discrimination per year are made to the Riverside County Fair Housing Program. *See* "Laws Have Not Stopped Biases in Housing Market," *The Press-Enterprise*, October 30, 1988.

(g) In 1990, vandals defaced structures in a racially mixed neighborhood with swastikas, white power slogans and Ku Klux Klan symbols in Moreno Valley, just east of Riverside in Riverside County. Commenting on the event, the assistant director of the Anti-Defamation League in Los Angeles stated that hate crimes were on the increase in Riverside County. *See* "Racist Marks Stir Fears in Moreno Neighborhood," *The Press-Enterprise*, May 17, 1990; *see also* "Supremacist Acts May Be On Rise," *Riverside Press-Enterprise*, May 26, 1990.

(h) In recent years, Riverside area schools have also noticed a growing effort by the local white supremacist movement to recruit new members from the student population. *See* "School Leaders Battle White Supremacist Movement," *Riverside Press-Enterprise*, December 15, 1991.

(i) In 1998, white parents in Riverside were fighting a plan to name a new high school after Martin Luther King Jr., claiming that the result would be that the school would be branded a "black school," which these white parents claim would

hurt their children's chances of attending the college of their choice. *See* "White Parents Resist Naming School for King," *San Francisco Chronicle*, January 5, 1998, at A-20.

112. Law enforcement agencies have had a history of discriminating against African-Americans and other minorities in employment and policing practices. In 1968, the Riverside Police Department employed only three African-American officers on its 152-officer force. In 1978, the police department employed only eight African-American officers out of 227 total officers. Ten years later, in 1988, the department employed only two more African-American officers – 10 out of 276 total officers. Moreover, over the past several decades, Riverside law enforcement officials have been publicly criticized for discriminatory treatment of African-Americans and their communities. On numerous occasions, complaints and lawsuits have been brought against various law enforcement officials and departments for police brutality and discrimination.

113. The Riverside District Attorney's Office has a history of discriminating against African-Americans and other minorities. For example:

(a) John M. Ruiz. a former Riverside prosecutor, heard racial slurs from fellow deputy district attorneys. More than once, he heard prosecutors refer to black defendants as "niggers." *See* "When a White Woman Accuses a Black Man of Rape," *Riverside Press-Enterprise*, December 27, 1988.

(b) In September 1986, the Riverside County Affirmative Action Commission noted problems in the District Attorney's hiring policies and requested that the District Attorney's office develop a plan for hiring minorities and women. *See* "DA's Office Scrutinized Over Hiring," *Riverside Press-Enterprise*, September 12, 1986, at B9.

(c) In 1983, Stephen Poe, an African-American, joined the District Attorney's investigative staff and was presented by his colleagues with a "pen set" in the form of a watermelon with two pens stuck into it. *See* "When a White Woman

Accuses a Black Man of Rape," *Riverside Press-Enterprise*, December 27, 1988.

114. The charging, prosecuting and sentencing of Jones was improperly influenced by racial considerations and other constitutionally impermissible factors, including:

(a) Jones was prosecuted by white attorneys, and convicted by an unrepresentative jury chosen from a panel that had been selected by the jury commissioner's office in a manner guaranteed to result in lack of a fair cross-section of the community, and sentenced to death by a white judge.

(b) The prosecutor excused two black jurors solely on the basis of race, Thomas and Wilson. See Claim Three, incorporated herein by reference.

(c) African-Americans were particularly questioned about racial issues, in such a manner as to discourage their participation as jurors. (*See*, *e.g.*, RT 1245-47.) The prosecution thus engaged in an impermissible practice and pattern of eliminating African-American jurors from Jones's jury. *See Powers v. Ohio,* 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

(d) As a result, the entire panel, including the sitting jurors, was exposed to prejudicial information about crime by African-Americans in their community, then simultaneously reminded again and again that Jones was a member of the same racial group as these other criminals. The jurors were likewise reminded that the victim's race was different than that of the defendant. The jurors were consciously or unconsciously influenced in such a manner as to be biased against Jones on account of his race.

115. The County of Riverside lacks meaningful charging guidelines to ensure capital prosecutions are not improperly brought. Together with evidence of improper motivations for the capital charging decision and prosecution in Jones's case, this renders the convictions, special circumstance findings, and sentences unconstitutional. The prosecution arbitrarily singled Jones out for capital prosecution

and sought the death penalty due to his race, and the victim's race, the media publicity attending this ease, the lack of guidelines for such matters in the prosecutors office, and the arbitrary practices of the prosecutors involved in making all decisions regarding Jones's case. Prosecutorial decisions may not be based on the unjustifiable standard of race or other arbitrary bases. *See*, *e.g.*, *Furman v. Georgia*, 408 U.S. at 238; *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); *Booth v. Maryland*, 482 U.S. 496, 506 & n.8, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987); *McCleskey v. Kemp*, 481 U.S. 279, 291 & n.8, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

116. Jones was prejudiced by these errors, in that his convictions and sentence were the product of a fundamentally unfair proceeding, which deprived him of a reliable sentencing determination and equal protection under the law.

2. The Prosecution's Decision to Seek Death Was Improperly Influenced by Financial and Political Considerations

117. The Riverside District Attorney's Office as an entity and individual prosecutors in that office, including the prosecutor who prosecuted the case against Jones, have a history of using capital cases for political and financial objectives. For example, the Riverside District Attorney's Office prosecuted cases as capital in order to obtain additional funding. On November 23, 1987, the Riverside Deputy District Attorneys' Association ran an advertisement in the *Riverside Press-Enterprise* urging the Board of Supervisors to agree to a new contract. The advertisement displayed photographs of four men charged in then-pending death penalty cases, and insinuated that prosecutions of serious cases would be undermined by a failure of the Board of Supervisors to approve a new contract with the Association. *See* Advertisement by Riverside County Deputy District Attorneys Association in the *Riverside Press-Enterprise*, November 23, 1987; "Prosecutors Still Pondering Job Action," *Riverside Press-Enterprise*, November 19, 1987, at B1 (quoting Kim Purbaugh,

deputy district attorney).

118. Media coverage of the instant prosecution portrayed Jones as the head of a Los Angeles-style gang consisting wholly of blacks who preyed on whites. (Ex. 56, newspaper articles.) In particular, the prosecution referred to Jones as the leader of a gang they called the "Hard Way Crips." In fact, there was no such gang, and no such association with the "Crips." Nevertheless, and even though Jones pleaded guilty to the "gang" charges so as to keep that kind of inflammatory evidence out of the trial, the prosecutor exploited the "gang of blacks" hysteria throughout the guilt and penalty phases.

3. Conclusion

119. The prosecution arbitrarily singled Jones out for capital prosecution, and sought the death penalty based on invalid and impermissible political, racial, and financial factors. Jones was prejudiced by these errors, because his conviction and death sentence were sought and secured on arbitrary and unconstitutional considerations.

120. The arbitrary and wanton prosecutorial discretion allowed by the California scheme – in charging, prosecuting, and submitting a case to the trier of fact in a capital crime – merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia*, 408 U.S. at 274-77.

121. This case was prosecuted on a first degree murder/felony-murder theory with felony-murder special circumstances. Apparently, the prosecutor did not target Jones for the death penalty based on Jones's intent or personal culpability, but instead because this case would almost certainly result in a conviction and death sentence. As a consequence of unbridled prosecutorial discretion, Jones, an African-American

man, was selected for capital prosecution in spite of the following facts: there were other perpetrators involved in the Domino's crime; the eyewitness identification was untrustworthy as the main witness had previously identified another suspect as the shooter; and all the evidence that was left was uncorroborated alleged statements by Jones to others. By contrast, many potential capital defendants of equal or greater moral culpability are not targeted for capital prosecution, both within and outside the county in which Jones was sentenced to death. On the facts, the prosecutor's decision to seek the death sentence constitutes unbridled, broad discretion without regard to Jones's mental state and personal culpability, which is prohibited by the Eighth Amendment of the federal constitution. *Furman v. Georgia*, 408 U.S. at 274-77.

D. The State Statute Violates Equal Protection Guarantees Under the Federal Constitution

122. The California capital punishment system is administered in a manner that violates equal protection principles, in that protections applicable to non-capital defendants are suspended in capital proceedings.

123. The California capital punishment system as administered violates equal protection principles in that the death penalty is more often imposed on black defendants in cases with white victims than on white defendants in cases with black victims, in all cases and in rape cases giving rise to the felony-murder rule.

E. The Right to a Reliable Penalty Determination and to Due Process of Law Was Violated Because Jones's Youth, His Potential for Rehabilitation, and His Exemplary Behavior in Prison Was Not Considered as the Basis for a Sentence of Life Without Parole as Opposed to the Death Penalty

124. Under California law, youth is not a mitigating factor but only a "metonym," or neutral factor. Accordingly, as a result of ineffectiveness of counsel, Jones's youth at the time of the offense (he was eighteen and one half years old at the time of the killing) was not considered as a mitigating factor.

125. California law does not allow the jury to take into consideration the

behavior of the defendant after his conviction. This is particularly unfair and irrational when the defendant is under twenty-one at the time of the offense, because the vast majority of the natural life of such a convicted capital defendant will be spent in prison.

126. Jones, who has been incarcerated for over fifteen years, has been a model prisoner. Jones had an exemplary record during his stay at the Riverside County Jail, which trial counsel was ineffective for failing to present as evidence to the jury. Jones has had an exemplary prison record since he has been incarcerated at San Quentin. Good behavior in prison is not listed as a mitigating factor in consideration of a sentence of death. However, a prosecutor is free to argue during the penalty phase that a life sentence carries the risk that the defendant will offend again. This is fundamentally unfair. Good behavior should be allowed as a factor which shows that the defendant does not have the propensity to re-offend. In fact, good behavior is used in many states as a way to reduce sentences to prevent prison overcrowding. The same consideration should be given to death row inmates in order to convert their sentences to life without parole.

127. The defense could argue that a prisoner who conforms to prison rules and participates actively in prison programs shows rehabilitation that was not evident at sentencing. If a defendant is vocationally or academically ambitious and/or responds well to various forms of therapy or social intervention, these are factors which, had the jury known at the time of sentencing, could have been considered to show more leniency. Currently, good behavior on death row is only given consideration upon application for clemency. A death sentence does not provide for rehabilitation. In 1997, the Governor of Virginia granted clemency to William Saunders based on his rehabilitation while incarcerated. Both the prosecutor and the judge from the trial recommended clemency.

128. Potential for rehabilitation is a factor which should be considered as mitigating a death sentence. A capital defendant should not have to rely solely on

executive clemency to have his good behavior considered as an avenue for a sentence of life without parole. A young person in particular has a greater capacity for rehabilitation than an older more "hardened" criminal and is more likely a successful candidate for life without parole.

129. Jones was only 18 at the time of the crimes and had no prior felonies or violent conduct prior to that time. Jones has conducted himself in exemplary fashion while incarcerated both in jail and in prison and has shown that he is a prime candidate for rehabilitation and thus a sentence of life without parole. By failing to take into account Jones's youth, his potential for rehabilitation, and his exemplary, discipline-free record in prison, California's death penalty scheme denies Jones his right under the Eighth Amendment to a reliable sentencing determination, and violates principles of international law.

F. The Death Penalty Violates the Eighth and Fourteenth Amendments

1. The Death Penalty, Through Lethal Injection, is Inflicted in a Manner Which is Cruel and Unusual

130. Lethal injection was adopted as an alternate means of execution, upon election of the inmate, in 1992. Cal. Penal Code § 3604. Subdivision (a) of that section provides that "punishment of death shall be inflicted by the administration of lethal gas or by an intravenous injection of substance or substances in a lethal quantity sufficient to cause death." Subdivision (b) provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection."[84]

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[84] On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), that the use of lethal gas is cruel and unusual punishment and thus violates the Constitution. In 1996, the Ninth Circuit affirmed the District Court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is

131. The Eighth Amendment prohibits deliberate indifference to the known risks associated with a particular method of execution. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. *Trop v. Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). In *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), a plurality of the Supreme Court upheld the constitutionality of Kentucky's three-drug lethal injection protocol. In doing so, the Court announced that a method of execution violates the Eighth Amendment if: (1) it presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm"; or (2) a state refuses to adopt alternative procedures that are "feasible, readily implemented," and will "significantly reduce a substantial risk of severe pain." *Id.* at 50-52.

132. In December 2006, prior to *Baze*, the Honorable Jeremy Fogel, District Judge of the Northern District of California, held that California's then-current protocol raised substantial questions as to whether Jones will suffer excessive pain

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unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996), *vacated*, 147 F.3d 1138 (9th Cir. 1998). The Ninth Circuit also permanently enjoined the State of California from administering lethal gas. *Id.* Accordingly, lethal injection is the only method of execution currently authorized in California.

In 1996, the Ninth Circuit concluded in *Bonin v. Calderon*, 77 F.3d 1155, 1163 (9th Cir. 1996), that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code section 3604(d). Thus, under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of execution leaves lethal injection as the sole means of execution to be implemented by the state. Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. *Id.*

when he is executed. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006). In response to Judge Fogel's ruling, the California Department of Corrections ("CDCR") hastily issued revisions to the lethal injection protocol, known as San Quentin Operational Procedure 0-770 ("OP 0-770") on February March 6, 2006 and May 15, 2007. *Morales v. Cate*, C-06-219-JF (N.D. Cal.), Docket # 96, Redacted Version of Lethal Injection Procedure, as revised March 6, 2006; San Quentin Operational Procedure No. 0-770, Execution by Lethal Injection, as revised May 15, 2007.

133. In October 2007, a state court judge found that the CDCR violated the Administrative Procedures Act when it adopted the newly revised OP 0-770. *Morales v. CDCR*, CV061436, Marin County Superior Court, Order After Hearing (October 31, 2007). The California Court of Appeal upheld the Superior Court, 168 Cal. App.4th 729 (Nov. 21, 2008), and the California Supreme Court declined to review the matter. The remittur was issued on March 11, 2009.

134. On May 9, 2009, the CDCR proposed new amendments to California Penal Code section 3349 and Title 16 of the California Code of Regulations which were, in substance, virtually identical to the May 15, 2007 revisions to OP 0-770. Additional revisions were proposed in January 2010 and June 2010. On July 30, 2010, California's Office of Administrative Law issued the Final Regulations, set to become effective on August 29, 2010.

135. After the CDCR issued new regulations, the plaintiffs in *Morales v. Cate*, C-06-219-JF (N.D. Cal.), filed a Fourth Amended Complaint. (Docket # 428, filed October 8, 2010). Plaintiffs made a facial challenge to the State of California's written regulations governing the administration of the death penalty by use of lethal injection; and alleged a claim that, under the standard for adopting an alternative execution protocol set forth in *Baze*, 553 U.S. at 61, there exists a known and available alternative to California's regulations as written which, in comparison to California's regulations, significantly reduces a substantial risk of severe pain. *Id.*

On December 10, 2010, the District Court denied a motion to dismiss, thus allowing the case to proceed to a merits determination. *Morales v. Cate*, 757 F. Supp. 2d 961, 2010 WL 5138572 (N.D. Cal., Dec. 10, 2010). The parties continue to litigate the constitutionality of the new protocol. The most recent filing indicates that, in the Warden's opinion, he will need until the end of 2011 to assemble a qualified execution team. *Morales v. Cate*, C-06-219-JF (N.D. Cal.), *Joint Proposed Schedule for Completing Discovery and Proposed Order*, Docket # 522, May 10, 2011.

136. Jones objects to any method of lethal injection that presents a "substantial risk of serious harm." *Baze*, 553 U.S. 50. Furthermore, Jones submits that California's refusal to adopt "feasible, readily implemented" alternative procedures that will "significantly reduce a substantial risk of severe pain" would violate his rights under the Eighth and Fourteenth Amendments. *Id.* at 52. Due to the ongoing *Morales* litigation and the lack of a firmly established lethal injection protocol or a specified execution team, Jones's claim that California's method of lethal injection violates his Constitutional rights is not yet ripe. Jones raises it in the instant Petition in order to preserve his right to federal review of the claim if and when California selects a new execution team and attempts to implement the latest revised protocol.

3. Requiring a Person to Spend Many Years Under Sentence of Death Constitutes Cruel and Unusual Punishment

137. It has been recognized that incarceration under a sentence of death for numerous years can, in itself, constitute cruel and unusual punishment. *See*, *e.g.*, *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed.2d 304 (1995) (Stevens, J., dissenting from denial of certiorari); *Furman v. Georgia*. 408 U.S. at 312 (White, J., concurring in judgment) (noting that when the death penalty "ceases realistically to further [the aims of deterrence and retribution] its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the

State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment"); *see also* Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case West. Res. L. Rev. 1, 1-2 (Fall 1995) ("Whatever purposes the death penalty is said to serve--deterrence, retribution, assuaging the pain suffered by the victims' families--these purposes are not served by the system as it now operates"); Justice Lewis Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989) ("[Y]ears of delay between sentencing and execution . . . undermin[e] the deterrent effect of capital punishment and reduc[e] public confidence in our criminal justice system.").

138. Jones was sentenced to death on December 13, 1991, and transferred to death row on January 2, 1992. (CT 985.) Jones has now been on California's death row for more than thirteen years. It is likely he will be there many more years before all legal proceedings will be concluded. The full extent of Jones's incarceration, and the attendant violation of the Eighth Amendment's prohibition on cruel and unusual punishment, cannot be measured until a warrant is issued in Jones's case. However, in order to fully preserve this claim for resolution at that time, it is necessary for Jones to raise this claim at this time, in the Petition. *See*, *e.g.*, *Martinez-Villarreal v. Stewart*, 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998) (raising claim not-yet-ripe in first federal petition preserves claim for review when ripe); *Gerlaugh v. Stewart*, 167 F.3d 1222 (9th Cir. 1999) (*Lackey* claim barred by AEDPA because not raised in first petition).

G. Conclusion

139. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on

the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

SIXTEENTH CLAIM FOR RELIEF FOR DENIAL OF RIGHT TO BE PRESENT

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, to confront the witnesses against him, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because Jones was not present during significant proceedings in his capital trial. *California v. Ramos*, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *Hopt v. Utah*, 110 U.S. 574, 579, 4 S. Ct. 202, 28 L. Ed. 262 (1884)*; see also Kentucky v. Stincer*, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled on other grounds*; *United States v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed.2d. 1149 (1967); *People v. Koontz*, 27 Cal. 4th 1041, 1069, 46 P.2d 335, 119 Cal. Rptr. 2d 859 (2002). These absences also violated his state constitutional right to be personally present at all proceedings bearing a "reasonably substantial relation to the fullness of his opportunity to defend against the charge." *People v. Jackson*, 28 Cal. 3d 264, 308, 309, 618 P.2d 149, 168 Cal. Rptr. 603 (1980); *People v. Bittaker*, 48 Cal. 3d 1046, 1080, 774 P.2d 659, 259 Cal. Rptr. 630 (1989); Cal. Const., art. 1, § 15; Cal. Penal Code §§ 977, 1043.

2. Due Process requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." *Snyder*, 291 U.S. at 108. Hence, where his presence "would contribute to the fairness of the

procedure," Jones is entitled to be present at "any stage of the criminal proceeding that is critical to its outcome[.]" *Kentucky v. Stincer*, 482 U.S. at 745. Moreover, a violation of the Sixth Amendment occurs where a defendant's absence would interfere with his ability to cross-examine or confront witnesses against him. *Id.* at 740.

3. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

4. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

5. On August 20, 1991, Jones was not present during an in camera hearing regarding the admissibility of reporter Joe Vargo's testimony. (RT 2824-29, 2832-36.) Vargo's testimony was sought by the prosecution because he allegedly wrote a story in which he interviewed someone who had a similar alias as Jones. Vargo, however, argued he was exempted from testifying due to the California shield law for reporters. In the hearing, Vargo and his attorney were the only parties present. Vargo's attorney discussed with the judge the substance of Vargo's testimony - which he "assumed" the defense would not want elicited. Much of the potentially damaging testimony was due to an alleged identification by Vargo of Jones. Jones's counsel should have certainly been able to participate in the hearing to determine for itself the proper strategy for dealing with the potential testimony. Moreover, Jones's absence was Constitutionally deficient because he could have assisted counsel in verifying or disputing Vargo's possible testimony.

6. On July 24, 1991, Jones was not present during an in camera hearing regarding jury selection proceedings. (RT 1260-61.) For the first prospective juror, the Court inquired whether or not the defense opposed the challenge, to which trial counsel offered a half-hearted objection, stating "I think she's got some uncertainty, some equivocation there, but I don't know if that's enough to excuse her for cause. I'd submit it." (RT 1260.) For the second, both parties agreed the that the court

adequately rehabilitated the other juror. (4 RT 1261.) On July 25, 1991, Jones was again not present during an in camera hearing regarding jury selection proceedings. (RT 1478-82.) This time, they discussed a challenge for cause of another prospective juror and the prosecution's language when discussing burdens of proof. (RT 1478-82.) In these critical proceedings, counsel was forced to make strategic decisions regarding cause-challenges and to what extent the defense would object. With such an important component of trial as the make-up of Jones's venire, due process and fundamental notions of fairness demand Jones's presence.

7. On August 12, 1991, Jones was not present during an in camera hearing regarding the upcoming testimony of Detective Portillo and statements made to Portillo by co-perpetrator Najee Muslim during an interview that took place before the preliminary hearing and before Muslim's plea agreement and felony conviction. (RT 2636-42.) Excluding Jones from this hearing denied the defense an opportunity to draw upon any information Jones knew about Najee Muslim or the events in at issue. *See People v. Harris*, 43 Cal. 4th 1269, 1306, 185 P.3d 727, 78 Cal. Rptr. 3d 245 (2008) ("Under the Sixth Amendment's confrontation clause, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent interference with his opportunity for effective cross-examination") (internal citations omitted).

8. On August 13, 1991, Jones was not present during an in camera hearing regarding the unavailability of Luis Villarreal, the steps taken to find him, and statements made by Villarreal to Erin Burton and Tara Taylor. (RT 2698-2701.) On the same date, Jones was not present during an in camera hearing regarding the trial court's previous ruling on a motion to prohibit defense counsel from asking specific questions about the plea bargain of Enrique Luna. (RT 2717-24.)

9. On August 14, 1991, Jones was not present during an in camera hearing when counsel discussed the testimony of Carlos Hunt, and defense counsel's concern that although Hunt had been admonished not to mention anything about Moreno

Valley in connection with the shooting that Jones pled to, the District Attorney's proposed line of questioning could imply that there were other crimes. (RT 2776-79.)

10. On August 30, 1991, it is unclear whether Jones was present when the court reporter read back the testimony of Najee Muslim and Enrique Luna to the jury. (RT 3204.)

11. On September 3, 1991, Jones was not present at an in camera conference regarding the penalty phase and the scheduling of witnesses. (RT 3217-18.)

12. On September 5, 1991, Jones was not present when an in camera hearing took place regarding the testimony of Deputy Aguirre, who was called to testify because his partner, Deputy Eldrich, was on vacation. (RT 3287-89.) Later that same day, Jones was also not present at an in camera hearing regarding the District Attorney's desire to introduce into evidence all of the weapons seized from the Villarreal residence. (RT 3333-38.)

13. On September 9, 1991, Jones was not present for an in camera hearing regarding whether the trial court would allow the testimony of Detective Vaughn. (RT 3349.)

14. On September 11, 1991, Jones was not present at an in camera hearing regarding defense counsel's request to show witness Minnie Nixon a letter from Jones, which was marked as a defense exhibit for identification, and a photograph of Jones and his son, also marked as a defense exhibit. (RT 3684-87.)

15. Jones was prejudicially excluded from these hearings, and should have been present. Jones's right to be present during the proceedings against him and to have the ability to assist counsel were violated when he was not present on the above occasions.

16. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity

of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

SEVENTEENTH CLAIM FOR RELIEF FOR UNCONSTITUTIONAL DENIAL OF MEANINGFUL APPELLATE REVIEW AND INEFFECTIVE ASSISTANCE OF APPELLATE AND HABEAS COUNSEL

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when the automatic appellate review by the California Supreme court was not carried out in a full, fair, and adequate manner under the circumstances. In addition, Jones's constitutional rights were violated when the California Supreme Court failed to provide full, fair, and adequate post-conviction review.

2. Further, William Flenniken and Kent Russell, Jones's state appellate and habeas counsel, provided ineffective representation and therefore deprived Jones of his rights to due process and equal protection of the law, to the reasonably competent assistance of counsel, to a fair appellate review of his convictions and death sentence, and his right to be free of cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

4. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

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A. Lack of Review and Incorrect Review by State Court of Certain Appellate Issues

5. The California Supreme Court neglected to address numerous issues raised by Jones on direct appeal. The Court disposed of arguably meritorious issues without a written decision or without a statement of reasons or by mischaracterizing the arguments presented, and, as such, denied Jones due process under the Fourteenth Amendment when it failed to show that Jones's contentions were reviewed and consciously rejected.

6. Furthermore, the state appeal was unduly delayed, resulting in the loss of exculpatory evidence and thereby prejudicing Jones.

7. Finally, the California Supreme Court also failed to engage in constitutionally adequate harmless error analysis regarding the claims in its appellate opinion.

B. Unfair State Habeas Process

8. The state habeas review by the California Supreme Court was not carried out in a full, fair, and adequate manner under the circumstances. State counsel was not afforded sufficient investigative funding to finish the guilt and penalty investigations. Absent authorization of adequate funds, counsel was unable to fund such an investigation out of his own pocket.

9. Habeas counsel received a budget of $25,000, which was not sufficient to conduct an adequate investigation and to hire all necessary experts. The absence of complete and meaningful investigation and discovery on state habeas impaired all of Jones's constitutional rights as alleged in these claims as they could not be presented until now. Since this investigation was to be conducted concurrently with Jones's direct appeal, the denial of funds violated his rights to due process, equal protection, and effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 393-94, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

10. Jones was denied due process under the Fourteenth Amendment when

Jones was precluded from proving his innocence and other claims because the California Supreme Court failed to grant an Order to Show Cause and conduct a reference hearing on meritorious claims.

C. Ineffective Assistance of State Appointed Counsel

11. Jones was denied the effective assistance of state appellate and habeas counsel when counsel failed to preserve evidence or seek the assistance of the court to do so. This denied Jones his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel on his first appeal as of right. Further, appellate counsel herein rendered ineffective assistance of counsel in unreasonably failing to investigate, research, prepare, or present numerous issues which could have, and should have, been raised on appeal in the state court, or which could have been raised pursuant to the habeas corpus proceedings. Appellate counsel inadequately presented and argued issues and failed to recognize and raise several valid constitutional issues apparent from the record, or apparent upon a reasonable and adequate investigation.

12. Flenniken and Russell failed to complete their investigation in time for the filing of the state habeas petition and failed to present available evidence, including, inter alia, declarations and documentary corroborating evidence regarding all relevant issues presented in this Petition, including Jones's childhood and background, strong evidence regarding Jones's innocence bearing on ineffective assistance of counsel, actual innocence, and the *Brady* claims, and documentary corroborating evidence bearing on the ineffective assistance of counsel claims, the innocence claim, and the *Brady* claims. (Exs. 1-175.)

13. To the extent that Flenniken failed to raise any of the other claims presented in the State Exhaustion Petition filed with the California Supreme Court by current federal habeas counsel on March 30, 2005, that failure fell below the recognized standard of care and prejudiced Jones. That Petition is incorporated herein by reference. To the extent that Flenniken and Russell failed to raise any of the other claims presented in the State Exhaustion Petition, that failure fell below the

recognized standard of care and prejudiced Jones.

D. Conclusion

14. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

EIGHTEENTH CLAIM FOR RELIEF FOR FAILURE TO REQUIRE MEANINGFUL INTER-CASE PROPORTIONALITY REVIEW

Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because he received no inter-case or other meaningful proportionality review. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

1. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

2. The failure of the California death penalty statute to require inter-case proportionality and to provide for meaningful proportionality review violated Jones's right to equal protection of the law, since, at the time of Jones's sentence, proportionality review was provided for non-capital felons under California Penal

Code Section 1170(f). This failure also violates the Eighth Amendment's requirement that the death penalty not be imposed arbitrarily or capriciously, *Gregg v. Georgia*, 428 U.S. at 189, and that all mitigating factors and evidence be considered by the sentencer. *See Parker v. Dugger*, 498 U.S. 308, 315, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

3. Thirty-one of the thirty-four states that sanction capital punishment require comparative, or inter-case, "appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether the sentence is disproportionate compared to those sentence imposed in similar cases." Ga. Stat. Ann. § 27-2537(c). The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman* . . . " *Gregg v. Georgia*, 428 U.S. at 198. Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." *Profitt v. Florida*, 428 U.S. 242, 259, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Twenty states have statutes similar to that of Georgia,[85] and seven have

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[85] *See* Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Star. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

judicially instituted similar review.[86]

4. California Penal Code section 190.3 does not require that either the trial court or the California Supreme Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. *See People v. Fierro*, 1 Cal. 4th 173, 253, 821 P.2d 1302, 3 Cal. Rptr. 2d 426, 468 (1991). California therefore does not guard "against a situation comparable to that . . . in Furman . . ." *Gregg v. Georgia*, 428 U.S. at 198.

5. *Furman* raised the question of whether, within a category of crimes (e.g., here murder) for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. Therefore, the California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. at 192, citing *Furman v. Georgia*, 408 U.S. at 313 (White, J., conc.).[87] This failure also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution, *Gregg v. Georgia*, 428 U.S. at 192; *Godfrey v. Georgia*, 446 U.S. 420, 428-429, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Stringer v. Black*, 503 U.S. 222, 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); *Zant v. Stephens*, 462 U.S.

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[86] *See State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 NE.2d 889, 899 (Ind. 1981); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977) (comparison with other capital prosecutions where death has and has not been imposed); *State v. Richmond*, 560 P.2d 41, 51(Ariz. 1976); *Collins v. State*, 548 S.W.2d 106, 121 (Ark. 1977).

[87] If the California Courts properly provided such review, it is likely that Jones's sentence would have been reduced to life without possibility of parole. The prosecution's case for death rested solely on the circumstances of the offenses in the guilt phase, and the Flats attempted murder case.

862, 865, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *see Parker v. Dugger*, 498 U.S. 308, and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases. *Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Beck v. Alabama*, 447 U.S. 625, 637-38 n.13, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

6. Additionally, this failure violates Jones's right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, under California Penal Code section 1170(f), which, at the time of Jones's sentence,[88] read:

> Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate. [¶] Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence . . . and resentence the defendant . . . as if the defendant had not been sentenced previously . . .

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[88] Any subsequent changes in California Penal Code Section 1170 are inapplicable to Jones as ex post facto violations, contrary to the United States Constitution (art. I, § 9, cl. 3, and § 10, cl. 1), insofar as such changes would amount to a lack of fair notice and governmental restraint when the legislature increases punishment beyond what was contemplated at the time of the crime. *Weaver v. Graham*, 450 U.S. 24, 29-31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

Cal. Penal Code § 1170(f).

7. Even assuming, arguendo, that Jones has no constitutional right to inter-case review, Jones is entitled to equal treatment with other inmates convicted of crimes occurring at the same time as those for which he has been convicted, i.e., the benefit of a determination of whether his "sentence is disparate in comparison with the sentences in similar cases." *Id.* With respect to inter-case proportionality, Jones's death sentence based on a felony-murder theory with felony-murder special circumstances imposes a more severe punishment than more serious first-degree murders in California. The death penalty can be imposed only on those defendants who have been found guilty of first degree murder. Cal. Penal Code § 190 and § 190.2(a). To prove first degree murder, the murder must have been either a willful, deliberate, and premeditated killing or committed in the perpetration of certain felonies under the felony-murder theory. Cal. Penal Code § 189.

8. The discrepancy between the intent requirement for premeditated killing and that under the felony-murder theory makes the imposition of the death penalty disproportionate in the felony-murder case. If, for example, a defendant intentionally kills a person, but not in the perpetration of a felony, and the trier of fact finds that the prosecutor cannot prove deliberation and premeditation beyond a reasonable doubt, the defendant will not be found guilty of first degree murder and will not be subject to the death penalty. However, if, as in Jones's case, a death occurs in the perpetration of a felony and the defendant did not have the intent to kill the person, the defendant may still be found guilty of first degree murder and will be subject to the death penalty.

9. In the non-felony-murder case, the defendant commits a more intentional and culpable killing yet may receive a less serious punishment than the defendant who causes an unintended death in the commission of a felony and is sentenced to death under a felony-murder theory. This illustrates the fact that a death sentence founded on a felony-murder theory violates the inter-case proportionality principle set

forth in *People v. Frierson*, 25 Cal. 3d 142, 180-84, P.2d 587, 158 Cal. Rptr. 281, 303 (1979) (holding that the court should consider whether defendant's punishment was higher than more severe crimes); *see People v. Jackson*, 28 Cal. 3d at 317.

10. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

NINETEENTH CLAIM FOR RELIEF FOR THE IMPOSITION OF AN UNCONSTITUTIONALLY DISPROPORTIONATE PUNISHMENT

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because his death sentence is unconstitutionally arbitrary, discriminatory, and grossly disproportionate to his personal culpability for the offense. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

4. The imposition of the death penalty in this case is radically disproportionate to Jones's culpability and constitutes cruel and unusual punishment.

The evidence against Jones failed to establish the level of moral culpability necessary to minimize the risk that a person may be sentenced to death even though he ought not to be. Jones incorporates herein by reference Claim Four. An overall examination of the present record demonstrates that this case is simply not within the small class of first degree murders that truly warrant the death penalty.

5. In conducting intra-case review, two principles of death penalty jurisprudence apply. First, as the United States Supreme Court stated in *Zant v. Stephens,* 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), a state "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* at 877. Second, the Supreme Court has indicated that there should be heightened procedural integrity at the trial level and heightened scrutiny at the appellate level with regard to capital cases. *California v. Ramos*, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).

6. In *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983), the California Supreme Court decided that the defendant's life sentence was too severe because his co-defendants, who were also active aiders and abettors in the underlying crime, received considerably shorter sentences or were not prosecuted at all. *Id.* at 488. Notably, several state courts have reached the same conclusion. *See*, *e.g.*, *Henry v. State*, 278 Ark. 478, 488 (1983) (sentencer can look at penalty received by codefendant in order to determine whether death penalty is appropriate); *People v. Glecker*, 82 Ill.2d 145, 166, 171 (1980) (death sentence disproportionate because codefendant only received sentence of imprisonment); *Hall v. State*, 241 Ga. 252, 258-59 (1978) (holding that death sentence for felony murder was disproportionate because codefendant received life sentence in subsequent trial); *Smith v. Commonwealth*, 634 S.W.2d 411, 413-14 (Ky. 1982) (affirming trial court's reduction of death sentence because the triggerman accomplice did not get death penalty); *Slater v. State*, 316 So.2d 539, 542 (Fla. 1975) (reversed death judgment

because the triggerman accomplice was given a life sentence).

7. Under California law, the test of disproportionality requires the court to examine, among other things, "'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' . . . [and to] ascertain whether more serious crimes are punished in this state less severely than the offense in question." *People v. Frierson*, 25 Cal.3d 142, 183, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (citation omitted); *In re Lynch*, 8 Cal. 3d 410, 424-27, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

8. Jones's death sentence is disproportionate to the nature of the offense and Jones's "personal responsibility and moral guilt." *People v. Marshall*, 50 Cal. 3d 907, 938, 790 P.2d 676, 269 Cal. Rptr. 269 (1990). The record also shows that Jones had ingested alcohol and marijuana immediately before his conduct. (Ex. 115, Decl. of Chemeka Goss-Kater, ¶ 4; Ex. 135, Decl. of Tara Taylor, ¶ 4; Ex. 140, Decl. of Mario Villarreal, Jr., ¶¶ 16, 18.)

9. Moreover, neither the circumstances of the offense nor the testimony of the snitches and eye-witness demonstrate reliably that Jones possessed the intent to kill. Either Jones was not the actual shooter or he did not possess the intent to kill (accomplice non-shooter or the killing of a single person during a robbery where the defendant drunkenly fired toward the wall but hit Weeks instead); the dismissal of all charges against co-defendant Eric Bailey; and the sentence of the accomplice Najee Muslim, who received straight probation on a plea to a misdemeanor accessory after the fact charge. Jones incorporates herein by reference Claim Four, Claim Eight, sections A-C, and Claim Twelve, section A.1.e. Given that set of facts, the death sentence is grossly disproportionate to Jones's personal culpability for the offenses.

10. An evaluation of the defendant's mental state is critical to a determination of a defendant's suitability for the death penalty. *Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). A death sentence which is based on a felony-murder theory ignores the defendant's mental state and

personal culpability and violates the defendant's state and federal constitutional rights of reliability in the imposition of the death sentence.

11. The facts of this case support a finding that Jones's death sentence is grossly disproportionate to Jones's personal culpability for the offense. The evidence presented by Jones demonstrates that he is: (1) not the triggerman and (2) did not have an intent to kill. Given that set of facts, the death sentence is grossly disproportionate to Jones's personal culpability for the offenses.

12. To determine whether a death sentence is either categorically or individually disproportionate, the United States Supreme Court has crafted a proportionality analysis that entails looking at objective standards and subjective factors to examine whether the sentence is disproportionate to the crime in light of our nation's evolving standards of decency. *See Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), *overruled on other grounds*, *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

13. *Atkins* and *Roper* provide instruction on how a proportionality analysis is performed. In both cases, the Court looked to state legislatures to etermine objective indicia of a community's evolving standard of decency. The *Atkins* and *Roper* courts also included states that did not have a death penalty at all in their determination. *See Roper v. Simmons*, *supra*, 543 U.S. at 574. The Court places more emphasis on the direction of change among state legislatures and the historical setting in which those legislatures operate. For example, in *Atkins*, the Court found it "is not so much the number of [States prohibiting the death penalty for the mentally retarded] that is significant, but the consistency of change." *Atkins v. Virginia*, *supra*, 536 U.S. at

315. In both *Atkins* and *Roper*, the Court took into account the popularity of anti-crime legislation to explain why more legislatures had not acted. *Id.* at 315; *Roper v. Simmons*, *supra*, 543 U.S. at 566.

14. The *Atkins* and *Roper* Courts also looked to the imposition of the death penalty as an objective indicator by examining the frequency by which death sentences for the mentally retarded and juveniles are actually imposed. *Roper v. Simmons*, *supra*, 543 U.S. at 567; *Atkins v. Virginia*, *supra*, 536 U.S. at 316. Finally, the Court signaled a willingness to look beyond juries and legislatures and consider international law and scholarly data. *Id.*; *Roper v. Simmons*, surpa, 551 U.S. at 575-77.

15. When assessing the proportionality of Jones's sentence, a reviewing court must also conduct a subjective analysis of proportionality. Again, the United States Supreme Court has shifted away from *Tison v. Arizona* regarding this anlaysis. In *Tison*, the Court held that the offender who neither kills nor intends to kill could, depending on a set of facts, be as culpable as an intentional murderer. *See Tison v. Arizona*, *supra*, 481 U.S. at 157. The court in *Atkins* and *Roper*, moved away from *Tison* by looking at the culpability attached to a category of offenders, rather than a particular individual. With this approach, the possibility that one defendant who is the "worst of the worst" be spared a death sentence is an acceptable outcome. Rather, what is more important is that "the death penalty is reserved for a narrow category of crimes and offenders." *Roper*, *supra*, 551 U.S. at 569. In other words, the Court recognized that some juveniles, on a case-by-case basis, may be as culpable as the worst criminals most deserving of the death penalty. The *Atkins* and *Roper* courts thereby flipped the focus from that in *Tison* to ensure that the Eighth Amendment prevents the possibility that an offender may wrongfully be executed even at the risk of allowing some of the most culpable to escape death.

16. Moreover, the *Tison* court stopped short of discussing the way in which a non-killer's culpability would affect the deterrence or retributive effect of the death

penalty. Justice Brennan pointed this out in his dissent in *Tison* when he stated, "the [*Tison*] Court has ignored most of the guidance this Court has developed for evaluating the proportionality of punishment." *Id.* at 180 [Brennan, J. dissenting]. The *Atkins* and *Roper* Courts returned to examining the deterrent and retributive effects of executing a particular class of inmates would have in assessing proportionality.

17. Applying the proportionality analysis the Supreme Court has recently provided us, the disproportionality of executing an accomplice lacking an intent to kill, a category of which Jones is a member, becomes evident.

18. The *Tison* Court found that jurisdictions allowing the death penalty for felony-murder accomplices outnumbered those that did not by almost two-to-one. *See Tison*, *supra*, 481 U.S. at 155 n.5-9. Today, however, this ratio would look different. Presently, thirty-three jurisdictions would not allow for the execution of a non-triggerman defendant lacking an intent to kill, with only ten jurisdictions adhering *Tison*'s minimal requirements. *See* Trigilio, J. & Casadio, T., *Executing Those Who Do Not Kill*, American Criminal Law Review, Vol. 48, Issue 3 at 1401 (Summer 2011). Accordingly, *Tison*'s two-to-one ratio now stands at one-to-three, a dramatic a shift as that in *Roper* and *Atkins*. Hence, Justice Brennan's dissent in Tison holds true that "contrary to the [Tison] Court's implication that its view is consonant with that of 'the majority of American jurisdictions,' the Court's view is itself distinctly the minority position." *Tison*, *supra*, 481 U.S. at 175 (Brennan, J. dissenting).

19. The *Tison* court satisfied the subjective portion of the proportionality analysis by finding that if a felony-murder accomplice could be among the worst of the worst, a jury can decide her suitability for the death penalty. *Atkins* and *Roper* indicate the court now needs more assurance a defendant is culpable enough to face death. Under the current approach, the court needs to know "certain classes of offenders" will not be subject to execution by the state if they are not in a "narrow

category of crimes and offenders" who, as a class, comprise the worst among us. *Roper v. Simmons*, *supra*, 543 U.S. at 553. It follows that now accomplices like Jones who did not actually kill or intend to kill should be regarded as a class of offenders who are "categorically" less culpable than murderers who kill with some aggravating circumstance.

20. As Jones's case shows, felony-murder accomplices, as a category of defendants, are less culpable than the "average murderer." Thus, they lack the culpability of the narrow class of defendants eligible for the death penalty. Ignoring "rare exceptions" as the Roper court chose to do, felony-murder accomplices who have "not chosen to kill, [have a] moral and criminal culpability [that] is of a different degree than that of one who killed or intended to kill." *Tison v. Arizona, supra*, 481 U.S. at 171 (Brennan, J. dissenting. The *Atkins* court stated that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of" a mentally retarded inmate "surely does not merit that form of retribution." *Atkins v. Virginia*, *supra*, 536 U.S. at 319. Hence, because a felony-murder accomplice categorically lacks the same culpability of even the average murderer, that class of defendant cannot be deemed the "worst of the worst" and should not be death-eligible.

21. When examining the retributive and deterrent effects of the death penalty, the conclusion that executing felony-murder accomplices lacking an intent to kill is unconstitutional becomes even more clear. To accomplish retribution, a punishment must ensure "the criminal gets his just deserts." *Enmund v. Florida*, *supra*, 458 U.S. at 801; *see also Atkins v. Virginia*, *supra*, 536 U.S. at 319 [stating that retribution is the "interest in seeing that the offender gets his 'just deserts'"]. The *Tison* court failed to examine retribution specifically, but did address the culpability of non-triggerman. The Court noted that "some nonintnetional murderers may be among the most dangerous and inhuman of all." *Tison v. Arizona*, *supra*, 481 U.S. at 157. Thus, their culpability analysis allowed an execution to possibly serve the

penological end of retribution. In contrast, while *Roper* also recognized that the culpability of a juvenile offender may possibly demonstrate "sufficient depravity to merit a sentence of death," *Roper v. Simmons*, *supra*, 543 U.S. at 554, the court implicitly found this possibility insufficient to justify executing juvenile offenders.

22. The reason for these divergent conclusions can again be traced to the categorization of defendants. In *Tison*, the court only looked to the floor of culpability, finding that as long as the possibility exists a felony-murder accomplice be sufficiently culpable, a death sentence is permissible. *Atkins* and *Roper* shifted the approach by finding the general lack of culpability among a category of defendants sufficient to forbid a death sentence, even if exceptions may exist. Thus, after *Atkins* and *Roper*, allowing a category of defendants who "did not commit and had no intention of committing or causing [murder] does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Enmund v. Florida*, *supra*, 458 U.S. at 801.

23. The second penological justification for the death penalty is deterrence, the "interest in preventing capital crimes by prospective offenders." *Atkins v. Virginia*, *supra*, 536 U.S. at 320. When a person does not intend to take a life, the possibility of receiving the death penalty will likely not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The reasoning of Atkins also makes it clear that deterrence cannot be a justification for executing felony-murder accomplices. The court stated that "it seems likely capital punishment can serve as a deterrent only when the murder is the result of premeditation and deliberation." *Atkins v. Virginia*, *supra*, 536 U.S. at 319 (quoting *Enmund v. Florida*, *supra*, 458 U.S. at 799, which takes the quote originally stated in *Fisher v. United States*, 328 U.S. 463, 484, 66 S. Ct. 1318, 90 L. Ed. 1382 (Frankfurter, J. dissenting)(1946)). Here, Jones, and indeed all felony-murder accomplices lacking and intent to kill necessarily lack premeditation and deliberation to kill; eliminating any deterrent value of an

execution.

24. Jones did not actually kill Shane Weeks. Even if he did, he did not intend to kill Shane weeks, or anyone else in the course of the Domino's incident. Therefore, he is in a category of defendants whose execution is disproportionate under the reasoning of both *Atkins v. Virginia* and *Roper v. Simmons*. Accordingly, for the reasons stated in the Petition, incorporated herein by reference, Jones is entitled to an issuance of an order to show cause and, if necessary, an evidentiary hearing to prove the allegations of his Petition, after which his conviction and death sentence must be set aside.

25. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

TWENTIETH CLAIM FOR RELIEF FOR UNCONSTITUTIONAL APPLICATION OF THE DEATH PENALTY TO JONES UNDER THE PRINCIPLES OF *ROPER V. SIMMONS* AND *ATKINS V. VIRGINIA*

26. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and international law because: (1) Jones is ineligible for the death penalty under the principles of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) and *Roper v. Simmons*, 543 U.S.

551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); and (2) California's death penalty statute unconstitutionally applies the death penalty to individuals from age 18 to 21 at the time of the commission of the crime. Further the court erred in not instructing the jurors to consider these factors, and counsel was ineffective for not presenting evidence and arguing these factors as a basis for mitigation evidence under California Penal Code section 190.3(k).

27. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

28. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Under Atkins and Simmons, Jones is Precluded from Receiving the Death Penalty

29. In reaching its conclusion that "death is not a suitable punishment for the mentally retarded criminal," the Supreme Court in *Atkins* concluded:

> We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Atkins v. Virginia, 536 U.S. at 321.

30. Jones's youth, his IQ score of ninety-five, and his brain damage together should provide adequate support for relief under *Simmons* and *Atkins*. Even if Jones is not mentally retarded and was not under 18 at the time of the crime, it remains true that from the time of his arrest through the present, Jones has suffered from a combination of impairments that have an equivalent impact of mental retardation on

Jones's mental functioning under *Atkins* and has less moral culpability given his youth at the time of the crime (eighteen and one half) under *Simmons*, to preclude him from the death penalty.

31. However his impairments are described, it is plain that Jones has suffered mental impairments that are as severe as mental retardation from the date of his arrest to the present. Accordingly, his execution would not "measurably advance the deterrent or retributive purpose of the death penalty." *Atkins v. Virginia*, 536 U.S. at 321. For this reason, consistent with Eighth Amendment principles, Jones cannot be executed.

B. Application of the Death Penalty to Those Eighteen to Twenty-one Years of Age at the Commission of the Capital Offense Should be Deemed Unconstitutional

32. Jones was only six months over eighteen at the time of the crimes; the application of the death penalty to such youthful offenders (those below the age of twenty-one when they commit the charged offenses) is contrary to fundamental notions of justice. The basic tenet of American jurisprudence that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult" is premised on the notion that:

> . . . inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult.

Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 2698-99, 101 L. Ed. 2d 702 (1988); *Graham v. Collins*, 896 F.2d 893, 897 (5th Cir. 1990).

33. The Supreme Court abolished the juvenile death penalty for those who commit a capital offense before their eighteenth birthday:

> The reality that juveniles still struggle to define their

> identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson*, *supra*, at 368, 113 S. Ct. 2658; *see also* Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Roper v. Simmons, 543 U.S. at 570. Evidence provided to the Supreme Court in that case shows that brain development and maturation is not complete until the age of 21 or 22, and that the decision making area of the brain is the last to develop. (*See* Ex. 154, Decl. of Natasha Khazanov, ¶¶ 116-17.)

34. In this case, Jones stands convicted of committing the capital offense on January 21, 1989, when he was approximately 18 and one half years of age. Had he committed the capital offense only six months earlier, he would have been statutorily ineligible for the death penalty. In California, a defendant who is under 18 years of age at the time of the commission of the crime is statutorily ineligible for the death penalty. Cal. Penal Code § 190.5. A person who is between 16 and 18 years of age when the crimes were committed which gave rise to the special circumstances

findings can be sentenced to a maximum of life without parole or, in the discretion of the court, twenty-five years to life, but not to death. Jones was just eighteen years old at the time of the offenses that were presented to the jury as aggravating factors to impose the death sentence.

35. Jones's youth should have mitigated his sentence. Had the crimes occurred just six months earlier, Jones would have been ineligible for the death penalty. However, trial counsel did not present evidence on or argue that Jones's youth was a mitigating factor during the penalty phase despite the fact that youth is statutorily recognized as a factor to be considered in imposing a death sentence.

36. To impose a death sentence upon a young offender who, had he committed the capital offense only six months earlier, would have been ineligible for the death penalty, without any consideration as to that fact, violates equal protection and constitutes cruel and unusual punishment under prevailing constitutional standards and international law.

C. Conclusion

37. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

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TWENTY-FIRST CLAIM FOR RELIEF FOR THE UNCONSTITUTIONALITY OF THE DEATH PENALTY BASED ON EVOLVING NATIONAL AND INTERNATIONAL STANDARDS OF DECENCY

38. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the imposition of capital punishment is cruel and unusual punishment and is imposed in violation of national and international law.

39. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

40. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

41. In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court examined the question of whether the death penalty "is morally unacceptable to the people of the United States at this time in their history." *Id.* at 360 (Marshall, J., concurring). Alternatively, the Supreme Court asked "whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable." *Id.* at 361. The court conducted these inquiries on the basis of "all information presently available", and upon "the predictable subjective, emotional reactions of informed citizens." *Id.* at 362, footnote to Packer, "Making the Punishment Fit the Crime," 77 Harv. L. Rev. 1071, 1076 (1964). The 1972 decision in *Furman* held, per curiam, that the "imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment." However, *Furman* produced nine separate opinions: two justices concluded that the death penalty is unconstitutional in all cases; three

justices concluded that the death penalty was unconstitutional there only because it was discretionary; four dissenting justices stated that they would adhere to prior decisions upholding the constitutionality of capital punishment.

42. In the wake of *Furman*, several states enacted death penalty statutes purporting to guide the discretion to impose the death penalty in any given case. In 1976, in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Supreme Court held that the punishment of death does not "invariably" violate the Constitution and that the death penalty is not necessarily cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. at 169. The lead opinion concluded that the imposition of the death penalty for murder does not violate the Eighth Amendment because a penalty must accord with the dignity of man and may not be excessive; that retribution is neither a forbidden objective nor is it inconsistent with respect for man's dignity; and that capital punishment may be the appropriate sanction in extreme cases in an expression of the community's belief that certain crimes are themselves "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184.

43. Although the divided *Gregg* court upheld the constitutionality of the death penalty generally, so long as there were adequate limits on the exercise of discretion in imposing it, the *Gregg* court made that determination on the basis that the Eighth Amendment has been interpreted in a "flexible and dynamic manner to accord with evolving standards of decency."

44. In the decades since *Gregg*, community attitudes on the death penalty have changed, to the point where, now, imposition of the death penalty no longer equates with the level of "dignity" and "decency" which the community demands. Indeed, almost forty percent of people polled in 2007 believe they would be disqualified from a capital jury because of their moral beliefs related to the death penalty. (*A Crisis of Conscience: American's Doubts About the Death Penalty*, Death Penalty Information Center, June 9, 2007.) Moreover, among those who had

changed their position on the death penalty over the last ten years, more people became opponents of the death penalty than proponents by a margin of 3 to 2. (*Id.*) In the last few years the number of death-sentenced individuals has been lower than it ever has been since the punishment's reinstatement in 1976. (*Id.*)

45. Throughout the world, worldwide unions and individual states are moving away from and abolishing the death penalty.

(a) The global community compares the death penalty to slavery and torture as outdated, harsh, and inhumane activities that violate basic human rights. The number of countries that has stopped implementing the death penalty has grown to an all-time high of 105. Richard C. Dieter, Esq., "International Perspectives on the Death Penalty: A Costly Isolation for the US.," Death Penalty Information Center (DPIC), October 1999.

(b) All of Western Europe has abolished the death penalty. *Id.*

(c) In 1995, the Constitutional Court of South Africa abolished the death penalty in the case of *Makwanyane and Mchunu v. The State*. In his judgment, Justice Sachs stressed that "[e]very person shall have the right to life. If not, the killer unwittingly achieves a final and perverse moral victory by making the state a killer too, thus reducing social abhorrence at the conscious extinction of human beings." Willa Mutofwe, "The Death Penally in Zambia: Are we heading towards Eradication," *The Human Rights Observer*, Vol. 3, October 2000.

(d) The list of countries that has abolished the death penalty continues to grow and now includes: Russia; Estonia; Malawi; Poland; Lithuania; Azerbaijian; Turkmenistan; Bulgaria. Richard C. Dieter, Esq., "International Perspectives on the Death Penalty: A Costly Isolation for the US.," Death Penalty Information Center (DPIC), October 1999.

(e) In April 1999, the United Nations Commission on Human Rights voted overwhelmingly in favor of the imposition of a moratorium on the death penalty. *Id.*

(f) On December 8, 2000, the U.N. Secretary General lent his support to a worldwide moratorium on the death penalty after receiving a petition signed by 3.2 million people seeking an end to state-sponsored executions. In so doing, he asked rhetorically: "Can the state, which represents the whole of society and has the duty of protecting society, fulfill that duty by lowering itself to the level of the murderer, and treating him as he treated others?" If, as expected, the United Nations votes to impose the worldwide moratorium on executions, that will have the effect of international law. The United States, of course, is a member of the United Nations and has agreed to be bound by its charter.

(g) By its continued use of the death penalty, the United States moves away from the rest of the world at the same time it tries to act as a world leader. Richard C. Dieter, Esq., "International Perspectives on the Death Penalty: A Costly Isolation for the US.," Death Penalty Information Center (DPIC), October 1999.

(h) The respected International Commission of Jurists (ICJ) recently found that death sentences in the United States were arbitrary and weighted against persons of color. The ICJ said obligations taken on by the United States under international human rights and anti-discrimination accords were largely unfulfilled. At present, ICJ declared that the administration of death sentences was "arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot . . . be assured." The ICJ Secretary-General Mama Dieng said the report "provides a disturbing account of the difficulties involved -- even for a country which is regarded by many as the world's leading democracy and protector of basic individual rights and freedoms -- in ensuring the implementation of the death penalty is in accordance with accepted international norms . . ." The ICJ said it was particularly disturbed by the influence of electoral politics on judges and district attorneys. The ICJ mission has found that "among elected judges, those who covet higher office -- or those who merely wish to retain their status as judges -- must constantly proclaim their fealty to the death penalty." In most states practicing capital punishment, both trial and appeals

judges faced "periodic and in most cases partisan elections." The mission finds that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Many judges did remain fair and impartial, but the fact that they were often required to answer to the vagaries of public opinion "places their independence and impartiality at risk." The factual and legal issues presented in this case demonstrate that Jones was denied his right to a fair and impartial trial, appeal and habeas corpus in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights, as well as Articles 1 and 26 of the American Declaration. (*Id.*)

(i) The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable. As the ICJ found:

> Under the Rule of Law, the application of the death penalty in an unjust and racial discriminatory manner is unacceptable. Alleged perpetrators of serious crimes should and must be brought to justice, however, they must also be dealt with in accordance to justice. More needs to be done, and the ICJ urges the United States and other countries with death penalty sentencing -- including India and Nigeria -- to take the necessary steps to ensure that there is greater compliance with their international obligations.

46. Across the United States, public support for the death penalty is at its lowest level ever:

(a) Public support for the death penalty in the United States has fallen

dramatically as a result of the public's recognition that the death penalty is disproportionately and unfairly imposed on members of racial minorities. Senators Feingold and Levin introduced S.2463, the National Death Penalty Moratorium Act of 2000, in the 106th Congressional Session to impose a moratorium on imposition of the death penalty and create a commission to study its imposition, citing "ample evidence that the death penalty is applied disproportionately to members of certain racial and ethnic groups." The National Death Penalty Moratorium Act of 2000, S.2463, introduced April 26, 2000.

(b) Sixty-four percent of Americans support a moratorium on imposition of the death penalty until questions of racial fairness in its implementation can be answered. Death Penalty Information Center (DPIC), "Summaries of Recent Poll Findings" (http://www.deathpenaltyinfo.org/Polls.html).

(c) This support for a moratorium has resulted in legislative change in Illinois, where Governor George Ryan effectively imposed a moratorium on the death penalty until an inquiry has been conducted into errors in the system. James S. Liebman, Jeffrey Fagan & Valerie West, "A Broken System: Error Rates in Capital Cases," 1973-1995.

(d) Serious campaigns are under way to abolish the death penalty in Oregon, New Hampshire, and Nebraska, where though the governor vetoed a moratorium, the legislature overruled the veto as to the appropriation of funds for a study on the fairness in implementation issues. (*Id.*)

(e) Overall support for the death penalty has dropped from seventy-five percent in 1997 to sixty-four percent in 2000, its weakest support in the past twenty years. Death Penalty Information Center (DPIC), "Summaries of Recent Poll Findings" (http://www.deathpena1tyinfo.org/Po11s.htm1); James S. Liebman, Jeffrey Fagan & Valerie West, "A Broken System: Error Rates in Capital Cases," 1973-1995.

(f) This percentage drops even further, to fifty-two percent when the

relevant poll also provides the alternative of life in prison without the possibility of parole. Death Penalty Information Center (DPIC), "Summaries of Recent Poll Findings" (http://www.deathpenaltyinfo.org/Polls.html).

(g) Even in tough-on-crime Texas, opposition to the death penalty has increased by 250% since 1994. (*Id.*)

(h) Public support for the death penalty in theory does not translate into support for the death penalty in individual cases as applied, as evidenced by the 1998 Texas case of Karla Faye Tucker. Though seventy-five percent of Texans stated that they supported the death penalty in theory, only forty-five percent supported the death penalty for Tucker. (*Id.*)

(i) Justice Thurgood Marshall stated: "The question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available."

(j) On December 8, 2000, President Clinton granted a six-month reprieve to Juan Raul Garza, a Mexican American inmate from Texas days away from him becoming the first federal prisoner executed since 1963. The President ordered the reprieve in order to study racial and geographic disparities in the federal death penalty. The President's reference to "disparities" was a reference to a September, 2000 Justice Department study that showed that seventy percent of federal death penalty defendants are Hispanic and black and that nearly half the federal cases in which the death penalty is sought are from a handful of states, including Texas.

(k) On March 3, 2005, President George W. Bush, signed an Executive Order giving full force and effect to the International Court of Justice's decision in *Avena and other Mexican Nationals* (*Mexico v. United States*) 2003 I.C.J. Rep__, ¶ 106 (March 31, 2004), which will affect Carlos Avena and fifty-one other Mexican nationals on death rows throughout the United States. The administration ordered new court hearings in various states for 51 Mexican nationals on death rows

who claim that their right to consular contact at the time of their arrest was denied.

47. In California, there is a dramatic lack of support for the death penalty:

(a) Californians are four-to-one in favor of a moratorium on imposition of the death penalty until a study is conducted to determine the racial fairness in imposition issues. This level of support is higher than the national level of sixty-four percent. Death Penalty Information Center (DPIC), "Summaries of Recent Poll Findings" (http://www.deathpenaltyinfo.org/Polls.html).

(b) Support for the death penalty in California is much lower than the national level: only fifty-eight percent of Californians support the death penalty, down from seventy-eight percent in 1990. (*Id.*)

48. Based on the foregoing, imposition of the death penalty now violates the Eighth Amendment to the U.S. Constitution.

49. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

TWENTY-SECOND CLAIM FOR RELIEF: JONES'S CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW

1. Jones's convictions and sentences were rendered in violation of his rights to due process, to present a defense, to a fair trial, to equal protection of the law, to effective assistance of counsel, to be free from cruel and unusual punishment and to a reliable, individualized, and non-arbitrary penalty determination in violation of international treaties and customary international law as set forth herein.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

A. Applicable International Law

4. The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 ("ICCPR") was adopted by the U.N. General Assembly on December 16, 1966 and entered into force on March 23, 1976. Article 2(1) of the ICCPR provides that a state that becomes party to the treaty "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Among those rights a state "undertakes to respect and ensure" are the right to life, *see* Art. 6; freedom from torture, *see* Art. 7; the right to a fair trial, *see* Art. 14; freedom of opinion and expression, *see* Art. 19; and freedom of association, *see* Art. 22.

5. On September 8, 1992, the United States, following the advice and consent of the Senate, became a party to the ICCPR, at which time the treaty became, coexistent with the United States Constitution and federal statues, the "Supreme Law of the Land." U.S. Const. Art. VI; *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000); "[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2.

6. The obligations imposed by the ICCPR and the other treaties mentioned herein, and the attendant rights granted thereby, are owed separately and independently to Jones.

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1. International Common Law

7. Customary international law refers to a set of principles that are so widely accepted by members of the international community that they have evolved into binding rules of law. United States courts may not ignore the precepts of customary international law. *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804); *The Paquete Habana*, 175 U.S. 677, 694-700, 20 S. Ct. 290, 297-300, 44 L. Ed. 320, 326-29 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769, 780 (1815). In general, customary international law has the same status as domestic legislation. Restatement (Third) of Foreign Relations Law § 701, Comment E ("The United States is bound by the international customary law of human rights.") The nation's credibility would be weakened by non-compliance with treaty obligations or with international norms. *Beharry v. Reno*, 183 F. Supp. 2d 584, 600 (E.D.N.Y. 2002).

8. Evidence of customary international law includes treaties and conventions, the general usage and practice of nations, judicial decisions, resolutions of international organizations, learned treatises and public declarations by international officials. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir. 1980); *see United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61, 5 L. Ed. 57 (1820); *see also* Statute of the International Court of Justice, Art. 38, 59 Stat. 1055, 1060 (1945). A norm of customary international law has binding effect when: (1) most countries adhere to the norm in practice; and (2) those countries follow the norm because they feel obligated to do so by a sense of legal duty. *See* Article 38, Statute of International Court of Justice, 59 Stat. 1005, 1060 (1945); *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992).

9. In the United States, international common law is part of the law of the land:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate

> jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. at 700. International customary law provides an independent body of law that is binding on United States courts and that is completely distinguishable from treaty obligations.

10. The obligations imposed by international common law and the attendant rights granted thereby are owed separately and independently to Jones.

B. Jones's Convictions and Sentences Were Obtained in Violation of His Due Process Rights Provided by International Law

11. Article 14 of the ICCPR enumerates due process rights relating to criminal proceedings. Specifically, Article 14 provides for the following rights:

(a) Equality before the courts and tribunals;

(b) A fair and public hearing by a competent, independent and impartial tribunal;

(c) Presumption of innocence;

(d) To be informed promptly and in a language the defendant understands of the nature and cause of the charge against him;

(e) To have adequate time and facilities for the preparation of his defense to communicate with counsel of his choice;

(f) To be tried without undue delay;

(g) To be present during the trial;

(h) To defend himself in person or through legal assistance of his own choosing, and to have legal assistance assigned to him without payment "in any case where the interest of justice so require."

(i) To confront the witnesses against him and obtain the

attendance of witnesses on his behalf;

(j) To review of the conviction and sentence by a higher tribunal;

(k) To compensation for wrongful convictions; and

(l) Not to be prosecuted twice for the same crime.

Article 6 of the ICCPR provides that the death penalty may only be imposed where these standards are observed.

12. The United Nations Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. *See*, *e.g.*, *Johnson v. Jamaica*, No. 588/1994, H.R. Comm. para. 8.9 (1966) (finding delay of fifty-one months between conviction and dismissal of appeal to be violation of ICCPR, Art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed); *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 (1990) ("[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of Article 6 of the Covenant.").

13. Additionally, the United Nations' "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" ("Safeguards"), mandate that:

> Capital punishment may only be carried out pursuant to a formal judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

United Nations, Economic and Social Counsil Resolution (1984/50, May 25, 1984).

14. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael Lamont Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, Case No. S094239 (habeas petition filed January 8, 2001); and (3) *In re Michael L. Jones On Habeas Corpus*, Case No. S132646 (habeas petition filed March 30, 2005), previously filed with the California Supreme Court and incorporated at this place by reference, Jones's convictions and sentences were obtained in violation of his due process rights as provided by international law.

15. The State's failure to abide by international law in this regard renders Jones's convictions and/or death sentence void.

C. The Imposition of Death in This Case Violates International Law as Jones Suffers From Limited Mental Competence

16. International common law prohibits the death penalty for persons who suffer from limited mental competence, whether such limited competence is suffered at the stage of sentence or execution. Jones's rights afforded by customary international law were violated when the State imposed a sentence of death despite the fact that Jones suffers from mental retardation and extremely limited mental competence. United Nations "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", United Nations, Economic and Social Counsel Resolution 1989/64, May 24, 1989.

17. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael L. Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, Case No. S094239 (habeas petition filed January 8, 2001); and (3) *In re Michael L. Jones On Habeas Corpus*, Case No. S132646 (habeas petition filed March 30, 2005), previously filed with the California Supreme Court and incorporated at this place by

reference, Jones suffers from limited mental competence.

18. The State's failure to abide by international law in this regard renders Jones's conviction death sentence void.

D. Failure to Ensure That Jones Was Represented by Competent Counsel at All Stages of the Proceedings

19. Articles 6 and 14 of the ICCPR guarantee the right to a fair trial, including competent counsel at all stages of the proceeding. International common law requires that persons facing charges for which capital punishment may be imposed be granted special protection above and beyond the protection afforded in non-capital cases, including competent legal counsel at all stages of the proceeding. The United Nations' "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" ("Safeguards"), mandate that:

> Capital punishment may only be carried out pursuant to a formal judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

United Nations, Economic and Social Council Resolution (1984/50, May 25, 1984).

20. The United Nations Economic and Social Council considers the following state actions necessary for implementation of the Safeguards:

> 1(a) Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and

beyond the protection afforded in non-capital cases.

United Nations Economic and Social Council Resolution 1989/64, May 24, 1989.

21. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael Lamont Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, Case No. S094239 (habeas petition filed January 8, 2001); and (3) *In re Michael L. Jones On Habeas Corpus*, Case No. S132646 (habeas petition filed March 30, 2005), previously filed with the California Supreme Court and incorporated at this place by reference, Jones's trial counsel provided inadequate representation. Jones's rights were violated when the State failed to ensure that Jones was represented by competent counsel at all stages of the proceedings.

22. The State's failure to abide by international law in this regard renders Jones's convictions and/or death sentence void.

E. Execution of the Death Penalty Constitutes Cruel and Inhuman Punishment Under International Law

23. Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Because of the long delay between sentencing and execution, and the conditions in which Jones is being incarcerated, execution of the death penalty in this case violates this provision of the ICCPR. The norm against cruel, inhuman, or degrading treatment is universally recognized as a violation of international law clearly distinguishable from torture. The Universal Declaration of Human Rights, Article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). See also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 16, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doe.

A/39/51 (1984) (entered into force June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); the American Convention on Human Rights, Art. 5, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1978).

24. International law bars execution when delay in carrying out the penalty is particularly protracted, a practice referred to as the "death row phenomenon." *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*) and *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989); and *see*, *Knight v. Nebraska*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (Breyer, J., respecting the denial of certiorari); *Ceja v. Stewart*, 97 F.3d 1246 (9th Cir. 1996) (Fletcher, J., dissenting from order denying stay of execution); *Lewis v. Attorney General of Jamaica and another*, 3 WLR 1785 (P.C. 12 September 2000).

25. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael Lamont Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, S094239 (habeas petition filed January 8, 2001); and (3) *In re Michael L. Jones On Habeas Corpus*, Case No. S132646 (habeas petition filed March 30, 2005), previously filed with the California Supreme Court and incorporated at this place by reference, because of the long delay between sentencing and execution, and the conditions in which Jones is kept, execution of the death penalty in this case violates

international law.

26. The State's failure to abide by international law in this regard renders Jones's death sentence void.

F. The Death Penalty as Imposed in this Case Constitutes the Arbitrary Deprivation of Life in Violation of International Law

27. The right to life is the most fundamental of the human rights contained in the International Bill of Rights. *See, e.g.*, Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.S. Doc. A/810 (1948) ("Everyone has the right to life, liberty, and security of the person"); ICCPR, Art. 6 ("Every human being has the inherent right to life"). A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." See, e.g. ICCPR, Art 6; American Convention on Human Rights, Art. 4, 1144 U.N.T.S. 123.

28. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael Lamont Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, Case No. S094239 (habeas petition filed January 8, 2001), and In re Michael L. Jones on Habeas Corpus, Case No. S132646 (habeas petition filed March 30, 2005) previously filed with the California Supreme Court and incorporated at this place by reference, the imposition of the death penalty in this case constitutes the arbitrary deprivation of life in violation of international law.

29. The State's failure to abide by international law in this regard renders Jones's death sentence void.

G. Jones Was Denied Protection from Discrimination as Required by International Law

30. The ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination ("ICEAFRD") serve to protect defendants in criminal

cases from discriminatory application of the laws. Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Moreover, Article 14 states that all persons "shall be equal before the courts and tribunals." See also Article 2.1 of the ICCPR.

31. The ICEAFRD opened for signature May 7, 1966, and was signed by the United States September 28, 1966. 600 U.N.T.S. 195. The Senate ratified the convention October 21, 1994. 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994). The ICEAFRD obligates member states to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law." Article 5(a). Article 6 of the ICEAFRD provides that parties "shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention."

32. The failure of the state to prohibit discrimination by law and to "guarantee to all persons equal and effective protection against discrimination" on the basis of race by, inter alia, proportionality review and adequate voir dire on discrimination issues, violates the mandates of the ICCPR and the ICEAFRD.

33. In 1998, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions concluded that the application of the death penalty in the United States was both "discriminatory and arbitrary." He concluded that "race, ethnic origin, and economic status appear to be key determinants of who will, and who will not, receive a death sentence." Report of United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States of America, U.N. Doc. E/CN.4/1998/68/Add. 3, para. 2, para. 148 (1998).

34. As set forth in the claims herein, and in the claims set forth by Jones in: (1) *People v. Michael Lamont Jones*, California Supreme Court Case No. S024599 (automatic appeal filed December 13, 1991 - Riverside County Superior Court Case No. CR40124, formerly CR-35410); (2) *In re Michael L. Jones On Habeas Corpus*, Case No. S094239 (habeas petition filed January 8, 2001); and (3) *In re Michael L. Jones On Habeas Corpus*, Case No. S132646 (habeas petition filed March 30, 2005), previously filed with the California Supreme Court and incorporated at this place by reference, Jones's trial was the product of discrimination in violation of the ICCPR and the ICEAFRD.

35. The State's failure to abide by international law in this regard renders Jones's conviction and/or death sentence void.

H. The Imposition of the Death Penalty in this Case is in Violation of the ICCPR, Which Limits the Death Penalty to Only the Most Serious Crimes

36. Article 6(2) of the ICCPR provides that the death penalty may only be imposed for the "most serious crimes." See also American Convention on Human Rights, Art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996). The Human Rights Committee has observed that this expression must be "read restrictively," because death is a "quite exceptional measure." Human Rights Committee, General Comment 6(16), para.7.

37. The imposition of the death penalty for the single victim homicide in this case, and for the reasons set forth in other claims herein and in Jones's previous appeals and habeas petition filed with the California Supreme Court, which are incorporated by reference at this point, violate the ICCPR and the Convention on Human Rights.

38. The State's failure to abide by international law in this regard renders Jones's death sentence void.

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I. Conclusion

39. These violations of rights afforded Jones by international law warrant the granting of this Petition without any determination of whether they substantially affected or influenced the jury's verdict. In any event, the errors alleged herein so infected the integrity of the proceeding against Jones that the errors cannot be deemed harmless and the State will be unable to meet its burden of showing this error harmless. Additionally, the violations of Jones's rights had a substantial and injurious effect or influence on the verdicts, rendered the guilt and penalty judgments fundamentally unfair, and resulted in a miscarriage of law.

TWENTY-THIRD CLAIM FOR RELIEF FOR CONSTITUTIONAL VIOLATION BECAUSE THERE IS AN INTOLERABLE RISK OF EXECUTING INNOCENT PEOPLE

1. The death penalty itself and Jones's conviction and sentence of death violate due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because we now know there is a real and intolerable risk of executing innocent people. Alternatively, doubt about whether Jones is guilty of first-degree murder makes it unconstitutional to execute him. Jones incorporates herein by reference Claim Four.

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

4. The United States Supreme Court recognized that "in recent years a disturbing number of inmates on death row have been exonerated." *Atkins v. Virginia*, 536 U.S. 304 n.25, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Indeed, "[s]ince 1973, 119 people in 25 states have been released from death row with evidence of their innocence." Death Penalty Information Center, Innocence and the

Death Penalty, *available at* http://www.deathpenaltyinfo.org/innoc.html (last visited March 28, 2005).

5. California has the largest death row population in the country of any state with over 600 people condemned to die. A November 26, 2003 study comparing the Illinois and California capital punishment systems, along with previous analyses by Howard Mintz of the *San Jose Mercury News* and James Liebman of Columbia University, reveal that California's death penalty system is clearly unreliable and unjust. (*See* Ex. 58, Robert Sanger, *Comparison of the Illinois Commission Report on Capital punishment with the Capital Punishment System in California* (2003) 44 Santa Clara L. Rev. 101-234; *see also* James Liebman, et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, Section II, (June 12, 2000), *available at* http://justice.policy.net/jpreport/Section2.html (last visited December 23, 2002) (noting significant number of death penalty cases in which, following reversal for error, defendant was not convicted or was convicted of lesser offense than capital murder); Howard Mintz, *Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold*, San Jose Mercury News, April 14, 2002; Howard Mintz, *State, U.S. Courts at Odds on Sentences: Different Standards Lead to Reversals, San Jose Mercury News*, April 15, 2002.

6. California has hardly been immune from the phenomenon of wrongful murder convictions, including capital ones in years past. Indeed, an investigation by a prominent publication in California conducted in 2004 revealed that, since 1989, California has wrongfully convicted over two hundred men and women of serious crimes, including capital murder -- more than any other state. *See Wrongful Convictions in California*, Death Penalty Focus, March 28, 2008 (citing *Innocence Lost*, San Francsico magazine; Martin, Nina, November 2004). More specifically, Death Penalty Focus's 2008 study identified six death-sentenced individuals who were later exonerated, and three exonerees who were sentenced to life without the possibility of parole. Id. This statistic becomes frightening when nearly 1/3 of

California's death row prisoners have yet to secure habeas counsel and more than 200 cases are awaiting review by this Court – making the study's findings certainly understated. *Id.* When combined with the irrevocable nature of a death sentence, this intolerably high rate of error in capital convictions makes a death sentence in California cruel and unusual punishment in violation of the Eighth Amendment.

7. Jerry Bigelow was convicted of the murder of John Cherry on October 9, 1980, in Merced, California. He was sentenced to death after acting as his own attorney. At a retrial in 1988, he was acquitted after putting on evidence that another man had boasted about the killings and took sole responsibility for the homicide. (Ex. 57.) The prosecutor sought death in the trial of Dwayne McKinney. However, the jury sentenced him to life without the possibility of parole. He was released in 2000, 19 years after his conviction because a man who knew the true perpetrators came forward exonerating McKinney.[89] (*Id.*)

8. Although these cases involved men who were shown to be completely innocent and thus were freed from prison, it is also constitutionally indefensible for a system to wrongly sentence to death a significant number of people who are innocent of capital murder, but proven guilty of some other, lesser crime. Yet this must also be happening regularly if completely innocent people are being sentenced to death in meaningful numbers. *See* James Liebman, et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, Section II, (June 12, 2000) (noting significant number of death penalty cases in which, following reversal for error, defendant was not convicted or was convicted of lesser offense than capital murder).

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[89] Two other men have also been freed. Patrick Croy was convicted and sentenced to death for the murder of a police officer in 1979. On retrial in 1990, he was acquitted. Additionally, Troy Lee Jones was given a retrial in 1996 for ineffective assistance of counsel at his original trial in 1981. The prosecution dropped all charges against Jones in November 1996, after he had been on death row for fourteen years. (*Id.*)

9. Because of the real and intolerable risk of executing an innocent person, and for all the other reasons set forth in the amicus curiae brief filed by a group of New York law professors in *People v. Harris*, 98 N.Y.2d 452 (2002), since published at 27 N.Y.U. Rev. L & Soc. Change 399 (2001-02) (specifically discussing innocence issue at 451-65), the California's death penalty statute should be invalidated under the Eighth Amendment to the United States constitution. *See also United States v. Quinones*, 196 F. Supp. 2d 416 (2002), *adhered to* 205 F. Supp. 2d 256 (2002) (S.D. N.Y.) (risk that a "meaningful number" of innocent people will be sentenced to death and executed before evidence of their innocence can be uncovered renders federal death-penalty statute unconstitutional), *rev'd* 313 F.3d 49, 65 (2nd Cir. 2002) (although judicial system is fallible and "innocent people might be executed," defendant's federal constitutional argument is foreclosed by Supreme Court precedent).

10. In the alternative, this Court should hold that these same provisions of the California death penalty statute forbid executing a death sentence unless the defendant's guilt of first-degree murder has been proven not only beyond a reasonable doubt, but beyond any doubt. This standard, which has been proposed by some judges and commentators and by the drafters of the Model Penal Code, reflects the irrevocability of the death penalty. *See State v. Josephs*, 803 A.2d 1074, 1136 (N.J. 2002) (Coleman & Long, JJ., & Poritz, C.J., dissenting) (urging court to adopt the "beyond any doubt" standard for "death-eligibility determinations" in cases involving circumstantial evidence); James Liebman, et al., *A Broken System, Part II: Why There is So Much Error in Capital Cases, And What Can Be Done About It*, Section VIII, at 397-99 (Feb. 11, 2002) (recommending "beyond any doubt" standard for capital convictions"); Margery Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 50-51 (2001) (discussing same recommendation by Model Penal Code).

11. In Jones's case, the prosecution certainly did not satisfy this heightened standard in its first-degree murder case, and thus Jones may not constitutionally be executed – even if the Court rejects his claim that the conviction was against the weight of the evidence. As discussed in Claim Four, there was no physical evidence or eyewitness testimony that showed that Jones was both the robber and the shooter. Indeed, Jones has demonstrated another perpetrator was responsible for the shooting death of Shane Weeks. *See* Claims Four, Seven, Eight. Each witness purporting to identify Jones as the shooter has since recanted or was (or should have been) subject to devastating impeachment due to bias in their testimony. Had the prosecutor performed his constitutional duty to disclose exculpatory evidence and had counsel performed effectively, these witnesses' testimony would have been debunked at trial. The flimsiness of Jones's conviction and the doubt created by the prosecutor and trial counsel's unconstitutional performances therefore render Jones's death sentence violative of the State and Federal constitutions.

12. Thus, the death penalty or, alternatively, a death sentence against Jones, violates the State and Federal Constitutions.

13. These constitutional violations, individually or cumulatively, warrant the granting of this Petition without any determination of whether these violations substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Jones's rights had a substantial and injurious effect or influence on the guilt, special circumstance, and penalty judgments, rendering the trial fundamentally unfair and resulting in a miscarriage of justice.

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TWENTY-FOURTH CLAIM FOR RELIEF: THE CUMULATIVE EFFECT OF CONSTITUTIONAL VIOLATIONS DURING ALL PHASES OF JONES'S TRIAL RENDERED JONES'S CONVICTIONS AND SENTENCES FUNDAMENTALLY UNFAIR

1. Jones's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because of the cumulative and inter-related errors that occurred during both the guilt phase and the penalty phase of his capital trial. Relief may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. *See Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *United States v. McLister*, 608 F.2d 785, 791 (9th Cir. 1979).

2. The facts in support of this claim, among others to be presented after full investigation, discovery, and an evidentiary hearing, are as follows:

3. Jones incorporates the allegations contained in the remainder of this Petition by reference as though fully set forth herein.

4. Each of the errors at Jones's guilt and penalty trials standing alone require that Jones be granted relief. The guilt phase errors alleged in Claims One, Two, Three, Four, Five, Six, Seven, Eight, Fourteen, Sixteen, and Seventeen mandate habeas relief and ultimate reversal of the guilt phase verdict.

5. Moreover, reversal of the death sentence and habeas relief is mandated, because the foregoing constitutional violations had a harmful effect on the penalty phase verdict. The effect of each and all of these guilt phase issues must be added to the subsequent penalty phase errors in the evaluation of cumulative error in both guilt and penalty phases. However, because the issues resolved at the guilt phase are fundamentally different from the question resolved at the penalty phase, the

possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. *Smith v. Zant*, 855 F.2d 712, 721-22 (11th Cir. 1998) (admission of confession harmless as to guilt but prejudicial as to sentence).

6. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." *Magill v. Dugger*, 824 F.2d 879, 888 (11th Cir. 1987); *see generally* Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.L. Rev. 299, 328-34 (1983) (section entitled "Guilt Phase Defenses and Their Penalty Phase Effects").

7. Further, Jones's sentence of death was unlawfully and unconstitutionally imposed as alleged in Claims One, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, and Twenty-Three. Such violations mandate habeas relief and ultimate reversal of the penalty phase verdict because the cumulative effect of the penalty phase errors requires reversal of Jones's death sentence. *Alcala v. Woodford*, (9th Cir. 2003), 334 F.3d 862, 882-83, 893-94 [holding that combined prejudice of multiple errors deprived defendant of fundamentally fair trial and constitutes separate and independent basis for relief]; *Killian v. Poole*, (9th Cir. 2002) 282 F.3d 1204, 1211 [holding that even where no single error is prejudicial, the cumulative effect of non-prejudicial errors may itself be prejudicial and require reversal]; *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) [noting that prejudice may result from the cumulative impact of multiple deficiencies]); *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988); *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Hicks v. Oklahoma*, 447 U.S. 343, 344, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980). The Court also must assess the combined effect of all the errors, since the fact finder's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which

might be harmless had it been the only error, can combine to create prejudice and compel reversal. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988).

8. The Ninth Circuit adopts 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. *Alcala*, *supra*, 334 F.3d at 883, 893; *see also 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"].

9. Considered individually, each of the constitutional violations alleged in the instant Petition deprived him of a fair trial and entitle him to relief. The illusion of a fair trial is shattered by the staggering and substantial evidence that has come to light showing Jones was not the actual shooter in the Domino's Pizza or Mad Greek robberies. Without the misconduct of the prosecutor, especially in failing to disclose evidence that would have helped Jones impeach the states' witnesses and expose his innocence before the jury; the trial court's refusal to allow counsel to reopen its case; counsel's ineffectiveness in presenting the case initially; or the partiality and bias of the jury selected to decide Jones's fate; Jones would not have been found guilty and sentenced to death. Taken together, each error exponentially aggravates the effect of every other error so that the violation of the Sixth Amendment rights to the assistance of counsel, to confront adverse witnesses, and to be tried by an unbiased tribunal, compound to form an acute violation of the Fifth and Fourteenth Amendment rights to due process and fundamental fairness. In the context of a capital case, such a travesty constitutes a violation of the Eighth Amendment. *See*, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) [holding that, because of the qualitative difference between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is

the appropriate punishment in a specific case"].

10. These errors variously deprived Jones of his rights to liberty, fair trial, an unbiased jury, effective assistance of counsel, due process, to present a defense, heightened capital case due process, a reliable and non-arbitrary determination of penalty, and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Taken together, these errors undoubtedly produced a fundamentally unfair trial and a new trial is required, due to cumulative error. *See Lincoln v. Sunn*, 807 F.2d 805, 814 n.6 (9th Cir. 1987); *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992); *cf. Taylor v. Kennedy*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several flaws in state court proceedings combine to create reversible federal constitutional error).

11. Moreover, taken together, the errors create an unacceptable level of prejudice, particularly regarding the essential fairness and reliability of the penalty determination in this case. The cumulative errors resulted in a miscarriage of justice and in verdicts and sentences in violation of Jones's constitutional rights. As such, habeas relief is warranted.

IX.

PRAYER FOR RELIEF

Wherefore, Petitioner, Michael Jones, requests that this Court:

1. Issue a writ of habeas corpus to have Jones brought before this Court to the end that he might be discharged from his unconstitutional confinement and restraint and that he might be relieved of his unconstitutional sentence of death;

2. Order Respondent to answer this Petition by specifically admitting or denying each allegation and claim herein;

3. Stay Jones's execution pending final disposition of this Petition, subsequent appeal, and until a mandate is issued and spread on the minutes of the Court, pursuant to 28 U.S.C. section 2251 and Local Rule 83-17.6 (a) and (b);

4. Permit Jones, who is indigent, to proceed without prepayment of costs and fees and grant him authority to obtain subpoenas in forma pauperis for witnesses and documents, and grant him sufficient funds to secure expert assistance and investigation necessary to prove the facts alleged in this Petition;

5. Conduct an evidentiary hearing at which proof may be offered concerning each of the allegations in this Petition or any affirmative defenses presented by Respondent;

6. Permit Jones a reasonable opportunity to amend this Petition to include claims which become apparent from further investigation and to fully develop the facts and law of the claims raised herein, pursuant to the Federal Rules of Civil Procedure;

7. Grant Jones the authority to conduct discovery;

8. Require Respondent to bring forth the entire state court record so that the Court can review those parts of the record that are relevant to the issues and defenses raised in this proceeding;

9. Upon final review of this Petition, order that Jones's conviction and death sentence be set aside.

10. Grant Jones such additional relief as the Court may find appropriate in the interest of justice.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

MARGO A. ROCCONI
JOSEPH A. TRIGILIO
MARK YIM
Deputy Federal Public Defenders

DATED: January 30, 2012

By: */S/ Mark Yim*
MARK YIM
Deputy Federal Public Defender

Attorneys for Petitioner
MICHAEL L. JONES

X.

VERIFICATION OF PETITION

I, Mark Yim, declare as follows:

1. I am an attorney licensed to practice in the State of California and I am a member of the Bar of this Court. I am counsel for Michael Jones by appointment of this Court.

2. Jones is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California. I make this verification as someone acting on behalf of Michael Jones, pursuant to 28 U.S.C. section 2242, because these matters are more within my knowledge than his, and because he is incarcerated in a county different from my office.

3. I have read the foregoing Petition and am familiar with its contents. Some of the information contained in the Petition is information that I know to be true and correct based on my personal knowledge. The remaining information in the Petition is true and correct to the best of my knowledge, information, belief, and understanding.

4. I have discussed the contents of the Petition with Michael Jones, and he approves the filing of the Petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of January, 2012 at Los Angeles, California.

/S/ Mark Yim
MARK YIM

XI.

VERIFICATION REGARDING AUTHENTICITY OF EXHIBITS

I, Mark Yim, declare as follows, under penalty of perjury:

1. I am an attorney admitted to practice law in the State of California and am a Deputy Federal Public Defender appointed to represent Michael Jones, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

2. The originals of all Exhibits filed by Jones are in the custody and control of counsel for Jones whose office is located at 321 East 2nd Street, Los Angeles, California. Viewing of the originals (with the exception of those filed in the California Supreme Court pursuant to its rules) are available upon request.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on January 30, 2012 at Los Angeles, California.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

Dated: January 30, 2012

By: */S/ Mark Yim*
MARK YIM
Deputy Federal Public Defender

PROOF OF SERVICE

I, the undersigned, declare that I am employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled below; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and at whose direction I served a copy of the attached **UNDER SEAL AMENDED PETITION FOR WRIT OF HABEAS CORPUS; EXHIBITS 1 TO 190** on the following individual(s) by:

[X] Placing same in a sealed envelope for collection and interoffice delivery addressed as follows:	[ ] Placing same in an envelope for hand-delivery addressed as follows:	[ ] Placing same in a sealed envelope for collection and mailing via the United States Post Office, addressed as follows:	[ ] Faxing same via facsimile machine addressed as follows:

Death Penalty Law Clerk
312 North Spring Street
Los Angeles, CA 90012
(Exhibits provided on CD only)

Adrianne S. Denault
Office of Attorney General of California
110 West A St. Suite 1100
P O Box 85266
San Diego, CA 92186-5266

This proof of service is executed at Los Angeles, California, on January 30, 2012.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Edith Prado
EDITH PRADO