IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re MICHAEL DAMONE ALLEN, Petitioner, On Habeas Corpus	Writ No. S166577 Related Automatic Appeal pending in S066939 Los Angeles Superior Court No. BA105846 [Death Penalty Case]

PETITION FOR WRIT OF HABEAS CORPUS

STEPHEN S. BUCKLEY (Bar No. 96331)
CHRISTIAN C. BUCKLEY (Bar No. 216998)
Buckley & Buckley
P.O. Box 4093
San Clemente, California 92674
(949) 369-5544

Attorneys for Petitioner:
Michael Damone Allen

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re MICHAEL DAMONE ALLEN,	Writ No.
Petitioner,	Related Automatic Appeal pending in S066939
On Habeas Corpus	Los Angeles Superior Court No. BA105846
	[Death Penalty Case]

PETITION FOR WRIT OF HABEAS CORPUS

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

Petitioner, Michael Damone Allen (hereafter Mr. Allen, Petitioner, or Michael), through his counsel, Stephen S. Buckley, respectfully petitions this Court for a writ of habeas corpus challenging the Los Angeles Superior Court judgment of conviction entered September 2, 1997, and sentences of death entered September 30, 1997, and again December 12, 1997. Mr. Allen's automatic appeal is pending before this Court in Case No. S066939. This petition raises certain claims related to arguments presented in the direct appeal and other claims factually independent of the appeal, which cumulatively demonstrate the convictions and judgment of death are

invalid. By this verified petition, Mr. Allen sets forth the following facts and causes for issuance of the writ:

I.

INTRODUCTION

"We are ever striving after what is forbidden, and coveting what is denied us."

≈ Ovid

"The man who is denied the opportunity of taking decisions of importance begins to regard as important the decisions he is allowed to take."

≈ C. Northcote Parkinson

"Justice is itself the great standing policy of civil society; and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all."

"Whenever a separation is made between liberty and justice, neither, in my opinion, is safe."

≈ Edmund Burke

1. As established in this petition, Michael Allen was denied a reasonable opportunity to create a commonplace life by the economic, racial, and violent conditions into which he was born and reared. He was further denied a reasonable defense at both the guilt and penalty phases of his trial by the grossly unreasonable ineptitude of his counsel. As a result,

he is left coveting both. In the face of the contentions set forth herein, it must be concluded that Mr. Allen's liberty has been separated from justice.

2. Five significant snapshots from the trial may perhaps act as signposts in this petition:

3. **Image 1:** Lead defense attorney Joseph Orr's entire guilt-phase opening statement constituted just 34 lines and assured the jury that there would be "plenty of evidence by the defense" that would contradict and impeach "everything that the People's witnesses say." [RT, 15:3253-3254] However, when later asked by the court "What do you have by way of a defense?" Mr. Orr responded, "If anything, one witness that will take 10 minutes." He never even presented that witness [RT, 19: 4465, 4473-4474] and managed to summon up only a 16-page guilt-phase closing argument that required no more than 20 minutes to present. [RT, 25:5190-5206]

4. **Image 2:** Mid-way through guilt-phase deliberations, the jury was interviewed concerning an act of juror misconduct and subsequent inability to reach a verdict as to Mr. Allen. One of the jurors opined that the prosecution's case "was a mess and the evidence was all over the place." [RT, 26:5319:25-26] Another stated that ". . . what I'd heard had me very undecided . . ." and added that "more than one" juror was only semi-convinced of appellant's guilt. [RT, 26: 5373:4, 5374:28-5375:1] At least three of the jurors developed "the mindset from the beginning [that]...

all the witnesses are unreliable, all the testimony is unreliable . . . [and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363:12-18] Regrettably for Mr. Allen, his counsel Joseph Orr gave the jury nothing more to consider that could have resulted in a positive verdict.

5. **Image 3:** At the outset of Mr. Allen's mitigation case, Attorney Joseph Orr told the court that he would be calling two very short witnesses, Mr. Allen's jail house wife and his mother, to be followed by the Reverend Robert Douglas, who would take less than a couple of hours. His entire mitigation case upon which Mr. Allen was depending would be finished in a tidy short morning. In explaining his strategy of essentially offering only the testimony of the Reverend Douglas in mitigation, a witness about whom the court could find almost no qualifying expertise. Attorney Orr stated, "Since 1961, I have seen thousands of reports and seen thousands of psychiatrists on the stand and thought they were worthless the way they try to over structure the situation that they were asked to give an opinion in. Most juries, I might add, never believe them." [RT, 33:6614:15-21]

6. **Image 4:** A portion of the way through the testimony of Mr. Allen's only independent mitigation witness, the Reverend Robert Douglas, the court stated that his testimony was "just gobbledegook." In response, Mr. Allen's attorney Joseph Orr, the one who had called the

witness, stated, "I agree." [RT, 33:6693] The court later opined that it was "of the firm and honest opinion after listening to the testimony of [the Reverend Robert Douglas] that it was meaningless and will be rejected by the jury. It was without substance, without foundation, without tremendous relevance....[and] I was less than impressed."

7. **Image 5:** At the close of the case and in rejecting defense counsel Orr's meager request for a modified judgment, the court eloquently and sadly summarized, ". . . briefly stated, the lack of mitigation is palpable." [RT, 39: 7643:25] "So very little to say. There is no evidence whatsoever here of any abusive childhood. There is no evidence of any mental disease or defect. There is no evidence of intoxication. . . . He had a very standard childhood, unfortunately for Mr. Allen as he sits here today, perhaps. Nothing particularly unusual about his situation." [RT, 39: 7645:11-27.)

8. These five signposts highlight that Mr. Allen was deprived of an active and zealous defense which resulted in the jury being deprived of knowledge of critical facts that should have saved Mr. Allen's life.

9. In the guilt phase the jury never knew that Michael had severe brain damage and a history of drug abuse and intoxication that could have in-part explained his apparently inexplicable behavior. The jury never knew that almost all of the material witnesses against Mr. Allen received or expected benefits or leniency for their testimony. The jury never knew

that the LAPD and LA District Attorney's Office used a complex system to compensate witnesses after convictions were achieved. The jury never knew that the defense team was denied critical discovery and that after their verdict the judge would provide a beneficial sentence to the key prosecution witness.

10. In the penalty phase the jury never knew that Michael had severe brain damage, a low IQ, a sixth grade education, and a history of PCP, marijuana, and alcohol abuse. The jury never knew that he was raised in an abusive home, abandoned by all of the men in his life, and essentially reared by the streets. The jury never knew that as a young school child Michael witnessed a man stabbed to death in front of his eyes and his mother robbed at gun-point while he sat helpless in the car with her. The jury never knew that he was beaten daily while in elementary school and dog-shit was rubbed on his face by gang members when he was in third grade. The jury never knew that he started drinking to excess in elementary school and spent his formative years in camp placements and CYA. The jury never knew that he was a model inmate.

11. The jury never knew the formative circumstances of Michael's life and was never introduced to the "real" Michael Allen.

12. Michael knew nothing of a father, he knew nothing of being nurtured, he new nothing of opportunity, and he knew nothing of peace or joy. He was weaned on death and violence, abuse and drugs, abandonment

and betrayal. He was born with a mind not sufficiently suited to digest his surroundings and like far too many, having been denied an opportunity to make decisions of fundamental life importance, made important the life decisions he could make.

13. In elementary school, when most American kids are riding bikes and playing in trees, Michael's childhood was being eroded by the daily impact of the South Central "Hood" and his young life ebbed to gang life. While other kids were exposed to sports and music, he learned how to defend himself on the streets, sell drugs to buy food, and get high and stay drunk to avoid reality. By fifth grade the path handed to him was made certain, his destination was clear.

14. When facing the trial for his life, the justice he hoped for was empty and the only person standing in the gap between life and death was his inept trial counsel. Because his counsel offered no defense to the crime and no real mitigation to death, the only image painted for the jury was the prosecution's portrait of a normal eighteen year old young man who killed in cold-blood, with no remorse, reason, or cause. As detailed herein, such a picture was exceedingly and prejudicially inaccurate.

15. Justice must be the policy of our civil society and this Court because Mr. Allen's life and the integrity of the judicial system depends on it.

II.

UNLAWFUL RESTRAINT, JURISDICTION AND TIMELINESS

16. Petitioner is a prisoner of the State of California. He is illegally and unconstitutionally confined at the California State Prison at San Quentin by Warden Robert L. Ayers, Jr. and Secretary of the California Department of Corrections and Rehabilitation, James E. Tilton, pursuant to a judgment of death imposed upon him by the Los Angeles County Superior Court, in case BA105846. His imprisonment and death sentence are the products of fundamentally unfair proceedings at the pretrial and trial level where a multitude of constitutional errors resulted in unreliable determinations of guilt and punishment due to the failure of law enforcement, the prosecutors, the trial judge, and defense counsel to fulfill their duties and protect Petitioner's constitutional rights.

17. Petitioner's convictions and sentence are not final. No other petition has been filed by Petitioner or on his behalf challenging his confinement, sentence, or convictions in this or any other court. The claims asserted in this petition are cognizable in a habeas corpus proceeding and brought in a timely manner. This petition has been filed within thirty-six months after April 13, 2005, the date counsel Stephen S. Buckley was appointed to represent Mr. Allen for habeas corpus proceedings in this Court, and is thus entitled to a presumption of timeliness. (Supreme Ct.

Policies Regarding Cases Arising from Judgments of Death, Policy 3, std 1-1.1.)

18. This petition is necessary because Petitioner has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by article IV, section 2 of the United States Constitution; the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28, article IV, section 16, subdivision (a), and article V, section 13 of the California Constitution; customary international law, international human rights law and jus cogens; California Penal Code section 1473 and other state laws, because the factual bases for these claims lie in whole or part outside the record developed on appeal.

III.

INCORPORATION AND REQUEST FOR JUDICIAL NOTICE

19. Mr. Allen hereby requests that this Court take judicial notice of the record on appeal, and the briefs and papers filed in PEOPLE V. MICHAEL ALLEN AND CLEAMON JOHNSON, Case No. S066939, to

avoid duplication of those voluminous documents, a copy of which this Court and counsel for respondent already possess.

a. By this request Mr. Allen re-alleges the claims made on his behalf in the automatic appeal so that they may be considered cumulatively with the claims raised herein in assessing the existence of constitutional error and/or the prejudice flowing from them. In addition, the claims of error presented herein are to be considered cumulatively with each other in assessing the existence of constitutional error and/or prejudice.

b. Mr. Allen makes the request for cumulative review for constitutional error and prejudice because such a cumulative review is required under the Eighth and Fourteenth Amendments to the United States Constitution.[1]

[1] Mr. Allen's request is consistent with this Court's jurisprudence (see, e.g., *People v. Holt* (1984) 37 Cal.3d 436, 458-459 [accumulating effect of errors]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [recognizing cumulative error analysis]) and its special duty in capital cases to examine the complete record to ascertain whether a capitally-charged defendant received a fair trial. (*People v. Easley* (1983) 34 Cal.3d 858, 863; see also *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all errors]; *United States v. Tory* (9th Cir. 1994) 52 F.3d 207, 211; *United States v. Wallace* (9th Cir. 1987) 848 F.2d 1464, 1475-1476.) Multiple deficiencies merit a collective or cumulative assessment of prejudice, because errors that do not require that a judgment be set aside when viewed alone, or do not rise to the level of a constutional violation when viewed singly, may require relief in the aggregate. (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883-884 [accumulating the issues of both error and prejudice]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211, cert. den.(2003) 537 U.S. 1179; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622, cert. den. (1993) 507 U.S. 951 [accumulating trial court errors and

20. Mr. Allen incorporates by reference all exhibits filed in support of this petition, the facts contained in those exhibits, and re-alleges the material in those documents to avoid wholesale repetition of facts contained therein so that they may be treated under state law as if each fact and conclusion in the exhibits was repeated in each relevant allegation of this petition. (*In re Fields* (1990) 53 Cal.3d 1063, 1070, fn. 2.) The exhibits appended to this petition also show that the factual allegations are bona fide and require issuance of an order to show cause, an evidentiary hearing if factual issues remain in dispute, and the grant of relief.

21. Mr. Allen hereby incorporates by reference each and every paragraph of this petition into each and every claim presented as if fully set forth therein.

IV.

ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

22. Mr. Allen has provided this Court with such allegations and claims that are known to him and documentation of those claims as is reasonably currently available to him.

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deficiencies of trial counsel]; *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 593-594; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333, cert. den. (1979) 440 U.S. 974; see also *Henry v. Scully* (2d Cir. 1996) 78 F.3d 51, 53.)

a. Mr. Allen has been unable to provide additional claims, allegations and documents because of the difficulty in obtaining documents from governmental and other public agencies and even from such entities as experts, staff, counsel, witnesses and personnel connected to his trial. Many of these agencies, entities, and persons have reported that they destroy their files on a regular basis and have previously destroyed or lost files and/or information related to this case. Thus, through no fault of Mr. Allen, many agencies, entities and persons that may have had critical documents related to his claims have destroyed or otherwise failed to preserve them. In addition, witnesses have died since the time of his trial.

b. Because of the foregoing and because a reasonable opportunity for full factual development through access to this Court's subpoena power and other means of discovery, further investigation, and an evidentiary hearing has not yet been provided to Mr. Allen or to his habeas corpus counsel, the full evidence in support of the claims that follow is not presently reasonably available.

23. Nonetheless, the factual allegations set forth below, as supported by reasonably-available documentary evidence, adequately support each claim and justify the issuance of an order to show cause and a grant of relief under clearly-established federal law as determined by the United States Supreme Court and California state constitutional and

statutory law. Each and every claim is based on both the state and federal constitutions.

24. Mr. Allen does not waive any applicable rights or privileges by the filing of this petition and exhibits and, in particular, does not waive either the attorney-client privilege or the work-product privilege. Mr. Allen hereby requests that any waiver of a privilege occur only pursuant to a court ruling 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. Mr. Allen also requests use-immunity for each and every disclosure he has made and may make in support of this petition.

25. If the prosecution disputes any material facts alleged below, Mr. Allen requests an evidentiary hearing so that the factual dispute(s) may be resolved. After Mr. Allen has been afforded discovery and the disclosure of all material evidence by the prosecution, the use of this Court's subpoena power, and the funds and an opportunity to investigate fully, counsel requests an opportunity to supplement or amend this petition. Mr. Allen is presently aware of the facts set forth below, establishing a prima facie case for relief.

26. To the extent that the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on Mr. Allen's behalf, Mr. Allen was deprived of the

effective assistance of counsel in violation of the state and federal constitutions.

27. To the extent that defense counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were either facially incompetent or based upon state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts, and therefore were not reasonable, rational or informed, in violation of the state and federal constitutions.

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

29. Defense counsel was ineffective at both the guilt and penalty phases of Mr. Allen's trial, in violation of the state and federal constitution.

30. Mr. Allen's convictions, special circumstances findings, and death sentence were obtained in violation of his most fundamental state and federal constitutional rights, which include the rights: to a fair trial; to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and

penalty; to an individualized determination of penalty; to heightened reliability of a capital sentence; to a penalty based on a jury's consideration and weighing of only materially accurate, non-prejudicial, relevant record evidence presented at trial, which Petitioner had notice and a fair opportunity to test and refute: to conviction and sentencing determinations found by proof beyond a reasonable doubt; to a jury's consideration and giving full effect to evidence in mitigation; to a trial by a fair and impartial jury; to the effective assistance of counsel; to present a defense; to a state death penalty law which genuinely narrows the class of persons eligible for the death penalty and justifies the imposition of a death sentence compared to others found guilty of murder; to confrontation and compulsory process; to being physically and mentally present for and able to comprehend all pretrial and trial proceedings; to the privilege against self-incrimination; to the presumption of innocence; to notice of the evidence against him; to the meaningful confrontation of witnesses; to the enforcement of mandatory state laws; to a trial free from the unacceptable risk of impermissible factors coming into play; to a trial free of materially misleading evidence; to a proceeding with a fair balance of advantages between the prosecution and defense; to fundamental fairness; to be free from cruel and unusual punishment; to an impartial and disinterested tribunal; to equal protection; to due process of law; to a unanimous verdict; to a jury fully and appropriately instructed on the relevant law, including clear instructions

defining the findings necessary to impose a judgment of death; and to a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (c). These rights are individually and collectively guaranteed to Petitioner by article IV, section 2 of the United States Constitution, the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28, article IV, section 16, subdivision (a), and article V, section 13 of the California Constitution; customary international law; international human rights law and jus cogens; and Penal Code section 1473 and other state laws. Based on the errors committed at Petitioner's trial, the entire judgment must be reversed.

V.

REQUEST FOR LEAVE TO AMEND PETITION

31. Despite the diligent efforts of Petitioner and his counsel and because of the government's tactics of obstruction and delay, discovery which should have been forthcoming months ago has still not been provided to Petitioner. This delay in the provision of discovery has severely hampered Petitioner's ability to identify the facts in support of the claims in this petition. Additionally, without full discovery, Petitioner

cannot fully identify all of the claims that should be included in this petition. As to each claim and the petition as a whole, Petitioner therefore asks the Court for leave to amend this petition if and when additional information is developed based on any delayed discovery which would support existing claims or new and different claims.

32. In May 2006, Petitioner's counsel initiated the informal discovery process outlined in *In re Steele* (2004) 32 Cal.4th 682, by requesting identified documents from numerous government and law enforcement offices including the Los Angeles County District Attorney's Office and the Los Angeles Police Department. All of the efforts were thwarted and on July 27, 2007, Petitioner's counsel filed a formal motion for discovery pursuant to Penal Code section 1054.9. That motion was argued before Judge Charles Horan on January 4, 2008, in Department 9A-M of the Los Angeles Superior Court. Judge Horan issued no order compelling discovery at that time. Since that time, Petitioner's counsel continued to engage in informal discovery procedures and a status conference before Judge Horan occurred on March 14, 2008, in Department 9A-M of the Los Angeles Superior Court. At that hearing, Prosecutor Snyder indicated that requested discovery materials could not be made available to Petitioner's counsel for three to five weeks. Also at that hearing the court granted the discovery order attached hereto as Exhibit 43. (Ex. 43, pp. 1051-1052.) A second status conference remains scheduled for

May 2, 2008, before Judge Horan in Department EA-M of the Los Angeles Superior Court.

33. Without completion of the discovery process and compliance by all of the agencies involved with the investigation and prosecution of Petitioner in his capital case, it is impossible to fully develop all of the claims for relief in habeas that are available to Petitioner. Moreover, the significant delays in the production of discovery have seriously impeded counsel's ability to fully investigate the information thus far provided and to use this information to support existing claims and identify derivative claims that may be new and different from those enumerated below. Nonetheless, the evidence that is obtainable and set out below adequately supports each claim and justifies issuance of an order to show cause and the grant of relief.

34. Further, as of January 1, 2008, Petitioner was provided with access to the additional investigation funds approved by this Court on December 21, 2007. The significant lack of funding and late provision of additional funds have seriously impeded counsel's ability to fully investigate information to support existing claims and identify derivative claims that may be new and different from those enumerated below. Nonetheless, the evidence that is obtainable and set out below adequately supports each claim and justifies issuance of an order to show cause and the grant of relief.

VI.

PROCEDURAL SUMMARY

35. On August 5, 1991, Donald Loggins and Payton Beroit were shot and killed while sitting in a car parked on Central Avenue near 88th Street in South Central Los Angeles. A police investigation followed but no arrests were made. [Clerk's Transcript, volume 1, pages 179-181 and pages 193-195][2] These killings are the basis for the instant case.

36. Approximately 1½ years later (March 9, 1993), Chester White was shot and killed as he ran from a convenience store near 89th Street and Avalon Blvd. in South Central Los Angeles. A police investigation followed. Mr. Allen was arrested and charged with White's murder in Los Angeles case #TA023268. [CT, 5:933] Mr. Allen was subsequently convicted by a jury of 1st degree murder. On December 22, 1993, Mr. Allen was sentenced to a term of 30 years to life in state prison. [CT, 5:933] The conviction and judgment is the basis for the Special Circumstance of Prior Murder [Pen. Code § 190.2(a)(2)] in the instant case.

37. One year later (December 16, 1994), a Los Angeles County grand jury indicted Mr. Allen and co-defendant Cleamon Johnson on two counts of murder for the August 5, 1991, shooting deaths of Loggins and Beroit. Enhancement allegations of armed with a deadly weapon [PC 12022(a)], personal use of a firearm [Pen. Code § 12022.5(a)], and personal

[2] Hereafter, all citations will be abbreviated as [CT, 1:179-181, 193-195].

use of an assault weapon [Pen. Code § 12022.5(b)] were also filed against Mr. Allen as to both counts. Additionally, two special circumstances were alleged against Mr. Allen: prior murder [Pen. Code § 190.2(a)(2)] and multiple murders [Pen. Code § 190.2(a)(3)]. [CT, 1:179-181; 193-195, 196] Three days later (December 19, 1994), the court ordered the original grand jury reporter's transcript sealed and only redacted copies of the grand jury transcript were to be provided to counsel. The redacted copies omitted the names of three civilian witnesses who testified before the grand jury (then referred to as Witness #1, Witness #2 and Witness #3). [CT, 1:197]

38. Attorney Joseph Orr was appointed by the Los Angeles County Superior Court to represent Mr. Allen on December 27, 1994. [CT, 1:192, 200] On January 19, 1995, Mr. Allen pled not guilty and denied the enhancements and special circumstances allegations. [CT, 1:210]

39. Initial discovery materials were provided to Mr. Allen including a copy of the redacted grand jury reporter's transcript pursuant to a court's earlier order. [CT, 1:197, 210] The apparent basis for this unusual prosecutorial request and court order was witness security and safety based on co-defendant Johnson's prior behavior. Eventually, this information was to be disclosed to the defendants not less than 30 days before the start of trial. [CT, 3:445]

40. On October 27, 1995, the court granted Mr. Allen's motion [CT, 2:338-43] to sever the "prior murder" special circumstance from the

remainder of the counts and allegations contained in the indictment. [CT, 2:377, 383]

41. On August 26, 1996, Mr. Allen's "Motion to Sever Defendants" and "Motion for Separate Juries" was filed. [CT, 3:470-482] The prosecution filed its response on November 4, 1996. [CT, 3:487-92] The following day (November 5, 1996) the court denied the motions. [CT, 3:493; RT, 4:993] On August 11, 1997, Mr. Allen renewed his Motion to Sever based on *Aranda/Bruton* grounds prior to witness Donnie Ray Adams testifying. The motion was again denied. [RT, 18:3932, 4038]

42. Jury selection began on July 23, 1997, and concluded on August 1, 1997. [CT, 3:635, 645-646] Opening statements were made and witnesses began testifying for the prosecution on August 5, 1997. [CT, 4:780-781]

43. Two weeks later (August 19, 1997), all parties rested. The jury was instructed. Closing arguments began [CT, 4:823] and concluded the following day (August 20, 1997). [CT, 4:824]

44. Jury deliberations began at approximately 11:00 a.m. on August 20, 1997. [CT, 4:824] and continued for three more days. [CT, 4:828, 830, 833] At 10:15 a.m. on the fifth day of deliberations (August 27, 1997), a hearing was conducted, a juror was removed over defense objection, and the removed juror was replaced with an alternate juror. The jury began deliberations anew at about 3:30 p.m. [CT, 4:836-837] The next

day (August 28, 1997) at about 4:00 p.m., the jury notified the court that they could not reach a unanimous verdict re Mr. Allen. [CT, 4:839-40] The following morning (August 29, 1997) Mr. Allen moved for a mistrial. The court inquired of the jury foreman, and he indicated the vote was 10-2. The court instructed the jury to resume deliberations. [CT, 4:842] Shortly before 2:00 p.m. the following court day (September 2, 1997), the jury notified the court that it had reached verdicts. Mr. Allen was found guilty of both counts of 1st degree murder. The three weapons allegations were found to be true, and the special circumstance of "multiple murder" was found to be true. Co-defendant Johnson was found guilty of the murders and the special circumstance of multiple murders. [CT, 4:916-928]

45. On September 4, 1997, Mr. Allen waived his right to trial on the bifurcated special circumstance allegation of "Prior Murder" and admitted that this special circumstance was true. The court found the special circumstance of "Prior Murder" to be true, and advised the jury thereof. [CT, 5:933]

46. The joint-defendant penalty phase began on September 11, 1997, with opening statements given by the prosecutor and Mr. Allen's counsel to the same jury that heard the evidence except for the replaced juror. [CT, 5:955]

47. The jury began penalty phase deliberations on September 24, 1997. [CT, 5:994] On September 29, 1997, at about 3:25 p.m., the jury

indicated they had reached a verdict. The court sealed the verdict until the following day. [CT, 5:998] On September 30, 1997, the jury verdicts of death against Mr. Allen and co-defendant Johnson for both murders were announced. [CT, 5:1081-1083]

48. On December 12, 1997, Mr. Allen's Motion for a New Trial was heard and denied. The automatic Motion for Modification of the Verdict was denied. The court imposed the judgment of death as to Mr. Allen and advised him of his appeal rights. [CT, 5:1174-8, 1180-1197] Co-defendant Johnson was also sentenced to death. [CT, 5:1198-1203, 1228-1232]

49. Mr. Allen's Notice of Automatic Appeal was filed with the Supreme Court pursuant to Penal Code section 190.6 on December 31, 1997.

50. The opening brief in Mr. Allen's Automatic Appeal was filed in this Court on January, 25, 2005. The Attorney General's respondent's brief was filed in this Court on March 24, 2006. Mr. Allen's reply brief was filed in this Court on December 26, 2006.

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VII.

FACTUAL SUMMARY

51. Mr. Allen incorporates by reference the Statement of Facts set forth in his Opening Brief filed in this Court on January 25, 2005, and any supplemental facts included in his Reply Brief filed in this Court on December 26, 2006. In addition thereto, Mr. Allen provides the following factual statements:

A. MICHAEL ALLEN'S LIFE HISTORY

52. Michael Allen was born out of wedlock on September 2, 1972, to Booker T. Cole Jr. and Rebecca Allen. (Ex. 2, p. 7, Declaration of Rebecca Allen; Ex. 1, p.1.) Dianne Sneed, Michael's grandmother and Rebecca's mother, grew up in the South Chicago projects and his non-biological grandfather Walter Blackledge was from Harlem, New York. Dianne was abused as a young woman and warned Rebecca about abusive men. (Ex. 2, p. 15, Declaration of Cynthia Allen; Ex. 1, p. 5.)

53. Michael's father, Booker Cole, was in the Navy at the time of Michael's birth. (Ex. 4.) In May of 1972, the year of Michael's birth, Cole was diagnosed with gonorrhea and admitted to having a previous history of venereal disease. (Ex. 4, p. 187.) Cole had a less than exemplary service record and was eventually discharged administratively for poor military

performance and numerous "alleged" physical and mental maladies. (Ex. 4.) Cole was diagnosed in 1977 with moderate or borderline paranoid personality and psychotic decompensation. He tested with an IQ of 85. (Ex. 4, pp. 180, 184.)

54. According to Rebecca Allen, Booker Cole was absent from Michael's life. He was not a good person and took no role in Michael's life. (Ex. 2, pp. 7-8, Declaration of Rebecca Allen.) Rebecca did not marry Booker and considered him to be nothing more than an unfortunate "sperm donor." (Ex. 2, pp. 7-8, Declaration of Rebecca Allen.)

55. At Michael's birth, Rebecca was eighteen years old. (Ex. 1, p.2.) He was born through an induced vaginal delivery at LA County hospital. (Ex. 2, pp. 7-8, Declaration of Rebecca Allen.) At birth, he was 21 inches long and weighed 5 lbs, 12.5 ounces. (Ex. 7, p. 327.)

56. As a baby, Michael was not breast fed, but rather ate Similac and cereal. Michael did not go to preschool. (Ex. 2, p. 7, Declaration of Rebecca Allen.)

57. Michael's entire childhood from birth to his initial entry into Camp Holton and then CYA was lived out in less than a ten block neighborhood in South Central Los Angeles. (Ex. 2, p. 14 Declaration of Derek King.)

58. Derek King, Michael's half-brother, was born out of wedlock on January 3, 1974, to Arthur King and Rebecca Allen. (Ex. 2, p. 11,

Declaration of Derek King.) Michael and his brother were raised in the same homes by their mother Rebecca. (Ex. 2, p. 11, Declaration of Derek King.)

59. In April of 1978, Rebecca Allen married Louis Jordan. The family lived together in Avalon Gardens for a short time until Rebecca left Louis in August of that same year because he seriously abused her. According to Rebecca, Michael told her years later that he and Derek were kicked by Jordan when she was not at home. (Ex. 2, pp. 7-9, Declaration of Rebecca Allen.)

60. Michael recalls that Jordan had a high temper, threw things, and hit his mother. Jordan would hit Michael when he got mad. He would often throw things and hit Allen and his little brother Derek. (Ex. 40, Declaration of Dr. Khazanov.)

61. Derek stated that "I can't remember one good thing about" Jordan. According to Derek, Jordan hit his Mom with his fists and "whooped" Michael and him. (Ex. 2, p. 13, Declaration of Derek King.)

62. According to Cynthia Allen (Rebecca's sister and Michael's aunt), Jordan physically abused Rebecca Allen. He was an angry man, who put holes in the walls and knocked Rebecca down steps. Michael was protective of his half-brother Derek and appeared to have been physically abused while protecting Derek. One time Rebecca ran home to 729 E. 90th Street from Avalon Gardens at around 2:00 or 3:00 in the morning because

Jordan was physically abusing her. Dianne Sneed, Rebecca's mom, asked her where the kids were and was told that they were still at Jordan's house. Dianne then got a gun, got in the car, and drove to Louis Jordan's house in Avalon Gardens where she rescued Michael and Derek. After the incident, Rebecca left Louis, moving out on a day when he was gone. Michael later said he was kicked by Louis. (Ex. 2, p. 19, Declaration of Cynthia Allen.)

63. The only father figure Derek and Michael had other than the abusive Jordan and the totally absent Cole, was Arthur King, Derek's father. While Arthur King and Rebecca were together, Michael spent time with Arthur and his family. Arthur never lived in the home and after the couple broke up prior to Rebecca's marriage to Jordan, Arthur King told her that Michael should no longer go with Derek to visit his family. As a result, Michael lost the additional highly valued connection to Arthur King and his family. (Ex. 2, p. 13, Declaration of Derek King; Ex. 2, pp. 7-10 Declaration of Cynthia Allen.)

64. During the summer before Michael's sixth grade year, Arthur King became (and remains) seriously addicted to crack and just faded away from Michael and Derek. (Ex. 2, p. 13, Declaration of Derek King; Ex. 2, pp. 7-10 Declaration of Rebecca Allen.)

65. Derek related that because of Jordan's abuse, King's absence, and Cole's abandonment, Michael never had a "father" in his entire life. He remembered Booker Cole only having three contacts with Michael,

twice when he came by the house and once when Michael went to see him. (Ex. 2, p. 13, Declaration of Derek King.)

66. Derek's father, Arthur, was involved in Derek's life; but Michael's father, Booker, was not involved in Michael's life. This bothered Michael greatly and it appeared to Michael's Aunt Cynthia that Booker did not want to be bothered with Michael. (Ex. 2, pp. 17, Declaration of Cynthia Allen.) According to Donovan Clark, one of Michael's best friends as a child, Michael never had a father around. (Ex. 2, p. 23, Declaration of Donovan Clark.)

67. On December 22, 1978, Michael's grandmother Diane Sneed died. (Ex. 1, p.4.) Michael was very close to Dianne, and for some weeks or a month after her death, he would wait every day on the front steps of the home for her to come home until he finally realized that she was not going to come home. At the request of Dianne and his mom, Michael did not go to his grandmother's funeral and the anger and hurt that came from this lasted into his teens. (Ex. 2, p. 17, Declaration of Cynthia Allen.) When Michael was nine or ten, he went to the cemetery to visit Dianne's grave. Michael asked his aunt Cynthia why she didn't clean Grandma's house anymore. (Ex. 2, p. 17, Declaration of Cynthia Allen.)

68. Michael's mom did not let him go to Diane's funeral because she did not feel it was a place for children. This hurt Michael deeply. (Ex. 2, pp. 7-9, Declaration of Rebecca Allen.)

69. From 1977 through 1981, Michael attended St. Albert the Great school in Compton where he completed Kindergarten through Third grade. (Ex. 5, pp. 188-203.)

70. Michael performed satisfactorily in kindergarten, but quickly fell behind in first grade. According to his first grade report card, he was performing poorly in spelling, math, and English. The school wanted to retain him in first grade, but he was promoted after his mother wrote a letter to the school asking that he be advanced and agreeing to return him to first grade if he fell behind in second grade. (Ex. 5, pp. 189-196.)

71. Michael's first grade CTBS test (March 1979 at grade 1.6) reflected that he was testing at grade 0.3 in reading, 0.1 in language, and 0.6 in math for a total effective grade level battery of 0.1. (Ex. 5, p. 200.)

72. In second grade, Michael fell further behind. He was generally a "C" student and was well behind grade level in reading. (Ex. 5, p. 198.) His teacher remarked that he had trouble concentrating on his reading and work and tended to day dream. (Ex. 5, p. 198.)

73. Michael's second grade CTBS test (March 1980 at grade 2.6) reflected that he was testing at grade 1.4 in reading, 1.7 in language, and 1.9 in math for a total effective grade level battery of 1.6. (Ex. 5, p. 200.)

74. In third grade, Michael's "C" work fell to mostly "D" work. His study skills fell dramatically. He missed 18 days of school and had difficulty listening and following directions. (Ex. 5, p. 199.)

75. Michael's third grade CTBS test (March 1981 at grade 3.6) reflected that he was testing at grade 2.1 in reading, 1.8 in language, and 2.7 in math for a total effective grade level battery of 2.1. (Ex. 5, p. 200.) His third grade results placed Michael in the bottom 8% of all test takers nationally and over a full year behind academically. (Ex. 5, p. 200-201.)

76. When Michael was in second or third grade at St. Albert, he was standing outside the school waiting to be picked up by his aunt Cynthia when he saw three or four guys running across a playground in a big fight. The group came toward him and then opened up and ran away. One guy was left lying on the ground in front of Michael with a butcher knife coming out of his chest. Someone yelled don't take it out and some girls from the school across the street helped him. (Ex. 40, Declaration of Dr. Khazanov.)

77. Around the time Michael was in third grade, he and his mom were leaving a McDonalds Restaurant around Avalon and Century when two guys came up to the car, pulled out a gun and pointed it through the window at his mother's head. She was pulled from the car and the gun was pointed at her stomach. One of the guys kept yelling to shoot her or blast her. Michael was found by his mother on the night of the incident crying because he was afraid that she could have died. (Ex. 2, pp. 7-9, Declaration of Rebecca Allen; Ex. 40, Declaration of Dr. Khazanov.)

78. Derek recalls that on another occasion, his Mom had just been paid, went to the store, and was robbed by Avalon Garden Crips. (Ex. 2, p. 12, Declaration of Derek King.)

79. In 1981-1982, Michael transferred to public school and attended fourth grade at 93rd Street Elementary where he was absent 25 days and obtained a "C" average. (Ex. 5, p. 205.)

80. When Michael started attending 93rd Street Elementary School things changed dramatically for him. (Ex. 2, p. 11, Declaration of Derek King.) Because of where Derek and Michael lived, they could not walk to any school without going through Crip gang neighborhoods and running the risk of being beaten up or worse. (Ex. 2, p. 11, 14, Declaration of Derek King and see Map at Ex. 2, p. 14.)

81. According to Donovan Clark, 93rd Street Elementary School was deep in Crip's territory and anyone affiliated with the 89 Family Bloods simply because of living where Michael lived (729 1/2 E. 90th Street or 616 89th Street) was jumped on, harassed, attacked and beaten constantly. (Ex. 2, p. 23, Declaration of Donovan Clark.)

82. According to Derek, when Michael was at 93rd Street Elementary School, it was a pretty rough school and was in Crip's territory. Because of where he lived at 729 East 90th Street and 616 89th Street, Crips believed that Michael and Derek were Bloods. "Every day" Michael was picked on, bullied, pushed around and physically hit by Crips after

school or on his way to or from school. (Ex. 2, p. 11, Declaration of Derek King.)

83. Michael acted as Derek's "big brother" and protected him. (Ex. 2, p. 11, Declaration of Derek King.)

84. In the fall of 1982, Michael transferred to Mother of Sorrows and completed a second year of fourth grade. (Ex. 5, p. 206.)

85. Michael was given a short-form IQ test in March of 1983 (the SFTAA test) which resulted in a raw score of 332, language score of 79, non-language score of 81, and a total IQ score of 79. (Ex. 5, p. 206.)

86. Michael was given a CTBS test in March 1983 at grade 4.6 when Michael was completing his second year in fourth grade. That test reflected that he was at grade 2.9 in reading, 3.5 in language, and 3.9 in math for a total effective grade level battery of 3.5. (Ex. 5, p. 206.) His fourth grade results placed Michael in the bottom 25% of all test takers nationally who were completing fourth grade for the first time rather than the second as Michael was doing. (Ex. 5, p. 206.)

87. While Michael and his brother attended Mother of Sorrows School, they were required to walk through territory controlled by the 87th Street Crips and Avalon Garden Crips to get to school. Almost daily, they would pick on Michael, beat him up, bloody his nose and on at least a couple of occasions, Derek saw them beat Michael to the ground and pick

up dog shit and rub it on him and in his face. (Ex. 2, p. 11, Declaration of Derek King.)

88. In February of 1982, Michael was in the fourth grade, was 56 inches tall, and weighed 98 pounds. In May of 1985, Michael was in sixth grade, was 65 inches tall, and weighed 182 lbs; almost double his earlier weight. (Ex. 7, p. 326.)

89. During Michael's childhood, his mom would give him "woopens" with a belt, switch, extension cord, or piece of race track from a car toy. (Ex. 40, Declaration of Dr. Khazanov.) Michael reported in September 1988, that his mother "whipped" him with a belt until the age of fourteen. (Ex. 6, p. 284.)

90. Michael had low self esteem as a young child because of his skin color and very large size. He was constantly teased about being fat, wearing thick glasses, having a mom on welfare, not having money to purchase cool clothes (e.g. Air Jordan's, sweats, etc.), getting jumped on, and being too big for his age to participate in sports. (Ex. 2, p. 17, Declaration of Cynthia Allen.) Michael considered himself "ugly" because of his skin color. (Ex. 2, p. 16, Declaration of Cynthia Allen.) Michael was told he was too fat to play Pop Warner football with his age group and too young to play with the group ahead of him. (Ex. 2, p. 17, Declaration of Cynthia Allen.) Because Michael wore very thick glasses, he was jumped. His mother moved him between schools in an attempt to avoid harassment

about his size, color, and glasses. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

91. Michael's mother attempted to take him to Kaiser for counseling for his low self esteem; but he was never given treatment because of the length of the waiting list and the priority of court ordered counseling. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

92. From fifth grade through junior high, Michael transferred schools at least six times and never completed a grade higher than sixth grade. (Ex. 5, pp. 206-209.)

93. When Michael was in fifth grade, Derek was with him when three Crips, two older and one younger, on bikes came up to them on 90th and Stanford Street and beat Michael "real bad." Older guys in the 89 Family Bloods gang saw this and chased the Crips away. (Ex. 2, p. 11, Declaration of Derek King.)

94. Michael remembers people being shot when he was a child and that people would celebrate New Years Eve by going outside and shooting their guns in the air. (Ex. 40, Declaration of Dr. Khazanov.)

95. Michael would get beat up and stomped on all the time as a kid. He was constantly worried about what was going to happen on the way to and from school. He felt like he was under the stress and tension of always wondering if he would make it home from school. (Ex. 40, Declaration of Dr. Khazanov.)

96. Michael attended fifth grade in 1983-1984 at 93rd Street Elementary. (Ex. 5, pp. 207-208.) Michael's May 1984 CTBS test reflected raw scores of 62 in reading and 62 in math. Michael was absent 20 days. (Ex. 5, pp. 207-208.)

97. Michael attended sixth grade in 1984-1985 at 93rd Street Elementary. (Ex. 5, pp. 207-208.)

98. From 1986 to early 1988, Michael attended Junior High without completion at Sutter Junior High, Mulholland Junior High, Drew Junior High, Mother of Sorrows School and Holmes Junior High. (Ex. 5, pp. 209.) During this period he scored only "F" or "D" marks, most of his classes were incomplete, and he missed an extensive number of days of school. (Ex. 5, pp. 209-213.)

99. When Michael was in Jr. High, the Crips were becoming even a bigger problem because of where he lived. He would ditch school to avoid them or cut his last class so he could get out of school early and avoid the confrontations. He was constantly tense and would only feel relaxed when he was out of the neighborhood. (Ex. 40, Declaration of Dr. Khazanov.)

100. According to Rebecca Allen, Michael went to Illinois with his father, Booker, during the summer before he entered Mother of Sorrows School for eighth grade. They drove to Illinois together. Michael stayed with Clara Cole his paternal grandmother, but Booker was not around for

most of the summer. Michael flew home later in the summer disheartened. (Ex. 2, p. 24b, Declaration of Rebecca Allen.) Michael also visited his father in San Diego once during fourth or fifth grade and potentially a couple of other times. Booker had a girlfriend named Carolyn Crawford, who had a daughter named Fay and a son. Michael liked Carolyn and Fay. The last time Michael went to San Diego as an early teenager, he locked Booker out of the house due to an argument and the police had to come let him back in. (Ex. 2, pp. 7-9, Declaration of Rebecca Allen.)

101. Around July 1979, according to Caroline Crawford, Booker Cole's girlfriend during the 1970s, Michael came to stay with her for the purpose of visiting his father Booker Cole. Michael returned home to go to school around late August of that year and while he was visiting, Cole was "in and out," not around very much of the time, and was "somewhere else." Because his father was not around, Michael spent most of his time with Caroline and her children. According to Caroline, Booker Cole was a "stern" man. (Ex. 2, p. 21, Declaration of Caroline Crawford.)

102. According to Cynthia, the summer before Michael entered Mother of Sorrows School for eighth grade when he was 10 or 11 years of age, he visited Booker Cole and Clara Cole in Illinois. Upon his return, it appeared that he had been rejected by his father. Based on Michael's demeanor, Cynthia believed that "something happened" or some significant

incident occurred during this visit. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

103. While being bussed to a school in the valley, Michael's teacher told him, "When you turn sixteen you can drop out like the rest of them." (Ex. 2, p. 18, Declaration of Cynthia Allen.)

104. When Michael was in seventh grade, his teacher told him in front of the class that he was a "baby refrigerator." (Ex. 2, pp. 9-10, Declaration of Rebecca Allen.)

105. Michael started drinking when he was twelve or thirteen. He would drink thunderbird, silver satin, or eight ball and would mix all the alcohol together with cool aid and call it a boilermaker. He was drinking every day by the time he was thirteen, sometimes to the point of throwing up. (Ex. 40, Declaration of Dr. Khazanov.)

106. Starting in junior high school, Michael and his friends would sell drugs to obtain money to buy food during the week. His mother would only fix food on the weekend, so during the week, he had to fix his own food and fend for himself. (Ex. 2, p. 12, Declaration of Derek King.)

107. According to Derek King, the neighborhood "defines who you are" in two ways. First, just by living where you live it makes other gangs believe that you are a member of the gang that controls the area you live in and even if you are not, others will react like you are – beating you up or worse. Second, by living in a neighborhood where you have no father

role to guide you or mother at home to help direct you, you become like the neighborhood because that is all you see, all you know, and only have older gang guys to guide you. (Ex. 2, p. 12, Declaration of Derek King.) In neighborhoods controlled by gangs, you either "lay down and be drug through the mud" or stand up and align yourself with the gang to become a man. You can hold out as long as you can, but there is a void, no one teaches you to be a man, and in a gang, you actually have men to teach you things. (Ex. 2, p. 12, Declaration of Derek King.) If you have no one to guide you and no father to teach you, you will eventually join a gang and do what the gang does because that's all you see and all you know. Even a stay-at-home Mom can't teach you how to be a man so you go to the older guys in the gang to learn how to "man up." (Ex. 2, p. 12, Declaration of Derek King.)

108. According to Donovan Clark, South Central in the late 1980's and early 1990's was "war zone" and the 89 Family Blood's area was a "killing field." (Ex. 2, p. 22, Declaration of Donovan Clark.)

109. According to Clark, gangs were role models for children. (Ex. 2, p. 22, Declaration of Donovan Clark.) He and other members of the 89 Family Bloods brought Michael into the gang around 1985 and for at least one year prior to that Michael was a "wannabe nuisance." Michael's first gang name was Fat Mike and then later it was changed to Fat Rat, but there was no significance to the name "rat." Michael did not want to be in a gang,

he was a good kid who had a good future. (Ex. 2, p. 23, Declaration of Donovan Clark.) Michael joined the gang to follow Clark and other older men in the neighborhood. Clark was an "older brother" to Michael. When all of Michael's closest friends and male role models joined the 89 Family Bloods, he followed. (Ex. 2, p. 23, Declaration of Donovan Clark.)

110. According to Clark, in South Central, you have to "grow up fast" to become "a man" because your mom does not have a husband and you try to be the man of the house. There are no jobs, so you do crime to try to help your family. (Ex. 2, p. 23, Declaration of Donovan Clark.) The 89 Family Bloods was a family structure of bonding and honor. The members of the gang looked at each other as a family and brothers. (Ex. 2, p. 23, Declaration of Donovan Clark.) The only boys in the area that did not join a gang were those that had a father who lived in the home. For everyone else, the men in the gang became their father and male role models. (Ex. 2, p. 23, Declaration of Donovan Clark.) "When you are young, you see something you like in gangs because of the camaraderie and the family bond that you are missing in the home and find in the gang. Your gang is your army and you fight for your brothers as a product of the South Central environment." (Ex. 2, p. 24, Declaration of Donovan Clark.)

111. According to Clark, once you are in the gang, you do what the gang does. You either sell drugs "big time" or defend the gang's honor and territory. (Ex. 2, p. 23, Declaration of Donovan Clark.) Killing

becomes nothing because there is so much of it, you don't duck when you hear gunshots and if you don't hear a helicopter or sirens you think something must be wrong. At first it seems shocking, but you get used to it and it becomes the "norm." (Ex. 2, p. 23, Declaration of Donovan Clark.)

112. In November 1987, Michael reported that he "joined" the 89 Family when he was eleven years old (according to Clark it was when he was thirteen), because on two occasions he had been jumped by Avalon Garden Crips and needed the protection. (Ex. 6, pp. 316-318.)

113. In July 1987, Michael told doctors that he was abusing alcohol and marijuana on a daily basis. (Ex. 7, pp. 328-329.) Apparently in Junior High, Michael weighed as much as 264 lbs, smoked two or three joints a day, and drank to excess daily. (Ex. 7, p 329.)

114. Michael reported in September 1988, that he had quit the gang on several occasions, but when he was shot at and jumped by opposing gangs, he rejoined the gang for protection. (Ex. 6, p. 284.) He was afraid for his safety because he had been shot at numerous times and was forced to run away from the shooting. (Ex. 6, p. 284.) He reflected on his childhood homes being in gang territory with "lots of gang shootings and sales of drugs." (Ex. 6, p. 284.)

115. While Michael was in CYA, he would be jumped all the time because of the neighborhood where he was from. CYA was a "hellhole"

for him, it was worse than the streets and it hardened him. (Ex. 40, Declaration of Dr. Khazanov.)

116. Prior to CYA, Michael's influence on Derek kept him out of gang banging. Michael encouraged Derek to play sports and would tell everyone, "my brother don't gang bang," and "that's my little brother." (Ex. 2, p. 12, Declaration of Derek King.) When Michael went to Camp and CYA, Derek had no one to protect him and eventually in 1990, he joined the Rolling 90's West Side Crips gang. (Ex. 2, p. 12, Declaration of Derek King.)

117. When Michael was fifteen or sixteen, he started smoking marijuana and cigarettes. He started smoking cigarettes in CYA and then started smoking a lot of marijuana when he got out. He also started drinking heavy amounts of E&J, Jack Daniels, and Hennessey when he was released from CYA. (Ex. 40, Declaration of Dr. Khazanov.)

118. Michael continued to attend Junior High while in juvenile hall and at Camp Holton, but failed to graduate from any grade level and failed to graduate from high school while at CYA. (Ex. 5, pp. 216-217.)

119. During the times Michael was out of CYA on parole, he started using PCP and eventually increased his consumption to around three times a week. By the age of nineteen, he was smoking a whole bit of PCP. At the same time, he was drinking hard alcohol and using marijuana daily. (Ex. 40, Declaration of Dr. Khazanov.)

120. Derek recalled that one of the times Michael was released from CYA around 1991, he began smoking a lot of PCP or "Sherm" cigarettes on a regular basis. One night after Michael was smoking Sherm, he got angry with Derek who recalled that Michael just snapped, started to sweat and his eyes got big. Michael jumped on Derek and punched him. Michael came back a couple of days later and apologized saying he was tripping on Sherm and freaked out. (Ex. 2, p. 12, Declaration of Derek King.)

121. Cynthia Allen recalled that on one occasion when she was watching Michael and Derek, she became aware that Michael was on PCP because he did not seem to be in his right mind, was disrespectful and was mean. On that occasion, Cynthia and Michael got into an argument over some Kool-Aid and it escalated because of the PCP until Derek told her to back off. At that time, Michael had been released from CYA on parole and was using PCP on a frequent basis. (Ex. 2, p. 19, Declaration of Cynthia Allen.)

122. According to Cynthia, when Michael was first released from CYA, the gang culture had changed from having general order, respect, and a code of conduct to significant drug use and violence. It appeared that Michael could not cope with the changes in the gang or adapt to the world into which he was released. Before Michael left for CYA, the gang had some positive impact; but when he returned from CYA, it had none. He no

longer lived in the original family home at 729 E. 90th Street, but lived at 616 East 89th Street, closer to Avalon and the Crips area. He seemed separated from the remainder of his family on 90th Street where he grew up and knew the families in the area. He didn't let his mom or Cynthia know what was going on with him. It seemed hard for him to process all of the circumstances and factors in his life. (Ex. 2, p. 20, Declaration of Cynthia Allen.)

B. MICHAEL ALLEN'S CYA AND JUVENILE CORRECTIONS HISTORY

123. Michael was placed at Camp Karl Holton on November 30, 1987, and released on June 20, 1988. (Ex. 6, p. 283.)

124. Michael was ordered placed in CYA for carrying a loaded firearm in September 1988 and arrived at El Paso De Robles on January 3, 1989. (Ex. 6, pp. 269, 281-282.)

125. In September 1988, Michael scored a total TABE test battery grade level equivalent of 6.9 and scored low or below average in verbal and performance ability and manual and finger dexterity on the Peabody Picture Vocabulary Test, Revised Beta Examination and Purdue Pegboard Test. (Ex. 6, pp. 292-239.) Michael described his school experience as "boring, frustrating and hard." (Ex. 6, p. 295.) He reported that his studies were too

hard and that he fell behind and couldn't keep his mind on his work. (Ex. 6, p. 296.)

126. In 1988 Michael reflected that while he didn't like being in the youth authority, perhaps God had used it to prevent him from getting shot and that he believed he could improve his life by associating with different friends and changing his dress to avoid the "colors." (Ex. 6, p. 286.)

127. A 1998 report stated that Michael was at an age where he was "heavily influenced by his peers" and needed "a program which will give him some adult male figures who model grown up behavior" because "if left in the community, he is likely to become more and more gang involved and involved in more serious offenses." (Ex. 6, p. 286.) At the time of the report, Michael was considered not to be a security risk and "only moderately criminally sophisticated." (Ex. 6, p. 286.)

128. Michael was given TABE testing in 1988 which reflected raw scores of 6.4 for math and 6.5 for reading. (Ex. 6, p. 275.)

129. In July 1989, it was noted that Michael was adjusting well to the staff and his peers and was moving away from his gang associations. (Ex. 6, p. 270.) He was recommended for parole based on his improvement and lack of involvement in gang activity. (Ex. 6, p. 272.)

130. In November 1989, Michael was noted as having a history of marijuana usage. (Ex. 6, p. 266.)

131. Michael's parole was revoked in December 1989 for drug use and failure to follow his guidelines. (Ex. 6, pp. 262-263.)

132. Michael was given TABE testing in 1990 which reflected grade equivalency levels of 6.3 for math and 7.3 for reading. (Ex. 6, p. 243.)

133. Again in May 1991, Michael had distanced himself from his gang affiliation, was getting along with the staff, was doing well in group counseling, had "demonstrated a new belief system incorporating positive values and morals," and had made sufficient progress for parole recommendation. (Ex. 6, pp. 238-240.)

134. On June 29, 1991, Michael was paroled from CYA and returned home to live with his mother at 616 East 89th Street. (Ex. 6, p. 229.)

135. On August 8, 1991, Michael's parole was violated due to marijuana use. (Ex. 6, p. 231.) The evaluation report of his violation stated that, "It appears that the parolee's problems stem from low self esteem, lack of confidence and motivation. These factors render him vulnerable to peer [sic] pressure. Also, he has no marketable skills and maybe [sic] intellectually unable to utilize the proper strategy to successfully seek employment." (Ex. 6, p. 230.)

136. In October 1991, Michael "volunteered to participate in the El Centro Chemical Dependency Program" for a three month period. (Ex. 6, p. 227.)

137. From August 1991 through September 1993, Michael consistently tested positive for marijuana use and was once cited for cocaine possession. (Ex. 6, p. 219, 224, 226.)

138. In September 1993, Michael was noted as being "heavily involved in substance abuse." (Ex. 6, p. 220.)

139. Michael was dishonorably discharged from CYA on September 24, 1993. (Ex. 6, p. 218.)

C. SELECTED FACTS ELICITED DURING THE GUILT PHASE OF TRIAL

140. On August 5, 1991, at about 3:30 p.m. [RT, 18: 3999, 4156], victims Donald Loggins and Payton Beroit were sitting in the front seats of Loggin's white Toyota Celica that was parked facing south on the west side of Central Avenue between 87th Place and 88th Street in Los Angeles. [RT. 17:3766, 3786]

141. Shortly before 3:41 p.m., Loggins and Beroit were killed from multiple gunshots fired in rapid succession. [RT, 17:3763-4, 17:3770-2, 3911, 3915; 18:4013-15] Firearms expert Starr Sachs examined the

collected evidence and opined that all of the recovered casings had been discharged from the same weapon [RT, 17:3833] and the evidence was consistent with the shooter having been standing near the passenger door of the white car, or a little bit further away but facing the car. [RT, 17:3843-7, 3858-60.] Sachs testified that the shooter would *not* have been standing out in the street. [RT, 17:3804-3805, 3861] Dr. Christopher Rogers, an expert witness in forensic pathology opined that if the two victims had been seated in a car, the shooter would have been standing to their right, on the passenger side of the car, and parallel to the passenger door. [RT, 18:4110, 4114]

142. Carl Connor, Freddie Jelks and Marcellus James were the only three witnesses tying Mr. Allen to the murders. (See Mr. Allen's Opening Brief pages 16-33 for factual recitation of their testimony.)

143. The Johnson defense called gang expert Jeffrey Gallipeau who testified specifically as to African-American gangs in South Central Los Angeles. [RT, 22:4869-70] Galipeau related that during the summer of 1991, a Crips gang that was hostile to the "89 Family Bloods" gang claimed territory directly to the east of Central Avenue. This gang was known as the "89 East Coast Crips." [RT, 19:4290, 4338; 22:4875] The "89 East Coast Crips" and the "Kitchen Crips" were arch enemies of the "89 Family Bloods" gang. However, in 1991 the "Kitchen Crips" and the ""89 East Coast Crips" were also at war with one another. According to Galipeau, in

the summer of 1991 it would have been "just as likely" that a "Kitchen Crip" would shoot an "89 East Coast Crip" as it would for a member of the "89 Family Blood" to shoot an "East Coast Crip." [RT, 19:4339; 23:4958]

144. During deliberations on August 25, 1994, the jury sent out a note to the court posing the question: "Is there any reward monies in any way associated with this case?" [RT, 26:5262; CT, 4:831]

145. On the 5th day of jury deliberations, jurors 4 and 5 complained to the court that juror 11 was not participating in jury deliberations. [RT, 26:5283] The court conducted a hearing, concluded that juror 11 was not deliberating, and over defense objection, the court excused juror 11. [RT, 26:5452] An alternate juror replaced juror 11. [RT, 26:5452; CT, 4:836-7]

146. The following day, the jury foreman wrote a note to the judge: "The jury is unable to reach a unanimous verdict re Mr. Allen." [CT, 4:840; RT, 26:5478] The jury reported that they were deadlocked 10-2, and requested direction from the court. [CT, 4:842; RT, 26:5482] Mr. Allen moved for a mistrial. [RT, 26:5479] After the court inquired further, it instructed the jury to continue deliberating until it reached a verdict. [RT, 26:5488] Thereafter the jury asked that all of Freddie Jelks' testimony be read back to them. [CT, 4:842, 846] The following day, the jury announced it had reached verdicts. [CT, 4:916-930; RT, 27:5514-23]

147. The record is clear that the jury was disenchanted with the guilt phase evidence.

148. First, the jury's skepticism about the motives for the prosecution's witnesses' testimony emerged on August 25, 2007, during discussions concerning the juror note "Is there any reward monies in any way associated with this case?" submitted to the court on the third day of the guilt phase deliberations. [CT, 4:830-831; RT, 26: 5263:5263-5272] In open court, jurors number 5 and 6 declared that "everybody was kind of wondering" [RT, 26:5272:9] and the jury actually "had lot of questions about reward." [RT, 26:5272:13-14.] At the conclusion of the day's proceedings after all of the other jurors had departed, jurors number 4 and 5 met and conferred privately about the matter and then demanded a private audience with the judge. [RT 26:5283-5284.)

149. Further evidence of the jury's lack of confidence in the prosecutions evidence emerged on August 27, 2007, the fifth day of guilt phase deliberations from the court's colloquy with the jury concerning hold out juror number 11 who was replaced over defense counsel's objection. [CT, 4:824, 828, 830, 833, 836-837, 842; RT, 26:5463, 5479, 5484]

a. Juror number 11 doubted the credibility of the prosecution's case and even though the juror's mind was not yet made up, the juror stated that "when the prosecution rested, she didn't have a case." [RT, 26:5314:3-5, 5317:9-11]

b. Juror number 4 also opined that "it was a mess and the evidence was all over the place." [RT, 26:5319:25-26]

c. Juror number 2 chimed in that ". . . what I'd heard had me very undecided . . ." and added that "more than one" juror was only semi convinced of appellant's guilt. [RT, 26: 5373:4, 5374:28-5375:1]

d. The jurors also advised that three jurors developed "the mindset from the beginning [that] . . . all the witnesses are unreliable, all the testimony is unreliable . . . [and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363:12-18]

e. On August 28, 2007, the sixth day of guilt phase deliberations, the jury submitted a note to the court stating that it was unable to reach a unanimous verdict re Mr. Allen. At that time, the jury was split 10 to 2, but a couple of other jurors apparently were ready to recant. [CT, 4:840-842; RT, 26: 5478:23-5479:2, 5363, 5484]

D. SELECTED FACTS ELICITED DURING THE PENALTY PHASE OF TRIAL

150. During the extensive joint penalty phase, in contrast to the evidence offered against Johnson, the only evidence in aggravation presented by the People against Mr. Allen was testimony by three witnesses regarding his admitted chronologically subsequent murder of Chester

White. (Appellant's Opening Brief pages 47-50.) No other aggravating evidence of any kind was offered against Mr. Allen.

151. Shockingly, Mr. Allen offered almost no mitigation and also only presented the testimony of three witnesses. (Appellant's Opening Brief pages 50-57.)

152. Rosalind Allen testified that she married Mr. Allen on August 17, 1997, just prior to the beginning of the trial. She related she met Mr. Allen about two years earlier while he was incarcerated, loved him and wanted him to live so that they could continue their relationship. [RT, 33:6621-6623]

153. Mr. Allen's mother, Rebecca Allen, testified briefly as to Mr. Allen's early life and concluded her testimony by relating that Michael had been a good boy until he began hanging out with 89 Family Bloods gang members. He spent time with his family and they all did things together. She related that Michael was a good cook, had a good sense of humor, and loved his family. She stated that there were a lot of good things he did, and that he is a good person. [RT, 33:6663-6666]

154. As defense counsel's only independent mitigation witness, he called the Reverend Robert Douglas to testify as an "expert" witness concerning gangs, gang psychology, and why Mr. Allen did what he had done. Douglas had a difficult time qualifying as an expert witness in any of those or any other areas.

155. In a colloquy with the court concerning Douglas, trial counsel Orr explained that he had done no testing or investigation on Mr. Allen's psychological makeup or mental health because:

> Since 1961, I [Orr] have seen thousands of reports and seen thousands of psychiatrists on the stand and thought they were worthless the way they try to over structure the situation that they were asked to give an opinion in. Most juries, I might add, never believe them. [RT, 33:6614:15-21]

The court responded that not all mental health experts are worthless and some can give useful testimony. [RT, 33:6612-6614]

156. Douglas testified that he was the Director of Outpatient Services for the "Inglewood Behaviorable (sic.) Health Sciences" in Inglewood, California. He was also a pastor. He claimed to have received his B.S. degree in "Life Assessment" from the "Ministerial Training Institute." He further testified he received a "Master's Degree" in "Christian Education" and he also received a "doctorate" in "Biblical Counseling" at Inglewood, California in 1996. At the time of his testimony, he was a first year law student at Abraham Lincoln University. From 1974 to 1996, he remained in the Inglewood area and became involved with Crips and Bloods gang members from that area. [RT, 33:6686-6687] On cross-examination, he admitted that he "maybe" had interviewed only one other member of Mr. Allen's gang, other than Mr. Allen himself, during his years of outreach. [RT, 33:6707] He further

admitted that Mr. Allen's 89 Family Bloods gang was a South Central Los Angeles Bloods gang, and *not* one of the Inglewood gangs that formed the basis of Douglas' expert opinion. [RT, 33:6706-6707] He interviewed Mr. Allen in preparation for testifying at the penalty phase of the trial. He took notes of his interview on two pieces of paper. The two pages of notes taken by Mr. Douglas were produced in discovery. One of the "pages" was the front of a preprinted Promise Keepers envelope. [CT Supp. IV, 2:313-314]

157. Mr. Douglas continued to explain his experience as it pertained to gangs and gang psychology:

> RD: We have a contract with the office of alcohol program, In terms of we have an agenda of service items that we provide to those constituents in the community. And some of the activities would include a personal outreach intervention, in terms of crisis situations and reporting. And if an agency of any type, department social services, children protective services, law enforcement, probation, parole, would give us a call to respond to an item, which is known as number 8 personal outreach and intervention, we will be dispatched to any particular locale that fits our contract or confines. [RT, 33:6687-8]

Mr. Douglas further testified:

> RD: I do family assistance therapy and open recovery group counseling and recovery treatment planning, and I sit in on a majority of groups that are didactic as well as gestalt. [RT, 33:6692]

158. At sidebar and out of the presence of the jury, the prosecutor objected to Mr. Douglas testifying about "didactic and gestalt intervention."

Judge Horan's comment as to Mr. Douglas' expertise in that field revealed how totally *unimpressed* the court was regarding Mr. Douglas. The court described Douglas' attempts to validate his expertise by stating, "This is just gobbledegook." Orr stated, "I agree." [RT, 33:6693]

159. The court, however, ruled that Douglas would be allowed to testify as an "expert" on the subject of gangs and he eventually rendered the following "expert" opinions regarding Mr. Allen's involvement in this case:

a. Co-defendant Johnson was a "shotcaller" on the day of the shootings, per the transcripts the witness had read. [RT, 33:6698-6699]

b. Mr. Allen was "under the domination of the gang from 1991 until he was taken into custody in 1993." [RT, 33:6703]

c. Being a member of an 89th Family Gang was a "dominating factor" in a gang member's life to the exclusion of any other dominating factor, and Mr. Allen was a member of "89th Street Family Blood." [RT, 33:6704]

d. Mr. Allen obtained the Uzi from Johnson and went out and did a "serving." [RT, 33:6698]

160. On cross-examination by the prosecutor, Douglas claimed that Mr. Allen was being "cloned" as he grew up:

> DDA: So, the fact that when he was an infant he might have lived in crip territory, that wouldn't impact his choices when he was 18 years old, necessarily, would it?

RD: Yes.

DDA: How?

RD: He's being cloned.

CRT: He's being what?

RD: He's being cloned. He's being primed.

CRT: Cloned?

RD: Yeah. He's being primed. Michael is being primed. He doesn't have anyone in terms of - see his - his residential area has changed so much, it's been nothing but a series of u-turns in his life.

CRT: [Interrupting and curtailing the testimony] Alright. Okay. Anything else? [RT, 33:6713 (Emphasis added)]

161. On cross-examination, Douglas compared Mr. Allen's role in these homicides to that of Luka Braza in *The Godfather*, as well as Tex Watson to Charles Manson, even though the court had earlier ruled the witness would not be allowed to make those comparisons.

Q: You testified that Michael Allen was under the dominance of the 89 Family Bloods from '91 to '93. Could you tell us the basis of your opinion?

A: Okay. Without being facetious or funny, to synopsize it. Michael Allen is like a Luka Braza in *The Godfather*, or Tex Watson in Manson. [RT, 33:6709]

162. Thereafter, counsel for co-defendant Johnson moved for a mistrial, claiming that Douglas's comparing Mr. Allen to Tex Watson meant he was comparing Johnson to Charles Manson, and the court had

specifically told Orr not to develop that area. The court's response to the motion for mistrial was illustrative of the impact Mr. Orr's "expert witness" was having:

> CRT: Your motion will be denied for the following reasons: The court is of the firm and honest opinion after listening to the testimony of the witness [Douglas] that it was meaningless and will be rejected by the jury. It was without substance, without foundation, without tremendous relevance, and it did no more than restate -- where it did make sense at all, it did no more than restate what the jury has heard from other witnesses. I was less than impressed. If you want to be heard, if you have a different characterization, if you think that the witness had some major impact on the jury, I'll hear your assessment. [RT, 33:6718]

163. After several days of deliberation, the jury returned with verdicts of death.

164. In denying Petitioner's motion for a new trial and request for a modified sentence, the court notably remarked:

a. "There is absolutely no factual basis for any claim for modification by the defendant Michael Allen." [RT, 39: 7643:12-14]

b. ". . . briefly stated, the lack of mitigation is palpable." [RT, 39: 7643:25]

c. "The mitigation that I heard, or the proffered mitigation evidence, was that when the defendant was small, he was teased. He was called names from time to time due to his weight. And I strained and listened for something to come out of his background that might

constitute some more substantial mitigation than that and there was nothing there." [RT, 39: 7643:26-7644:5.)

d. "So very little to say. There is no evidence whatsoever here of any abusive childhood. There is no evidence of any mental disease or defect. There is no evidence of intoxication. . . . He had a very standard childhood, unfortunately for Mr. Allen as he sits here today, perhaps. Nothing particularly unusual about his situation." [RT, 39: 7645:11-27.)

e. "Under factor (d) there's no showing that the defendant was mentally or emotionally disturbed at the time of the commission of the crime or that he was in any way mentally or emotionally impaired." [RT 39, 7650:8-12.)

f. "Under factor (h) there is no evidence of mental disease or defect or intoxication. Under factor (j), the court does not find the defendant's age to be a mitigating factor." [RT, 39: 7651:6-11]

g. "Finally, under factor (k), the record is bereave (sic) of any substantial mitigation. There is simply nothing about the defendant's past or about his character which offers anything but trivial mitigation of his crime."[3] [RT, 39: 7651:18-23]

165. The Commitment Pursuant to Judgment of Death ratified the court's discernment concerning the lack of mitigation evidence tendered on

[3] Presumably the "trivial mitigation" is a reference to the testimony of Robert Douglas that the court characterized as "just gobbledegook." [RT, 33: 6693:11]

Mr. Allen's behalf. Therein, the court observes that the record is "bereft of any substantial mitigation" and that **"[T]here is simply nothing about the defendant' (sic) past, or about his character, which offers any but trivial mitigation of his misdeeds."** [CT, 5: 1190] (Emphasis added.)

VIII.
CLAIMS FOR RELIEF

CLAIM ONE

PETITIONER IS INELIGIBLE FOR A DEATH SENTENCE BECAUSE OF HIS MENTAL RETARDATION AND SIGNIFICANT MENTAL IMPAIRMENTS.

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to be free of cruel and unusual punishment, and to equal protection of the laws and article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because his mental impairments make him ineligible for a death sentence.

A capital sentence violates the Eighth Amendment when it is "grossly out of proportion to the severity of the crime" or "so totally

without penological justification that it results in the gratuitous infliction of suffering." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173, 183 [96 S.Ct. 2909, 49 L.Ed. 859].) Determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense. "[F]or purposes of imposing the death penalty…punishment must be tailored to [a defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801; See also *California v. Brown*, (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934] (O'Connor, J. concurring) ["[P]unishment should be directly related to the personal culpability of the criminal defendant."].) Thus, in considering claims that particular categories of convicted murderers are not constitutionally punishable by death, the Court has long focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense.

The United States Supreme Court has held that there are certain categorical exemptions from the imposition of the death penalty, which must be made in order to comport with the Eighth Amendment's prohibition on cruel and unusual punishment. In 2002, the Court declared that executing mentally retarded defendants violates the prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. (*Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335].) More recently, in *Roper v. Simmons* (2005)

543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 2005], the Court held that the execution of juveniles is also cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. Although the Court has so far declined to announce a categorical prohibition against the death penalty for the significantly mentally ill, other courts around the country have recognized the substantial overlap between mental retardation and other mental impairments with parallel implications. (*Bryan v. Mullin* (10th Cir. 2003) 335 F.3d 1207, 1237; *State v. Nelson* (2002) 173 N.J. 417, 493, 803 A.2d 1, 47; *People v. Danks* (2004) 32 Cal.4th 269, 322 (Moreno, J. concurring and dissenting).)

In *Atkins v. Virginia, supra,* 536 U.S. at 304, the United States Supreme Court declared that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibited the execution of individuals with mental retardation. The decision in *Atkins* relies upon three related rationales: The empirically established consensus against executing the mentally retarded; the Court's independent determination that retaining the death penalty for the mentally retarded would not further any interest in retribution or deterrence; and the fact that the nature of the impairment of mentally retardation leads to an unacceptable "risk of wrongful executions." (*Id.* at 320-321.) All three rationale apply equally to persons, such as petitioner, who were unable to control their conduct due to mental illness.

The imposition of the death penalty on offenders so mentally ill that they are unable to control their behavior offends a longstanding collective judgment of the American people, as expressed in their laws and sentencing practices, is grossly disproportionate to such offenders' moral culpability, serves no permissible penological goal, and carries an enhanced risk of error. Because such an anomalous sentence was imposed upon petitioner, the Cruel and Unusual Punishment Clause of the Eighth Amendment requires vacating his sentence.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

166. Those facts and allegations set forth in Claims 2, 3, and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

A. PRIMA FACIE EVIDENCE EXISTS THAT PETITIONER IS MENTALLY RETARDED

167. Petitioner's lifelong affliction with mental retardation and neurocognitive and medical deficits and disabilities rendered him unable to understand and process information, to cooperate with and assist his counsel, and to understand the charges and the proceedings against him

with the constitutionally requisite capacity throughout. Further, petitioner's deficits rendered him unable to engage in logical reasoning, attend to, comprehend and remember events and information, and plan and control his behavior.

168. Petitioner's significantly subaverage intellectual functioning and profound limitations and deficits in adaptive behavior, alone, and in combination with his neurocognitive deficits and mental vulnerabilities, render his sentence unconstitutionally invalid.

169. The available facts concerning Petitioner present a prima facie claim of mental retardation.

170. The Eighth and Fourteenth Amendments preclude executing persons with this diagnosed disorder. State law was amended by legislative enactment signed by the Governor on October 8, 2003, adding section 1376 to the Penal Code, precluding imposition of the death penalty for any capitally charged defendant who was diagnosed by a qualified expert to be mentally retarded, in the absence of a fair and reliable judicial determination to the contrary. Section 1376 applies to post-conviction petitioners as well as pre-conviction defendants. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47.)

171. Petitioner cannot be executed. Overwhelming evidence establishes that petitioner was mentally retarded throughout his childhood,

adolescence and adulthood, including at the time of the crime and his trial, and he remains so today.

172. Mr. Allen was given a Short Form Test of Academic Aptitude (SFTAA) IQ test in March of 1983 when he was 10 years old. The test revealed a raw score of 332, language score of 79, non-language score of 81, and a total IQ score of 79. (Ex. 5, p. 206.)

173. Prior to and after that test, Mr. Allen exhibited subaverage intellectual functioning, profound limitations and deficits in adaptive behavior, and neurocognitive deficits and mental vulnerabilities.

a. From 1977 through 1981, Michael attended St. Albert the Great school in Compton where he completed Kindergarten through Third grade. (Ex. 5, pp. 188-203.) Michael quickly fell behind in first grade. According to his first grade report card, he was performing poorly in spelling, math and English. The school wanted to retain him in first grade, but he was promoted because his mother wrote the school a letter asking that he be advanced and agreed that if he fell behind in second grade, she would have him returned to first grade. (Ex. 5, pp. 189-196.)

b. Michael's first grade CTBS test (March 1979 at grade 1.6) reflected that he was testing at grade 0.3 in reading, 0.1 in language, and 0.6 in math for a total effective grade level battery of 0.4. (Ex. 5, p. 200.)

c. In second grade, Michael fell further behind. He was generally a "C" student and was well behind grade level in reading. (Ex. 5, p. 198.) His teacher remarked that he had trouble concentrating on his reading and work and tended to day dream. (Ex. 5, p. 198.) Michael's second grade CTBS test (March 1980 at grade 2.6) reflected that he was testing at grade 1.4 in reading, 1.7 in language, and 1.9 in math for a total effective grade level battery of 1.6. (Ex. 5, p. 200.)

d. In third grade, Michael's "C" work fell to mostly "D" work. His study skills fell dramatically. He had difficulty listening and following directions. (Ex. 5, p. 199.)

e. Michael's third grade CTBS test (March 1981 at grade 3.6) reflected that he was testing at grade 2.1 in reading, 1.8 in language, and 2.7 in math for a total effective grade level battery of 2.1. (Ex. 5, p. 200.) His third grade results placed Michael in the bottom 8% of all test takers nationally and over a full year behind academically. (Ex. 5. p. 200-201.)

f. In 1981-1982, Michael transferred to public school and attended fourth grade at 93rd Street Elementary where he was absent 25 days and obtained a "C" average. (Ex. 5. p. 205.) Michael then transferred to Mother of Sorrows and completed a second year of fourth grade from 1982-1983. (Ex. 5, p. 206.) He was placed in remedial reading. (Ex. 5., p. 206.)

g. Michael's fourth grade CTBS test was given in March 1983 at grade 4.6 when Michael was completing his second year in fourth grade. That test reflected that he was at grade 2.9 in reading, 3.5 in language, and 3.9 in math for a total effective grade level battery of 3.5. (Ex. 5, p. 206.) His fourth grade results placed Michael in the bottom 25% of all test takers nationally who were completing fourth grade for the first time rather than the second as Michael was doing. (Ex. 5, p. 206.)

h. From fifth grade through junior high, Michael transferred schools at least six times and never completed a grade higher than sixth grade. (Ex. 5, pp. 206-209.) During this time, Michael missed substantial amounts of school. (Ex. 5, p. 206-208.)

i. Michael attended fifth grade in 1983-1984 at 93rd Street Elementary. (Ex. 5, pp. 207-208.) Michael's May 1984 CTBS test reflected raw scores of 62 in reading and 62 in math. Michael was absent 20 days. (Ex. 5, pp. 207-208.) Michael attended sixth grade in 1984-1985 at 93rd Street Elementary. (Ex. 5, pp. 207-208.)

j. From 1986 to early 1988, Michael attended Junior High without completion at Sutter Junior High, Mulholland Junior High, Drew Junior High, Mother of Sorrows School and Holmes Junior High. (Ex. 5, pp. 209.) During this period he scored only "F" or "D" marks, most of his classes were incomplete, and he missed an extensive number of classes. (Ex. 5, pp. 209-213.) Michael continued to attend Junior High

while in juvenile hall and at Camp Holton and failed to graduate from high school while at CYA. (Ex. 5, pp. 216-217.)

k. In September 1988, Michael scored a total TABE test battery grade level equivalent of 6.9 and scored low or below average in verbal and performance ability and manual and finger dexterity on the Peabody Picture Vocabulary Test, Revised Beta Examination and Purdue Pegboard Test. (Ex. 6, pp. 292-239.) Michael described his school experience as "boring, frustrating and hard." (Ex. 6, p. 295.) He reported that his studies were too hard and that he fell behind and couldn't keep his mind on his work. (Ex. 6, p. 296.)

174. Mental retardation is a lifelong condition of impaired or incomplete mental development. According to the most widely used definition of mental retardation, it is characterized by three criteria: significantly subaverage intellectual functioning; concurrent and related limitations in two or more adaptive skill areas; and manifestation before age eighteen. (The American Association on Intellectual and Developmental Disabilities (AAIDD) formerly the American Association on Mental Retardation (AAMR), Definition of Mental Retardation, available at http://www.aaidd.org/Policies/faq_mental_retardation.shtml.) (Ex. 25.)

175. Intelligence quotient (I.Q.) tests are designed to measure intellectual functioning. An I.Q. score provides a rough numerical

assessment of an individual's present level of mental functioning in comparison with that of others. To be diagnosed as having mental retardation, a person must have an I.Q. below 70-75, i.e. significantly below average. If a person scores below 70 on a properly administered and scored I.Q. test, he or she is in the bottom 2 percent of the American population. (Ex. 25.)

176. The threshold I.Q. level for a diagnosis of mental retardation has been progressively lowered over the years, in part because of awareness of the damaging social prejudice suffered by those labeled "retarded." In 1959, the American Association on Mental Deficiency set 85 as the I.Q. below which a person was considered to be retarded. In 1992, the renamed American Association on Mental Retardation lowered the mental retardation "ceiling" to an I.Q. of 70-75, but many mental health specialists argue that people with I.Q.s of up to 80 may also have mental retardation. Flexibility in the I.Q. standard is important because tests given at different times may show slight variations due to differences in the tests and because of testing error -- the standard error measurement on I.Q. tests is generally three to five points. (Patricia Perez-Arce, Ph.D., "Neuropsychological evaluation of Luis Mata," January 27, 1992; Biasini, "Mental Retardation." See also R.C. Sheerenberger, A History of Mental Retardation (Baltimore: Brookes Publishing Co., 1983; American Association on Mental Retardation, Mental retardation: Definition, classification, and systems of

supports (Washington, D.C.: American Association on Mental Retardation, 1992.) (Ex. 25.)

177. With the upper ceiling on mental retardation currently reduced from an I.Q. of 85 to an I.Q. of 70, far fewer Americans are today diagnosed as "mentally retarded" than before. Although the lower I.Q. ceiling for mental retardation was agreed upon in part to avoid applying stigmatizing labels to people whose intelligence was below average, the changed I.Q. ceiling ironically had the effect of cutting off from social services such as special education many people who would have otherwise benefited from the extra support. Scholars have emphasized that because of the possibility of testing error, a person with an I.Q. of up to 75 should be considered "retarded" if the diagnosis is necessary to ensure access to special education or other assistance. (H. J. Grossman, ed., Manual on Terminology in Mental Retardation (Washington, D. C.: American Association on Mental Deficiency, 1977): H.J. Grossman, ed. Classification in Mental Retardation (Washington D.C.: AAMR. 1983.) (Ex. 25.)

178. This Court has recognized the need for flexibility in considering the nature and extent of Mental Retardation and the lack of a definite numerical cutoff. (*In re Hawthorne, supra,* Cal.4th at 40; *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999.) (Ex. 25.)

179. A standard error measurement of 5, testing error, and the adjustment of scores on account for the age of the test (the "Flynn Effect")

must all be taken into account when considering an actual IQ test result. (Ex. 25.)

180. According to Dr. Natasha Khazanov, researchers in the field of intelligence agree that IQ testing is affected by what is referred to as "the Flynn Effect." The Flynn Effect describes that IQ scores increase from one generation to the next at the rate of 3 IQ points per decade.[4] This necessitates creating new norms about every ten years, and if the norms used to evaluate a person are not current, many researchers suggest using corrections for the Flynn Effect.[5] (Ex 40, p. 1025, Declaration of Dr. Khazanov.)

181. While mental retardation clearly encompasses everyone with an accurately scaled and adjusted score of 70 or below, some individuals with higher scores, depending on the nature of the testing information and the clinical judgment of the evaluator, may also properly be considered mentally retarded. Because IQ measurements may not accurately reflect Petitioner's true deficit level and there is no precise cut-off IQ score distinguishing whether or not he is mentally retarded, Petitioner maintains

[4] Flynn, J.R. *Searching for Justice: The Discovery of IQ Gain Over Time*, 1999, American Psychologist, 54, 5-20.

[5] Kanaya T., Scullin M., & Ceci, S.J, The Flynn Effect and the U.S. Policies: the Impact of Rising IQ scores on American Society via Mental Retardation Diagnoses, 2003; *American Psychologist*, Vol. 58.

that his historical score qualifies him under the first prong of the test for classification of mental retardation.

182. This position is supported by the fact that the California Court of Appeal has upheld a trial court determination that an individual with an IQ ranging as high as 83 was in fact mentally retarded. (*Money v. Krall* (1982) 128 Cal.App.3d 378.) A higher IQ does not rule out a mental retardation diagnosis. (*Id.* at 400-401.)

183. Daily adaptive functioning must also be evaluated. Further, intellectual functioning must be assessed in context as "intelligence is not merely book learning, a narrow academic skill, or test-taking smarts. Rather, it reflects a broader and deeper capacity for comprehending our surroundings - catching on, making sense of things, or figuring out what to do." (Mental Retardation at p. 40, 10th ed. 2002). Petitioner was functioning well below intellectual expectations in all areas.

184. In order to apply the label of mental retardation to an individual, a second prong must also be met: there must be significant limitations in the individual's adaptive behavior. Adaptive behavior is a "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." (Mental Retardation at p. 41 (10th ed. 2002).)

185. As detailed above, Petitioner suffered from limitations in each area of adaptive behavior. Petitioner had difficulty in school as noted above and his deficits are still extremely evident.

186. Dr. Natasha Khazanov was retained by writ counsel to conduct a comprehensive neuropsychological evaluation of Petitioner, Mr. Allen.

a. Natasha Khazanov is a clinical psychologist licensed to practice in the state of California specializing in the practice of clinical neuropsychology and neuropsychological assessment. She received her BA. degree in Psychology from Leningrad State University in 1975, M.S. in Clinical Psychology from Leningrad State University in 1977, and Ph.D. in Clinical Psychology from the Bekhterev Psychoneurological Institute in 1988. She has extensive clinical experience in diagnosis and treatment of patients with various psychiatric and neurological disorders. From 1996 to the present, she has been in private practice specializing in psychotherapy and neuropsychological assessment in medical and forensic settings. In addition to other qualifications, from 1993 to 2002, she was employed in the Behavioral Medicine Unit, Division of General Internal Medicine, at the University of California at San Francisco. She has published articles in numerous journals, including *Problems in Clinical Psychology*, *Neurology, Neurosurgery and Psychiatry*, *Rehabilitation of Epileptic Patients*, and *Psychological Assessment of Neuropsychiatric Disorders*. She has

presented the results of her research at national and international conferences. (Ex 40, pp. 1017-1019, Declaration of Dr. Khazanov.)

b. Dr. Khazanov conducted a comprehensive neuropsychological evaluation of Mr. Allen at San Quentin State Prison on August 29 and 30, 2007. The purpose of her evaluation was to determine whether measurable neuropsychological dysfunction or deficits were present and, if so, the nature, extent, and effects of those impairments on Mr. Allen's behavioral and psychological cognitive functioning. Her formal assessment included the expanded Halstead-Reitan neuropsychological battery, as well as other standardized neuropsychological measures designed to assess more specifically Mr. Allen's frontal, parietal, temporal, and occipital lobe functions. In addition to the full Halstead-Reitan battery, she administered the Wechsler Adult Intelligence Scale-III (WAIS-III), Wide Range Achievement Test-III (WRAT-3), Memory Assessment Scales (MAS), Rapid Alternating Movements Test, Hand Position Sequences, Controlled Oral Word Association Test, and the Test of Memory Malingering (TOMM). She also conducted a clinical interview, speaking with Mr. Allen about his family background, personal history and experiences, and his current medical and emotional state. The clinical interview with Mr. Allen and test administration took approximately ten hours over a two-day period. (Ex 40, pp. 1019-1022, Declaration of Dr. Khazanov.)

c. Dr. Khazanov reviewed various case materials and found that an unusual number of these hallmark signs and symptoms were present and often documented throughout Mr. Allen's childhood and adolescence. (Ex 40, pp. 1019-1021, Declaration of Dr. Khazanov.)

d. Dr. Khazanov found, based on various tests including the Test of Memory Malingering (TOMM) that Mr. Allen was not, in any way, malingering on the given tests and thus the results of her test administration provide a valid estimate of Michael Allen's neuropsychological functioning. (Ex 40, pp. 1024-1025, Declaration of Dr. Khazanov.)

e. Mr. Allen's WAIS-III test scores reflect a current adjusted Full-Scale IQ of 83, in the low average range of intelligence. However, his IQ testing was affected by what is referred to as "the Flynn Effect." The WAIS-III, used to test Mr. Allen's intelligence, was published in 1997, and the new edition, the WAIS-IV, will be published in 2008. Because the norms used to score Mr. Allen's performance were about ten years old, it would be reasonable to assume that his testing represents a slight overestimate of his present intellectual abilities. If the correction for the Flynn effect is made, Mr. Allen's actual Full Scale IQ would be 80. (Ex 40, pp. 1024-1025, Declaration of Dr. Khazanov.)

f. In addition, Mr. Allen's WRAT-3 reading score was 89 (high school grade level and in the 23rd percentile for his age group),

spelling score was 81 (6th grade level and in the 10th percentile for his age) and arithmetic was 73 (4th grade level and in the 5th percentile for his age). These findings implicate brain dysfunction, specifically in the left parietal lobe. (Ex 40, pp. 1025-1026, Declaration of Dr. Khazanov.)

g. Mr. Allen presented significant deficits in auditory verbal memory. His performance on the list acquisition subtest of the MAS fell in the 2nd percentile. He also made a number of mistakes called intrusions which is typical in persons with frontal lobe dysfunction. His performance on the Prose Recall subtests of the MAS fell in the 5th percentile on both immediate and delayed recall. This finding yet again implicates frontal lobe dysfunction. (Ex 40, pp. 1026-1028, Declaration of Dr. Khazanov.)

h. Mr. Allen's overall ability to retrieve visual information over a twenty-minute delay tested in the 1st percentile, further exemplifying his frontal lobe dysfunction. (Ex 40, pp. 1028-1029, Declaration of Dr. Khazanov.)

i. Mr. Allen obtained an Overall Halstead Impairment Index of 0.6, placing him squarely in the moderate range of impaired neuropsychological functioning. (Ex 40, pp. 1028-1030, Declaration of Dr. Khazanov.)

j. Mr. Allen scored poorly on the Trail Making Test and Category Test further indicating the presence of brain dysfunction and

frontal lobe impairment. Specifically, Mr. Allen's results revealed severe deficits in abstract concept formation, rigidity in thinking and an inability to inhibit unwanted responses. (Ex. 40, pp. 1028-1030, Declaration of Dr. Khazanov.)

k. Further testing revealed additional brain dysfunction, frontal lobe impairment, weakness in the left temporal area of the brain, possible frontal lobe dysfunction in the right hemisphere of the brain, and parietal lobe dysfunction. (Ex 40, pp. 1028-1030, Declaration of Dr. Khazanov.)

l. The frontal lobes of the brain are primarily responsible for the organization, planning, execution and regulation of complex motor movements and actions. They are often referred to as the "organ of civilization" because they enable the integration of the highest levels of human behavior. Although those with frontal lobe impairment may speak coherently and logically, and thus appear normal, their impairments are reflected in their actions and behavior. Proper functioning of the frontal lobes is fundamental to meeting the daily challenges of motivation, control, and self-regulation. The frontal lobes allow an individual to maintain and shift attention, exert organizational control over all aspects of expression, anticipate consequences, consider alternatives, plan and formulate goals, shape, direct and modulate personality and emotional functioning, and act to integrate ideas, emotions, and perceptions. Frontal lobe disorders may

have the most extreme and far-reaching implications for behavior and functioning. (Ex 40, pp. 1031-1033, Declaration of Dr. Khazanov.)

m. Dr. Khazanov concluded that Michael Allen suffers from moderate organic brain damage as well as Posttraumatic Stress Disorder (PTSD). The neuropsychological testing she conducted identified both localized dysfunction -- primarily in the left parietal and frontal lobes - and diffuse damage in both 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 (whether verbal or nonverbal), to assess his environment or specific situations and respond rationally or thoughtfully, are severely and chronically impaired. The signs and symptoms of this damage have been present since elementary school. Moreover, the effects of his organic impairments are compounded by several coexisting conditions, including chronic underlying mental illness and substance abuse. At critical points in his life, the effects of his organic impairments have also been exacerbated by his history of chronic physical and psychological trauma. While it is impossible to determine the causes of these conditions, it is clear that their symptoms and effects are interrelated and cumulative. (Ex 40, pp. 1041-1046, Declaration of Dr. Khazanov.)

n. Dr. Khazanov also concluded that Mr. Allen suffers from Post-Traumatic Stress Disorder. Severe trauma that Mr. Allen suffered during his childhood and adolescence triggered the onset of PTSD. PTSD in turn contributed to self-medication with alcohol and drugs starting at an early age, which exacerbated his preexisting brain damage. (Ex 40, pp. 1041-1046, Declaration of Dr. Khazanov.)

o. According to Dr. Khazanov, at the time of this offense, Mr. Allen was seriously mentally impaired, suffering from the cumulative effects of longstanding brain damage and a serious psychiatric disorder, specifically PTSD. As a result, his ability to conform his conduct to the requirements of the law, control his behavior, and comprehend the consequences of that behavior was severely impaired. (Ex 40, pp. 1041-1046, Declaration of Dr. Khazanov.)

187. With respect to the third prong of the definition of mental retardation, as demonstrated above, Petitioner's difficulties manifested before Petitioner reached the age of 18. Further, as detailed above, Petitioner's adaptive functioning in numerous areas was long observed to be severely impaired, beginning in childhood and continuing to the present.

188. Given Petitioner's educational difficulties, impaired intellectual ability, and severely restricted adaptive functioning, the Eighth Amendment prohibits his execution (*Atkins v. Virginia, supra,* 536 U.S. at 304.)

189. The reasoning and logic of *Atkins* applies to Petitioner, whose mental disorders render him volitionally incapacitated. When the Supreme Court concluded that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty, its rationale for doing so compels the conclusion that the volitionally incapacitated are likewise ineligible. The Court noted the obvious cognitive limitations of the retarded, but also stressed their "diminished capacit[y] ... to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," characterizations that have even greater applicability to those who because of mental illness or brain damage are completely unable to conform their conduct to the requirements of the law. (*Atkins v. Virginia, supra*, 536 U.S. at 318.)

190. Based on the above information, and that which may become available to Petitioner following further investigation, this Court should modify the judgment by vacating the sentence of death, or order that petitioner be afforded a jury trial on the question of whether he is constitutionally and statutorily ineligible for the death penalty. (Ex. 25.)

B. PETITIONER IS MENTALLY IMPAIRED SUCH THAT HIS EXECUTION IS IMPERMISSIBLE.

a. As detailed above, at the time of this offense, Mr. Allen was seriously mentally impaired, suffering from the cumulative

effects of longstanding brain damage and PTSD. As a result, his ability to conform his conduct to the requirements of the law, control his behavior, or comprehend the consequences of that behavior was severely impaired. (Ex. 40, pp. 1041-1046, Declaration of Dr. Khazanov.)

191. No experts testified at trial and no mental health information was presented regarding Mr. Allen. [RT 33.]

192. As a result of his mental illness, petitioner was incapable of controlling his behavior, forming intent to commit the crimes, or otherwise modulating his behavior to conform to the law. [Ex. 25.]

193. In *Atkins v. Virginia, supra,* 536 U.S. at 304, the United States Supreme Court reversed the position taken in *Penry v. Lynaugh* (1989) 492 U.S. 302 [109 S.Ct. 2934, 106 L.Ed.2d 256] that there is an insufficient national consensus barring the execution of person afflicted with mental retardation, and held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibited the execution of individuals with mental retardation. The Court's rational, reasoning and framework was as follows:

a. The core Eighth Amendment concept, focusing on the "'dignity of man,'" required that its constitutional content be informed by "'the evolving standards of decency that mark the progress of a maturing society.'" (*Id.* at 311-312 [quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-01 [78 S.Ct. 590, 2 L.Ed.2d 630].)

b. The evolving standard, the Court declared, should be informed by "objective factors" to the maximum extent possible; the most reliable evidence of which is found in state legislative enactments and jury verdicts.

c. The Court first reviewed the lay of the legislative land. The Court noted that at the time of *Penry* only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders, but that since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Court with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." (*Id.* at 315-316.)

d. In finding a national consensus, the Court relied first upon the fact that the legislatures passing the laws voted overwhelmingly in favor of the prohibition.

e. The Court secondarily looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, (*id.* at 316 n. 21), the opposition to the practice by "widely diverse religious organizations," international practice and polling data. Although "not dispositive," these factors gave further support to the Court's opinion there was a consensus opposing the

practice "among those that have addressed the issue." (*Ibid.*)

f. Last, the Court observed that even in those states retaining the death penalty for those afflicted with mental retardation, only five had actually carried out such an execution of a mentally retarded individual in the wake of *Penry*. (*Ibid.*)

g. In light of the above, the court concluded that the practice had become "truly unusual," and it therefore was "fair to say," that "a national consensus has developed against it." (*Ibid.*)

h. Against this framework, the Court examined the underlying merits of and rational driving the consensus, beginning with the observation that it reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." (*Id.* at 317.)

i. The Court noted that due to their impairments those with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." (*Id.* at 318.)

j. These deficiencies, while not justifying a complete exemption from criminal liability, do diminish personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty -- retribution and deterrence - would be

served by permitting their execution. (*Id.* at 318-319.)

k. Retribution in the capital context has been constitutionally limited, and requires that "only the most deserving of execution are put to death." (*Id.* at 319.) Since "just deserts" necessarily depends on the culpability of the offender, the most extreme punishment was excessive due to the "lesser culpability of the mentally retarded offender." (*Ibid.*)

194. The Court also concluded that no legitimate deterrence interests are served by the execution of the mentally retarded, because, in its views, capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will "inhibit criminal actors from carrying out murderous conduct," but this type of calculus is at the "opposite end of the spectrum" from the behavior of the mentally retarded due to their cognitive and behavioral impairments. (*Id.* at 320.)

195. In addition to concluding that retaining the death penalty for the mentally retarded would not further any interest in retribution or deterrence, the Court also held that the reduced capacity of mentally retarded offenders provided a "second justification for a categorical rule making such offenders ineligible for the death penalty." (*Ibid.*) Due to their impairments, there were a host of reasons, including the increased risk of false confessions, difficulties in communicating with counsel, lesser

ability due to limited communication skill to effectively testify on their own behalf or express remorse that, "in the aggregate," carried an unacceptable "risk of wrongful executions." (*Id.* at 320-321.)

196. Last, the court opined that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes," which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. (*Id.* at 321.)

197. The Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the federal Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (*Ibid.* [quoting *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335]].)

198. Application of the *Atkins* framework and reasoning to petitioner's death sentence, imposed for a crime he lacked the capacity to avoid, compels the conclusion that his sentence is an unconstitutional punishment and that evolving standards of decency prohibit the execution of a person for conduct he was unable to control. (See *Corcoran v. State*, 774 N.E.2d 495, 502-503 (Ind. 2002) [Rucker, J. dissenting] [evolving standards of decency prohibit executing the seriously mentally ill.].)

199. The legislative enactments and judicial interpretations of those enactments provide "powerful evidence that today our society views" offenders such as petitioner "as categorically less culpable than the average criminal." (*Atkins v. Virginia, supra,* at 315-316.)

200. Nineteen of the twenty states whose laws explicitly address the question of whether conduct the defendant was powerless to avoid may serve as the basis for a death sentence have concluded that it may not. In seventeen states, the trial court's fact finding concerning the petitioner's volitional capacity would have shielded the applicant from all criminal responsibility and all punishment. (Ark. Stat. Ann.§ 5-2-312 (1995); Conn. Gen. Stat. § 53a-13 (1994); Ga. Code Ann.§16-3-2 (1996); Haw. Rev. Stat. § 704-400 (1996); Ky. Rev. Stat. Ann. § 504.020 (Michie 1995); Md. Health-Gen. Code § 12-108 (1995); Mich. Stat. Ann. § 28.1044(1); Or. Rev. Stat. § 161.295 (1995); 13 Vt. Stat. Ann. § 4801 (1995); Wis. Stat. 971.15 (1994); Wyo. Stat. 7-11-304 (1996); *Commonwealth v. McHoul* (Mass. 1967) 226 N.E.2d 556; *State v. Cegelis* (N.H. 1994) 638 A.2d 783; *State v. White* (N.M. 1954) 270 P.2d 727; *State v. Johnson* (R.I. 1979) 399 A.2d 469; *Thompson v. Commonwealth* (Va. 1952) 70 S.E.2d 284; *State v. Myers* (W.V. 1976) 222 S.E.2d 300, *overruled on other grounds in State v. Guthrie,* 461 S.E.2d 163.)

201. Of the seventeen states that have a volitional prong as part of their insanity defense, seven do not currently have a death penalty.

Nevertheless, they contribute equally to the legislative consensus that the death penalty may not be imposed based upon conduct the defendant was powerless to avoid. It is not their prohibition of the death penalty, but their recognition of the radically lesser culpability of non-volitional actors that contributes to this consensus. If any of these seven states were to enact a death penalty tomorrow, persons who were volitionally incapacitated would be ineligible for death sentencing for precisely the same reason they are presently ineligible in the ten death penalty volitional prong states: because such persons are deemed undeserving of any criminal sanction at all.

202. In Montana, a barrier closely related to the volitional prong of the insanity defense would preclude execution of a person unable to avoid his criminal act. Although Montana allows mental illness to excuse criminal conduct only when it proves that the defendant did not have the requisite mental state (Mont. Code Ann. § 46-14-102 (1995)), the existence of a mental disease or defect at the time of the offense that rendered the defendant unable "to conform the defendant's behavior to the requirements of law," (*Id.* at § 46-14-311, affects the sentencing of that defendant. Upon a finding that the defendant lacked the ability to conform his conduct, "the court shall sentence him to be committed to the custody of the director of the department of corrections to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed [upon a finding that

the defendant did not suffer from such a mental disease or defect[." (*Id.* at § 46-14-312.) Thus, in Montana as well as in the seventeen volitional prong states listed above, no criminal punishment may be imposed on a person who lacked the capacity to conform his conduct to the requirements of law.

203. In addition to the eighteen states in which persons who are unable to control their conduct would be totally excused from criminal punishment, in at least one more state they are ineligible for a death sentence because their volitional incapacity would provide an affirmative defense that mitigated murder to manslaughter. In New York, it is an affirmative defense to murder that the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." (N.Y. Penal L. § 125.27 (Consol. 1996).) Defendants who are unable to control their conduct would, by virtue of that impairment, be under the influence of extreme emotional disturbance. Because New York requires that the disturbance be judged from the viewpoint of a person in the defendant's situation under the circumstances the defendant perceives, the defendant's "situation" would include his mental illness, and his resultant incapacity to

control his conduct would provide the only required explanation for his emotional disturbance.

204. In states such as Delaware and Montana, a similar "extreme emotional disturbance" formula would often result in the mitigation of murder to manslaughter for volitionally impaired defendants, but might not always do so because those states require that the reasonableness of the explanation for the disturbance be judged by a reasonable person in the accused's situation, thus precluding reliance upon the illness itself to form part of the explanation. (Del. Code. Ann. tit. 11, § 641 (1995); Mont. Code. Ann. § 45-5-103 (1995).)

205. In contrast to the nineteen states whose laws explicitly preclude execution of a defendant for conduct he was incapable of controlling, only South Carolina law, as explicated by its highest court, affirmatively sanctions execution of a defendant for conduct he was unable to control. Although nine other death penalty states have "Guilty-But-Mentally-Ill" statutes that would seem to include volitionally incapacitated defendants, two of them would exonerate volitionally incapacitated defendants through their insanity defenses (Ky. Rev. Stat. Ann. 504.020 (Michie 1995); *State v. White* (N.M. 1954) 270 P.2d 727), and the remaining seven have not yet determined the question. Moreover, although the Delaware statute on its face appears to allow an offender to be found Guilty-But-Mentally-Ill only if he wholly lacked the capacity to control his

conduct, and the Delaware Supreme Court has held that a Guilty-But-Mentally-Ill verdict does not preclude a death sentence, it did so only after construing the Guilty-But-Mentally-Ill verdict to require only a finding that the defendant's "volitional capacity was impaired by mental illness." (*Sanders v. State* (Del. 1991) 585 A.2d 117, 135; see also *id.* at 125 ["[A]ny significant volitional impairment is included with the scope of [the GBMI statute]"].) In explaining why the legislature deemed punishment as well as treatment appropriate for Guilty-But-Mentally-Ill defendants, the court explained that "an individual whose willpower was undermined by disease . . . might, in theory at least, have resisted the urge to commit the crime with which he is charged." (*Id.* at 126.) Reiterating that a Guilty-But-Mentally-Ill verdict is not inconsistent with the possibility that the defendant "might have resisted his pathological impulses," (*id.* at 134), the *Sanders* court explicitly reserved the question of whether a person who, as a result of mental illness, had "insufficient willpower to choose" whether or not he would commit the crime with which he was charged could be executed for that crime. (*Id.* at 135.)

206. In Illinois, a Guilty-But-Mentally-Ill defendant has been held to be eligible for the death penalty, but because the insanity defense in effect at that time had a volitional prong, that defendant had been found to be "able to conform his conduct to the requirements of law." (*People v. Crews* (Ill. 1988) 522 N.E.2d 1167, 1174, *cert. denied* 492 U.S. 925

(1989).) The court cited this finding as proof that "deterrence and retribution remain valid considerations in his punishment." (*Id.*) Illinois no longer has a volitional prong to its insanity defense, but the Illinois courts have yet to rule upon the death eligibility of Guilty-But-Mentally-Ill defendants under its new insanity defense.

207. Indiana has affirmed the death sentence of a Guilty-But-Mentally-Ill defendant, but there was no indication that that defendant lacked the ability to control his conduct; in Indiana, a Guilty-But-Mentally-Ill finding implies nothing about volitional capacity, requiring only that the defendant suffered from "a psychiatric disorder which substantially impairs a person's thinking, feeling, or behavior and impairs the persons ability to function." (Ind. Rev. Stat. 1983, ch. 38, par. 6-2(d).)

208. Of the remaining Guilty-But-Mentally-Ill states, Georgia, Nevada, South Dakota, and Pennsylvania have yet to rule on whether a Guilty-But-Mentally-Ill defendant is eligible for the death sentence. Moreover, no death penalty state without a Guilty-But-Mentally-Ill statute has held, or said in dicta, or even suggested, that the death penalty may be applied to offenders who lack sufficient capacity to conform their conduct to the requirements of law.

209. In at least five additional states Arizona, Florida, Mississippi, Ohio, and Nevada -- proportionality review has served to remove many mentally ill offenders from the ranks of the condemned

despite the apparent availability of capital punishment in such cases. (See *e.g., State v. Jimenez* 799 P.2d 785, 797-801 (Ariz. 1990) [reducing death sentence to life imprisonment based on defendant's mental incapacity]; *State v. Fierro* 804 P.2d 72 (Ariz. 1990) [death penalty held disproportionate due in part to defendant's "history of psychological illness"]; *State v. Doss* 568 P.2d 1054, 1061 (Ariz. 1977) [same]; *Jones v. State* (Fla. 1976) 332 So.2d 615, 619 [reducing death sentence to life based on evidence of defendant's mental illness]; *Burch v. State* 343 So.2d 831 (Fla. 1977) [same]; *Huckaby v. State* 343 So.2d 29 (Fla. 1977) [evidence of mental illness outweighed evidence in aggravation and required reduction of sentence from death to life imprisonment; while defendant "may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired"]; *Knowles v. State* 632 So.2d 62 (Fla. 1993) [mitigating factors of defendant's mental illness, including his impaired capacity to control his conduct outweighed aggravating factors]; *Besaraba v. State* 656 So.2d 441 (Fla. 1995) [death sentence overturned where defendant was under the influence of great emotional disturbance]; *State v. Clayton* 61 Ohio St.3d 234 (1991) [where defendant produced unrebutted evidence that he lacked substantial capacity to conform, impact of that mitigating factor should have been given more weight and a life sentence imposed]; *Edwards v. State* 441 So.2d 84, 92-94 (Miss. 1983) (plurality

opinion) [vacating death sentence based on offender's mental illness]; *Haynes v. State* 103 Nev. 309, 739 P.2d 497 (1987), [vacating as disproportionate death sentence imposed on mentally ill offender].) Although these proportionality decisions do not correspond precisely to the issue here, they sweep in offenders less impaired than the petitioner, and help explain why these state courts may not have had to squarely face the issue of the permissibility of death sentences for conduct the defendant was incapable of controlling. Moreover, the fact that these jurisdictions have used proportionality review to strike down sentences of mentally ill offenders whose illness has left them with some capacity to control their conduct suggests that they might well adopt a per se rule prohibiting the execution of offenders totally lacking in that capacity if such an offender were in fact sentenced to death in that jurisdiction.

210. There remain three states -- California, Idaho and Louisiana - which have imposed and affirmed relatively large numbers of death sentences, and which have neither any formal method of determining whether mentally ill defendants meet the "irresistible impulse" test nor a record of reversing death sentences of mentally ill offenders on proportionality grounds. But even these jurisdictions do not reflect, for Eighth Amendment purposes, any "considered judgment approving the imposition of capital punishment" on mentally ill offenders who were unable to conform their conduct. (*Thompson v. Oklahoma* 1988) 487 U.S.

815, 852 [108 S.Ct. 2687, 101 L.Ed.2d 702].) Rather, like the states' laws governing waiver of juvenile offenders for trial as adults which were considered in *Thompson*, the states' substantive insanity standards reflect a myriad of legislative considerations far more pressing than their theoretical effect on eligibility for capital punishment. (*Ibid.*) A state's decision to reject or abandon use of the capacity-to-conform prong of criminal responsibility simply does not constitute reliable evidence of a legislative or public attitude in favor of using the death penalty in such cases. (*Ibid.*) In the absence of actual death sentences and executions of volitionally incapacitated offenders, the lack of legislative or judicial preclusion of such sentences is similarly ambiguous; silence under these circumstances signifies neither approval nor disapproval.

211. Moreover, even these states have not been entirely silent on the issue; all three recognize impaired capacity to conform conduct to legal requirements as a statutory mitigating factor. (Cal. Penal Code § 190.3; Idaho Code § 19-2523 (1996); La. Code Crim. Proc. Art.905.5 (1996).) One plausible inference from these statutory mitigation schemes is that legislators anticipated that, at the extreme, those rare cases where the defendant possesses insufficient capacity to conform his conduct to the law, juries instructed on the mitigating significance of impaired capacity will not impose the death penalty. Although this is not the only possible inference from the overall statutory schemes, it is at least as likely as the silence-

equals-approval inference that silence signifies approval. Indeed, if legislators have assumed that juries will give life sentences in extreme cases of impaired volitional capacity, such an assumption would seem to comport with the actual behavior of juries.

212. The incontrovertible fact is that no state has by express legislative enactment rendered offenders who lacked sufficient capacity to conform their conduct to the requirements of law eligible for capital punishment, no court has ever so construed the laws of any American state to permit such a result. At least nineteen states' laws preclude the possibility of such a sentence, and this virtual unanimity among those states whose laws speak directly to this issue more than establishes the "evolving standard of decency" that precludes the execution of a class of offenders.

213. The behavior of sentencing juries provides "powerful evidence that today our society views" offenders such as petitioner "as categorically less culpable than the average criminal." (*Atkins v. Virginia, supra,* 536 U.S. at 315-316.)

a. The silence of many death penalty states on the question of the death eligibility of a person totally lacking in the ability to control his conduct may be attributable to the screening behavior of prosecutors and the sentencing behavior of juries. The latter is itself another "significant and reliable objective index of contemporary values" regarding a given punishment. (*Gregg v. Georgia, supra,* 428 U.S. at 181;

Coker v. Georgia (1977) 433 U.S. 584, 596 [97 S.Ct. 2861, 53 L.Ed.2d 982.).

b. Whether juries have been given few or many opportunities to impose such sentences, the undeniable fact is that the imposition of death sentences on such volitionally impaired offenders by American juries is so infrequent as to be virtually unknown. (Cf. *Atkins v. Virginia, supra*, 536 U.S. at 316 [deeming the practice of executing the mentally retarded "truly unusual" because it was limited to five states].)

c. Public opinion, as reflected by polling data and by informed public commentary, may in some cases shed additional light on contemporary societal norms regarding criminal punishments. (See *Atkins v. Virginia, supra*, 536 U.S. at 316 n. 21 [reviewing public opinion survey data and positions of pertinent professional associations on question of executing mentally retarded offenders].)

d. Nearly every major mental health association in the United States has published a policy statement addressing the umbrella issue of the execution of mentally ill offenders, and all of those organizations advocate either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented.

(1) Although these organizations differ on whether to outlaw or suspend such executions, they unanimously agree that

the current capital punishment system inadequately addresses the complexity of cases involving mentally ill defendants. (American Psychiatric Association, Moratorium on Capital Punishment in the United States (approved October 2000), APA Document Reference No. 200006; American Psychological Association, Resolution on the Death Penalty in the United States, National Alliance for the Mentally Ill, The Criminalization of People with Mental Illness; National Mental Health Association, Death Penalty and People with Mental Illness (approved March 10, 2001).)

(2) It is obvious from these general statements about a wide range of mentally ill offenders that these organizations would be even more adamant about the execution of persons as severely mentally ill as the petitioner. The reason for the paucity of direct evidence of public and expert attitudes towards the execution of the subcategory of mentally ill defendants who lack the capacity to control their behavior is because such executions are by and large nonexistent. The use of the death penalty as a punishment for essentially involuntary crimes disappeared long ago both from our society's arsenal of criminal sanctions and from our public consciousness.

214. For all of these reasons, the sentence pronounced upon petitioner in this case is, without doubt, "opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and

unusual punishment within the meaning of the Eighth Amendment." (*Thompson v. Oklahoma, supra*, 487 U.S. at 859 [Scalia, J., dissenting].) The Eighth Amendment analysis applied by the Supreme Court to assess the constitutionality of the death penalty for the mentally retarded, (see *Atkins v. Virginia, supra*), for rapists (see *Coker v. Georgia, supra*), for non-triggermen (see *Enmund v. Florida, supra*), and for offenders under the age of eighteen (see *Roper v. Simmons, supra*), clearly establishes the impermissibility of the sentence imposed in this case. The categories of death sentences struck down in *Atkins, Coker, Enmund* and *Roper* appeared to have been rarely authorized and rarely imposed, but they were not wholly unknown.

215. Petitioner's sentence is grossly disproportionate to his personal moral culpability and lacks penological justification.

a. A sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment. (*Gregg v. Georgia, supra*, 428 U.S. at 173 [joint opinion of Stewart, Powell and Stevens, JJ.])

b. Determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense "for purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." (*Enmund v. Florida, supra*, 458 U.S. at 801; see also *California v. Brown,*

supra, 479 U.S. at 545 ["[P]unishment should be directly related to the personal culpability of the criminal defendant."].)

c. In considering claims that particular categories of convicted murderers are not constitutionally punishable by death, the Supreme Court has always focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense. (See *Atkins v. Virginia, supra* [death penalty unconstitutional for mentally retarded offenders]; see *Enmund v. Florida, supra* [death penalty unconstitutional for minor participant who did not intend to kill]; see *Tison v. Arizona* (1986) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] [death penalty not unconstitutional for non-triggerman who was major participant in dangerous felony and acted with reckless indifference to human life]; see *Roper v. Simmons, supra,* 125 S.Ct. 1183 [death penalty unconstitutional for offenders under the age of eighteen].)

d. The Supreme Court's rationale in accepting the contention that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty compels the conclusion that the volitionally incapacitated are likewise ineligible. The Court noted the obvious cognitive limitations of the retarded, but also stressed their "diminished capacity . . . to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," characterizations that have even greater applicability to

those who because of mental illness are completely unable to conform their conduct to the requirements of the law. (*Atkins v. Virginia*, supra, 536 U.S. at 318; see *People v. Danks, supra,* 32 Cal.4th at 322 [Kennard, J. dissenting] [defendant's mental deficiencies caused by paranoid schizophrenia are comparable in severity to deficiencies caused by mental retardation.].)

e. Even prior to *Atkins*, petitioner's ineligibility for the death penalty ought to have been clear because *Penry's* rationale strongly implied the ineligibility of persons who were volitionally incapacitated. The *Penry* Court was careful to note that by rejecting Penry's insanity defense and convicting him of capital murder under Texas law, the jury had necessarily found "that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law." (*Penry v. Lynaugh, supra,* 492 U.S. at 333.) This second finding is exactly opposite of the undisputable evidence concerning petitioner's mental capacity. Thus the petitioner lacked one of the two characteristics that the *Penry* Court found to be crucial in ascribing to Penry sufficient moral responsibility to justify the death penalty.

216. Neither retribution nor deterrence is served by petitioner's death sentence.

a. A capital sentence violates the Eighth Amendment when it is "so totally lacking in penological justification that it

results in the gratuitous infliction of suffering. (*Gregg v. Georgia, supra,* 428 U.S. at 183 [joint opinion of Stewart, Powell, and Stevens, JJ.]) Unless the death penalty "measurably contributes" to either the goal of deterrence or the goal of retribution, it is "nothing more than the purposeless and needless infliction of pain and suffering," and therefore an unconstitutional punishment. (*Enmund v. Florida, supra,* 458 U.S. at 798.) Neither retribution nor deterrence is served by the execution of defendants whose mental illness rendered them powerless to avoid criminal conduct.

b. Deterrence cannot justify imposing the death penalty upon these volitionally incapacitated defendants because by definition, those whose mental disorders robbed them of the capacity to conform their conduct to the requirements of law are incapable of responding to legal rules.

c. Logic and precedent dictate the conclusion that the death penalty can serve no deterrent purpose when applied to defendants who lacked sufficient capacity to avoid their criminal acts. Because the capital sentencing of persons determined to be unable to control their conduct amounts to execution for essentially nonvolitional conduct, neither retribution nor deterrence are thereby measurably advanced. (See *State v. Nelson,* 803 A.2d 1, 41-50 (N.J. 2002) [Zazzali, J. concurring] [executing the mentally ill does not advance retribution or deterrence.]; see *Bryan v. Mullin, supra,* 335 F.3d at 1246 [Henry, J.,

dissenting] [executing a mentally ill, brain damaged defendant does not contribute to the furtherance of retribution or deterrence].)

217. Capital prosecution of volitionally incapacitated offenders carries heightened risks of unjustified executions.

a. In *Atkins*, the Supreme Court cited the enhanced risk faced by retarded defendants "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," (*Atkins v. Virginia, supra,*, 536 U.S. at 320 [quoting *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]), as a second justification for the national consensus that they should be categorically excluded from eligibility for the death penalty. Volitionally incapacitated defendants such as petitioner face similar obstacles in "mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (*Id.*)

b. Any defendant whose mental illness at the time of the offense rendered him unable to conform his conduct to the requirements of law is a defendant suffering from severe mental illness. Severe mental illness, just like significant cognitive limitations, sharply constricts a defendant's ability "to give meaningful assistance to their counsel." (*Atkins v. Virginia*, supra, 536 U.S. at 320.)

c. Volitional incapacity is frequently the consequence of hallucinations and/or delusions. Hallucinations and

delusions diminish the defendant's ability to report in two distinct ways: They impair his ability to accurately observe, and, particularly where the delusions are paranoid, they cause mistrust of persons attempting to help, and consequently impair willingness to cooperate with defense attorneys. Thus, whether the question is the accuracy of aggravating details of the crime or the existence of mitigating circumstances, a severely mentally ill defendant is less able to assist his attorney in presenting "factors which may call for a less severe penalty." (*Id.*)

d. Another impediment to effective defense of the volitionally incapacitated lies in the fact that defendants who are unable to conform their conduct to the requirements of law usually are equally unable to conform their conduct to the requirements of courtroom decorum and procedure. They therefore "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." (*Atkins v. Virginia, supra*, 536 U.S. at 320-321.)

e. When such defendants are medicated in an attempt to reduce psychotic symptoms and restore competence (as petitioner was), the resulting synthetic competence is likely to create its own significant impediments to cooperation with attorneys and manufacture a blank demeanor likely to be read as indifference. (See *Riggins v. Nevada* (1992) 504 U.S. 127, 142 [112 S.Ct. 1810, 118 L.Ed.2d 479] [Kennedy, J., concurring] ["[D]rugs [that restore competence] can

prejudice the accused in two ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom and (2) by rendering him unable or unwilling to assist counsel."].)

f. Mental illness that disables a defendant from controlling his own conduct "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." (*Atkins v. Virginia, supra*, 536 U.S. at 321.) It is difficult to imagine a fact about a defendant that would engender greater fear of future violence, and yet would not reflect moral culpability on his part.

218. Thus, the weight of national consensus is substantially greater in petitioner's case than it is with respect to mentally retarded defendants, and an "independent evaluation of the issue reveals no reason to disagree with [that] judgment." (*Atkins v. Virginia, supra*, 536 U.S. at 321.) In light of Petitioner's significant mental illness, his death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, and must be vacated.

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CLAIM TWO

THE IMPOSITION OF A SENTENCE OF DEATH ON PETITIONER RESULTED IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT, BECAUSE OF HIS MULTIPLE COGNITIVE AND NEUROLOGIC IMPAIRMENTS, MENTAL ILLNESS, AND YOUTH AT THE TIME OF THE CRIME.

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to be free of cruel and unusual punishment, and to equal protection of the laws and article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because his effective age at the time of the commission of the offense makes him ineligible for a death sentence.

A capital sentence violates the Eighth Amendment when it is "grossly out of proportion to the severity of the crime" or "so totally without penological justification that it results in the gratuitous infliction of suffering." (*Gregg v. Georgia, supra,* 428 U.S. at 173, 183.) Determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense. "[F]or purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund v. Florida, supra,* 458 U.S. at 801 (1982). (See also *California v. Brown, supra,* 479 U.S. at 545 ["[P]unishment should be directly related to the personal

culpability of the criminal defendant."].) Thus, in considering claims that particular categories of convicted murderers are not constitutionally punishable by death, the Court has long focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense.

The United States Supreme Court has held that there are certain categorical exemptions from the imposition of the death penalty, which must be made in order to comport with the Eighth Amendment's prohibition on cruel and unusual punishment. In 2002, the Court declared that executing mentally retarded defendants violates the prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. (*Atkins v. Virginia, supra,* 536 U.S. at 304.) More recently, in *Roper v. Simmons, supra,* 543 U.S. at 551, the Court held that the execution of juveniles is also cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. Although the Court has so far declined to announce a categorical prohibition against the death penalty for the significantly mentally ill, other courts around the country have recognized the substantial overlap between mental retardation and other mental impairments with parallel implications. (*Bryan v. Mullin, supra,* 335 F.3d at 1237; *State v. Nelson* (2002) 173 N.J. 417, 493, 803 A.2d 1, 47; *People v. Danks, supra,* 32 Cal.4th at 322 (Moreno, J. concurring and dissenting).)

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment.

In *Roper v. Simmons, supra,* 543 U.S. at 551, the Supreme Court held that "the death penalty cannot be imposed upon juvenile offenders," because it offends the Eighth and Fourteenth Amendments to do so. Although the Court used a bright-line test of 18 years of age, the Court also recognized that "[the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Id.* at 574.)

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

219. Petitioner realleges and incorporates by reference as though fully set forth herein the allegations of Claim 1, the facts set forth in the Statement of Facts, and each and every other claim in this Petition and the exhibits and declarations cited therein that is relevant hereto.

220. Petitioner was born on September 2, 1972. (Ex. 1, p. 1)

221. On August 5, 1991, the date of the commission of the offense underlying this case, Petitioner was 18 years, 11 months, and 4 days old.

222. As detailed in Claim 1, because of his learning disabilities, mental illness, neurological and cognitive deficits, and other deficits in functioning, Petitioner was, whether or not he met the clinical criteria for mental retardation, similar developmentally to a 17-year old at the time of this offense and entitled to *Simmons* relief. His neurological, physiological and psychological deficits are exactly the characteristics that the U.S. Supreme Court identified as warranting an exemption from the death penalty.

223. Petitioner's medical, psychiatric, neurological, and psychological disturbances, including post-traumatic stress disorder, and other deficits left him with "diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." (*Atkins v. Virginia, supra,* 536 U.S. at 318.)

224. For all of the reasons below, the imposition of a sentence of death violates Petitioner's Eighth and Fourteenth Amendment right to be free from cruel and unusual punishments. (U.S. Const., amends. VIII and XIV; *Roper v. Simmons, supra.*)

225. At the time of this offense, Petitioner was developmentally akin to a 17-year old rather than an adult, and therefore, less culpable and less deserving of the death penalty.

226. As detailed in Claim 1 above and Exhibit 40, Dr. Khazanov concluded that Michael Allen suffers from organic brain damage as well as Posttraumatic Stress Disorder (PTSD). The neuropsychological testing she conducted identified both localized dysfunction – primarily in the left parietal and frontal lobes – and diffuse damage in both 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 (whether verbal or nonverbal), to assess his environment or specific situations and respond rationally or thoughtfully, are severely and chronically impaired. The signs and symptoms of this damage have been present since elementary school. Moreover, the effects of his organic impairments are compounded by several coexisting conditions, including chronic underlying mental illness and substance abuse. At critical points in his life, the effects of his organic impairments have also been exacerbated by his history of chronic physical and psychological trauma. (Ex. 40, pp. 1024-1033, 1041-1046, Declaration of Dr. Khazanov.)

227. Dr. Khazanov also concluded that Mr. Allen suffers from Post-Traumatic Stress Disorder. Severe trauma that Mr. Allen suffered during his childhood and adolescence triggered the onset of PTSD. (Ex. 40, pp. 1041-1046, Declaration of Dr. Khazanov.)

228. Dr. Khazanov formed the opinion that at the time of this offense, Mr. Allen was seriously mentally impaired, suffering from the cumulative effects of longstanding brain damage and a serious psychiatric disorder, specifically PTSD. As a result, his ability to conform his conduct to the requirements of the law, control his behavior, or comprehend the consequences of that behavior was severely impaired. (Ex. 40, pp. 1024-1033, 1041-1046, Declaration of Dr. Khazanov.)

229. According to Dr. Khazanov, at the time of the offense which resulted in capital punishment, Mr. Allen was severely developmentally immature. She noted that scientific studies indicate that the development of the brain is not fully complete until individuals reach their early twenties.[6] Specifically, the frontal lobes, which are responsible for executive functioning, impulse control, and foresight of consequences, are the last to develop.[7] Those in their late adolescence are less able than adults to control

[6] Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holems, Kevin D. Tessner, and Arthur W. Toga, *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 Journal of Neuroscience 22 (2001); Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holems, Terry L. Jernigan and Arthur W. Toga, *in Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 10 (1999) at 859.

[7] Ibid at 8821; Ibid at 860; Nitin Gogtay, et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proceedings Nat'l Acad. Sci. 8174, 8175 (2004).

their impulses and exercise self-restraint in refraining from aggressive behavior. Critical components of psychosocial maturity, which are necessary to make rational, reasoned decisions, must include the ability to conduct a risk-benefit analysis accurately, the ability to think of future consequences, and the ability to resist impulses and control emotions, even in the face of environmental or peer pressures. Those individuals in Mr. Allen's age group at the time of the capital crime generally have not fully developed these abilities and therefore lack the capacity for reasoned judgment. (Ex. 40, pp. 1044-1046, Declaration of Dr. Khazanov.)

230. Studies examining biological brain maturation have been conducted on normal adolescents. With respect to the maturation and functioning of Mr. Allen's brain, there is a dramatic overlay of other factors, such as existing brain damage, abuse, witnessing domestic violence, and a chaotic upbringing, in the developmental period of his life. Mr. Allen's functioning was much more impaired than the studies conducted for the normal adolescents have shown. The frontal lobes, already hindered by the limited biological stage of maturation, were concurrently impaired by the existing brain damage and other psychosocial factors. (Ex. 40, pp. 1045-1046, Declaration of Dr. Khazanov.)

231. According to Dr. Khazanov, Mr. Allen, therefore, was exceptionally immature at the time of the capital offense. She concluded 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. (Ex. 40, pp. 1045-1046, Declaration of Dr. Khazanov.)

232. The American Medical Association, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child & Adolescent Psychiatry, the American Academy of Psychiatry and the Law, the National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association filed an amicus brief in *Roper v. Simmons, supra,* 543 U.S. at 551, 1418.

233. The amicus brief provides a comprehensible explanation of the scientific data which have demonstrated that the adolescent brain is physiologically under-developed in areas that control impulse, foresee consequences, and temper emotions. Studies cited within the amicus brief document that even the normal brain does not cease to mature until the early 20s, in those relevant parts of the brain that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.

234. Following the initial explanation of the anatomical nature of the adolescent brain, the amicus brief reflects on how serious psychological disturbances exacerbate the already existing vulnerabilities of youth, and result in substandard levels of functioning. The amicus brief concludes that

the death penalty is an inappropriate sanction because it does not serve the recognized Eighth Amendment purposes of deterrence and retribution. (Amicus Brief of AMA, APA, et al. filed with the U.S. Supreme Court in *Roper v. Simmons*, No. 03-633,2004 WL 1633549.)

235. In particular, the amicus brief reads in pertinent part:

> Modern brain research technologies developed a body of data in the late 1990s ... that provides a compelling picture of the inner workings of the adolescent brain. Adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fibers of their brains.

236. This insight emerges from sophisticated and non-invasive brain imaging techniques, performed by high-resolution structural and functional magnetic resonance imaging ("MRI") and other technologies. These imaging techniques are a quantum leap beyond previous mechanism for assessing brain development.... Brain imaging allows researchers to study how a live brain progresses longitudinally two complementary observations have been especially revealing. First, adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment.

Second the regions of the brain associated with impulse control, risk assessment, and moral reasoning develop last, after late adolescence.

237. Research shows that adolescent brains are more active in regions related to aggression, anger, and fear, and less active in regions related to impulse control, risk assessment, and moral reasoning than adult brains.

> The brain is a complex network of interrelated parts. Each part is associated with different functions and capabilities. The regions relevant to understanding the adolescent behaviors discussed in the previous section are the areas of the brain associated with (1) emotional impulses, particularly aggression; and (2) impulse control, risk assessment, and moral reasoning.
>
> The emotional center of the brain is the limbic system. Within the limbic system is the amygdala, which is associated with aggressive and impulsive behavior.... It dictates instinctive gut reactions, including fight or flight.
>
> When it comes to 'response inhibition, emotional regulation, planning and organization,' the so-called executive functions, the most important components of the brain are the frontal lobes ...
>
> The frontal lobe modulates synaptic transmissions from the amygdala to which it is strongly connected. A still-maturing frontal lobe exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature frontal lobe. In other words, if the frontal lobe is immature or underdeveloped, there is less of a check on the amygdala...

> Even more "groundbreaking than the evidence of brain activity is the recent revelation, confirmed through brain imaging studies, that the brain's frontal lobes are still structurally immature well into late adolescence. The prefrontal cortex (which, as noted above, is most associated with impulse control, risk assessment, and moral reasoning) is 'one of the last brain regions to mature.' This, in turn, means that 'response inhibition, emotional regulation, planning and organization" ...continue to develop between adolescence and young adulthood. As one prominent neurophysiologist put it, '[s]tructural maturation of individual brain regions and their connecting pathways is a condition sine qua non for the successful development of cognitive . . . functions.'" (Amicus Brief of AMA, APA, et al., supra.)

238. Of particular significance is footnote 55 in the amicus brief, which cites to several studies done by Gotay, Giedd, and Sowell, which have focused on subjects older than 17 years of age. Their scientific work in brain development indicate that 'pronounced brain maturational processes continu[e] into post-adolescence.' (See also, Elizabeth Sowell, "Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation." 21(22) J. Neuroscience 8819-8829 (November 15, 2001).) In this report, for the first time we have mapped the spatial distribution of late brain growth-and demonstrate that it does indeed continue in the frontal and posterior temporal lobes during the postadolescent years regardless of whether individual differences in global brain size are controlled.

239. Interestingly, the anatomical regions within the frontal lobes where we see the most robust accelerated gray matter density loss are in precisely the same locations where we see the most robust continued postadolescent brain growth. The upshot is that those portions of the brain that make people morally culpable remain undeveloped until an individual moves into his early 20s. Dr. Ben Gur, an eminent neuropsychologist and brain researcher, attests: "The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." (See Affidavit of Ben Gur, at http://ecjr.policy.net/relatives/21901.pdf.)

240. As discussed in Claim I of this petition and documented in Exhibits 2, 5, 25, and 40, Petitioner suffers from mental illness, neurological and cognitive impairments and learning disabilities. Because of these deficits, he did not operate even at the level of a normal adolescent but rather was functioning at the time of this incident as a juvenile.

241. As detailed in Claim I, Petitioner, beginning in first grade, has been consistently behind schedule academically and grossly impaired in his mental and social functioning. (Ex. 5; Ex. 40.)

242. In August of 1991, Petitioner was heavily using drugs and according to Parole Agent John Blake, at that time Mr. Allen, "had no

marketable skills and maybe intellectually unable to utilize the proper strategy to successfully see employment." (Ex. 6, p. 233.)

243. In September 1988, Michael scored a total TABE test battery grade level equivalent of 6.9 and scored low or below average in verbal and performance ability and manual and finger dexterity on the Peabody Picture Vocabulary Test, Revised Beta Examination and Purdue Pegboard Test. (Ex. 6, pp. 292-239.) Michael described his school experience as "boring, frustrating and hard." (Ex. 6, p. 295.) He reported that his studies were too hard and that he fell behind and couldn't keep his mind on his work. (Ex. 6, p. 296.)

244. The Supreme Court recognized that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18 'Indeed, youth is more than a chronological fact .... It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 [102 S.Ct. 869, 71 L.Ed.2d 1].)

245. The Supreme Court held that where there is diminished culpability, the penological justifications of retribution and deterrence are not served by the imposition of the death penalty: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, it is unclear whether the

death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the Petitioner acknowledged at oral argument." (*Roper v. Simmons, supra*, 543 U.S. at 571.)

246. The same consideration is equally applicable to Petitioner. His neurological, physiological and psychological deficits are exactly the characteristics that the U.S. Supreme Court has identified as warranting an exemption from the death penalty under *Simmons* and *Atkins*. These deficits left him with "diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." (*Atkins v. Virginia, supra,* 536 U.S. at 318.)

247. For all of the aforementioned reasons, the imposition of a sentence of death violates Petitioner's Eighth and Fourteenth Amendment right to be free from cruel and unusual punishments. (U.S. Const. amends. VIII, XIV; *Roper v. Simmons, supra*, 543 U.S. at 551.)

248. Based on the above information, and that which may become available to Petitioner following further investigation, this Court should modify the judgment by vacating the sentence of death, or order that petitioner be afforded a jury trial on the question of whether he is constitutionally and statutorily ineligible for the death penalty.

CLAIM THREE

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.

The judgment of conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of petitioner's rights to a trial by a fair and impartial jury; a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty; the effective assistance of counsel; present a defense; confrontation and compulsory process; the privilege against self-incrimination; the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights law and *jus cogens*, and state law, because petitioner's trial counsel rendered constitutionally deficient representation in failing adequately to investigate, prepare or present meritorious guilt, special circumstance, and penalty defenses thereby prejudicing petitioner at all critical stages of the criminal

proceedings, and resulting in a complete breakdown in the adversarial process such that a presumption of prejudice is compelled.

Trial counsel unreasonably and prejudicially failed to conduct a timely or adequate investigation, did not make informed and rational decisions regarding potentially meritorious defenses and tactics, and did not develop or present an adequate and coherent trial defense and mitigation case.

Trial counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion. Reasonably competent counsel handling a capital case at the time of petitioner's trial would have known that a thorough investigation of the prosecution's theories of guilt, an independent analysis of the evidence supporting those theories, a review and examination of law enforcement's investigation, an examination of witnesses' and petitioner's statements and a review of potential defenses were essential to the development and presentation of a defense at trial. Reasonably competent counsel also would have recognized that a thorough investigation of witnesses' and petitioner's background and family history, including, but not limited to medical, mental health, academic, and social history, including but not limited to evidence of his physical, psychological, psychiatric, cognitive, emotional, and social deficits and the developmental operative impact of such deficits on his functioning and behavior was

essential to adequate preparation for the guilt and penalty phases of the trial.

Trial counsel unreasonably and prejudicially failed to adequately investigate, develop, and present any guilt defense or effective penalty mitigation. Trial counsel's failure to investigate and adequately present defenses and mitigation and protect petitioner's statutory and constitutional rights prejudiced him. But for counsel's unprofessional errors, the result of the proceedings would have been different. Trial counsel's numerous failings also resulted in a total breakdown of the adversarial process such that a presumption of prejudice is mandated.

Counsel must represent defendants competently. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 690-691 [104 S.Ct. 2052, 80 L.Ed.2d 674].) The Sixth Amendment right to counsel "contemplates the services of attorney devoted solely to the interests of his client." (*Von Moltke v. Gillies* (1948) 332 U.S. 708, 725 [68 S.Ct. 316, 29 L.Ed. 309].) This right carries a correlative right to the attorney's loyalty and to representation free of conflicts of interest. (*Strickland v. Washington, supra,* 466 U.S. at 687-688, 690-691; *Boyde v. California* (1990) 494 U.S. 370, 382 [110 S.Ct. 1190, 108 L.Ed.2d 316] [recognizing long-held societal belief that "defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse"]; *Williams v.*

Taylor (2000) 529 U.S. 362, 415 [120 S.Ct. 1495, 146 L.Ed.2d 389] [effective assistance requires counsel to conduct "diligent investigation into his client's troubling background and unique personal circumstances"]; *Wiggins v. Smith* (2003) 539 U.S. 510, 521-523 [123 S.Ct. 2527, 156 L.Ed.2d 471] [defense attorney has a duty to investigate, develop and present mitigation evidence at penalty phase]; *Rompilla v. Beard* (2005) 545 U.S. 374, 390-394 [125 S.Ct. 2456, 162 L.Ed.2d 360] [trial counsel's penalty-phase performance prejudicially deficient where she failed to unearth abuse and alcoholism in defendant's history].) The reasons for this requirement are absolutely clear: in weighing the balance between aggravating and mitigating factors, jurors are entitled to an accurate picture of the defendant's life. In addition to the light shone by the prosecution on a defendant's criminal acts, light must also have been shone on the other aspects of a defendant's life – who he is as a person, and how he came to be that person.

In this regard, the Supreme Court has consistently cited with approval the ABA Standards for Criminal Justice as indicia of the obligations of criminal defense attorneys in capital cases. (See *Williams v. Taylor, supra,* 529 U.S. at 396; *Wiggins v. Smith, supra,* 539 U.S. at 524 [noting that "we have long referred [to the ABA standards as 'guides to determining what is reasonable'" (quoting *Strickland v. Washington, supra,* 466 U.S. at 688)]; *Rompilla v. Beard, supra,* 545 U.S. at 387.) At the time

of Mr. Allen's trial, those standards required, among other things, that counsel "...develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained." (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 8.2 (1989).)

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

A. PETITIONER WAS FACIALLY DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL JOSEPH ORR'S SYSTEMIC PREJUDICIALLY DEFICIENT PERFORMANCE.

249. Those facts and allegations set forth in Claims 1, 2, 4, 5, 6 and 7 and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

250. Trial counsel Joseph Orr wholly and absolutely failed to comply or attempt to uphold the then controlling ABA guidelines and standards for professional conduct in defense of a capital case. [Ex. 27.]

a. Counsel failed to create a "defense team" comprised of mitigation experts and specialists including screening for mental and psychological disorders and impairments (ABA guideline 10.4, Ex. 27, p. 803), create and maintain close contact with Mr. Allen and

establish a relationship of trust (ABA guideline 10.5 and 11.4.2, Ex. 27, pp. 782-783, 808, Ex. 2, pp. 7-10), conduct thorough and independent investigations related to both guilt and penalty including developing a meaningful life history by interviewing neighbors, family, friends, teachers, etc. (ABA guidelines 10.7 and 11.4.1, Ex. 27, pp. 778-781, 813, 816, Ex. 2), investigate and present available mitigation evidence including medical history, educational history, social history, prior juvenile correctional experience, rehabilitative potential, etc. (ABA guideline 10.7, 11.8.3, and 11.8.6, Ex. 27, pp. 797-798, 819, 821, 844-845, Exs. 1-3, 4-7), consider and assert all legal claims (ABA guideline 10.8, Ex. 27, p. 824) and cooperate with successor counsel (ABA guideline 10.13 and 11.9.1, Ex. 27, p. 800-801, 860).

b. Representative, although not exhaustive, of trial counsel's failure to satisfactorily perform, was his complete failure under ABA guidelines 10.7, 11.8.3, and 11.8.6 to investigate and present expert testimony regarding Mr. Allen's mental health history and psychological functioning.

(1) The record is clear that Counsel Orr failed to conduct such an investigation and present such testimony because, "Since 1961, [he had] seen thousands of reports and seen thousands of psychiatrists on the stand and thought they were worthless the way they try to over structure the situation that they were asked to give an opinion in.

Most juries, [he added], never believe them." [RT, 33:6614:15-21]

(2) Instead of investigating and presenting proper mitigation as detailed in this Claim 3, and Claims 1 and 2 above (Exs. 1-7, 25), he presented testimony from Mr. Allen's jail-house wife, his mother, and the alleged expertise of Robert Douglass, who has since admitted that he was not qualified or prepared to testify. (Ex. 25.)

(3) Mr. Allen's "mitigation case" required less than one morning of court time to present and required less than 100 pages of reporter's transcript to record. [CT, 5:978, RT, 33:6620-6716, 6583]

(4) The result was that the court concluded that: "There is absolutely no factual basis for any claim for modification by the defendant Michael Allen." [RT, 39: 7643:12-14] ". . . briefly stated, the lack of mitigation is palpable." [RT, 39: 7643:25] "So very little to say. There is no evidence whatsoever here of any abusive childhood. There is no evidence of any mental disease or defect. There is no evidence of intoxication. . . . He had a very standard childhood, unfortunately for Mr. Allen as he sits here today, perhaps. Nothing particularly unusual about his situation." [RT, 39: 7645:11-27.) "Under factor (d) there's no showing that the defendant was mentally or emotionally disturbed at the time of the commission of the crime or that he was in any way mentally or emotionally impaired." [RT 39, 7650:8-12.) "Under factor (h) there is no

evidence of mental disease or defect or intoxication. Under factor (i), the court does not find the defendant's age to be a mitigating factor." [RT, 39: 7651:6-11] "Finally, under factor (k), the record is bereave of any substantial mitigation. There is simply nothing about the defendant's past or about his

251. In violation of ABA guidelines 10.13 and 11.9.1, trial counsel Joseph Orr failed to maintain and produce his trial files in any orderly, coherent, systematic or reasonably complete form. [Ex. 21, pp. 654-683.]

a. By declaration, California Appellate Project (CAP) staff attorney Sarah Chester recounted that Mr. Orr informed her that he could not safely store "the trial file in Mr. Allen's capital case" and sent it to CAP.

b. In December of 2000, CAP received a total of 11 boxes from Mr. Orr, two of which were too large to store and therefore were opened and chronicled. In the two boxes were loose copies of random transcript and murder book pages from this case. [Ex. 21, pp. 656, 659, 671, 676, 680.] Intermingled therewith and representative, albeit not exhaustive, of Mr. Orr's disorganization and blatant lack of care for his client's files, were multiple unrelated legal and personal documents including but not limited to the following:

(1) *Henderson* case records. [Ex. 21, pp. 654.]

(2) *Pocasangre* case records. [Ex. 21, pp. 655.]

(3) *Shannon* case records. [Ex. 21, pp. 656.]

(4) *Polanco* case records. [Ex. 21, pp. 656.]

(5) *Khrayan* case records. [Ex. 21, pp. 657.]

(6) *Howard* case records. [Ex. 21, pp. 657.]

(7) *Hamilton* case records. [Ex. 21, pp. 659.]

(8) *Reyes* case records. [Ex. 21, pp. 660.]

(9) *Chow* case records. [Ex. 21, pp. 654.]

(10) *Littlejohn* case records. [Ex. 21, pp. 663.]

(11) *Silverya* case records. [Ex. 21, pp. 664.]

(12) *Gilbert* case records. [Ex. 21, pp. 666.]

(13) *Meraz* case records. [Ex. 21, pp. 668.]

(14) *Delcampo* case records. [Ex. 21, pp. 669.]

(15) *Cervantes* case records. [Ex. 21, pp. 669.]

(16) *Lee* case records. [Ex. 21, pp. 670.]

(17) *Benson* case records. [Ex. 21, pp. 671.]

(18) *Palma* case records. [Ex. 21, pp. 671.]

(19) *Guizal* case records. [Ex. 21, pp. 672.]

(20) *Duron* case records. [Ex. 21, pp. 672.]

(21) *Kelly* case records. [Ex. 21, pp. 672.]

(22) *Kawaguchi* case records. [Ex. 21, pp. 672.]

(23) *Monge* case records. [Ex. 21, pp. 673.]

(24) *Quineanilla* case records. [Ex. 21, pp. 677.]

(25) *City Seafoods* case records. [Ex. 21, pp. 680.]

(26) Checks written by Mr. Orr to parking authorities with related citations. [Ex. 21, pp. 655.]

(27) Pasadena Police impound report [Ex. 21, pp. 657.]

(28) American Bankers Mortgage Settlement Agreement [Ex. 21, pp. 657.]

(29) Copy of "Handball" magazine [Ex. 21, pp. 658.]

(30) DMV letter to "K. Dunn" [Ex. 21, pp. 660.]

(31) Bill of Services of Gary Littlejohn [Ex. 21, pp. 663.]

(32) Personal Letters from Farris and Kaiser

(crumpled) [Ex. 21, pp. 665.]

(33) Ad from PacBell [Ex. 21, pp. 666.]

(34) Fax from AAA bail bonds [Ex. 21, pp. 667.]

(35) Insurance paperwork [Ex. 21, pp. 667.]

(36) Crumpled piece of paper regarding alcohol treatment. [Ex. 21, pp. 668.]

(37) Blank certificate of attendance with two hours of CLE credit [Ex. 21, pp. 670.]

(38) Envelope from the LA Mission [Ex. 21, pp. 672.]

(39) Insurance Company Receipt [Ex. 21, pp. 672.]

(40) St. James' School envelope [Ex. 21, p. 674.]

(41) Folder labeled Pasadena East Parish [Ex. 21, pp. 675.]

(42) Letter to the INS [Ex. 21, pp. 676.]

(43) 2 Copies of a California DUI report [Ex. 21, pp. 681.]

(44) Dilapidated box with papers packed tightly inside it. [Ex. 21, pp. 682.]

(45) 30 other randomly named files [Ex. 21.]

e. Mr. Orr's failure to preserve and maintain any semblance of an organized trial file for Mr. Allen (and obviously other clients) has seriously impeded counsel's ability to fully investigate, support existing claims, and identify derivative or independent claims that may inure to the benefit of Petitioner. [Ex. 21, pp. 654-683.] Nonetheless, the evidence that is obtainable and set out in this petition adequately supports each claim and justifies issuance of an order to show cause and the grant of relief.

252. In violation of ABA guidelines 10.13 and 11.9.1, trial counsel Joseph Orr has totally refused to cooperate with appellate and writ counsel. [Ex. 18, pp. 617-634.] His blatant and unreasonable refusal to aid in the post-conviction review proceedings has seriously impeded counsel's ability to fully investigate, support existing claims, and identify derivative or independent claims that may inure to the benefit of Petitioner. Nonetheless, the evidence that is obtainable and set out in this petition adequately supports each claim and justifies issuance of an order to show cause and the grant of relief.

253. Trial counsel Joseph Orr consistently failed to appropriately utilize second counsel Edward Murphy, effectively leaving Mr. Allen with representation by only one attorney. [Exs. 17, 20, 22.]

d. In seeking his fee, Orr stated under penalty of

perjury that the case required extensive investigation and preparation. [Ex. 22, p. 686.]

e. In seeking his fee, Orr stated under penalty of perjury that the case was a Category III level because of its complexity and two special circumstances. [Ex. 22, p. 687.]

f. Counsel Orr was provided a fee of $125,000 for his "work" on the case. [Ex. 20, pp. 648, 653.]

g. In requesting second-counsel, Orr stated under penalty of perjury that such an individual was necessary because of the issuance of "15 search warrants" and the interrelationship of "two other murder cases which must be investigated." [Ex. 22, p. 691.] Orr stated that the second counsel would, "assist in examining all discovery for its relationship to the guilt or penalty phase of the trial" and to, "prepare mitigating evidence" and perhaps "make one of the arguments at the penalty phase of the trial." [Ex.22., p. 691:10-15.]

h. Edward Murphy was appointed as second-counsel on June 3, 1996 and was awarded a fee of $18,750. [Ex. 20, pp. 650, 653.]

i. According to Mr. Murphy, his representation in capital cases, with the exception of this case, was always as lead counsel. With respect to this case, he had "limited involvement" and did only the "specific tasks" Mr. Orr "requested." Mr. Murphy stated that, "The

understanding I had with Mr. Orr is I would only do specific tasks he requested. As it turned out, to the best of my recollection, he requested very few. I was not involved with the overall preparation of the case and rarely spoke in court. I believe the record speaks for itself. I have no recollection of being consulted regarding any of Mr. Orr's tactics in the guilt or penalty phase of the case." [Ex. 17.]

j. Mr. Orr's refusal to collaborate and effectively use second counsel that he had stated under penalty of perjury was necessary prejudicially denied Mr. Allen the effective assistance of the second-counsel appointed on his behalf.

254. Trial counsel Joseph Orr inexplicably failed to use all awarded funds for investigation and expert evidence on behalf of Mr. Allen. [Ex. 20, 22.]

a. In seeking an expense allowance for the case, Orr stated under the penalty of perjury that he required an initial award of $20,000 to use in investigation and expert services. [Ex. 22, p. 687:15-17.] Orr stated that such an amount was required to adequately investigate and review the contemporaneous and special circumstances charges. He further stated the "necessity for the services of experts in the penalty phase of the trial." [Ex. 22, p.687.]

b. Orr was awarded $10,000. [Ex. 20, p. 648.]

c. Orr spent a total of $8,906.88 on investigation

($4,094), expert testimony ($3,800) and trial material preparation ($1,012.88). [Ex. 20, p. 651.]

d. Orr returned $1,093.12 to the Los Angeles Superior Court at the conclusion of the case. [Ex. 20, p. 651-653.]

e. Capital petitioners now have available up to $50,000 for use in investigation and the presentation of expert opinion. Mr. Orr's use of less than $8,000 for investigation and expert testimony when $20,000 was requested is facially incompetent and inexcusable.

255. Trial counsel Joseph Orr inexplicably proceeded to trial with redacted discovery documents and used such documents to cross-examine witnesses and prepare his defense. [Exs. 23 and 24.] On July 23, 1997, the first day of trial, Orr stated that he still did not know the names on the redacted documents. [RT 1793:26-1794:2.] Using redacted discovery at trial with no ability to decipher its contents is facially incompetent.

256. Trial counsel Joseph Orr filed an eight (8) page Motion for a New Trial. [Ex. 19.]

a. Orr was appointed on December 27, 1994 [Ex. 22, p. 685] and filed his motion for a new trial on December 4, 1997 [Ex. 19].

b. Three years of discovery proceedings, hearings, motions and meetings culminated in an approximately forty-one day guilt and penalty phase trial. The Reporter's Transcript of pre-trial and trial

proceedings constitutes 38 volumes and over 7,500 pages.

c. In response to the entirety of the proceedings, Orr could only conceive of four errors, could muster only eight (8) pages of argument in support of his contentions, and cited only five (5) cases. Notably, one of his four arguments was that the court unreasonably restricted the testimony of his penalty phase "expert" Robert Douglas. [Ex. 19.]

d. Appellate counsel for Mr. Allen, after reviewing the identical record before Mr. Orr, filed an over 700 page opening brief alleging 24 separate issues justifying reversal. (See Appellant's Opening Brief.)

e. Orr's Motion for a New Trial represents a total abandonment of his client, displays total legal incompetence, and compels reversal.

257. Each of the above enumerated deficiencies has no reasonable tactical explanation and compels reversal, both independently and cumulatively.

258. Further highlighting that Mr. Orr had no business defending Mr. Allen in this death penalty case, in 2003, when the Los Angeles Superior Court judges assumed the role of assigning lawyers to the Los Angeles County Bar Association Indigent Criminal Defense Panel for Death Penalty Cases, Joseph Orr was removed. (Ex 41, p. 1047.)

259. Trial counsel had no reasoned, informed, tactical, or strategic justification for the above acts and omissions, nor could such acts or omissions have been committed by any attorney reasonably and sufficiently well experienced and qualified to represent a defendant in a capital case at the time of Mr. Allen's trial. But for trial counsel's unprofessional failures, errors and omissions, Mr. Allen would not have been sentenced to death. Trial counsel's unreasonable failure prejudicially deprived Mr. Allen of the benefit of reasonably available evidence relevant to the questions of both guilt and innocence, which would have resulted in a different result at both the guilt and penalty phases had trial counsel reasonably investigated, prepared and presented a defense.

B. PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.

260. Those facts and allegations set forth in Claims 1, 2, 4, 5, 6 and 7 and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

261. Trial counsel unreasonably and prejudicially failed to present a competent opening statement during the guilt phase of trial. Counsel's entire opening statement was 34 lines long and assured the jury that there would be "plenty of evidence by the defense" that would contradict and

impeach "everything that the people's witnesses say." [RT, 15:3253-3254] In reality, counsel put on no defense. [RT, 23:4982-4983]

262. Trial counsel unreasonably and prejudicially failed to present any defense or substantial impeachment of the People's witnesses. When asked by the court "What do you have by way of a defense?" Mr. Orr responded, "If anything, one witness that will take 10 minutes." Later he remarked that he had not decided if he was going to call a witness. [RT, 19: 4465, 4473-4474.] In reality counsel called no witness and put on no defense. [RT, 23:4982-4983]

263. Trial counsel unreasonably and prejudicially failed to investigate and prepare for trial by failing to appropriately utilize second counsel Edward Murphy, effectively leaving Mr. Allen with representation by only one attorney. [Exs. 17, 20, 22.]

a. In seeking his fee, Orr stated under penalty of perjury that the case required extensive investigation and preparation and was a Category III level because of its complexity and two special circumstances. [Ex. 22, pp. 686-687.]

b. Counsel Orr was provided a fee of $125,000 for his "work" on the case. [Ex. 20, pp. 648, 653.]

c. In requesting second-counsel, Orr stated under penalty of perjury that such an individual was necessary because of the issuance of "15 search warrants" and the interrelationship of "two other

murder cases which must be investigated." [Ex. 22, p. 691.] Orr stated that the second counsel would "assist in examining all discovery for its relationship to the guilt or penalty phase of the trial" and to "prepare mitigating evidence" and perhaps "make one of the arguments at the penalty phase of the trial." [Ex.22., p. 691:10-15.]

d. Edward Murphy was appointed as second-counsel on June 3, 1996 and was awarded a fee of $18,750. [Ex. 20, pp. 650, 653.]

e. According to Mr. Murphy, his representation in capital cases, with the exception of this case, was always as lead counsel. With respect to this case, he had "limited involvement" and did only the "specific tasks" Mr. Orr "requested." Mr. Murphy stated that, "The understanding I had with Mr. Orr is I would only do specific tasks he requested. As it turned out, to the best of my recollection, he requested very few. I was not involved with the overall preparation of the case and rarely spoke in court. I believe the record speaks for itself. I have no recollection of being consulted regarding any of Mr. Orr's tactics in the guilt or penalty phase of the case." [Ex. 17.]

f. Mr. Orr's refusal to collaborate and effectively use second counsel that he had stated under penalty of perjury was necessary prejudicially denied Mr. Allen the effective assistance of the second-counsel appointed on his behalf.

264. Trial counsel unreasonably and prejudicially failed to investigate and prepare for trial by inexplicably failing to use all of the awarded funds for investigation and expert evidence on behalf of Mr. Allen. [Ex. 20, 22.]

a. In seeking an expense allowance for the case, Orr stated under penalty of perjury that he required an initial award of $20,000 to use in investigation and expert services. [Ex. 22, p. 687:15-17.] Orr stated that such an amount was required to adequately investigate and review the contemporaneous and special circumstances charges. He further stated the "necessity for the services of experts in the penalty phase of the trial." [Ex. 22, p.687.]

b. Orr was awarded $10,000. [Ex. 20, p. 648.]

c. Orr spent a total of $8,906.88 on investigation ($4,094), expert testimony ($3,800) and trial material preparation ($1,012.88). [Ex. 20, p. 651.]

d. Orr returned $1,093.12 to the Los Angeles Superior Court at the conclusion of the case. [Ex. 20, p. 651-653.]

e. Capital petitioners now have available up to $50,000 for use in investigation and the presentation of expert opinion. Mr. Orr's use of less than $8,000 for investigation and expert testimony when $20,000 was requested, is facially incompetent and inexcusable.

265. Trial counsel Joseph Orr inexplicably proceeded to trial with redacted discovery documents and used such documents to cross-examine witnesses and prepare his defense. [Exs. 23 and 24.] On the July 23, 1997, the first day of trial, Orr stated that he still did not know the names on the redacted documents. [RT 1793:26-1794:2.] Using redacted discovery at trial with no ability to decipher its contents is facially incompetent.

266. Trial counsel Orr failed to investigate and present any information or defense related to factual innocence and third party culpability which was reasonably available to him as detailed in Claim 4 and incorporated by reference herein. There was no strategic reason to forego taking these actions as reasonably competent counsel would have done. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

267. Trial counsel Orr failed to file a motion alleging the discovery violations and prosecutorial misconduct which was reasonably available to him as detailed in Claim 7 and incorporated by reference herein. There was no strategic reason to forego taking these actions as reasonably competent counsel would have done. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

268. Trial counsel Orr failed to file a motion alleging the judicial misconduct which was reasonably apparent and available to him as detailed

in Claim 9 and incorporated by reference herein. There was no strategic reason to forego taking these actions as reasonably competent counsel would have done. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

269. Trial counsel unreasonably and prejudicially failed to adequately investigate and present evidence of petitioner's mental health and functioning, and to provide mental health professionals with information necessary to conduct minimally competent psychological and psychiatric evaluations of petitioner, and to explain the impact of petitioner's deficits on his behavior throughout his life, including in and around the time of the crime, pretrial, and during trial. If evidence of mental illness or intoxication raises a reasonable doubt the defendant premeditated or deliberated, but establishes he did harbor malice aforethought, then he is guilty of second degree murder; if such evidence negates malice aforethought, the only supportable verdict is involuntary manslaughter or acquittal. (*People v. Saille, supra,* 54 Cal.3d at 1103, 1117.) Reasonably competent counsel would have investigated, developed and presented evidence of petitioner's life-long history of mental, psychological, neuropsychological, emotional, cognitive, social, and adaptive functioning deficits as related to his involvement in the crime and his ability to attend to and understand the proceedings against him.

Petitioner incorporates by reference the facts, allegations and exhibits set forth in Claims 1 and 2, as well as the additional facts and information contained in the penalty phase portions of this Claim 3. There was no strategic reason to forego taking these actions as reasonably competent counsel would have done. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

270. Trial counsel unreasonably and prejudicially failed to adequately investigate and present evidence of petitioner's life-long substance abuse condition and substantial contemporaneous use of alcohol, marijuana and PCP in and around the time of the crime. If evidence of mental illness or intoxication raises a reasonable doubt the defendant premeditated or deliberated, but establishes he did harbor malice aforethought, then he is guilty of second degree murder; if such evidence negates malice aforethought, the only supportable verdict is involuntary manslaughter or acquittal. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.) Reasonably competent counsel would have investigated, developed and presented evidence of petitioner's life-long history of substance abuse and its impact on his mental, psychological, neuropsychological, emotional, cognitive, social, and adaptive functioning as related to his involvement in the crime and his ability to attend to and understand the proceedings against him. Petitioner incorporates by reference the facts, allegations and exhibits

set forth in Claims 1 and 2, as well as the additional facts and information contained in the penalty phase portions of this Claim 3. There was no strategic reason to forego taking these actions as reasonably competent counsel would have done. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

271. Trial counsel unreasonably and prejudicially failed to object to and/or investigate, develop and/or present evidence, cross-examine and/or challenge evidence and arguments presented by the prosecution including, but not limited to, the following:

a. The prosecution asked a series of leading questions on direct examination of Freddie Jelks to which Orr never objected. The result was that the prosecutor elicited inflammatory information by her questions to which Jelks merely agreed (e.g. Prosecutor Snyder detailing the discipline and criminal actions of the gang). [AOB 511, RT, 16:3512-3756, 3551]

b. Defense counsel failed to object to Jelks testimony concerning the facts of the shooting even though he admitted on direct examination that he was not a percipient witness. [RT, 16:3519] The result was that Jelks' testimouy improperly was allowed to support the earlier testimony of Carl Connor. Importantly, it was Jelks' testimony that the jury asked to review after declaring they were unable to reach a verdict

and immediately prior to reaching a verdict against Mr. Allen.

c. Defense counsel's failure to investigate prior to trial was evidenced by his discovery type questions of witness Willie Clark during trial. The result was that he was chastised by the court on the record before the jury for asking "discovery proceeding" type questions of a witness at trial. The court further noted that the questioning had no connection to the witness whatsoever and sounded "like a free floating discovery request." [RT, 15:3309]

d. During the testimony of Marcellus James, defense counsel failed to object to testimony concerning "rumors" that Allen had committed the crime and testimony by James about what he heard from other people that Allen had said. The result was that totally inadmissible testimony was admitted before the jury further bolstering prior testimony by Jelks and Connor. [RT, 18:4082-4085]

e. Defense counsel had multiple irresponsible and counterproductive confrontations with Judge Horan and expressed general disrespect to the court, thereby negatively impacting the court's view of Petitioner and the potential for a subsequent lingering doubt.

(1) During the testimony of Detective McCartin, Orr violated a prior court ruling regarding referring to the trailing case for which Mr. Jelks was in custody, by stating it was a murder case. Out of the presence of the jury, the court reprimanded Orr and Orr

showed abject disrespect by insulting, interrupting and inflaming the court's reasonable position. The court admonished Orr by stating, "you ought to stop for a second and think before you go any further." The court further advised Orr that he would remind him again on the next day of trial of his ruling and the encounter, because he would "probably forget if I tell you now…" Orr responded for the court to "Be my guest." [RT, 18:4198-4205]

The court after further explanation stated to Orr "…are you really that thick" and after Orr's response the following exchange occurred:

> Court: Let me put it bluntly to you. If you violate another court order, you will be in a very bad vicarious situation. Okay? Are you shrugging as if that is means nothing.
>
> Orr: I say that is up to you.
>
> Court: Okay. Good. Thank you, Mr. Orr, for your cooperation and your kind response. Appreciate it. [RT, 18:4202-4203]

(2) Attorney Orr was admonished by the court for giving it funny looks after the court ruled on objections. [RT, 16:3641-3642]

(3) During guilt phase deliberations in dealing with the Juror 11 issue, Orr stated, "After the interrogation of no. 11, I want to know if the court will be fair to Mr. Allen." [RT, 26:5480]

The court responded, "Yes. I think your request is bordering on contemptuous when you ask a question like that." [RT, 26:5480]

f. Attorney Orr acted unreasonably during cross-examination of People's gang expert Detective Barling who had specialized in gang prosecution since 1988 and worked in a formal gang capacity for no fewer than 4 years, when he asked if he was familiar with co-defendant's expert witness Galipeau. Barling responded no, severely damaging the credibility of Johnson's defense witness' expertise. [RT, 24:5042, 5045] Five questions later, Attorney Lasting objected to Orr's line of questioning in an effort to prevent further damage, and the court sustained the objection, terminating Orr's cross-examination. [RT, 24:5045-5046]

g. During Defense Counsel Orr's short 16-page guilt-phase closing argument [RT, 25:5190-5206], three prosecution objections and two objections by co-defendant Johnson were sustained. [RT, 25:5192, 5196, 5200, 5197, 5198] At one point, Orr argued that "at some point in Miss Jennifer Lentz' testimony." [RT, 25:5196] Then, after several "misstatements," the court interrupted Orr's argument, admonished the jury, and had the following exchange with Orr in front of the jury:

> Court: . . .listen more carefully to yourself, go ahead.
>
> Orr: Angie's name didn't come up in the interview with the police, that was the stipulation.

> Now Angie's name comes up here in court - -
>
> Court: Mr. Orr, that was not the stipulation. Listen to the court. In conjunction with this case, I recall that proviso. Okay?
>
> Orr: If you understand what the court's talking about. I'll keep going. Where is Angie's name - -
>
> Court: Hold it. Hold it. Hold it. Just like I don't want to interrupt your arguments, I don't countenance those type of comments either. [RT, 25:5200-5201]

Five sustained objections (two by the co-defendant) and a serious judicial reprimand in front of the jury during a capital guilt phase closing argument lasting only approximately fifteen minutes (16 pages) is facially incompetent representation.

h. During Orr's short and often interrupted closing argument, he referred to the key prosecution witness Carl Connor as "Carol Connor" no fewer than four times, showing a complete disregard for preparation and knowledge of the case. [RT 25:5195, 5198-5199]

272. By virtue of defense counsel's failures, petitioner was denied the effective assistance of counsel, and a fair and reliable determination of guilt to which he was entitled. Prejudice from counsel's failings is clear because the jury was disenchanted with the guilt phase evidence.

273. First, the jury's skepticism about the motives for the prosecution's witnesses' testimony emerged on August 25, 2007, during discussions concerning the juror note "Is there any reward monies in any

way associated with this case?" submitted to the court on the third day of the guilt phase deliberations. [CT, 4:830-831; RT, 26: 5263:5263-5272] In open court, jurors number five and six declared that "everybody was kind of wondering" [RT, 26:5272:9[and the jury actually "had lot of questions about reward." [RT, 26:5272:13-14.] At the conclusion of the day's proceedings after all of the other juror's had departed, jurors number four and five met and conferred privately about the matter and then demanded a private audience with the judge. [RT 26:5283-5284.]

274. Further evidence of the jury's lack of confidence in the prosecutions evidence emerged on August 27, 2007, the fifth day of guilt phase deliberations from the court's colloquy with the jury concerning hold out juror number eleven who was replaced over defense counsel's objection. [CT, 4:824, 828, 830, 833, 836-837, 842; RT, 26:5463, 5479, 5484]

a. Juror number eleven doubted the credibility of the prosecution's case and even though the juror's mind was not yet made up, the juror stated that "when the prosecution rested, she didn't have a case." [RT, 26:5314:3-5, 5317:9-11]

b. Juror number four also opined that "it was a mess and the evidence was all over the place." [RT, 26:5319:25-26]

c. Juror number two chimed in that ". . . what I'd heard had me very undecided . . ." and added that "more than one" juror was only semi convinced of appellant's guilt. [RT, 26: 5373:4, 5374:28-5375:1]

d. The jurors also advised that three jurors developed "the mindset from the beginning [that] . . . all the witnesses are unreliable, all the testimony is unreliable . . . [and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363:12-18]

e. On August 28, 2007, the sixth day of guilt phase deliberations, the jury submitted a note to the court stating that it was unable to reach a unanimous verdict re Mr. Allen. At that time, the jury was split 10 to 2, but a couple of other jurors apparently were ready to recant. [CT, 4:840-842; RT, 26: 5478:23-5479:2, 5363, 5484]

275. Trial counsel's failings, individually and cumulatively, had a substantial and injurious influence and effect on the determination of the jury's verdicts at the guilt phase of petitioner's trial, and unfairly deprived him of a rational and reliable determination of guilt. But for any or all of counsel's failing, the jury would have reached a more favorable result at the guilt and penalty phases of petitioner's trial.

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C. PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.

276. Those facts and allegations set forth in Claims 1 and 2 and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

277. "A substantial mitigating case may be impossible to construct without a life-history investigation." (*Karis v. Woodford*, 283 F.3d at 1135 (citing G. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev 299, 321 (May 1983)). In *In re Lucas* (2004) 33 Cal.4th 682, 725, this Court held, "lead counsel's failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history - as agreed by respondent's own experi and as reflected in the AJBA standards relied upon by the court in the *Wiggins* case."

278. Counsel in capital cases "have an obligation to conduct an investigation which will allow a determination of what sorts of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." (*Caro v.*

Calderon (9th Cir. 1999) 165 F.3d 1223, 1226.) Failure to select experts with the appropriate expertise for the issues involved, or failure to furnish the experts with all relevant information, is strong evidence of deficient performance. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1078; *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1117 (expounding upon the obligation to seek out persons with special expertise in the relevant areas and provide the examining doctor with all relevant information).

279. A reviewing court must be mindful of counsel's tactical decisions, but, if counsel had no tactical reason for failing to present available mitigation, counsel's performance is almost always deemed unreasonable. (*Stewart v. Smith* (9th Cir. 1999) 189 F.3d 1004 ("The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance"); *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043 (failure to investigate mitigating evidence in the absence of "strategic choice" may constitute deficient performance).

280. "Mitigating evidence unrelated to dangerousness may alter the [finder of fact]'s selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." (*Williams* v. *Taylor*, *supra*, 529 U.S. at 398.) Therefore, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." (*Smith* v. *Stewart* (9th Cir. 2001) 241 F.3d 1191, 1198 (quoting *Caro* v.

Calderon, supra, 165 F.3d at 1227).) Because the failure "to present important mitigating evidence to the penalty phase - if there is no risk in doing so - can be as devastating as a failure to present proof of innocence in the guilt phase," *Caro v. Calderon, supra,* 165 F.3d at 1227, such an omission constitutes ineffective assistance.

281. Trial counsel unreasonably, unconstitutionally, and prejudicially failed to investigate, develop, and present readily-available, compelling mitigation evidence that would have persuaded any impartial juror to spare Mr. Allen's life. A minimally-competent investigation and trial preparation would have resulted in substantial mitigation and a penalty-phase strategy which any minimally-competent attorney would have presented in Mr. Allen's penalty phase.

F. "Efforts" Taken by Defense Counsel before and during Trial

282. At the outset of his appointment, trial counsel Orr stated he needed extensive funds to investigate and prepare for trial — funds he did not actually ever fully use for investigation and expertise he did not ever actually employ. [Ex. 20, 22.]

a. In seeking an expense allowance for the case, Orr stated under the penalty of perjury that he required an initial award of $20,000 to use in investigation and expert services. [Ex. 22, p. 687:15-17.] Orr stated that such an amount was required to adequately investigate and

review the contemporaneous and special circumstances charges. He further stated the "necessity for the services of experts in the penalty phase of the trial." [Ex. 22, p.687.]

b. Orr was awarded $10,000. [Ex. 20, p. 648.]

c. Orr spent a total of $8,906.88 on investigation ($4,094), expert testimony ($3,800) and trial material preparation ($1,012.88). [Ex. 20, p. 651.]

d. Orr returned $1,093.12 to the Los Angeles Superior Court at the conclusion of the case. [Ex. 20, p. 651-653.]

283. During the initial years of the case, Orr had extensive contact with renowned expert Dr. James Johnson, stated an intention to use him as an expert, but in the end, inexplicably failed to do so.

a. On March 17, 1995, Orr wrote to Dr. Johnson seeking to retain him because in Orr's opinion, Johnson possessed, "a unique ability to outline to a superior court jury the reasons people or persons such as Mr. Allen commit violent acts while members of street gangs." Orr stated in that letter that it was his intention to retain Johnson as an expert witness for the penalty phase of Allen's trial. (Ex. 3, p. 25-26.)

b. On May 9, 1995, Orr wrote to Dr. Johnson asking if there was anything he could do to prepare Johnson prior to his planned travel to Los Angeles for the pending trial scheduled for July 1995. (Ex. 3, p. 27.)

c. On August 8, 1995, Orr wrote to Dr. Johnson assuring him that his services were still needed and asking for information concerning the potential costs of Dr. Johnson's preparation and testimony. (Ex. 3, p. 28.)

d. On August 14, 1995, Dr. Johnson responded by advising Orr of the information he needed to prepare for his testimony. He stated,

> "....I typically try to reconstruct the critical life course events which may have contributed to the sequence of events leading to the first degree murder conviction...To do this, I will need detailed information on Mr. Allen's residential history, including the street addresses of all prior residences; his school records, including grades and any other information pertaining to his behavior and performance in school; compete family history, including any evidence of incidences of abuse in the family; and his prior experiences with the criminal justice system. I also would like to have copies of any psychological evaluations that may have been done on Mr. Allen. **In essence, I would like to have copies of all of the documents that are normally compiled by a penalty phase counselor in such cases.**" (Ex. 3, p. 29.) (Emphasis added.)

Astonishingly, based on Dr. Johnson's detailed request, Orr apparently had no prior knowledge of what a competent penalty phase counselor should produce. Obviously, Orr was put on notice in August of 1995 of what he needed to investigate and produce. Sadly, he never did it.

e. At some point thereafter, Dr. Johnson and Orr

met in person and Dr. Johnson provided an expansive resume of his positions, honors and publications as requested by Orr. (Ex. 3, pp. 30-62.)

f. On October 12, 1995, Orr requested the provision of $5,000 excluding costs, to retain Dr. Johnson. In that request, Orr stated that he had made "numerous inquiries of people intimately familiar with this type of testimony and have been advised that Professor Johnson is a highly effective witnesses [sic] in cases of this nature." (Ex. 3, p. 65.) Orr describes Dr. Johnson as being a "highly effective witness" critical to the defense as a "gang expert" opining that Johnson was "intimately familiar with the circumstances involving black gangs in Los Angeles" and through his testimony "has been successful in aiding counsel to secure LWOP verdicts in sixteen out of nineteen cases" in which he has testified. **Orr concluded that in his professional opinion under the penalty of perjury, "...the testimony of Professor Johnson could be vital in securing a life verdict as opposed to the death penalty."** (Ex. 3, pp. 64.) (Emphasis added.)

g. The fee request was held by Judge Reid, pending a decision on whether the death-penalty would be sought. (Ex. 3, p. 66.)

h. Professor Johnson was never contacted again by the defense team. According to Professor Johnson, subsequently contacted by writ counsel and retained as an expert, for reasons unknown to him, Orr

did not call him to testify or ask him for a professional report or opinion. He does not recollect Mr. Orr ever providing him with the requested documents or materials for review and he recalls receiving no compensation. (Ex. 3, p. 69-70.)

i. In 1997, the year of trial, Professor Johnson published a major article entitled, "African American Males and Capital Murder: A Death Penalty Mitigation Strategy" in Urban Geography, 1997, 18, 5, pp. 403-433. (Ex. 3, 136-166.)

284. In February 1995, trial counsel Orr requested second counsel and then consistently failed to appropriately utilize that second counsel to the prejudice of Mr. Allen. [Exs. 17, 20, 22.]

a. In seeking his fee, Orr stated under the penalty of perjury that the case required extensive investigation and preparation. [Ex. 22, p. 686.]

b. In requesting second-counsel, Orr stated under the penalty of perjury that such an individual was necessary because of the issuance of "15 search warrants" and the interrelationship of "two other murder cases which must be investigated." [Ex. 22, p. 691.] Orr stated that the second counsel would, "assist in examining all discovery for its relationship to the guilt or penalty phase of the trial" and to, "prepare mitigating evidence" and perhaps "make one of the arguments at the penalty phase of the trial." [Ex. 22., p. 691:10-15.]

c. Edward Murphy was appointed as second-counsel on June 3, 1996 and was awarded a fee of $18,750. [Ex. 20, pp. 650, 653.]

d. According to Mr. Murphy, his representation in capital cases, with the exception of this case, was always as lead counsel. With respect this case, he had "limited involvement" and did only the "specific tasks" Mr. Orr "requested." Mr. Murphy stated that, "The understanding I had with Mr. Orr is I would only do specific tasks he requested. As it turned out, to the best of my recollection, he requested very few. I was not involved with the overall preparation of the case and rarely spoke in court. I believe the record speaks for itself. I have no recollection of being consulted regarding any of Mr. Orr's tactics in the guilt or penalty phase of the case." [Ex. 17.]

285. Once second counsel was appointed, the defense team continued their lack of preparation.

286. Defense counsel failed to investigate expert testimony regarding Mr. Allen's mental health history and psychological functioning because, as Orr made clear on the record, "Since 1961, [he had] seen thousands of reports and seen thousands of psychiatrists on the stand and thought they were worthless the way they try to over structure the situation that they were asked to give an opinion in. Most juries, [he added], never believe them." [RT, 33:6614:15-21]

287. In spite of Professor Johnson's admonitions, Defense counsel failed to obtain records regarding Mr. Allen's social, education, medical, and psychological history. Mr. Allen told his attorneys about his history of drug use and was only contacted by an investigator on a couple of occasions. The defense team failed to contact Allen's best friend Donovan Clark and never formally interviewed Derek King. (Ex. 2, pp. 22, 11.) The defense team also failed to spend any substantial amount of time with Allen's mother Rebecca or his Aunt Cynthia. (Ex. 2, pp. 15.)

288. Defense counsel did identify several mitigation witnesses and stated his intent to call them, but he then failed to conduct a proper social history investigation and failed to use the identified witnesses at trial.

a. On August 18, 1997, defense counsel Murphy asked the court to order Witness Derek King (Allen's brother) back for the penalty phase of trial to be a defense witness. [RT, 23:4933] He was ordered back, but never called by the defense to testify. Mr. King could have testified to extensive information regarding Allen's youth, drug use, abuse, gang abuse, and abandonment issues as detailed in his declaration. (Ex. 2, pp. 11-14.)

b. Counsel Murphy stated that he intended to call Cynthia Allen, Michael's Aunt. [RT, 28:5648-4649] According to Cynthia, she never met attorney Murphy and met attorney Ort once, at his office, for about one hour. He seemed "full of himself" to her and told her that she

was going to be called as a witness for Michael, but she never was called or told why. During her office meeting with Mr. Orr, she told him about Michael's life. She also recalls that an investigator named Mosby may have come to her house one time. (Ex. 2, p. 15.) Cynthia Allen could have testified to extensive information regarding Allen's youth, drug use, abuse, and abandonment issues as detailed in her declaration. (Ex. 2, pp. 15-16.)

c. Counsel Murphy stated the he knew of two other family members, but that he did not intend to call them. One was Allen's non biological grandfather Walter Blackledge and the other was Mr. Allen's wife. With respect to Allen's wife, the court noted that she had been in the courtroom every day of the trial and Murphy responded that he "did not know she was Mr. Allen's wife." [RT, 28:5649-5650]

d. Counsel Orr eventually stated the witnesses on behalf of Mr. Allen would be comprised only of, "the reverend and the wife of Mr. Allen and the mother of Mr. Allen." [RT, 31:6260] When the court inquired as to the length of the Mr. Orr's mitigation case, he stated that the family members would be brief and that "Mr. Douglass" would be the longest witness and including cross-examination his testimony would take no more than two hours. [RT, 31:6260]

289. Instead of investigating and presenting proper mitigation as detailed in this Claim, and Claims 1 and 2 above (Exs. 1-7, 25, 40), the defense team presented testimony by Mr. Allen's jail-house wife, his

mother, and the alleged expert Robert Douglass, who has since admitted that he was not qualified or prepared to testify and took his notes in preparation for trial on the front of an envelope. (Ex. 25.)

290. Mr. Allen's "mitigation case" required less than one morning of court time to present and required less than 100 pages of reporter's transcript to record. [CT, 5:978, RT, 33:6620-6716, 6583]

291. Rosalind Allen testified that she married Mr. Allen on August 17, 1997, just prior to the beginning of the trial. She related she met Mr. Allen about two years earlier while he was incarcerated, loved him and wanted him to live so that they could continue their relationship. [RT, 33:6621-6623]

292. Mr. Allen's mother, Rebecca Allen, testified briefly as to Mr. Allen's early life and concluded her testimony by relating that Michael had been a good boy until he began hanging out with 89 Family Bloods gang members. He spent time with his family and they all did things together. She related that Michael was a good cook, had a good sense of humor, and loved his family. There were a lot of good things he did, and that he is a good person. [RT, 33:6663-6666]

293. As their only other witness, Mr. Allen's counsel called Mr. Robert Douglas to testify as an "expert" witness concerning gangs, gang psychology, and why Mr. Allen did what he had done. Douglas had a difficult time qualifying as an expert witness in any of those areas.

294. Attorney Orr, in requesting approval of Douglas' appointment as a "gang expert" stated under the penalty of perjury that he had personally interviewed Mr. Douglas and had come to the professional conclusion that he possessed "all the experience and insight about the behavior of members of black street gangs which would be advantageous at the penalty phase...." (Ex. 15, p, 549-550.)

295. At the time of Orr's request, Mr. Douglas' claim to fame was being the president of the board of directors of "Jacob's Ladder Community Fellowship Inc. The Church that Climbs for Jesus." Douglas' educational credentials were essentially based upon his Theological PhD from the Ministerial Training Institute in biblical counseling and a Masters Degree in Christian education. (Ex. 15, pp. 542-545, 546-547, 601.)

296. Douglas prepared for trial by scribbling notes on the front of a Promise Keepers envelope. (Ex. 15, p. 552.)

297. In a colloquy with the court concerning trying to have Douglas testify as a mitigation expert, trial counsel Orr explained that he had done no testing or investigation on Mr. Allen's psychological makeup because he deemed it "worthless." [RT, 33:6614:15-21] The court responded that not all menial health experts are worthless and some can give useful testimony. [RT, 33:6612-6614]

298. Douglas, in attempting to establish some basis for an expert qualification, testified that he was the director of Outpatient Services for the

"Inglewood Behaviorable (sic.) Health Sciences" in Inglewood, California. He was also a pastor. He claimed to have received his B.S. degree in "Life Assessment" from the "Ministerial Training Institute." He further testified he received a "Master's Degree" in "Christian Education" and he also received a "doctorate" in "Biblical Counseling" at Inglewood, California in 1996. At the time of his testimony, he was a 1st year law student at Abraham Lincoln University. From 1974 to 1996, he remained in the Inglewood area and became involved with Crips and bloods gang members from that area. [RT, 33:6686-6687] On cross-examination, he admitted that he "maybe" had interviewed only one other member of Mr. Allen's gang, other than Mr. Allen himself, during his years of outreach. [RT, 33:6707] He further admitted that Mr. Allen's 89 Family Bloods gang was a South-Central Los Angeles bloods gang, and *not* one of the Inglewood gangs that formed the basis of Douglas' expert opinion. [RT, 33:6706-6707]

299. In front of the jury, Mr. Douglas continued to explain his experience as it pertained to gangs and gang psychology:

> RD: We have a contract with the office of alcohol program. In terms of we have an agenda of service items that we provide to those constituents in the community. And some of the activities would include a personal outreach intervention, in terms of crisis situations and reporting. And if an agency of any type, department social services, children protective services, law enforcement, probation, parole, would give us a call to respond to an item, which is known as number 8 personal outreach and intervention, we will be dispatched to any particular locale that fits our contract or confines. [RT, 33:6687-8]

Mr. Douglas further testified:

> RD: I do family assistance therapy and open recovery group counseling and recovery treatment planning, and I sit in on a majority of groups that are didactic as well as gestalt. [RT, 33:6692]

300. At sidebar and out of the presence of the jury, the prosecutor objected to Mr. Douglas testifying about "didactic and gestalt intervention." Judge Horan's comment as to Mr. Douglas' expertise in that field revealed how totally *unimpressed* the court was regarding Mr. Douglas. **The court described Douglas' attempts to validate his expertise by stating, "This is just gobbledegook."** Shockingly admitting the idiocy of his own witness, Orr stated, **"I agree."** [RT, 33:6693] (Emphasis added.)

a. The court, however, ruled that Douglas would be allowed to testify as an "expert" on the subject of gangs and Douglas eventually rendered the "expert" opinion that co-defendant Johnson was a "shotcaller," Mr. Allen was "under the domination of the gang from 1991 until he was taken into custody in 1993," and the gang was a dominating factor in his life he did a "serving" on the day of the incident. [RT, 33:6698-6703] The comprehensible portion of his testimony essentially noted that Allen was a gang member and gang members kill people.

301. On cross-examination by the prosecutor, Douglas claimed that Mr. Allen was being "cloned" as he grew up and the trial court violently interrupted:

DDA: So, the fact that when he was an infant he might have lived in crip territory, that wouldn't impact his choices when he was 18 years old, necessarily, would it?

RD: Yes.

DDA: How?

RD: He's being cloned.

CRT: He's being what?

RD: He's being cloned. He's being primed.

CRT: Cloned?

RD: Yeah. He's being primed. Michael is being primed. He doesn't have anyone in terms of - see his his residential area has changed so much, it's been nothing but a series of u-turns in his life.

CRT: [Interrupting and curtailing the testimony] Alright. Okay. Anything else? [RT, 33:6713]

302. Also on cross-examination, Douglas compared Mr. Allen's role in these homicides to that of Luka Braza in *The Godfather*, as well as Tex Watson to Charles Manson, even though the court had ruled the witness would not be allowed to make these comparisons.

Q: You testified that Michael Allen was under the dominance of the 89 Family Bloods from '91 to '93. Could you tell us the basis of your opinion?

A: Okay. Without being facetious or funny, to synopsize it, Michael Allen is like a Luka Braza in *The Godfather*, or Tex Watson in Manson. [RT, 33:6709]

303. Thereafter, counsel for co-defendant Johnson moved for a mistrial, claiming that Douglas's comparing Mr. Allen to Tex Watson

meant he was comparing Johnson to Charles Manson, and the court had specifically told Orr not to develop that area. The court's response to the motion for mistrial was illustrative of the impact Mr. Orr's "expert witness" was having:

> CRT: Your motion will be denied for the following reasons: The court is of the firm and honest opinion after listening to the testimony of the witness [Douglas] that it was meaningless and will be rejected by the jury. It was without substance, without foundation, without tremendous relevance, and it did no more than restate -- where it did make sense at all, it did no more than restate what the jury has heard from other witnesses. I was less than impressed. If you want to be heard, if you have a different characterization, if you think that the witness had some major impact on the jury, I'll hear your assessment. [RT, 33:6718]

304. Mr. Douglas is currently a part-time pastor and an employee of the Pasadena Department of Public Health. (Ex. 15, pp. 601-602.) He possesses only a theological PhD from the Ministerial Training Institute in biblical counseling and a Masters Degree in Christian Education.

305. Douglas admits that at the time of this trial, he had and continues to have no expertise, degrees, or certifications in psychology, psychiatry, abuse, or any other medical discipline. (Ex. 15, pp. 601-602.)

306. According to Mr. Douglas, he was contacted in 1996 by Pastor Ed Bryant, a friend of his and apparently of Joseph Orr. Bryant asked him on behalf of Orr if he would assist in the defense of Michael Allen by testifying about Michael's gang experience, the impact of the gang

on him, and the general gang/social environment in which Michael lived. He agreed to help Orr as a favor to Pastor Bryant. (Ex. 15, pp. 601-602.)

307. At no time prior to or after his testimony in this matter has Douglas testified as an expert in any other criminal case. (Ex. 15, pp. 601-602.)

308. According to Douglas, he asked defense counsel to provide him with records or summaries of Michael Allen's medical, social, mental health, and educational histories; but none were provided and he was denied funding to conduct any investigation into Michael's youth and life to develop a competent social, medical, mental health, and educational history. (Ex. 15, pp. 601-602.)

309. He had limited contact with the Allen family and Michael, and did not speak to any of Michael's friends, other relatives, or members of the 89 Family Bloods gang. (Ex. 15, pp. 601-602.)

310. The trial team never mentioned Professor James Johnson or his potential involvement on behalf of Michael at trial and they never explained their defense strategy to Douglas. He was also not asked to help develop any strategy with respect to the guilt or penalty phases of Mr. Allen's trial. (Ex. 15, pp. 601-602.)

311. Mr. Douglas, the only independent mitigation witness called on behalf of Mr. Allen, now admits that "Based on the limitations placed on me by Attorney Orr, the areas of my experience and training, and my lack

of preparation; I do not believe that I was properly prepared or qualified to testify on behalf of Mr. Allen in his penalty phase to the majority of areas and issues about which I was asked to address on direct examination by Attorney Orr and challenged on during cross examination." (Ex. 15, pp. 601-602.)

312. Finally, in addition to the above failures of investigation, preparation, and presentation, trial counsel unreasonably and prejudicially failed to object to and/or investigate, develop and/or present evidence, cross-examine and/or challenge evidence and arguments presented by the prosecution including, but not limited to, the following:

a. During the penalty phase of trial on September 16, 1997, Orr and Mr. Allen pointed and motioned at the jury. As a result, a note was given to the court by Alternate #2 stating, "Your honor, I feel very uncomfortable being pointed at by defendant Allen and his lawyer. Would you please address this issue. Thank you." [RT, 32:6553] After Orr dismissed the issue flippantly, the court strongly admonished him stating, "Don't point at them. They'll think you are going to put them on a hit list, given the evidence they've heard. Gee whiz, you are dealing with lay persons." [RT, 32:6554] The court spoke with the jurors regarding the issue and with counsel. As a result of the incident, co-defendant Johnson's attorney observed that defense counsel Orr's and Allen's conduct was interpreted as a threat and moved for severance and a mistrial. [RT,

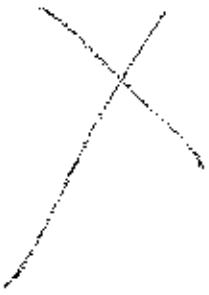
32:6573-6574] After the court denied the motions, Attorney Lasting stated that threatening the jurors had no place in the penalty trial. [RT 32:3574]

b. During Attorney Murphy's opening statement for the penalty phase, he asserted that he would produce evidence that Louis Jordan kicked and hit Allen [RT, 29:5820]; however no evidence of this was presented to the jury. Substantial evidence existed and was neither investigated nor used to demonstrate the massive abuse that took place in Mr. Allen's home and against him, his brother, and his mother. (Ex. 2.)

c. Counsel failed to prepare testifying witness Rebecca Allen and as a result, Prosecutor Snyder dismantled her testimony on cross examination. [RT, 33:6667-6680.] According to Rebecca Allen, she had little contact with Allen's lawyers during trial, had one short meeting with Robert Douglas and met with the defense lawyers for only about an hour to be prepared for her mitigation testimony. (Ex 2. pp. 9-10, Declaration of Rebecca Allen.)

313. Each of the above enumerated deficiencies has no reasonable tactical explanation and compels reversal, both independently and cumulatively.

314. Trial counsel had no reasoned, informed, tactical, or strategic justification for the above acts and omissions, nor could such acts or omissions have been committed by any attorney reasonably and sufficiently well experienced and qualified to represent a defendant in a capital case at



the time of Mr. Allen's trial. But for trial counsel's unprofessional failures, errors and omissions, Mr. Allen would not have been sentenced to death. Trial counsel's unreasonable failure prejudicially deprived Mr. Allen of the benefit of reasonably available evidence relevant to the questions of both guilt and innocence, which would have resulted in a different result at both the guilt and penalty phases had trial counsel reasonably investigated, prepared and presented a defense.

II. What the ABA Standards Required Mr. Allen's Defense Team to Do.

315. The 1989 and 2003 ABA Guidelines for defense performance in capital cases are attached as Ex. 27, pp. 777-801, 802-863.

316. Counsel failed to follow the 1989 guidelines for performance:

317. GUIDELINE 11.4.1 INVESTIGATION (1989) A Mr. Orr should have conducted independent investigations relating to the guilt/innocence phases and to the penalty phases of Mr. Allen's capital trial. Both investigations should have begun in 1994, when Mr. Orr was appointed, and should have been pursued expeditiously. (Ex. 27, pp. 778-779.)

318. GUIDELINE 11.4.2 CLIENT CONTACT (1989) Trial counsel Orr should have maintained close contact with Mr. Allen throughout his preparation of the case, discussing (inter alia) the

investigation, potential legal issues that existed or developed, and the development of a defense theory. (Ex. 27, pp. 782-783.)

319. GUIDELINE 11.7.1 GENERAL TRIAL PREPARATION (1989) A -- As the investigations mandated by Guideline 11.4.1 produced information, Mr. Orr should have formulated a defense theory. In doing so, defense counsel Orr should have considered both the guilt/innocence phase and the penalty phase, and sought a theory that would be effective through both phases. (Ex. 27, p. 792.)

320. GUIDELINE 11.8.3 PREPARATION FOR THE SENTENCING PHASE (1989) (Ex. 27, pp. 795-796.)

a. -- A -- As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should have begun in 1994, immediately upon counsel Orr's entry into the case. Counsel should have sought information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

b. -- F -- In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should have considered the following:

1) Witnesses familiar with and evidence relating to Mr. Allen's life and development, from birth to the time of sentencing, who would have been favorable to

him, explicative of the offense(s) for which he was being sentenced, or would have contravened evidence presented by the prosecutor;

2) Expert witnesses should have been considered to provide medical, psychological, sociological or other explanations for the offense(s) for which Mr. Allen was being sentenced, to have given a favorable opinion as to his capacity for rehabilitation, etc. and/or to have rebutted expert testimony presented by the prosecutor;

3) Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

4) Witnesses drawn from the victim's family or intimates who would have been willing to speak against killing Mr. Allen.

321. GUIDELINE 11.8.6 THE DEFENSE CASE AT THE SENTENCING PHASE (1989) (Ex. 27, pp. 797-798.)

a. Counsel Orr and Murphy should have presented to the jury all the reasonably available evidence in mitigation unless there were strong strategic reasons to forego some portion of such evidence.

b. Among the topics counsel should have considered presenting were;

1) Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2) Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3) N/A

4) Employment and training history (including skills and performance, and barriers to employability);

5) Family, and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);

6) Rehabilitative potential of Mr. Allen.

7) Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses.

8) Expert testimony concerning any of the above and the resulting impact on Mr. Allen, relating to the offense and to his potential at the time of sentencing.

c. Mr. Orr should have considered all potential methods for offering mitigating evidence to the jury, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could have included challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to Mr. Allen), letters and public records.

d. Mr. Orr should have considered having Mr. Allen testify or speak during the closing argument of the sentencing phase.

322. Counsel's performance also fell well below the standard set in the 2003 guidelines:

323. GUIDELINE 10.4 -- THE DEFENSE TEAM -- As soon as possible after his appointment in 1994, Attorney Orr should have assembled a defense team that included, at a minimum, (a) at least one mitigation specialist and one fact investigator; (b) at least one member

qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and (c) any other members needed to provide high quality legal representation. Counsel should have demanded on behalf of Mr. Allen all resources necessary to provide high quality legal representation. (Ex. 27, p. 803.)

324. GUIDELINE 10.5 - RELATIONSHIP WITH THE CLIENT -- Attorney Orr at all stages of the case should have made every appropriate effort to establish a relationship of trust with Mr. Allen, and should have maintained close contact with him. (Ex. 27, p. 808.)

325. GUIDELINE 10.7 -- INVESTIGATION - Attorney Orr at every stage had an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. (Ex. 27, p. 813.)

326. The commentary to guideline 10.7 indicates that the defense team should have interviewed at least: (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself; (2) potential alibi witness (3) witnesses familiar with aspects of Mr. Allen's life history that might affect the likelihood that he committed the charged offense(s), the degree of culpability for the offense, including: (a) members of Mr. Allen's immediate and extended family (b) neighbors, friends and acquaintances who knew Mr. Allen or his family (c) former teachers, clergy, employers, co-workers, social service providers, and

doctors (d) correctional, probation or parole officers (4) members of the victim's family. (Ex. 27, p. 816.)

327. The continued commentary to guideline 10.7 (Ex. 27, p. 816-821) informs that "Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."

328. Defense counsel Orr should have explored: (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage); (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities); (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive

limitations and learning disabilities) and opportunity or lack thereof, and activities; (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services); (5) Employment and training history (including skills and performance, and barriers to employability); (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

329. Further, counsel Orr should have used all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to Mr. Allen, his brother and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

330. Because Mr. Allen was incarcerated, institutionalized and placed outside of the home, as a juvenile and an adult, attorney Orr should have investigated the possible effect of the facility's conditions on Mr. Allen's contemporaneous and later conduct. The investigation should

also have explored the adequacy of institutional responses to childhood trauma, mental illness or disability to determine whether Mr. Allen's problems were ever accurately identified or properly addressed. (Ex. 27, p. 820-821.)

331. The historical note to guideline 10.11 states that "The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation."

332. GUIDELINE 10.13 - THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL (Ex. 27, pp. 862-893) In accordance with professional norms, Attorneys Orr and Murphy, as well as all other persons who were members of the defense team, have a continuing duty to safeguard the interests of Mr. Allen and should cooperate fully with successor counsel. This duty includes, but is not limited to:

a. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

b. providing Mr. Allen's files, as well as information regarding all aspects of the representation, to successor counsel;

c. sharing potential further areas of legal and factual research with successor counsel; and

d. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

333. The commentary to GUIDELINE 10.13 provides the most scathing observation of what Attorney Orr has failed to do: "The duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights. '[T]he strategic thinking of the lawyer, and learning this strategic thinking[,] is absolutely critical to the thorough presentation of a post-conviction claim. It should be routinely and openly presented to the post-conviction counsel.' To do otherwise is professionally unethical." (See David M. Siegel, My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings, 23 J. LEGAL PROF. 85, 90-91 (1998/1999).) (Ex. 27, pp. 862-893)

334. The prejudice from counsel's abject failure to comply with above ABA standards, resulted in an evidentiary vacuum in which the jury was left only with the theories and evidence presented by the prosecution when evaluating the factors for consideration in mitigation enumerated in CALJIC 8.85 [CT, 5: 1055-1056].

335. While several of the CALJIC 8.85 factors (as given) are connected to the crime itself, multiple factors stood devoid of any

mitigating evidence where such evidence existed and could have been presented: [CT, 5: 1055-1056]

> (d) Whether or not the offense was committed while Mr. Allen was under the influence of extreme mental or emotional disturbance.
>
> (g) Whether or not Mr. Allen acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of Mr. Allen 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.
>
> (i) The age of Mr. Allen at the time of the crime.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of Mr. Allen's character or record that he offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

336. As is abundantly demonstrated below in Subsection IV of this sub-claim detailing the mitigating evidence found by writ counsel, substantial mitigating evidence was fully available and proper for

presentation on behalf of Mr. Allen. The fact that none of it was presented by Mr. Orr represents reprehensible legal ineptitude and stupidity.

337. To the extent this Court believes writ counsel's evaluation constitutes hyperbole, counsel would defer to Judge Horan's characterizations detailed below.

III. What the Trial Court Thought About the "Mitigation Case" presented on behalf of Mr. Allen.

338. Having detailed counsel's failures and the standards set forth by the ABA, it should be no surprise to this Court that we now turn to trial Judge Horan's conclusions and impressions regarding the total lack of mitigation presented on behalf of Mr. Allen.

339. As discussed above, the trial court felt that the testimony of the only "expert" called on behalf of Mr. Allen was, "meaningless…[would] be rejected by the jury…was without substance…without foundation, without tremendous relevance," and made no "sense at all." [RT, 33:6718]

340. In denying Petitioner's motion for a new trial and request for a modified sentence, the court notably remarked:

a. "There is absolutely no factual basis for any claim for modification by the defendant Michael Allen." [RT, 39: 7643:12-14]

b. ". . . briefly stated, the lack of mitigation is palpable." [RT, 39: 7643:25]

c. "The mitigation that I heard, or the proffered mitigation evidence, was that when the defendant was small, he was teased. He was called names from time to time due to his weight. And I strained and listened for something to come out of his background that might constitute some more substantial mitigation than that and there was nothing there." [RT, 39: 7643:26-7644:5]

d. "So very little to say. There is no evidence whatsoever here of any abusive childhood. There is no evidence of any mental disease or defect. There is no evidence of intoxication. . . . He had a very standard childhood, unfortunately for Mr. Allen as he sits here today, perhaps. Nothing particularly unusual about his situation." [RT, 39: 7645:11-27.]

e. "Under factor (d) there's no showing that the defendant was mentally or emotionally disturbed at the time of the commission of the crime or that he was in any way mentally or emotionally impaired." [RT 39, 7650:8-12.]

f. "Under factor (h) there is no evidence of mental disease or defect or intoxication. Under factor (i), the court does not find the defendant's age to be a mitigating factor." [RT, 39: 7651:6-11]

g. "Finally, under factor (k), the record is bereave of any substantial mitigation. There is simply nothing about the defendant's past or about his character which offers anything but trivial mitigation of his crime." [RT, 39: 7651:18-23]

341. The Commitment Pursuant to Judgment of Death ratified the court's discernment concerning the lack of mitigation evidence tendered on Mr. Allen's behalf. Therein, the court observes that the record is "bereft of any substantial mitigation" and that "[T]**here is simply nothing about the defendant' (sic) past, or about his character, which offers any but trivial mitigation of his misdeeds.**" [CT, 5: 1190] (Emphasis added.)

IV. What the Defense Team should have Investigated and Presented on behalf of Mr. Allen.

342. A minimally-competent investigation and trial preparation would have resulted in at least the presentation of the following pieces of mitigation:

The Presentation of a Complete Social History

343. Reasonably competent counsel would have presented a minimally complete and fully investigated social history such as the following:

a. Michael Allen was born out of wedlock on September 2, 1972, to Booker T. Cole Jr. and Rebecca Allen. (Ex. 1, p.1.) Dianne Sneed, Michael's grandmother and Rebecca's mother, grew up in the South Chicago projects and his non-biological grandfather Walter Blackledge was from Harlem, New York. Dianne was abused as a young woman and

warned Rebecca about abusive men. (Ex. 2, p. 15, Declaration of Cynthia Allen; Ex. 1, p. 5.)

b. Michael's father, Booker Cole, was in the Navy at the time of Michael's birth. (Ex. 4.) In May of 1972, the year of Michael's birth, Cole was diagnosed with gonorrhea and admitted to having a previous history of venereal disease. (Ex. 4, p. 187.) Cole had a less than exemplary service record and was eventually discharged administratively for poor military performance and numerous "alleged" physical and mental maladies. (Ex. 4.) Cole was diagnosed in 1977 with moderate or borderline paranoid personality and psychotic decompensation. He tested with an IQ of 85. (Ex. 4, p. 180, 184.)

c. According to Rebecca Allen, Booker Cole was absent from Michael's life. He was not a good person and took no role in Michael's life. Rebecca did not marry Booker and considered him to be nothing more than an unfortunate "sperm donor." Booker became heavily addicted to cocaine/crack and was disabled by a drug related stroke. (Ex. 2, pp. 7-10, Declaration of Rebecca Allen.)

d. At Michael's birth, Rebecca was eighteen years old. (Ex. 1, p.2.) He was born through an induced vaginal delivery at LA County hospital. (Ex. 2, p. 7, Declaration of Rebecca Allen.) At birth, he was 21 inches long and 5 lbs, 12.5 ounces. (Ex. 7, p. 327.) As a baby,

Michael was not breast fed, but rather ate Similac and cereal. Michael did not go to preschool. (Ex. 2, p. 7, Declaration of Rebecca Allen.)

e. Rebecca Allen moved to Los Angeles from San Diego with her mother and recalls that she had never heard gunfire before the move. (Ex. 2, p.7, Declaration of Rebecca Allen.)

f. Michael's entire childhood from birth to his initial entry into Camp Holton and then CYA was spent in less than a ten block neighborhood in South Central Los Angeles where he essentially lived in three homes, all in and surrounded by Crips territory. His entire childhood was spent in one of the most dangerous and violent gang neighborhoods in America. (Ex. 2, p. 14 Declaration of Derek King.)

g. Derek King, Michael's half-brother, was born out of wedlock on January 3, 1974, to Arthur King and Rebecca Allen. (Ex. 2, p. 11, Declaration of Derek King.) Michael and his brother were raised in the same home by their mother Rebecca Allen. (Ex. 2, p. 11, Declaration of Derek King.)

h. In April of 1978, Michael's mother married Louis Jordan. The family lived together in Avalon Gardens for a short time until Rebecca left Jordan in August of that same year because he seriously abused her. According to Rebecca, Michael told her years later that he and Derek were kicked by Jordan. (Ex. 2, pp. 7-10, Declaration of Rebecca Allen.)

i. Michael recalls that Jordan had a high temper, threw things, and hit his mother. Jordan would hit Michael when he got mad. He was violent and would throw things and hit Allen and his little brother Derek. (Ex. 40, Declaration of Dr. Khazanov.)

j. Derek stated that "I can't remember one good thing about" Lewis Jordan. According to Derek, Jordan hit his Mom with his fists and "whooped" Michael and him. (Ex. 2, p. 13, Declaration of Derek King.)

k. According to Cynthia Allen, Louis Jordan physically abused Rebecca. Louis was an angry man, who put holes in the walls and knocked Rebecca down steps. Michael was protective of his half-brother Derek and appeared to have been physically abused while protecting Derek. One time Rebecca ran home to 729 E. 90th Street from Avalon Gardens at around 2:00 or 3:00 in the morning because Jordan was physically abusing her. Dianne Sneed, Rebecca's mother, asked her where the kids were and was told that they were still at Jordan's house. Dianne then got a gun, got in the car, and drove to Louis Jordan's house in Avalon Gardens where she rescued Michael and Derek. After the incident, Rebecca left Louis, moving out on a day when he was gone. Michael later said he was kicked by Louis. (Ex. 2, p. 19, Declaration of Cynthia Allen.)

l. The only father figure Derek and Michael had other than the abusive Jordan and totally absent Cole, was Arthur King, Derek's

father. While Arthur King and Rebecca were together, Michael spent time with Arthur and his family. After the couple broke up prior to Rebecca's marriage to Jordan, he told her that Michael should no longer go with Derek to visit his family. As a result, Michael lost the additional highly valued connection to Arthur King and his family. During the summer before Michael's sixth grade year, Arthur became (and remains) seriously addicted to crack and just faded away in Michael and Derek's life. (Ex. 2, p. 13, Declaration of Derek King; Ex. 2, p. 16, Declaration of Cynthia Allen.)

m. Rebecca Allen recalls that Michael was hurt by the absence of his father and the fact that Derek had a connection to Arthur King. (Ex. 2, p. 9, Declaration of Rebecca Allen.)

n. Because of Jordan's abuse, King's absence, and Cole's abandonment, Michael never had a "father" in his entire life. He remembered Booker Cole only having three contacts with Michael, twice when he came by the house and once when Michael went to see him. (Ex. 2, p. 13, Declaration of Derek King.)

o. Derek's father, Arthur, was involved in Derek's life; but Michael's father, Booker, was not involved in Michael's life. This bothered Michael greatly and it appeared to Michael's Aunt Cynthia that Booker did not want to be bothered with Michael. (Ex. 2, p. 16, Declaration

of Cynthia Allen.) According to Donovan Clark, Michael never had a father figure around. (Ex. 2, p. 23, Declaration of Donovan Clark.)

p. On December 22, 1978, Michael's Grandma Diane Sneed died. (Ex. 1, p.4.) Michael was very close to Dianne, and for some weeks or a month after her death, he would wait on the front steps of the home every day for her to come home until he finally realized that she was not going to come home. At the request of Dianne and his mom, Michael did not go to his grandmother's funeral and the anger and hurt that came from this lasted into his teens. (Ex. 2, p. 17, Declaration of Cynthia Allen.) When Michael was nine or ten, he went to the cemetery to visit Dianne's grave. Michael asked his Aunt Cynthia why she didn't clean Grandma's house anymore. (Ex. 2, p. 17, Declaration of Cynthia Allen.)

q. Michael's mom did not let him go to Diane's funeral because she did not feel it was a place for children. This hurt Michael deeply. (Ex. 2, p. 8, Declaration of Rebecca Allen.)

r. During this same period of physical violence in the home, abandonment, and the death of his Grandmother, Michael entered school for the first time. From 1977 through 1981, Michael attended St. Albert the Great school in Compton where he completed Kindergarten through Third grade. (Ex. 5, pp. 188-203.)

s. Michael performed satisfactorily in kindergarten, but quickly fell behind in first grade. According to his first grade report card,

he was performing poorly in spelling, math and English. The school wanted to retain him in first grade, but he was promoted because his mother wrote the school a letter asking that he be advanced and agreed that if he fell behind in second grade, she would have him returned to first grade. (Ex. 5, pp. 189-196.)

t. Michael's first grade CTBS test (March 1979 at grade 1.6) reflected that he was testing at grade 0.3 in reading, 0.1 in language, and 0.6 in math for a total effective grade level battery of 0.1. (Ex. 5, p. 200.)

u. In second grade, Michael fell further behind. He was generally a "C" student and was well behind grade level in reading. (Ex. 5, p. 198.) His teacher remarked that he had trouble concentrating on his reading and work and tended to day dream. (Ex. 5, p. 198.) Despite his mother's commitment, he was not returned to first grade.

v. Michael's second grade CTBS test (March 1980 at grade 2.6) reflected that he was testing at grade 1.4 in reading, 1.7 in language, and 1.9 in math for a total effective grade level battery of 1.6. (Ex. 5, p. 200.)

w. In third grade, Michael's "C" work fell to mostly "D" work. His study skills fell dramatically. He missed 18 days of school and had difficulty listening and following directions. (Ex. 5, p. 199.)

x. Michael's third grade CTBS test (March 1981 at grade 3.6) reflected that he was testing at grade 2.1 in reading, 1.8 in language, and 2.7 in math for a total effective grade level battery of 2.1. (Ex. 5, p. 200.) His third grade results placed Michael in the bottom 8% of all test takers nationally and over a full year behind academically. (Ex. 5, p. 200-201.)

y. When Michael was in second or third grade at St. Albert, he was standing outside the school waiting to be picked up and saw three or four guys running across a playground in a big fight. The group came toward him and then opened up and ran away. One guy was lying on the ground in front of him with a butcher knife coming out of his chest. Someone yelled don't take it out and some girls from the school across the street helped him. (Ex. 40, Declaration of Dr. Khazanov.)

z. Around the time Michael was in third grade, he and his mom were leaving a McDonalds Restaurant around Avalon and Century when two guys came up to the car, pulled out a gun and pointed it through the window at Rebecca Allen's head. She was removed from the car and one of the men held her arms behind her back while the other pointed the gun at her stomach. One of the guys kept yelling "Shoot her man, shoot her" and "blast her." A crowd of people walked by and the robbers ran away. Michael remembers the incident and the gun being pointed at his mother. Rebecca remembers finding Michael later that evening crying

about the attempted robbery and fearful that she might have been killed. (Ex. 2, p. 8, Declaration of Rebecca Allen; Ex. 40, Declaration of Dr. Khazanov.)

aa. Derek recalls that on another occasion, his Mom had just been paid, went to the store, and was robbed by Avalon Garden Crips. (Ex. 2, p. 12, Declaration of Derek King.)

bb. Michael's early childhood was filled with loss, violence, abuse, academic difficulty, and personal tragedy. These elements would be exacerbated in 1981-1982, when he transferred to public school and attended fourth grade at 93rd Street Elementary where he was absent 25 days and obtained a "C" average. (Ex. 5, p. 205.)

cc. When Michael started attending 93rd Street Elementary School things dramatically changed for him. (Ex. 2, p. 11, Declaration of Derek King.) Because of where Derek and Michael lived, they could not walk to school anywhere without going through Crip gang neighborhoods and running the risk of being beaten up or worse. Even though they were young children, it was assumed that their families and friends were connected to the 89 Family Bloods because of where they lived and they paid the price. (Ex. 2, p. 11, 14, Declaration of Derek King and see Map at Ex. 2, p. 14.)

dd. According to Donovan Clark, 93rd Street Elementary School was deep in Crip's territory and anyone affiliated with the 89

Family Bloods because solely of living where Michael lived (729 1/2 E. 90th Street or 616 89th Street) was jumped on, harassed, attacked and beaten constantly. (Ex. 2, p. 23, Declaration of Donovan Clark.)

ee. According to Derek, when Michael was at 93rd Street Elementary School, it was a pretty rough school and was in Crip's territory. Because of where he lived at 729 East 90th Street, and 616 89th Street, Crips believed that Michael and Derek were connected with the bloods in some way. "Every day" Michael was picked on, bullied, pushed around and physically hit by Crips after school or on his way to or from school. (Ex. 2, p. 11, Declaration of Derek King.)

ff. During this time, Michael acted as Derek's "big brother" and protected him. (Ex. 2, p. 11, Declaration of Derek King.)

gg. In the fall of 1982, Michael transferred to Mother of Sorrows School and completed a second year of fourth grade from 1982-1983. (Ex. 5, p. 206.)

hh. Michael was given a short-form IQ test in March of 1983 (the SFTAA test) which resulted in a raw score of 332, language score of 79, non-language score of 81, and a total IQ score of 79. (Ex. 5, p. 206.)

ii. Michael's fourth grade CTBS test was given in March 1983 at grade 4.6 when Michael was completing his second year in fourth grade. That test reflected that he was at grade 2.9 in reading, 3.5 in language, and 3.9 in math for a total effective grade level battery of 3.5.

(Ex. 5, p. 206.) His fourth grade results placed Michael in the bottom 25% of all test takers nationally who were completing fourth grade for the first time rather than the second as Michael was doing. (Ex. 5, p. 206.)

jj. While Michael and his brother attended Mother of Sorrows School, they were required to walk through territory controlled by the 87th Street Crips and Avalon Garden Crips to get there. Almost daily, they would pick on Michael, beat him up, bloody his nose and on at least a couple of occasions, Derek saw them beat Michael to the ground and pick up dog shit and rub it on him and in his face. (Ex. 2, p. 11, Declaration of Derek King.)

kk. In February of 1982, Michael was in the fourth grade, was 56 inches tall, and weighed 98 lbs. In May of 1985, Michael was in sixth grade, was 65 inches tall, and weighed 182 lbs: almost double his earlier weight. (Ex. 7, p. 326.)

ll. During Michael's childhood, his mom would give him "woopens" with a belt, switch, extension cord, or piece of race track from a car toy. (Ex. 40, Declaration of Dr. Khazanov.) Michael reported in September 1988, that his mother "whipped" him with a belt until the age of fourteen. (Ex. 6, p. 284.)

mm. Michael had low self esteem as a young child because of his skin color and very large size. He was constantly teased about being fat, wearing thick glasses, having a mom on welfare, not

having money to purchase cool clothes (e.g. Air Jordan's, sweats, etc.), getting jumped on, and being too big for his age to participate in sports. (Ex. 2, p. 17, Declaration of Cynthia Allen.) Michael considered himself "ugly" because of his skin color. (Ex. 2, p. 16, Declaration of Cynthia Allen.) Michael was told he was too fat to play Pop Warner football with his age group and too young to play with the group ahead of him. (Ex. 2, p. 17, Declaration of Cynthia Allen.) Because Michael wore very thick glasses, he was jumped. His mother moved him between schools in an attempt to avoid harassment about his size, color, and glasses. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

nn. Michael's mother attempted to take him to Kaiser for counseling for his low self esteem; but he was never given treatment because of the length of the waiting list and the priority of court ordered counseling. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

oo. From fifth grade through junior high, Michael transferred schools at least six times and never completed a grade higher than sixth grade. (Ex. 5, pp. 206-209.)

pp. When Michael was in fifth grade, Derek was with him when three Crips, two older and one younger, on bikes came up to them on 90th and Stanford Street and beat Michael "real bad." Older guys in the 89 Family Bloods gang saw this and chased the Crips away. (Ex. 2, p. 11, Declaration of Derek King.)

qq. Michael remembers people being shot when he was a child and that people would celebrate New Years Eve by going outside and shooting their guns in the air. Michael would get beat up and stomped on all the time as a kid. He was constantly worried about what was going to happen on the way to and from school. He felt like he was under stress and tension of always wondering if he was going to get jumped on and beaten up on the way home from school. (Ex. 40, Declaration of Dr. Khazanov.)

rr. Rebecca Allen recalls that when Michael was a child New Year's Eve sounded like Vietnam in the neighborhood. There was such constant gunfire, sirens and helicopter noise in the neighborhood that if you didn't hear it, you thought something was wrong. To this day, it is difficult for her to sleep when there is quiet. (Ex 2. p. 7, Declaration of Rebecca Allen.)

ss. Michael became substantially aware of the gangs in his neighborhood around fourth or fifth grade and started hanging out with the guys in his neighborhood around that time. (Ex. 40, Declaration of Dr. Khazanov.)

tt. Michael attended fifth grade in 1983-1984 at 93rd Street Elementary. (Ex. 5, pp. 207-208.) Michael's May 1984 CTBS test reflected raw scores of 62 in reading and 62 in math. Michael was absent 20 days. (Ex. 5, pp. 207-208.)

uu. Michael attended sixth grade in 1984-1985 at 93rd Street Elementary. (Ex. 5, pp. 207-208.)

vv. From 1986 to early 1988, Michael attended Junior High without completion at Sutter Junior High, Mulholland Junior High, Drew Junior High, Mother of Sorrows School and Holmes Junior High. (Ex. 5, pp. 209.) During this period he scored only "F" or "D" marks, most of his classes were incomplete, and he missed an extensive number of classes. (Ex. 5, pp. 209-213.)

ww. According to Rebecca Allen, Michael went to Illinois with his father, Booker, during the summer before he entered Mother of Sorrows School for eighth grade. They drove to Illinois together. Michael stayed with Clara Cole his paternal grandmother, but Booker was not around for most of the summer. Michael flew home later in the summer disheartened. (Ex. 2, p. 24b, Declaration of Rebecca Allen.) Michael also visited his father in San Diego once during fourth or fifth grade and potentially a couple of other times. Booker had a girlfriend named Carolyn, a daughter named Fay and a son. Michael liked Carolyn and Fay. The last time Michael went to San Diego as an early teenager, he locked Booker out of the house due to an argument and the police had to come let him back in. (Ex. 2, p. 24b, Declaration of Rebecca Allen.)

xx. According to Caroline Crawford, Booker Cole's girl friend during the 1970s, around July 1979, Michael came to stay with her

for the purpose of visiting his father Booker Cole. Michael returned home to go to school around late August of that year and while he was visiting, Cole was "in and out," not around very much of the time, and was "somewhere else." Because his father was not around, Michael spent most of his time with Caroline and her children. According to Caroline, Booker Cole was a stern man. (Ex. 2, p. 21, Declaration of Caroline Crawford.)

yy. According to Cynthia, the summer before Michael entered Mother of Sorrows School for eighth grade when he was 10 or 11 years of age, he visited Booker Cole and Clara Cole in Illinois. Upon his return, it appeared that he had been rejected by his father. Based on Michael's demeanor, Cynthia believed that "something happened" or some significant incident occurred during this visit. (Ex. 2, p. 18, Declaration of Cynthia Allen.)

zz. While attending a school in Junior High where Michael was bussed to the valley, his teacher told him, "When you turn sixteen you can drop out like the rest of them." (Ex. 2, p. 18, Declaration of Cynthia Allen.)

aaa. When Michael was in seventh grade, his teacher told him in front of the class that he was a "baby refrigerator." (Ex. 2, p. 24c, Declaration of Rebecca Allen.)

bbb. Michael started drinking when he was twelve or thirteen. He would drink thunderbird, silver satin, or eight ball and would

mix all the alcohol together with cool aid and call it a boilermaker. He was drinking every day by the time he was thirteen, sometimes to the point of throwing up. (Ex. 40, Declaration of Dr. Khazanov.)

eee. Michael's Dad was never around and his Mom had to work long hours, so no one ever came to his or Derek's events. (Ex. 2, p. 12, Declaration of Derek King.)

ddd. Starting in junior high school, Michael would sell drugs with his friends to obtain money to buy food during the week. His mother would only fix food on the weekend, so during the week, he had to fix his own food and fend for himself. (Ex. 2, p. 12, Declaration of Derek King.)

eee. In November 1987, Michael reported that he "joined" the 89 Family when he was eleven years old (according to Clark it was when he was thirteen), because on two occasions he had been jumped by Avalon Garden Crips and needed the protection. (Ex. 6, pp. 316-318.)

fff. In July 1987, Michael told doctors that he was abusing alcohol and marijuana on a daily basis. (Ex. 7, pp. 328-329.) Apparently in Junior High, Michael weighed as much as 264 lbs, smoked two or three joints a day and drank daily. (Ex. 7, p 329.)

ggg. Michael reported in September 1988, that he had quit the gang on several occasions, but when he was shot at and jumped by opposing gangs, he rejoined the gang for protection. (Ex. 6, p. 284.) He

was afraid for his safety because he had been shot at numerous times and was forced to run away from the shooting. (Ex. 6, p. 284.) He reflected on his childhood homes as being in gang territory with "lots of gang shootings and sales of drugs." (Ex. 6, p. 284.)

hhh. While Michael was in CYA, he would be jumped all the time because of the neighborhood where he was from. CYA was a "hellhole" for Allen, it was worse than the streets and it hardened him. (Ex. 40, Declaration of Dr. Khazanov.)

iii. Michael's influence on Derek kept him out of gang banging. Michael encouraged Derek to play sports and would tell everyone, "my brother don't gang bang," and "that's my little brother." (Ex. 2, p. 12, Declaration of Derek King.) When Michael went to Camp and CYA, Derek had no one to protect him and eventually in 1990, he joined the Rolling 90's West Side Crips gang. (Ex. 2, p. 12, Declaration of Derek King.)

jjj. When Michael was fifteen or sixteen, he started smoking marijuana and cigarettes. He started smoking cigarettes in CYA and then started smoking a lot of marijuana during the times he was out. He also started drinking heavy amounts of E&J, Jack Daniels, and Hennessey during the times he was out of CYA. (Ex. 40, Declaration of Dr. Khazanov.)

kkk. Michael continued to attend Junior High while in juvenile hall and at Camp Holton, but failed to graduate from any grade level and failed to graduate from high school while at CYA. (Ex. 5, pp. 216-217.)

lll. During the times Michael was out of CYA in 1991 and thereafter, he started using PCP and increased his consumption up to around three times a week. By the age of nineteen, he was smoking a whole hit of PCP at a time. At the same time, he was drinking hard alcohol and using marijuana daily. Michael never knew how he was going to act on PCP. When he was sad or mad and got high on PCP, he would go into a rage. (Ex. 40, Declaration of Dr. Khazanov.)

mmm. Derek recalled that after Michael was released from CYA around 1991, he began smoking a lot of PCP or "Sherm" cigarettes on a regular basis. One night after Michael was smoking Sherm, he got angry with Derek who recalled that Michael just snapped, started to sweat and his eyes got big. Michael jumped on Derek and punched him. Michael came back a couple of days later and apologized saying he was tripping on Sherm and freaked out. (Ex. 2, p. 12, Declaration of Derek King.)

nnn. Cynthia Allen recalled that on one occasion when she was with Michael and Derek, she became aware that Michael was on PCP because he did not seem to be in his right mind, was disrespectful

and was mean. On that occasion, Cynthia and Michael got into an argument over some Kool-Aid and it escalated because of the PCP until Derek told her to back off. At that time, Michael had been released from CYA and was using PCP on a frequent basis. (Ex. 2, p. 19, Declaration of Cynthia Allen.)

ooo. According to Cynthia, when Michael was released from CYA, the gang culture had changed from having general order, respect, and a code of conduct to significant drug use and violence. It appeared that Michael could not cope with the changes in the gang or adapt to the world into which he was released. Before Michael left for CYA, the gang had some positive impact; but when he returned from CYA on parole, it had none. He no longer lived in the original family home at 729 E. 90th Street, but lived at 616 East 89th Street, closer to Avalon and the Crips area. He seemed separated from the remainder of his family on 90th Street where he grew up and knew the families in the area. He didn't let his mom or Cynthia know what was going on with him. It seemed hard for him to process all of the circumstances and factors in his life. (Ex. 2, p. 20, Declaration of Cynthia Allen.)

344. Reasonably competent counsel would have investigated and introduced testimony and information detailing the impact on Michael's life of domestic violence, abandonment, drug addiction, alcohol abuse, community violence, gang warfare, educational difficulty and the like.

345. None of the above information was presented with any clarity or significance at trial. All that was presented about Michael's life was that he had a hard childhood, was fat, and eventually joined a gang, despite his mother's efforts. The story told at trial was neither accurate nor remotely complete. In this respect, Mr. Allen's defense lawyers completely failed.

The presentation of Mitigating Evidence Regarding Gang Culture and its Influence in South Central Los Angeles

346. Reasonably competent counsel would have investigated and introduced testimony by a properly qualified "gang expert" and psychologist on the impact of urban gang activities on developing children.

a. Michael's entire childhood was spent in less than a ten block neighborhood in South Central Los Angeles essentially in three homes all surrounded and ingrained in gang violence and activity (Avalon Gardens -- Crips territory, 729 E. 90th Street and 616 89th Street -- 89 Family Bloods territory surrounded by Crip territory). (Ex. 2, p. 14 Declaration of Derek King.)

b. Gang abuse and trauma started for Michael when he was in second or third grade and relentlessly escalated for him all the way through his formative years.

c. When Michael was in second or third grade at St. Albert, he was standing by his school and witnessed a gang fight and a

person stabbed in the chest with a butcher knife. (Ex. 40, Declaration of Dr. Khazanov.)

d. Derek recalls that on another occasion, his Mom had just been paid, went to the store, and was robbed by Avalon Garden Crips. (Ex. 2, p. 12, Declaration of Derek King.)

e. When Michael started attending 93rd Street Elementary School things dramatically changed for him. (Ex. 2, p. 11, Declaration of Derek King.) Because of where Derek and Michael lived, they could not walk to school anywhere without going through rival Crip gang neighborhoods and running the risk of being beaten up or worse. (Ex. 2, p. 11, 14, Declaration of Derek King and see Map at Ex. 2, p. 14.) 93rd Street Elementary School was deep in Crip's territory and anyone affiliated with the 89 Family Bloods simply for living where Michael lived (729 1/2 E. 90th Street or 616 89th Street) was jumped on, harassed, attacked and beaten constantly. (Ex. 2, p. 23, Declaration of Donovan Clark.)

f. According to Derek, when Michael was at 93rd Street Elementary School, it was a pretty rough school and was in Crip's territory. Because of where he lived at 729 East 90th Street, and 616 89th Street, Crips believed that Michael and Derek were bloods. "Every day" Michael was picked on, bullied, pushed around and physically hit by Crips after school or on his way to or from school. (Ex. 2, p. 11, Declaration of Derek King.)

g. While Michael and his brother attended Mother of Sorrows School, they were required to walk through territory controlled by the 87th Street Crips and Avalon Garden Crips to get there. Almost daily, they would pick on Michael, beat him up, bloody his nose and on at least a couple of occasions, Derek saw them beat Michael to the ground and pick up dog shit and rub it on him and in his face. (Ex. 2, p. 11, Declaration of Derek King.)

h. When Michael was in fifth grade, Derek was with him when three Crips, two older and one younger, on bikes came up to them on 90th and Stanford Street and beat Michael "real bad." Older guys in the 89 Family Bloods gang saw this and chased the Crips away. (Ex. 2, p. 11, Declaration of Derek King.)

i. Michael remembers people being shot when he was a child and that people would celebrate New Years Eve by going outside and shooting their guns in the air. (Ex. 40, Declaration of Dr. Khazanov.)

j. Michael would get beat up and stomped on all the time as a kid. He was constantly worried about what was going to happen on the way to and from school. He felt like he was under stress and tension of always wondering if he was going to get jumped on and beaten up on the way home from school. (Ex. 40, Declaration of Dr. Khazanov.)

k. Michael started hanging out with the guys in his neighborhood around fourth or fifth grade. (Ex. 40, Declaration of Dr. Khazanov.)

l. One time when Michael was around eleven years old, he was stopped by a CRASH Unit around Avalon and 103rd Street. The police drove him into Crips territory, threatened to leave him there, and then stopped the car and let the Crips push and hit him through the windows of the car. (Ex. 40, Declaration of Dr. Khazanov.)

m. Rebecca Allen stated that when Michael was in Junior High, gangs and drugs were everywhere around their home and she remembers seeing shootings outside their apartment. (Ex. 2, p. 9, Declaration of Rebecca Allen.)

n. According to Derek King, the neighborhood where he and Michael were raised "defines who you are" in two ways. First, just by living where you live it makes other gangs believe that you are a member of the gang that controls the area and even if you are not, others will react like you are – beating you up or worse. Second, by living in a neighborhood where you have no father role to guide you or mother at home to help direct you, you become like the neighborhood because that is all you see, all you know, and only have older gang guys to guide you. (Ex. 2, p. 12, Declaration of Derek King.) In neighborhoods controlled by gangs, you either "lay down and be drug through the mud" or stand up and

align yourself with the gang to become a man. You can hold out as long as you can, but there is a void, no one teaches you to be a man, and in a gang, you actually have men to teach you things. (Ex. 2, p. 12, Declaration of Derek King.) If you have no one to guide you and no father to teach you, you will eventually join a gang and do what the gang does because that's all you see and all you know. Even a stay-at-home Mom can't teach you how to be a man so you go to the older guys in the gang to learn how to "man up." (Ex. 2, p. 12, Declaration of Derek King.)

o. Some time prior to 1985, Donovan Clark, one of Michael's closest friends as a child, joined the 89 Family Bloods. In 1988, when the movie Colors came out, he spoke to schools, multiple news agencies in California and New York and other individuals about the South Central life and gang culture. He was on television and gave speeches on the topic of South Central gang structure, nature, makeup, territories and activities. (Ex. 2, pp. 22-23, Declaration of Donovan Clark.)

p. Being Michael's "older brother," Donovan Clark was an obvious source of information, but Orr's "defense team" never contacted him. (Ex. 2, pp. 22-23, Declaration of Donovan Clark.)

q. He described South Central in the late 1980's and early 1990's as a "war zone" and the 89 Family Blood's area as a "killing field." (Ex. 2, p. 22, Declaration of Donovan Clark.)

r. According to Clark, gangs were role models for children. (Ex. 2, p. 22, Declaration of Donovan Clark.) He and other members of the 89 Family Bloods brought Michael into the gang in 1985 and for at least one year prior to that he was a "wannabe nuisance." Michael's first gang name was Fat Mike and then later it was changed to Fat Rat, but there was no significance to the name "rat." Michael did not want to be in a gang, was a good kid who had a good future. (Ex. 2, p. 23, Declaration of Donovan Clark.) Michael joined the gang to follow Clark and other older men in the neighborhood, and Clark was an "older brother" to him. Michael's closest friends and male role models joined the 89 Family Bloods and so he followed. (Ex. 2, p. 23, Declaration of Donovan Clark.)

s. According to Clark, in South Central, you have to "grow up fast" to become "a man" because your mom does not have a husband and you try to be the man of the house. There are no jobs, so you do crime to try to help your family. (Ex. 2, p. 23, Declaration of Donovan Clark.) The 89 Family Bloods was a family structure of bonding and honor. The members of the gang looked at each other as a family and brothers. (Ex. 2, p. 23, Declaration of Donovan Clark.) The only boys in the area that did not join a gang were those that had a father who lived in the home. For everyone else, the men in the gang became their father and male role models. (Ex. 2, p. 23, Declaration of Donovan Clark.) "When

you are young, you see something you like in gangs because of the camaraderie and the family bond that you are missing in the home and find in the gang. Your gang is your army and you fight for your brothers as a product of the South Central environment." (Ex. 2, p. 24, Declaration of Donovan Clark.)

t. According to Clark, once you are in the gang, you do what the gang does. You either sell drugs "big time" or defend the gang's honor and territory. (Ex. 2, p. 23, Declaration of Donovan Clark.) Killing becomes nothing because there is so much of it, you don't duck when you hear gunshots and if you don't hear a helicopter or sirens you think something must be wrong. At first it seems shocking, but you get used to it and it becomes the "norm." (Ex. 2, p. 23, Declaration of Donovan Clark.)

u. In November 1987, Michael reported that he "joined" the 89 Family when he was eleven years old (according to Clark it was when he was thirteen), because on two occasions he had been jumped by Avalon Garden Crips and needed the protection. (Ex. 6, pp. 316-318.)

v. Michael reported in September 1988, that he had quit the gang on several occasions, but when he was shot at and jumped by opposing gangs, he rejoined the gang for protection. (Ex. 6, p. 284.) He was afraid for his safety because he had been shot at numerous times and was forced to run away from the shooting. (Ex. 6, p. 284.) He reflected on

his childhood homes being gang territory with "lots of gang shootings and sales of drugs." (Ex. 6, p. 284.)

w. While Michael was in CYA, he would be jumped all the time because of the neighborhood where he was from. CYA was a "hellhole" for Allen, it was worse than the streets and it hardened him. (Ex. 40, Declaration of Dr. Khazanov.)

x. In 1993, Michael reported that he had no vocational training, had only completed ninth grade, and had no certifications for working of any kind. (Ex. 31, p. 883.) He further reported that he never had a job. (Ex. 31, p. 884.)

y. In 1993, Michael stated that he had been in a "blood gang" for eight years, and had separated in 1991. (Ex. 31, p. 885.)

z. On June 16, 1991, the Watts Parole Office considered Michael's apartment in Los Angeles at 616 E. 89th St. to be an area "high in gang activity" and knowingly paroled him there. (Ex. 6, p. 234-235.)

aa. "In 1959, less than one-third of the poverty population in the United States lived in metropolitan central cities. By 1991, the central cities included close to half of the nation's poor. Many of the most rapid increases in concentrated poverty have occurred in African-American neighborhoods." (William Julius Wilson, When Work Disappears: The World of the New Urban Poor.)

bb. "America is, by far, the most violent country in the world when measured against comparable, industrialized nations. Violence is deeply rooted in our society and has become woven into the fabric of the American lifestyle. A culture of violence has emerged that invades our lives at every level, from our most intimate relationships at home to our schools and work environments." (Violence: Attorney General Daniel Lungren's Policy Council on Violence Prevention 1994.)

cc. "At a minimum, children who witness traumatic events in their homes or in their neighborhoods are ill-prepared to function well at school or in their community. They frequently vent their anger through violence. Many youth who have witnessed violent and traumatic events in their families and neighborhoods suffer from Post Traumatic Stress Disorder (PTSD) and/or related personality disorders. With PTSD, youth experience the same symptoms exhibited by military personnel who have witnessed violent and traumatic events in war. Researchers have found that the effects of such traumatic exposures accumulate from birth, rendering these youth highly suggestible and resulting in behavior that is highly disruptive. These youth often become capable of committing the most outrageous acts against other people." (Violence: Attorney General Daniel Lungren's Policy Council on Violence Prevention 1994.)

dd. "[W]hen faced with an external threat, people tend to band together in groups to protect themselves against external

enemies. The degree to which individuals seek this kind of protection depends on both their internal sense of security and the intensity of the external threat . . . the more terrifying the external threat, the stronger the allegiance becomes." (Dr. Bessel A. Van de Kolk, Psychological Trauma (1987), p. 155.)

ee. As detailed in Claim 1, Exhibit 2, and the social history of Michael Allen set forth herein, Michael's entire life was critically impacted by his immersion in a community of gang dominance and war that created pervasive and overwhelming patterns of violence and danger. Michael had immense exposure to traumatic events that were persistently re-experienced in his life. As a result, Michael exhibited persistent avoidance to the triggering events in his life and became numb. These conditions persisted for his entire childhood and led to his persistent symptoms of increased arousal and significant impairment in social, occupational and other important areas of functioning.

ff. According to Dr. Natasha Khazanov, the effects of Mr. Allen's long-standing emotional trauma, neglect, and abuse cannot be understood without consideration of the brain through which these experiences were perceived and interpreted. (Dx. 40, Declaration of Dr. Khazanov.)

gg. Children, like Michael, who live in a constant state of anxiety, especially those again like Michael whose intellectual or

emotional resources are already compromised, are often forced to devote all their energy, attention, and emotions to their own daily survival. This unrelenting state of anxiety and hypervigilance can effectively thwart healthy development--cognitive, psychological, social, and even physical--in virtually every area critical to adult functioning. Much of the clinical research has confirmed that in assessing or treating trauma-based symptoms or conditions, clinicians have had to expand the scope of their treatment to "foci" which include: (1) the role of traumatic reminders and secondary adversities; (2) comorbid conditions; (3) specific developmental consequences; (4) the impact of emerging personality and moral development; (4) serial and repeated traumatic experiences; (6) the interplay of traumatic experiences within a background of neglect or abuse and parental psychopathology; (7) the role of child-intrinsic factors such as temperament, intelligence, or prior successful coping; and (8) the link of PTSD and secondary disorders to specific familial predispositions. (Ex. 40, Declaration of Dr. Khazanov.)

347. Reasonably competent counsel would have investigated and introduced testimony by a properly qualified "gang expert" and psychologist on the impact of urban gang activities on developing children. None of the above information was presented as mitigation at trial and the jury was left only with the impression that Michael Allen freely joined the

gang as a teenager without any background, context or explanation for his decision.

The presentation of Mitigating Evidence and Expert Testimony regarding the Impact of Poverty, Race, Crime and Absentee Fathers in South Central Los Angeles by an individual such as Professor James Johnson

348. Reasonably competent counsel, having identified the eminently qualified Professor James Johnson (as detailed above), would have presented Johnson's testimony on the impact of Michael's development in the urban geography of South Central Los Angeles.

a. As detailed in the guilt section of this claim above, in March of 1995, Joe Orr stated it was his intention to retain Johnson as an expert witness for the penalty phase of Allen's trial. (Ex. 3, p. 25-26.)

b. On October 12, 1995, Orr requested the provision of $5,000 excluding costs, to retain Dr. Johnson. In that request, Orr stated that he had made "numerous inquiries of people intimately familiar with this type of testimony and have been advised that Professor Johnson is a highly effective witnesses [sic] in cases of this nature." (Ex. 3, p. 65.) Orr described Dr. Johnson as being a "highly effective witness" critical to the defense as a "gang expert" opining that Johnson was "intimately familiar with the circumstances involving black gangs in Los

Angeles" and through his testimony "has been successful in aiding counsel to secure LWOP verdicts in sixteen out of nineteen cases" in which he has testified. **Orr concluded that in his professional opinion under the penalty of perjury, "...the testimony of Professor Johnson could be vital in securing a life verdict as opposed to the death penalty."** (Ex. 3, pp. 64.) (Emphasis added.)

c. After September 1995, Professor Johnson was never contacted again by the defense team. According to Professor Johnson, subsequently contacted by writ counsel and retained as an expert, for reasons unknown to him, Orr did not call him to testify or ask him for a professional report or opinion. He does not recollect Mr. Orr ever providing him with the requested documents or materials for review and preparation and he recalls receiving no compensation. (Ex. 3, p. 69-70.)

d. In 1997, the year of trial, Professor Johnson published a major article entitled, "African American Males And Capital Murder: A Death Penalty Mitigation Strategy" in Urban Geography, 1997, 18, 5, pp. 403-433. (Ex. 3, 136-166.)

e. Writ counsel Stephen S. Buckley contacted and retained Professor Johnson to review investigation and provide an expert opinion in this matter.

f. Professor Johnson is the William Rand Kenan, Jr. Distinguished Professor of Entrepreneurship, Sociology, and Public

Policy, and Director of the Urban Investment Strategies Center in the Kenan Institute of Private Enterprise in the Kenan-Flagler Business School at the University of North Carolina at Chapel Hill. (Ex 3, p. 67.)

g. Prior to his tenure at the University of North Carolina at Chapel Hill, Professor Johnson held the following positions in the Los Angeles area: Professor of Geography, University of California, Los Angeles, July 1, 1989 -- June 30, 1994; Visiting Associate Professor, Department of Geography, University of Southern California, 1986-87; Associate Professor of Geography, University of California at Los Angeles, July 1, 1985 - June 30, 1989; Assistant Professor of Geography, University of California, Los Angeles, July 1, 1980 - June 30, 1985; Director, UCLA Center for the Study of Urban Poverty, July 1, 1989 - June 30, 1994. During his time at the above institutions, he developed his academic fields relating to the urban environment of South Central Los Angeles. (Ex 3, p. 67.)

h. Over the past two decades, Professor Johnson has researched, studied, lectured on, and written about a broad range of issues related to urban communities including economics, sociology, geography, political science and race. (A copy of his curriculum vitae is attached and incorporated into his declaration as Appendix A at Ex. 3, pp. 83-135.) (Ex 3, p. 67-68.)

i. Based on his expertise in urban studies, including specific expertise in the urban areas of South Central Los Angeles, Professor Johnson has either provided litigation support or expert witness testimony in the penalty phase of more than two dozen capital cases involving African American and Hispanic male defendants in the states of California, Colorado, North Carolina, Nevada, Pennsylvania, and Tennessee. Typically, his expertise is sought in such cases because he can best develop evidence regarding the nature of the urban environment and the role it plays in influencing a person's development. According to Professor Johnson, such evidence is necessary for an accurate psychological or psychiatric evaluation and the jury's penalty determination. (Ex 3, p. 68.)

j. Prior to his failure to retain and call Professor Johnson as a mitigation expert, Joseph Ore researched Johnson's effectiveness and learned that he had "been successful in aiding counsel to secure LWOP verdicts in sixteen out of nineteen cases" in which he testified. (Ex. 3, pp. 64.)

k. That success was largely due to the fact that Professor Johnson's interdisciplinary expertise, as detailed in his curriculum vitae, permits him to comment on well-established research in a number of fields regarding the causes and consequences of poverty and lethal violence in urban America, particularly as these problems are

manifested in the African American and Hispanic communities, including South Central Los Angeles. (Johnson, Farrell, and Sapp, 1997; Grant and Johnson, 1995; Johnson, Farrell, and Stoloff, 1998; 2000; Bobo, Oliver, Johnson, and Valenzuela, 2000.) He is also able to identify those critical events or circumstances in the course of a defendant's life that, when viewed in the context of the impoverished and violent experiences (and which are often a product of that environment), undergird the criminal behavior in question. (Johnson, Farrell. and Sapp, 1997; Johnson, Farrell, and Sapp, 1996; Johnson, Farrell, and Stoloff, 2000.) (Ex 3, p. 68-69.)

l. In preparing his expert opinion, Mr. Johnson relied upon Mr. Allen's case records, Mr. Allen's family social history records, declarations of Mr. Allen's family, friends, and members of his community, and published scholarship and research. (Ex 3, p. 69.)

m. Based on his review of the above records and the testimony of Robert Douglas, he concluded at least four key issues were not addressed or properly supported, explained, or explored during the penalty phase of Mr. Allen's trial. (Ex 3, pp. 70-71.)

1) First, Michael Allen grew up without the benefit of warmth and emotional support from one of his biological parents--an aspect or element of effective parenting that is critical to successful child development. (Ex 3, pp. 71-74.)

2) Research confirms that African American males who benefit from the guidance and direction of one or more strong male role models, particularly during early childhood and adolescent years, are far less likely to engage in anti-social or dysfunctional behaviors than their African American male counterparts who do not have access to such male role models during their formative years of life. (Johnson, Farrell, and Stoloff, 1998, 2000.) (Ex 3, p. 73.)

3) In all likelihood, Mr. Allen's involvement with gangs and other antisocial behaviors would have been mitigated had he had the benefit of mentoring from a strong male role model. Such a father-figure would have helped him develop a strong self concept and would have facilitated his engagement in a range of pro-social behaviors and his involvement in a host of life-enhancing activities during his critical formative years. (Ex 3, p. 74.)

4) Second, owing to his unstable family situation, Mr. Allen's formative years were spent in extremely dangerous neighborhood environments in South Central Los Angeles (Bobo, Oliver, Johnson, and

Valenzuela, 2000). These neighborhoods are characterized by high rates of joblessness (especially among prime-working age African-American males), persistent and concentrated poverty, deteriorating schools, and an absence of mainstream institutions (e.g., the YMCA and the Boys and Girls Clubs of America) and role models (i.e., people who work everyday and are actively engaged in the lives of youth). (Grant and Johnson, 1995; Johnson and Farrell, 1998.) (Ex 3, p. 74.)

5) Research confirms that, in such resource-depleted, hostile and dangerous neighborhoods, a sub-cultural norm emerges that has a devastating impact on the growth, development, and maturity of disadvantaged youth like Mr. Allen (Anderson, 1990). Popularly referred to as the "code of the streets" (Anderson, 1994), studies indicate that in these neighborhoods, being tough is a form of human capital; gang affiliation is a form of social capital -that is, a social support structure; and lethal violence becomes the normal way of resolving conflict. In these neighborhoods, young men like Michael Allen, who

grow up in households where the biological father is not present (Johnson, Levine, and Doolittle, 1999), either adhere to the "code of the streets" or become a victim of it. (Johnson, Farrell, and Sapp, 1997; Johnson, Farrell, and Stoloff, 1998; Slaby, 1997.) (Ex 3, pp. 75-76.)

6) Third, Mr. Allen's growth and development also appears to have been adversely affected by chronic residential mobility. Growing up in an unstable family situation, Mr. Allen's family moved several times during his formative years within and among the dangerous and resource-depleted neighborhoods that make up much of South Central Los Angeles (Bobo, Oliver, Johnson, and Valenzuela, 2000). His repeated encounters with the California criminal justice system- a state of affairs that would have been mitigated in all likelihood if he had the benefit of mentoring from his biological father or some other strong male role model--also contributed to his chronic mobility. As a consequence of a high degree of residential instability, Mr. Allen was never able to: (1) become fully entrenched in any one community; (2)

establish strong networks of positive role models and friends; or (3) connect with skills-enhancing and youth character building programs and activities offered by such institutions as the Boy Scouts, YMCA, Boys and Girls Clubs, etc. (Johnson, Farrell, and Stoloff, 1998; 2000.) (Ex 3, p. 76.)

7) Constant changes in schools and chronic absenteeism combined with poor vision--a correctable but undiagnosed problem for a long period of time--had a devastating impact on Mr. Allen's academic performance. As a function of not being able to read at grade level and repeatedly performing below grade level on standardized tests, Mr. Allen became disaffected from school. Rather than taking steps to address his disaffection, one teacher reportedly chastised him about his poor academic performance by stating: "When you turn 16 you can drop out like the rest of them." Lacking positive male role models and caring educators in the school system, it was at this point that Mr. Allen's attitude, behavior and friends began to change. (Ex 3, p. 77.)

8) Mr. Allen was not able to pursue mainstream avenues of social and economic mobility because the neighborhoods in which he and his family were forced to live were bereft to the kinds of mainstream mediating institutions that discourage disadvantaged youth for engaging in dysfunctional or anti-social behaviors. (Johnson and Oliver, 1992; Johnson and Farrell, 1998.) In addition, employed African American males, who historically served as the role models for fatherless disadvantaged youth like Mr. Allen, were in short supply in these neighborhoods. They were in short supply because plant closings and capital flight to Mexico and other foreign destinations devastated the local employment base in South Central Los Angeles during Mr. Allen's formative years. (Johnson and Oliver, 1992; Bobo, Oliver, Johnson, and Valenzuela, 2000.) African American males bore the brunt of the job losses in south central Los Angeles. (Johnson and Oliver, 1992.) (Ex 3, p. 78.)

9) Sharp increases in black male joblessness, in turn, contributed to a growing concentration of poverty in

the neighborhoods in which Mr. Allen and his family lived. Emblematic of this problem, Mr. Allen was unemployed and lacked vocational training that would have enabled his job search when he was released from the CYA. Research indicates that this type of geographically concentrated poverty and black male joblessness can have a devastating effect on youth development. (Press, 2000.) (Ex 3, pp. 78-79.)

10) Finally, there is no evidence that Mr. Allen received any psychological counseling to deal with his chronic exposure to street violence and other stressful events that characterized his life in the concentrated poverty stricken neighborhoods of South Central Los Angeles. In fact, Mr. Allen's record clearly states that when his mother attempted to get him counseling through Kaiser for low self esteem he was never served due to back logs of court ordered counseling. His parole officer reported, in 1991, that "Allen suffers from low self esteem, a lack of confidence, is vulnerable to peer pressure, and does not have the skills to independently seek employment." That these kinds of critical life events can adversely affect one's social and

psychological well-being is well documented in the extant literature. (McCord, 1997; Fraser, 1998; Sapp, Farrell, Johnson, and Ioannidis, 1997; Kozol, 1992.) (Ex 3, pp. 79.)

n. Professor Johnson concluded that research has proven time and again the importance of powerful and influential role models and strong mediating institutions for inner city youth from disadvantaged backgrounds. He opined that "It is unfortunate that Michael Damone Allen did not have the benefit of such social capital resources. It is highly unlikely that Mr. Allen would be in the situation he finds himself in today had he had the benefit of social supports that research has shown foster and facilitate success among underprivileged youth who grow up in economically distressed and dangerous neighborhood environments."

o. Professor Johnson further concluded that "Based on the information gleaned from the sources provided by Mr. Buckley, all of which appear to have been available at the time of trial in 1995, and my review of the testimony of penalty phase witness Robert Douglas, I am convinced that the outcome of Mr. Allen's trial for the August 5, 1991 shooting deaths of Donald Loggins and Payton Beroit in Los Angeles may have been different had the jury been afforded the opportunity to hear proper expert testimony in the penalty phase of the trial about how the sociological and broader societal forces, described [above],

shaped his social development. Based on my academic experience and experience as a penalty phase expert witness, I believe the verdict may have been different had proper expert testimony been presented because many of the forces that profoundly shaped or influenced Mr. Allen's life were beyond his control." (Ex 3, p. 70.)

p. Given Professor Johnson's strong and illuminating declaration, writ counsel concurs with the prophetic and heartbreaking statement of trial counsel Orr under the penalty of perjury that in his professional opinion,"...the testimony of Professor Johnson could be [and we now know would have been] vital in securing a life verdict as opposed to the death penalty." (Ex. 3, pp. 64.)

q. None of the above information was presented as mitigation at trial. Once again, Mr. Orr's abject failure clearly prejudiced Mr. Allen's chances at life.

The presentation of Mitigating Evidence and Expert Testimony regarding Mr. Allen's Mental Health and Organic Brain Damage by an individual such as Dr. Natasha Khazanov

349. Reasonably competent counsel would have completed investigation and introduced qualified testimony on Michael's mental health and the presence of organic brain damage.

a. Defense counsel failed to investigate expert testimony regarding Mr. Allen's mental health history and psychological

functioning because, as Orr made clear on the record, "Since 1961, [he had] seen thousands of reports and seen thousands of psychiatrists on the stand and thought they were worthless the way they try to over structure the situation that they were asked to give an opinion in. Most juries, [he added], never believe them." [RT, 33:6614:15-21]

b. Writ counsel Stephen S. Buckley contacted and retained Dr. Natasha Khazanov to review investigation, conduct testing, and provide and expert opinion in this matter.

c. As detailed in Claims 1 and 2 and Ex. 40, Natasha Khazanov is a clinical psychologist licensed to practice in the state of California specializing in the practice of clinical neuropsychology and neuropsychological assessment. She received her B.A. degree in Psychology from Leningrad State University in 1975, M.S. in Clinical Psychology from Leningrad State University in 1977, and Ph.D. in Clinical Psychology from the Bekhterev Psychoneurological Institute in 1988. She has extensive clinical experience in diagnosis and treatment of patients with various psychiatric and neurological disorders. (Ex. 40.)

d. Dr. Khazanov conducted a comprehensive neuropsychological evaluation of Mr. Allen at San Quentin State Prison on August 29 and 30 of 2007. The details of this evaluation are set forth in Claim 1 and Exhibit 40.

e. Dr. Khazanov found that Mr. Allen currently has a Flynn adjusted Full-Scale IQ of 80. In addition, Mr. Allen's WRAT-3 reading score was 89 (high school grade level and in the 23rd percentile for his age group), spelling score was 81 (6th grade level and in the 10th percentile for his age) and arithmetic was 73 (4th grade level and in the 5th percentile for his age). These findings implicate brain dysfunction, specifically in the left parietal lobe. (Ex. 40.)

f. Mr. Allen presented significant deficits in auditory verbal memory. His performance on the list acquisition subtest of the MAS fell in the 2nd percentile. He also made a number of mistakes called intrusions which is typical in persons with frontal lobe dysfunction. His performance on the Prose Recall subtests of the MAS fell in the 5th percentile on both immediate and delayed recall. This finding yet again implicates frontal lobe dysfunction. (Ex. 40.)

g. Mr. Allen's overall ability to retrieve visual information over a twenty-minute delay tested in the 1st percentile, further exemplifying his frontal lobe dysfunction. Mr. Allen obtained an Overall Halstead Impairment Index of 0.6, placing him squarely in the moderate range of impaired neuropsychological functioning. (Ex. 40.)

h. Further testing revealed additional brain dysfunction, frontal lobe impairment, weaknesses in the left temporal area

of the brain, possible frontal lobe dysfunction in the right hemisphere of the brain, and parietal lobe dysfunction. (Ex. 40.)

i. Dr. Khazanov concluded that Michael Allen suffers from moderate organic brain damage as well as Posttraumatic Stress Disorder (PTSD). The neuropsychological testing she conducted identified both localized dysfunction -- primarily in the left parietal and frontal lobes - and diffuse damage in both 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 (whether verbal or nonverbal), to assess his environment or specific situations and respond rationally or thoughtfully, are severely and chronically impaired. The signs and symptoms of this damage have been present since elementary school. Moreover, the effects of his organic impairments are compounded by several coexisting conditions, including chronic underlying mental illness and substance abuse. At critical points in his life, the effects of his organic impairments have also been exacerbated by his history of chronic physical and psychological trauma. (Ex. 40.)

j. Dr. Khazanov also concluded that Mr. Allen suffers from Post-Traumatic Stress Disorder. Severe trauma that Mr. Allen suffered during his childhood and adolescence triggered the onset of PTSD. PTSD in turn contributed to self-medication with alcohol

and drugs starting at an early age, which exacerbated preexisting brain damage even further. (Ex. 40.)

k. Dr. Khazanov holds the professional opinion that findings consistent with hers would have been reached at the time of Mr. Allen's trial, had he been evaluated by a qualified neuropsychologist. It is also her opinion that the need for a thorough neuropsychological assessment was abundantly clear at all points relevant to Mr. Allen's trial. Despite Mr. Allen's documented history of indicators of significant brain damage, poor intellectual performance, drug and alcohol abuse, and early childhood trauma, no appropriate or reliable examination was ever conducted by his trial defense team. According to Dr. Khazanov, organic deficits of the nature and severity suffered by Mr. Allen must be considered by an accurate mental health assessment and the defense team's failure to obtain such an assessment negated the ability to raise the then available guilt and penalty mental health claims. Given Mr. Allen's history and the multiple impairments contributing to his cognitive and behavioral functioning, Robert Douglas, the witness retained by trial counsel, was inappropriate and woefully incomplete. (Ex. 40.)

l. Further, according to Dr. Khazanov, the many indicators of organic brain damage and the records documenting them (detailed in her declaration and attached to this writ) were sufficiently powerful and consistent to warrant further investigation prior to trial of

Mr. Allen's mental state. This should have included interviews aimed at obtaining data and observations from a range of family members (other than his mother), other lay witnesses, and the retention of actual examining professionals. This additional investigation, including critical witness interviews, was essential to an accurate assessment of any issues pertaining to Mr. Allen's mental state, personal history, and mitigation case. (Ex. 40.)

m. Dr. Khazanov formed the opinion that at the time of this offense, Mr. Allen was seriously mentally impaired, suffering from the cumulative effects of longstanding brain damage and a serious psychiatric disorder, specifically PTSD. As a result, his ability to conform his conduct to the requirements of the law, control his behavior, or comprehend the consequences of that behavior was severely impaired. Her opinion is based substantially on testing she performed and information gathered independently of statements made by Mr. Allen.

n. Further, as detailed in Claim 2, according to Dr. Khazanov, at the time of the offense which resulted in capital punishment, Mr. Allen was severely developmentally immature. Those individuals in Mr. Allen's age group at the time of the capital crime generally have not fully developed these abilities and therefore lack the capacity for reasoned judgment. With respect to the maturation and functioning of Mr. Allen's brain, there is a dramatic overlay of other factors, such as existing brain damage, abuse, witnessing domestic

violence, and a chaotic upbringing, in the developmental period of his life. Mr. Allen's functioning was much more impaired than the studies conducted for the normal adolescents have shown. The frontal lobes, already hindered by the limited biological stage of maturation, were concurrently impaired by the existing brain damage and other psychosocial factors. Mr. Allen, therefore, was exceptionally immature at the time of the capital offense. 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. (Ex. 40.)

350. Reasonably competent counsel would have completed investigation and introduced expert testimony such as that detailed above. The ABA standards make clear that such investigation is a requirement of a proper and reasonable mitigation case and here it would have revealed voluminous admissible information.

351. None of the above information was investigated or presented as mitigation at trial and obviously represents substantial mitigating evidence beneficial to Mr. Allen and totally overlooked and uninvestigated by his defense team.

The presentation of Mitigating Evidence and Expert Testimony regarding the Impact of Drug Addiction on Mr. Allen's Life and the Charged Offenses.

352. Reasonably competent counsel would have completed investigation and introduced expert testimony on Michael's extensive drug and alcohol addiction and its impact on Allen's behaviors, development and cognitive functioning.

a. Two of the three "father" figures in Michael's life became addicted to cocaine and crack and had their lives ruined. (Ex. 2, Declaration of Rebecca Allen.)

b. Michael started drinking when he was twelve or thirteen. He would drink thunderbird, silver satin, or eight ball and would mix all the alcohol together with cool aid and call it a boilermaker. He was drinking every day by the time he was thirteen, sometimes to the point of throwing up. (Ex. 40, Declaration of Dr. Khazanov.)

c. Starting in junior high school, Michael would sell drugs with his friends to obtain money to buy food during the week. (Ex. 2, p. 12, Declaration of Derek King.)

d. In July 1987, Michael told doctors that he was abusing alcohol and marijuana on a daily basis. (Ex. 7, pp. 328-329.) Apparently in Junior High, Michael weighed as much as 264 lbs, smoked two or three joints a day and drank daily. (Ex. 7, p 329.)

e. When Michael was fifteen or sixteen, he started smoking marijuana and cigarettes. He started smoking cigarettes in CYA and then started smoking a lot of marijuana during the times he was out. out. He also started drinking heavy amounts of E&J, Jack Daniels, and Hennessey when he was out of CYA. (Ex. 40, Declaration of Dr. Khazanov.)

f. In November 1989, Michael was noted as having a history of marijuana usage. (Ex. 6, p. 266.)

g. Michael's parole was revoked in December 1989 for drug use and failure to follow his guidelines. (Ex. 6, pp. 262-263.)

h. On August 8, 1991, Michael's parole was violated due to marijuana use. (Ex. 6, p. 231.) The evaluation report of his violation stated that "It appears that the parolee's problems stem from low self esteem, lack of confidence and motivation. These factors render him vulnerable to peer [sic] pressure. Also, he has no marketable skills and maybe [sic] intellectually unable to utilize the proper strategy to successfully seek employment." (Ex. 6, p. 230.) The report stated that he had a history of substance abuse. (Ex. 6, p. 233.)

i. In October 1991, Michael "volunteered to participate in the El Centro Chemical Dependency Program" for a three month period. (Ex. 6, p. 227.)

j. From August 1991 through September 1993, Michael consistently tested positive for marijuana use and was once cited for cocaine possession. (Ex. 6, p. 219, 224, 226.) He tested positive for marijuana on August 8; October 16, 22 and 24; and December 30, 1991. He was arrested for possession of cocaine on October 24, 1991. (Ex. 6, p. 219.)

k. In 1991, 1992, and 1993, Michael was noted by authorities as being "heavily involved in substance abuse." (Ex. 6, pp. 220, 225, 226.)

l. When Michael was out of CYA, he slowly started using PCP. At first he started doing a little, but then increased his consumption up to around three times a week. By the age of nineteen, he was smoking a whole bit of PCP at a time. At the same time, he was drinking hard alcohol and using marijuana daily. (Ex. 40, Declaration of Dr. Khazanov.)

m. Michael never knew how he was going to act on PCP. When he was sad or mad and got high on PCP, he would go into a rage. (Ex. 40, Declaration of Dr. Khazanov.)

n. Derek King recalled that once when Michael was released from CYA in 1991, he began smoking a lot of PCP or "Sherm" cigarettes on a regular basis. One night after Michael was smoking Sherm, he got angry with Derek who recalled that Michael just

snapped, started to sweat and his eyes got big. Michael jumped on Derek and punched him. Michael came back a couple of days later and apologized saying he was tripping on Sherm and freaked out. (Ex. 2, p. 12, Declaration of Derek King.)

o. Cynthia Allen recalled that on one occasion when she was watching Michael and Derek, she became aware that Michael was on PCP because he did not seem to be in his right mind, was disrespectful and was mean. On that occasion, Cynthia and Michael got into an argument over some Kool-Aid and it escalated because of the PCP until Derek told her to back off. At that time, Michael had been released from CYA and was using PCP on a frequent basis. (Ex. 2, p. 19, Declaration of Cynthia Allen.)

p. A 1993 probation report states that Michael was using PCP and marijuana, and drank alcohol daily. (Ex. 31, 882.)

q. Rebecca Allen recalls that drugs were everywhere in the neighborhood when Michael was in junior high. (Ex 2, p. 9, Declaration of Rebecca Allen.)

r. In an article entitled, "Phencyclidine (PCP)-Related Psychiatric Disorders", authors Alan D Schmeizer, MD (Professor and Vice-Chair for Education, Department of Psychiatry, Director of Residency Training, Indiana University School of Medicine) and Roland McGrath, MD (Chairman, Professor, Department of Emergency Medicine,

Indiana University School of Medicine) discuss the history and impact of PCP addiction. (Ex. 14, p. 533.)

s. Phencyclidine (PCP) was originally developed as an anesthetic agent; however, the agitation that some people developed following such anesthesia quickly led to abandonment of PCP for this indication. PCP is known to produce a syndrome in humans who are not schizophrenic that is similar to schizophrenia, and it will worsen the psychotic symptoms in people who have a schizophrenic illness. (Ex. 14, p. 533.)

t. PCP is a sympathomimetic dissociative anesthetic. The term dissociative means that the user feels his or her mind is separated from the body. Evidence for behavioral toxicity exists, however, and numerous deaths from suicide, homicide, and accidents related to bizarre behavior have been reported in those intoxicated with PCP. (Ex. 14, p. 534.)

u. PCP is absorbed rapidly whether it is smoked, ingested orally, inhaled intranasally, or injected into the veins. Primary intoxication lasts from 4-6 hours, but the behavioral toxicities noted above may last for as long as several weeks. The lasting presence of behavioral toxicities is thought to be due to storage of PCP within fatty tissues of the body because PCP is highly lipophilic. (Ex. 14, pp. 534-535.)

v. Death from PCP usually is caused by overdose, suicide while under the influence of the drug, or accidental death due to bizarre behavior during intoxication or withdrawal. Those intoxicated with PCP also have been reported to be more likely to be violent, and they have committed homicides. (Ex. 14, pp. 536.)

w. According to Dr. Nora Volkow of the Brookhaven National Laboratory in New York, who along with other researchers has published the strongest evidence to date, the surge of dopamine in addicts' brains is what triggers a drug high. Dopamine plays an important role in the regulation of pleasure. Dopamine is manufactured in nerve cells within the ventral tegmental area and released in the nucleus accumbens and the frontal cortex. (Journal of Psychoactive Drugs Vol. 29(4), October-December 1997.) Many substance abusers have dual psychiatric diagnoses, and it is believed that these persons may be using their substances as a way to medicate underlying psychiatric or neurological problems, such as depression, panic symptoms or posttraumatic stress anxiety. "As scientists learn more about how dopamine works (and how drugs work on it), the evidence suggests that we may be fighting the wrong battle. Americans tend to think that drug addiction is a failure of character. But this stereotype is beginning to give way to the recognition that drug dependence has a clear biological basis. "Addiction,"

"is a disorder of the brain that is no different from other forms of mental illness." (Time Magazine Article May 5, 1997.)

x. "Sherm" or street PCP cigarettes come disguised as ordinary brown cigarettes, or as sloppy marijuana joints stained brown from their plunge into noxious liquid meant for preserving human bodies for burial. (Ex. 14, pp. 539-541b.)

y. Doctors disagree on whether "Sherms" are a unique form of formaldehyde-soaked cigarettes or simply a newer name for an old way to take PCP. (Ex. 14, pp. 539-541b.)

z. "Why anyone would want to take [sherm], I don't know, because it doesn't really make you high, it gives you a really bum trip," said Lawrence Halpern, an associate professor of pharmacology at the University of Washington. "A lot of people say they think it's fun. It's not fun. It makes people do things they regret later, when they're being put to death or locked up in jail for life." (Ex. 14, pp. 539-541b.) "The worst-case scenario is you go bonkers and you kill people..." Halpern said. (Ex. 14, pp. 539-541b.)

aa. In 1994 in Tacoma, police tied a string of slayings to Sherm smoking, including an execution-style triple murder by a man who police said was paranoid from days of smoking Sherms. Then in 1997, a Tacoma man, Albert Spears, shot and killed an elderly man on a

bus, then later testified that he'd been smoking Sherms and thought rap-music lyrics ordered him to kill people. (Ex. 14, pp. 539-541b.)

bb. According to Dr. Michael Copass, then director of emergency services at Harborview Medical Center, in 2001, his hospital treated someone for Sherm-related problems every three days or so. He stated that the effects of the mix of chemicals in embalming fluid and PCP are relatively the same in that it gives a "Superman" effect and often leads to extreme trouble breathing or incapacitating paranoia. According to Dr. Copass "It's a lethal drug…It's a drug that shortens your life and makes you do things you'd be horribly ashamed of if you were cognizant of it." (Ex. 14, pp. 539-541b.)

cc. According to Dr. Julie Holland, a drug expert who has worked in the psychiatric emergency room at Bellevue Hospital in New York City, the chemical Sherm or PCP "tends to make people psychotic and very paranoid and aggressive.... [it] separates you from your mind" and can cause users to hallucinate. (Ex. 14, pp. 539-541b.)

dd. Michael had a documented history of using drugs on and around the date of this crime including marijuana, PCP and hard alcohol.

ee. According to Dr. Natasha Khazanov, alcohol and drugs are considered neurotoxins 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 preexisting deficits, and a marked tendency to perseverate. The effects of alcohol and drugs can be both acute (transient) and chronic, i.e., producing lasting effects that 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 neurocognitive (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. 40.)

ff. Dr. Khazanov further opined that the effects of organic deficits are not necessarily limited to a specific realm, such as memory, attention, or psychomotor coordination. They can also exacerbate the effects of impairments in other areas, including major psychiatric disorders (i.e., mood and trauma related disorders). Similarly, even minor deficits may be compounded and disabling when coupled with chronic alcoholism and/or heavy drug use.

gg. Specifically, Phencyclidine or PCP is a drug in the family of dissociative anesthetics known for its hallucinogenic and

neurotoxic properties. Psychological effects in PCP users include unpredictable mood changes, impulsive acts such as self-injury or even suicide, violent acts toward others, as well as destruction of property. Recreational doses of PCP can induce psychotic states similar to schizophrenic episodes. There are studies confirming PCP related brain damage referred to as Olney's lesions in animals. Even though neuroscientists agree that more research is needed to substantiate this, many experts opine that similar brain damage can occur in humans. In Dr. Khazanov's opinion, chronic PCP use further exacerbated organic brain damage in Mr. Allen, as well as hindered his ability to manage his moods. (Ex. 40.)

hh. In addition Dr. Khazanov found that Mr. Allen also suffers from Post-Traumatic Stress Disorder due to the severe trauma that Mr. Allen suffered during his childhood and adolescence. That PTSD in turn contributed to Mr. Allen's habits of self-medication with alcohol and drugs starting at an early age, exacerbating his pre-existing brain damage. (Ex. 40.)

353. Reasonably competent counsel would have investigated Allen's use and abuse of alcohol and drugs, including his contemporaneous addiction and frequent abuse of PCP. Such information is obviously mitigating in nature, and was listed both as a factor in the instructions given

to the jury and one that the court was looking to hear. Inexplicably, none of the above information was presented by defense counsel as mitigation.

The Presentation of Mitigating Evidence and Expert Testimony regarding the Impact of Camp and CYA Confinement on Mr. Allen

354. Reasonably competent counsel would have investigated Allen's time in confinement at camp and CYA and called an expert to testify to the negative impact of those experiences on him.

a. Michael was placed at Camp Karl Holton on November 30, 1987, and released on June 20, 1988. (Ex. 6, p. 283.) Michael also spent substantial time in juvenile hall. (Ex. 6, p. 304.)

b. Michael was ordered placed in CYA for carrying a loaded firearm in September 1988, arrived at Norwalk Youth Authority on September 8, 1988, and arrived at El Paso De Robles on January 3, 1989. (Ex. 6, pp. 269, 281-282; Ex. 31, p. 881.) During his time in CYA he was placed at El Paso de Robles School, Cholame Orientation Program, Arenal Kitchen Program, Cayucos Cottage, Pismo Lifestyle Program, and Cambria Re-Direct Program. (Ex. 6, p. 238.)

c. A 1998 report stated that Michael was at an age where he was "heavily influenced by his peers" and needed "a program which will give him some adult male figures who model grown up behavior" because "if left in the community, he is likely to become more

and more gang involved and involved in more serious offenses." (Ex. 6, p. 286.) At the time of the report, Michael was considered not to be a security risk and "only moderately criminally sophisticated." (Ex. 6, p. 286.)

d. Michael has never been employed. (Ex. 31, p. 884.)

e. Michael's parole was revoked in December 1989 for drug use and failure to follow his guidelines. (Ex. 6, pp. 262-263.)

f. On June 29, 1991, Michael was paroled from CYA and returned home to live with his mother at 616 East 89th Street. (Ex. 6, p. 229.)

g. On August 8, 1991, Michael's parole was violated due to marijuana use and on several repeated occasions thereafter including for possession of cocaine. (Ex. 6, p. 231; Ex. 31, p.895-898.) The evaluation report of his violation stated that, "It appears that the parolee's problems stem from low self esteem, lack of confidence and motivation. These factors render him vulnerable to peer [sic] pressure. Also, he has no marketable skills and maybe [sic] intellectually unable to utilize the proper strategy to successfully seek employment." (Ex. 6, p. 230.)

h. Michael was dishonorably discharged from CYA on September 24, 1993. (Ex. 6, p. 218.)

i. The conditions of confinement in CYA facilities during the time of Michael's juvenile incarceration were brutal, traumatic,

and dangerous. The experience added to the long-term damage to Michael's behavior and functioning.

j. Inadequate funding, overcrowding and poorly administered programs caused violence to be endemic in CYA institutions and to constitute an inescapable component of Michael's daily life. The ward social structure revolved around gangs which were ethnic groups defined by the power they wielded and their ability to cause fear in others. Gangs were firmly established in CYA by the time Michael was incarcerated there. Gang membership, or lack thereof, was determined by how a ward responded to attacks in an early testing period. It was also irrevocable; once branded a "snitch" (a ward who betrayed others to the staff) or a "punk" (a ward who was an open target of sexual molestation by other wards), a boy was labeled for the entire period of his incarceration. Upon arrival at CYA there was normally a testing period during which the other youths determined where the newcomer would draw the line. A fully functioning youngster who entered CYA for the first time quickly learned the rules of survival. (Michael Kroll, Locking Up the Problem, San Jose Mercury News, February 19, 1989, at 12-16.)

k. New wards had to establish credibility or turf with the other inmates and make it clear that when push came to shove they were willing to hurt someone to protect themselves. An inmate who was considered weak would be used, beaten and/or raped. (Steve Lerner, The

CYA Report Part Two: Bodily Harm, (Common Knowledge Press, Commonweal Research Institute) (1986) Michael Kroll, Locking Up the Problem, San Jose Mercury News, February 19, 1989, at 12-16.)

l. Karl Holton School is a CYA institution for 16 to 17 year olds. Wards are theoretically housed according to psychiatric "make-up." (Anne Jackson, Does the Youth Authority make criminals out of its wards?, California Journal, March 1976, at 99, 102.)

m. Neurologically impaired prisoners have a notoriously difficult time adjusting to new prison environments and find it more difficult than others to quickly "read" their new surroundings and the new prisoners with whom they must interact. Indeed, there is a large body of literature on the difficult challenges and largely unmet needs of mentally impaired persons who are placed in prison and confinement settings. (Jane Hall, *Identifying and Serving Mentally Retarded Inmates*, 5 Journal of Prison & Jail Health 29 (1985); R. Rockowitz, *Developmentally Disabled Offenders: Issues in Developing and Maintaining Services*, 66 Prison Journal 19 (1986); R. Lampert, *The Mentally Retarded Offender in Prison*, 2 Justice Professional 60 (1987); Louis Veneziano, Carol Veneziano & Charles Tribbet, *The Special Needs of Prison Inmates with Handicaps: An Assessment*, 12 Journal of Offender Counseling, Services & Rehabilitation 61 (1987); and Terry Kupers, *Prison Madness*, 18-27 (1999).)

n. In addition to stress of imminent physical and sexual attack there were other stressors inherent in incarceration at CYA. First, there was no escape from the deafening level of noise in the facilities. Second, the adolescent wards were provided no privacy, even in the bathroom. Wards are made to shower in an open area directly across from the counselor's control station. (Steve Lerner, The CYA Report: Conditions of Life at the California Youth Authority (Common Knowledge Press, Commonweal Research Institute) (1982) at 92.)

o. Finally, the simple fact that the facilities are filled beyond capacity lead to a certain degree of paranoia and tension. (Steve Lerner, The CYA Report: Conditions of Life at the California Youth Authority (Common Knowledge Press, Commonweal Research Institute) (1982) at 71-72.)

p. As a result of constant physical danger, the ever-present potential for attacks, and other stressors, inmates, including Michael, become hyper-vigilant and ever-watchful, unable to relax even momentarily. Since many attacks occurred at night, wards learn to sleep lightly, if at all. They become adept at masking or suppressing signs of weakness such as fear or anxiety; they are unable to experience emotions normally, and they are forced to suppress natural emotional responses. They lose the ability to distinguish actual threats from imagined threats and learn to overreact to any perceived threat. Furthermore, wards, including

Michael, often respond with overwhelming violence to repel perceived attacks; this is a survival skill that is absolutely essential in the violent atmosphere of CYA facilities. The signs and symptoms resulting from life in CYA are consistent with those of post-traumatic stress disorder.

q. Professor James Johnson, after reviewing Michael's records, stated, "Even the California Youth Authority (CYA) could not provide Mr. Allen protection from the negative encounters of violence and gang activity that characterized his life on the outside. While institutionalized, he was jumped repeatedly by Crips due to the location of his home and school on the outside. (During this time, Mr. Allen's brother, Derek, reportedly joined the Crips for the protection his brother is not present to provide.) The CYA also served as Mr. Allen's first introduction to drugs and alcohol." (Ex. 3, p. 77-78.)

r. Michael's conception of CYA as a "hell-hole" was likely an understatement of his experience, but none of the above information was presented at trial in mitigation.

The Presentation of Mitigating Evidence and Expert Testimony regarding the Impact of Future Confinement on Mr. Allen

355. Reasonably competent counsel would have presented evidence of Mr. Allen's exemplary behavior while incarcerated and lack of future dangerousness. (*Strickland v. Washington, supra,* 466 U.S. at 687-

688, 690-691; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 7 [106 S.Ct. 1669, 90 L.Ed.2d 1] ["A defendant's disposition to make a well-behaved and peaceful adjustment in life in prison is . . . relevant to the sentencing determination"]; *Williams v. Taylor, supra,* 529 U.S. at 396 [counsel's performance in penalty phase prejudicially ineffective for, *inter alia*, failure to gather and present evidence of defendant's exemplary behavior in prison].)

a. Trial counsel unreasonably and prejudicially failed to present evidence -- especially through the testimony of an expert on this subject -- that life in prison was harsh and provided a severe punishment, and that Mr. Allen would not pose a risk of future dangerousness. Indeed, as Mr. Allen's institutional records of his time on death row demonstrate, he is a model inmate.

b. Trial counsel unreasonably and prejudicially failed to present evidence, through a qualified prison expert, that life in prison was harsh punishment indeed, but that Mr. Allen would adjust without posing a risk of future dangerousness.

c. Such an expert could have educated the jury about prison conditions - that prison is a very severe environment, where every effort is made to control prisoners, monitor their behavior, and punish them whenever they violate the rules. There was no testimony about the severity of prison life.

d. Indeed, the prison environment regulates virtually every aspect of a prisoner's existence, and requires relatively rigid conformity to the standard set of procedures that it imposes, covering even seemingly mundane, personal, and intimate parts of life. Regulations about everything from where to walk, when it is permissible to be where within the institution, when and for how long one is allowed to engage in which activities, to how and under what circumstances personal hygiene may be practiced govern every minute of a prisoner's existence. Unlike in most of the rest of society, prisoners have little or no "space" to do things their own ways, and have virtually no freedom to deviate from iron-clad procedures. Deviations from the extremely limited, prescribed courses of proper conduct are noticed and punished.

e. In addition, such an expert could have reiterated that the drug, alcohol and gang issues that contributed so significantly to Mr. Allen's behavior on the outside would be minimized in prison. The expert could have explained to the jury the lengths to which prison officials go to control drug use, including careful monitoring and testing, and swift imposition of punishment for failures to follow the rules. The expert could have explained how the complete lack of privacy and constant surveillance throughout the institution contributed to the prisons' policies against illicit activities. The expert could have reminded the jury that petitioner would be clean and sober in prison -- just as he had been in jail, but which he had not

been able to sustain on the outside. In addition, a prison expert could have informed the jury about treatment opportunities available to Mr. Allen in prison so that, for the first time in his life, he could have consistent access to the therapy and treatment he needed (and should have received much earlier).

f. A prison expert could also have explained to the jury that the highly-regulated and monitored nature of prison would make a person like Mr. Allen behave better in prison than he could on the outside. Thus, he would not have posed any significant risk of future danger. And indeed, Mr. Allen has become a model prisoner. Mr. Allen has a lengthy history of incarceration at Camp, CYA and in Prison, during which he has generally been a stable and non-violent member of the system. (Ex 6.)

g. Individuals who are born or become "stimulus-bound" have a difficult time in unstructured settings, and in organizing their lives based on anything other than the stimuli they are receiving from the environment immediately around them. Individuals may inherit this tendency genetically, may adopt it due to life circumstances, or both. For example, where people such as Michael have endured chaotic lives — where outcomes are unpredictable and they have little control over the events around them — what they internalize in response is psychological disorganization. Consequently, it is difficult for them to maintain (or even achieve, at all) stability, and they often have a sense that their worlds are

spinning out of control. It is in a very stable, predictable, boundary-laden and rule-laden environment – like prison -- where stimulus-bound individuals find they are able to focus, and to regulate their behavior effectively.

h. As set forth above in Claims 1 and 2, and as confirmed by his records at set forth below, Michael is just such an individual. An expert could have explained this, and therefore that he would not pose a risk of future dangerousness.

(1) In 1988, Michael reflected that while he didn't like being in the youth authority, perhaps God had used it to prevent him from getting shot and that he believed he could improve his life by associating with different friends and changing his dress to avoid the "colors." (Ex. 6, p. 286.)

(2) The 1988 report also stated that Michael was at an age where he was "heavily influenced by his peers" and needed "a program which will give him some adult male figures who model grown up behavior" because "if left in the community, he is likely to become more and more gang involved and involved in more serious offenses." (Ex. 6, p. 286.) At the time of the report, Michael was considered to not be a security risk and "only moderately criminally sophisticated." (Ex. 6, p. 286.)

(3) In July 1989, it was noted that Michael was adjusting well to the staff and his peers and was moving away from his

gang associations. (Ex. 6, p. 270.) He was recommended for parole based on his improvement and lack of involvement in gang activity. (Ex. 6, p. 272.)

(4) Again in May 1991, Michael had distanced himself from his gang affiliation, was getting along with the staff, was doing well in group counseling, had "demonstrated a new belief system incorporating positive values and morals," and had made sufficient progress for parole recommendation. (Ex. 6, pp. 238-240.)

(5) Upon reaching prison following his 1993 conviction, Michael's intake review dated February 3, 1994, included an institutional staff recommendation summary that indicated he, "...was cooperative and responded adequately to all questions. He appears to [be] making the appropriate adjustments to prison life since arriving at this Reception Center and is not viewed as a management problem at this time." (Ex. 32, p. 909.)

(6) Mr. Allen has distanced himself from any gang ties while on death row and has never been a problem inmate of any kind. (Ex. 32, p. 908.)

i. Trial counsel unreasonably failed to utilize the prison experts and did not present any of the above information in mitigation.

V. Conclusion

356. At the risk of stating the obvious, reasonably competent counsel could have presented a significant and persuasive mitigation case. In reality, none was presented.

357. The trial court knew it, second counsel Murphy knew it, prosecutor Snyder knew it and worst of all Michael Allen knew it. Significant mitigating evidence was available and presentable had defense counsel made the effort to look for it. In almost every category of mitigating consideration material information was available -- drug use, mental illness, brain damage, low IQ, childhood trauma, domestic abuse, CYA trauma, positive prison adjustment, geographic poverty, educational delay, community violence, etc. Trial counsel Orr not only presented none of it, he knowingly elected to present bad testimony by a woefully incompetent and unprepared pastor who was there only as a favor to a mutual friend.

358. It is no wonder that Orr was eventually removed from the death penalty panel when the judges got the chance: but unfortunately for Mr. Allen, it was too late. (Ex. 41.)

CLAIM FOUR

MR. ALLEN IS FACTUALLY INNOCENT

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to be free of cruel and unusual punishment, and to equal protection of the laws and article 1, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law in that he is actually innocent of the charged crimes.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

359. Defense Counsel Orr, by declaration, stated "Page 9 of the Chronological Record of the Los Angeles Police Department states that an informant identified other suspects to the investigating officers as the persons who were responsible for the crime. The other suspects are clearly not the two defendants who are named in the present grand jury indictment." [CT, 2:286:14-18]

360. In a subsequent declaration, Defense Counsel Orr stated that Sergeant Wright of the Compton Police Department advised the

investigating officers in Mr. Allen's case that "Lucky Mike and D.L." are suspects in this case. [CT, 2:332]

361. The testimony and evidence presented at trial linking Mr. Allen to these killings based on Angie Williams driving the shooter from the scene and supporting the testimony of the prosecution witnesses has been refuted by Donovan Clark who declared under the penalty of perjury that:

a. When I was told that at trial, testimony was presented that Angie Williams drove the shooter from the scene of the crime, I knew this was not true because she did not drive and the 89 Family Bloods would always use expert drivers. (Ex 2, p. 24.)

b. As far as I know, Marcellus James and Freddie Jelks and Donnie Ray Adams did not hang with Johnson (Big Evil). James and Jelks didn't really hang with the 89 Family Bloods. (Ex 2, p. 24.)

c. I do not know and have not heard of Carl Connor. (Ex 2, p. 24.)

362. The prosecution theory of the case that Johnson and Allen were co-actors is negated by the declaration of Derek King that "Big Evil was a "mythical guy" in the neighborhood because of his reputation, but neither Michael nor I hung out with him because he was older and hung out with older guys." (Ex. 2, p. 13.)

363. Percipient witness Nellie Chavez when presented with a photo lineup by the LAPD during their investigation stated that a man other than Mr. Allen (identified in picture 4) "looks like the guy who was with the guy who did the shooting." (Ex. 36.) This statement makes clear that the actual shooting was committed by two individuals, not one as presented at trial.

364. Percipient witness Robert Lee Brown, owner of the repair shop on Central Ave. adjacent to the shooting, reported to LAPD Detectives Tapia and McCartin that the shooter was wearing "blue jeans" and that even though he knew Michael Allen and saw him earlier in the day, he could not say for sure that the person he saw running away was Michael Allen. (Ex. 37.) This statement of Mr. Brown substantially undercuts the testimony of Freddie Jetks who stated that Mr. Allen was wearing Khaki pants. (See Appellant's Opening Brief pp. 9-37; RT, 16:3558.)

365. Documentary evidence supports the claim that Mr. Allen did not commit these crimes:

a. LAPD documents and FBI wire-tap transcriptions of calls by and with Cleamon Johnson reveal that members of the Johnson family believed and suggested that "Tuffy" did the killing. (Ex. 28, p. 864-866.)

b. An LAPD investigation report suggests that both victims were subjects of intensive narcotic investigation and were known dealers of substantial amounts of cocaine. The report provides that the narcotic investigations network confirmed the drug ties of the victims, suggesting that the killings may have been narcotics related. (Ex. 28, p. 867.)

c. LAPD Investigation reports suggest that the killings were initially considered to be contract hits. (Ex. 28, pp. 868-870.) A statement given to Investigators Tapia and Barling by Bryan Kuykendall at Terminal Island Federal Prison suggests that he may have been the intended target and that the victims were killed by mistake. The statement further indicated that the victims were members of the 89 East Coast Crips as was Mr. Kuykendall. (Ex. 28, p. 871.)

d. The victims in this case, Donald Loggins and Payton Beroit were documented substantial narcotics traffickers being investigated by the LAPD at the time they were killed. (Ex. 35.) During a four day sting operation, Loggins was caught receiving a drug tainted package of $10,635 in cash at LAX airport. (Ex. 35, pp. 1001-1002.) Beroit was documented as selling over a kilo of cocaine a week in association with the 89 East Coast Crips. (Ex. 35, pp. 1004.)

366. The blatantly false and misleading testimony and statements of Carl Connor prior to trial, at the grand jury phase, and at trial, suggest

that Mr. Allen was not involved in this crime and that Connor's testimony was the product of neighborhood rumor, speculation and coaching. Mr. Allen incorporates by reference as is set forth herein the detailed recitation of Carl Connor's statements and testimony set forth in his opening brief at pages 16-25 and 64-121.

367. Those facts and allegations set forth in Claims 5, 6 and 7 of this petition and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

368. The individual and cumulative effect of the above information undermines the integrity of the verdicts obtained and requires reversal.

CLAIM FIVE

STATE AUTHORITIES ENGAGED IN A PATTERN OF MISCONDUCT THAT CREATED PREJUDICIALLY FALSE AND MISLEADING PROOF OF GUILT AND MORAL CULPABILITY.

Petitioner's conviction and sentence of death are violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the state authorities systematically committed specific acts and omissions which were designed to, and which did in fact, create

false, misleading and unreliable proof of petitioner's requisite guilt and aggravated his sentence. Petitioner's constitutional rights were violated by these acts and this course of systemic conduct include but are not limited to deprivations of his rights to due process, a fair trial, the right to present a defense, including the rights to compulsory process and to present all relevant evidence; the right to disclosure of all material, exculpatory and/or impeaching evidence; the right to a trial free from intentionally, demonstrably or inferentially false inculpatory or impeaching evidence; the right to a reliable, rational and accurate determination of guilt, death-eligibility and death-worthiness, free of any unconstitutionally unacceptable risk that such determinations were the product of bias, prejudice, arbitrariness or caprice; and the right to effective assistance of counsel that is unencumbered by interference of state officials in withholding, mischaracterizing, suppressing or altering evidence, or otherwise unfairly manipulating the proceedings to affect the introduction and/or exclusion of material, probative evidence.

The violations of these rights individually and cumulatively prejudicially affected and distorted the investigation, discovery, presentation, and consideration of evidence as well as each and every factual and legal determination made by trial counsel, the courts and the jurors at all stages of the proceedings from the time of petitioner's charge

through and including the rendering of the judgment of death and continue to unfairly, misleadingly and prejudicially affect his custodial status.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

369. Those facts and allegations set forth in Claims 4, 6 and 7 of this petition and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

370. The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession, but information in the possession of all agencies to which the prosecution has access. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380; *People v. Robinson* (1995) 31 Cal.App.4th 494, 499.) Disclosure of a benefit or payment may not be avoided based on the contingent nature of the payment because the practice of waiting to apply for an award until after a successful prosecution obviously has the tendency to color witnesses testimony to ensure they obtain a reward. Such a practice has been rejected by this Court and the 9th Circuit. (*People v. Phillips* (1985) 41 Cal.3d 29, 47-48; *Wilhoite v. Vasquez* (9th Cir. 1990) 921 F.2d 247.) Federal courts have questioned the practice of providing benefits contingent on conviction. (*United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331.)

371. Here, the prosecution, LAPD and City of Los Angeles unconstitutionally failed to disclose to defense counsel favorable impeachment evidence regarding systemic and individualized rewards and payments including the pervasive pattern and practice of coercing, intimidating, tampering with, and/or coaching witnesses; offering undisclosed inducements to witnesses in exchange for testimony; improperly tailoring their investigation; presenting and failing to correct false evidence; creating an atmosphere of paid testimony and information; and withholding material exculpatory information.

372. According to LAPD Detective Eugene Tapia, the investigation and prosecution of this case was the "result of the state and federal task force targeting the 89 Family Blood Gang." (Ex. 34, p. 999.)

373. In the instant case, as early as October 3, 1991, assigned detectives Tiampo and Santiago stated that they "will consider offering rewards for information leading to the arrest and convictions of the suspects." (Ex. 12, pp. 507-508.)

374. As a result, an "Information Wanted" bulletin by Tiampo on behalf of South Bureau Homicide was prepared and distributed on August 18, 1994. (Ex. 12, p. 509; Ex. 38, p. 1010.)

375. The printing and design of the reward flyers made clear that the LAPD was offering $75,000 for information on three murders. (Ex. 38, pp. 1011-1012.) One of the flyers made it clear that rewards could be

obtained on a broad basis if citizens would "work together" with the LAPD to "make the neighborhood a safer place to live." (Ex. 38, p. 1012.)

376. LAPD records indicate that detectives were trained and instructed on the process for using awards to produce information and convictions. (Ex. 16, pp. 603-614.) These procedures outlined the very clear mandate that rewards would be paid based on convictions and that potential claimants should remain confidential and only contact the detectives, rather than city officials. (Ex. 16, p 604.)

377. Because the reward system employed by the City of Los Angeles and the LAPD is structured to impede the established safeguards of our legal system (see *Hoffa v. United States* (1966) 385 U.S. 293, 311-312 [87 S.Ct. 408, 17 L.Ed.2d 374]) the witness has no incentive to volunteer that he or she will be paid reward because the jury might not believe him or her, thereby jeopardizing a payment based on conviction.

378. Further, the police are instructed to keep the issue of a reward and possible claimant confidential and nebulous during the pending trial so that the prosecution can state that no benefit or payment has been offered or promised to a witness in any specific case or with respect to any specific witness. (Ex. 16, 8-10.) Because the police are instructed not to claim a reward until after conviction, the defendant and jury are denied any ability to know of a contingent benefit. (Ex. 16.)

379. The practice of paying secret rewards based on convictions created a perverse incentive structure that compromised the truth-seeking process. Non-disclosure of anticipated benefit is built into the system so that witnesses such as those in the instant case, who receive eventual benefit contingent on the outcome of the case, are not required to disclose such benefit and the prosecution can maintain that no benefit as been offered or provided. Such a process violated Michael's Fifth and Fourteenth Amendment rights to due process. The process of concealed contingent benefits not only violates the constitution and the tenants of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], but also perverts the trial process by creating too high of a risk that the defendant will be tried on false information.

380. By comparison, if a defendant were to secretly pay a witness after and contingent upon an acquittal, he would be guilty of witness tampering and the jury instructed that such conduct evidences consciousness of guilt.

381. While a specific payment and benefit to a specific witness under the reward system employed by the City of Los Angeles is difficult to establish, the public at large is aware that beneficial testimony will be rewarded. The pattern and practice of paying reward and benefits was well established at the time of trial in this case in South Central Los Angeles. (Exs. 8, 9, 10, 12, 38.)

382. During the period of this case, the City of Los Angeles through the LAPD and district attorneys office paid no fewer than 33 rewards to confidential individuals that were premised on a conviction. (Ex. 10, pp. 494-498.) Two representative reward scenarios are detailed below. (Exs. 8 and 9.)

383. Carl Connor, a key testifying witness at the Grand Jury and Trial phases of the instant case, received a reward following his testimony in the prosecution of Reco Wilson. Significantly, defense counsel for Reco Wilson did not receive any information regarding a payment to Connor until after Mr. Wilson was convicted. (Ex. 10, p. 494, item 5; Ex. 8.) Flyers were distributed regarding the Reco Wilson reward payment in South Central Los Angeles on September 6, 1994. (Ex. 12, p. 521-A.) Connor's reward for his testimony in the Reco Wilson case was approved for payment to him on March 5, 1997. (Ex. 8, p. 351.)

384. In the case of *People v. Reynoso* (LA032732) the States only two identification witnesses received rewards following conviction in the matter; and again, defense counsel was not made aware of the payment of the rewards until after the matter was tried. Both individuals responded to the published announcement that a reward would be paid on conviction in the matter and surfaced three years after the homicide and just weeks after the reward was announced. (Ex. 9.)

385. The remaining 31 other cases in which rewards have been paid about which Petitioner is aware contain similar practices and facts. (Ex. 10.)

386. The specific facts and evidence regarding the pervasive existence of benefits and rewards in this matter is set forth under Claim 6 of this petition and is incorporated herein by reference.

387. The law enforcement agencies involved in this case prejudicially failed to disclose this systemic pattern and practice of contingent confidential rewards. Prosecutor Snyder was emphatic that no rewards or incentives played any role in this case. (Ex. 12.)

388. Trial counsel was constitutionally ineffective in failing to challenge and object to the State's misconduct on any and all of the foregoing grounds. Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel and prejudiced petitioner.

389. To the extent appellate counsel was required and/or permitted to challenge the State's misconduct on any and all of the foregoing grounds, appellate counsel was constitutionally ineffective in failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced petitioner.

390. The prosecution, LAPD and State misconduct detailed above prejudiced Michael in that he was unable to present evidence regarding this systemic pattern and practice of contingent payments and its impact on his case and the testimony of the prosecution's witnesses.

391. The pattern and practice engaged in regarding the provision of payments and benefits for information and testimony leading to convictions is closely akin to the expansive corruption found to be common place in the Rampart Division of the LAPD in the late 1990's. (Ex. 33.)

a. The Rampart Division is adjacent to the South Bureau where the detectives completed this investigation. (Ex. 33, p. 910.) Renowned Professor Erwin Chemerinsky chronicled the corruption and systemic culture of the LAPD and LA District Attorney's Office in his September 11, 2000, report entitled "An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal," (Ex. 33, pp. 911-697.)

b. Therein, Mr. Chemerinsky found that the LAPD had a culture of corruption that could only be remedied through wide sweeping reforms to be enforced by a consent decree or federal court oversight following a pattern and practice judgment. (Ex. 33, pp. 962.)

c. Of particular application here was the need for "greater controls on specialized units within the LAPD" and the need to

investigate the District Attorney's connection to police misconduct and perjury. (Ex. 33, pp. 964, 966.)

d. The report further recommended that the District Attorney's Office be required to "adopt an office policy defining and enforcing prosecutors' *Brady* responsibilities. (Ex. 33, p. 966.) Further, it was recommended that procedures be adopted to "report and track lying by police officers in criminal proceedings." (Ex. 33, p. 966.)

e. A report prepared by the Blue Ribbon Rampart Review Panel described the corruption by stating that the true scandal was the "scale of the abuses" involving the integrity of the entire Los Angeles criminal justice system. (Ex. 33, p. 968-998, 972.) The report noted that the Rampart culture in the LAPD had not changed and remained evident and "brewing" in other divisions seven years later. (Ex. 33, p. 978.) The report concluded that the City of Los Angeles needed a "new public safety framework" that is "free from corruption, bias, and brutality." (Ex. 33. p. 985.) "The Rampart CRASH crisis was a system-wide failure of every Los Angeles institution with responsibility for providing constitutional public safety and justice." (Ex. 33, p. 989.)

392. Prejudice from the lack of disclosure and pattern and practice of secret contingent rewards is evident from the jury's skepticism about the motives for the prosecution's witnesses' testimony. On August 25, 2007, discussions occurred concerning the juror note "Is there any reward monies

in any way associated with this case?" submitted to the court on the third day of the guilt phase deliberations. [CT, 4:830-831; RT, 26: 5263:5263-5272] In open court, jurors number five and six declared that "everybody was kind of wondering" [RT, 26:5272:9] and the jury actually "had lot of questions about reward." [RT, 26:5272:13-14.] At the conclusion of the day's proceedings after all of the other juror's had departed, jurors number four and five met and conferred privately about the matter and then demanded a private audience with the judge. [RT 26:5283-5284]

393. Further evidence of the jury's lack of confidence in the prosecutions evidence emerged on August 27, 2007, the fifth day of guilt phase deliberations from the court's colloquy with the jury concerning hold out juror number eleven who was replaced over defense counsel's objection. [CT. 4:824, 828, 830, 833, 836-837, 842; RT, 26:5463, 5479, 5484]

a. Juror number eleven doubted the credibility of the prosecution's case and even though the juror's mind was not yet made up, the juror stated that "when the prosecution rested, she didn't have a case." [RT. 26:5314:3-5, 5317:9-11]

b. Juror number four also opined that "it was a mess and the evidence was all over the place." [RT, 26:5319:25-26]

c. Juror number two chimed in that ". . . what I'd heard had me very undecided . . ." and added that "more than one" juror was only semi convinced of appellant's guilt. [RT, 26: 5373:4, 5374:28-5375:1]

d. The jurors also advised that three jurors developed "the mindset from the beginning [that] . . . all the witnesses are unreliable, all the testimony is unreliable . . . [and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363:12-18]

394. The above items of misconduct and systemic illegality, individually and collectively, violated petitioner's above-enumerated constitutional rights, rendered the trial proceedings fundamentally unfair and had a substantial and injurious influence in the determination of the jury's verdict, and unconstitutionally deprived petitioner of a fair and reliable determination of guilt and penalty.

CLAIM SIX

THE STATE PREJUDICIALLY FAILED TO DISCLOSE BENEFITS OFFERED TO WITNESSES IN EXCHANGE FOR THEIR ASSISTANCE WITH THIS CASE.

The Due Process Clause requires that a prosecutor disclose to a criminal defendant all material, exculpatory evidence in her possession. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433 [115 S.Ct. 1555, 131 L.Ed.2d 490], citing *Brady v. Maryland, supra,* 373 U.S at 87.) *Brady* material may

relate either to guilt or punishment. (*Giglio v. United States* (1972) 405 U.S. 150, 154 [92 S.Ct. 763, 31 L.Ed.2d 104].) The state violates its obligations under *Brady* where 1) the evidence is favorable to the defendant because it is exculpatory or impeaching; 2) the evidence was suppressed by the state; and 3) the evidence is material -- i.e., the prejudice must be "sufficient to undermine confidence in the outcome" of the trial. (*Kyles v. Whitney, supra*, 514 U.S. at 433-443; *Strickler v. Greene* (1999) 527 U.S. 263, 281-282 [119 S.Ct. 1936, 144 L.Ed.2d 286].) As set forth in detail below, each of these criteria has been met (to the extent it is possible for Mr. Allen to prove, without having had access to the materials and information he describes).

The state has committed *Brady* violations which require the reversal of Mr. Allen's convictions and the death verdict against him. Because of these violations, Mr. Allen's sentence of death was rendered in violation of his rights to due process, to be free of the infliction of cruel and unusual punishment and to have a fair and impartial jury, a reliable, fair, non-arbitrary and non-capricious determination of penalty, the effective assistance of counsel, confrontation and compulsory process, the enforcement of mandatory state laws, equal protection under the law, and due process of law as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California

Constitution and state statutory law; and international human rights law as established in treaties, customary law, and under the doctrine of *juris cogens*.

In support of this claim, Mr. Allen alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's processes including subpoena power and other means of discovery, and an evidentiary hearing:

395. Those facts and allegations set forth in Claims 4, 5 and 7 of this petition and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

396. Those facts, allegations, authorities and arguments set forth in Appellant's Opening Brief Issues I through IX are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

397. Throughout the duration of this matter at trial, Prosecutor Snyder was resolute that no payments, benefits, inducements, personal benefits, offers of leniency, or offers of deals were provided to or received by any of the People's witnesses as a consequence of their testimony in this case. (Ex. 12, p. 517.)

398. Snyder repeatedly stated that no payments or benefits were provided to any witness, but at one point had to recant because it was

discovered that one critical witness (Freddie Jelks) had been paid a relocation benefit of $3,000. In making that disclosure, she reiterated that no other benefit had been given to the witnesses. (Ex. 12, p. 511, 517-518.)

399. Snyder stated on the record that neither Connor, Jelks, nor Adams were offered leniency or other personal benefit for their testimony. (Ex. 12, p. 518.)

400. On March 7, 1996, the court ordered Prosecutor Snyder to disclose "any benefit either directly or indirectly given to any witnesses." [CT, 3:445]

401. Prosecutor Snyder's statement and overtures were clearly incorrect and constitute both prosecutorial misconduct and the concealment of material exculpatory evidence. Further, Prosecutor Snyder was involved in a series of cases wherein benefits were not disclosed.

402. Key witness Freddie Jelks received undisclosed benefits.

a. Prior to trial and during a custodial interview of Freddie Jelks conducted by Detectives Tapia, McCartin and Mathew, Jelks stated that he would work with the police if his name was redacted and he was relocated. (Ex. 29.) As an inducement to cooperate with the officers, Detective McCartin promised to protect Jelks by redacting his name and relocating him. (Ex 29.).

b. Prosecutor Snyder was forced to disclose this benefit and denied any other benefit. (Ex. 12.) However, because Jelks cooperated, he received an additional massive benefit. [RT, 16:3638]

c. During trial, Jelks testified while handcuffed with Detective Tapia sitting next to him during his testimony. [RT, 16:3513, 17:3683] Detective Sanchez was also in the courtroom during his testimony. [RT, 16:3548-3549] However, when not in front of the jury, attorney Richard Lasting observed that he was "walking up [the street] with Detective Sanchez smoking a cigarette with one hand in [his] pocket." [RT, 17:3684] Clearly Jelks had a strong and positive relationship with the detectives who were intimately involved in prosecuting this matter.

d. Trailing this case also before Judge Horan and also prosecuted by Jennifer Snyder, was the case of *People v. Cleamon Johnson and Freddie Jelks* (BA108967), also a death penalty case. (Ex. 11.) Johnson was a co-defendant in both this matter and the trialing matter, and as challenged in appellant's opening brief Issue IV, the defense was precluded from inquiring at trial regarding the details of the trailing murder case of Johnson and Jelks. (See Appellant's Opening Brief pages 185-189.)

e. During a discussion regarding the limitations on cross-examination of Jelks, Prosecutor Snyder stated that she told Jelks that "his case would be presented to the D.A.'s office and they would tell the D.A.

that he was -- that he was a cooperative witness, et cetera, et cetera." [RT, 16:3588-3610]

f. Later, Snyder also stated that after the police told Jelks they had evidence against him in the trailing matter, "he does give himself up and give up the other people that were involved in that particular case." [RT, 16:3589-3610]

g. As a result, Jelks was allowed to testify that he was only testifying out of a desire to change the neighborhood, received and expected no benefit, and did not have a disposition on the trailing matter as of the date he testified. [RT, 16:3514, 3628, 3638, 3727, 3748.] Jelks further testified that he was facing a lot of time in prison on the pending case and even possibly a life sentence. (RT 3628.) Judge Horan and Johnson defense counsel Lasting both noted that Jelks was facing a life sentence in the trailing matter. [RT, 16: 3606, 3609.]

h. Jelks testified repeatedly that nothing was promised to him in this matter or in the trailing matter and was only testifying as a "good citizen." [RT, 16: 3515, 3628, 3638]

i. In reality, Jelks did receive a benefit.

j. On May 11, 1998, in the trailing Johnson/Jelks matter, rather than a life sentence, Jelks received the low-term of three years plus an additional one-year enhancement. The result was that he was released

from the court-room on that day based on his time served and the low sentence approved by Prosecutor Snyder and Judge Horan.

k. Jelks was released on the low-term time served sentence because of the danger to him, his lack of a serious prior criminal record, his efforts toward rehabilitation and most notably, "**his cooperation and giving truthful testimony in a prior trial in this [Horan's] courtroom.**" [Ex. 11, p. 503.] (Emphasis added.)

l. Clearly, the above lenient sentence was afforded Jelks directly because of his testimony in the instant case. The prosecution's overtures to the contrary were blatantly false and misleading.

m. Petitioner was prejudiced from this *Brady* violation and clear prosecutorial misconduct because his ability to cross-examine and impeach Jelks was severely limited both by the lack of disclosure and the court's restrictions. [See Appellant's Opening Brief Issue IV.]

n. Further, Jelks was one of the three identification witnesses tying Mr. Allen to these crimes and presented unique testimony of Mr. Allen's admissions to him. [RT 16, 3550-3546]

o. Finally and perhaps most significantly, it was the testimony of Jelks that the jury reviewed after it had hung 10-2 and immediately before it returned a verdict of guilt against Mr. Allen. [CT, 4:842, 846]

403. Key witness Carl Connor received undisclosed benefits.

a. Carl Connor, a key testifying witness at the Grand Jury and Trial phases of the instant case, received a reward following his testimony in the prosecution of Reco Wilson in which Ms. Jennifer Snyder was involved at least prior to trial. Significantly, defense counsel for Reco Wilson did not receive any information regarding a payment to Connor until after Mr. Wilson was convicted. (Ex. 10, p. 494, item 5; Ex. 8.)

b. Detective Sanchez requested the provision of a reward in the Reco Wilson case in August of 1994. (Ex. 12, p. 521-A.) and distributed flyers in South Central Los Angeles on September 6, 1994. (Ex. 12, p. 521-A, Ex. 38.)

c. Carl Connor was interviewed regarding the Reco Wilson case and this case on August 15, 1994, by Detective Sanchez at which time he provided information about potential suspects in both cases. (Ex. 24, p. 332.)

d. On August 17, 1994, the LA City Counsel approved the offer of a reward in the Reco Wilson Case. (Ex. 8, p. 339.) The Mayor concurred on August 26, 1994. (Ex. 8, p. 339.) Later documents mistakenly suggest that the reward was approved on August 12, 1994, but it was not. (Ex. 8, 336, 338.)

e. As a result, an "Information Wanted" bulletin by Detective Tiampo on behalf of South Bureau Homicide was prepared and distributed on August 18, 1994. (Ex. 12, p. 509; Ex. 38, p. 1010.)

f. The printing and design of the reward flyers made clear that the LAPD was offering $75,000 for information on three murders. (Ex. 38, pp. 1011-1012.) One of the flyers made it clear that rewards could be obtained on a broad basis if citizens would "work together" with the LAPD to "make the neighborhood a safer place to live." (Ex. 38, p. 1012.)

g. Public information about the reward was published on September 15, 1994. (Ex. 8, pp. 340-342.)

h. According to Detective Sanchez, Connor was never promised any reward or made aware of an award in either the Wilson case or this case. (Ex. 24, 334.)

i. Connor's $25,000 reward for his testimony in the Reco Wilson case based on the information he provided in his August 15, 1994, interview was submitted for approval by the LAPD on January 17, 1997, and approved for payment to him by the City of Los Angeles on March 5, 1997. (Ex. 8, p. 343-344, 351.)

j. According to Connor's Testimony at the grand jury in this case on December 16, 1994, he received no benefit or payment for his testimony. [CT, 34:1-2; Grand Jury p. 27.]

k. According to Connor's testimony at trial in this case on August 5, 1997, he received no payments or benefits for his testimony in this matter, but did receive a payment for his testimony in the Reco Wilson

case. [RT, 15: 3389-1390.] Notably, the interview with Detective Sanchez which led to the reward in the Reco Wilson case was the same interview wherein Connor provided information against Mr. Allen in this case. [RT 3975-3986]

l. Detective Sanchez admitted to placing a flyer regarding the reward on Carl Connor's door step in September of 1994, following their interview but before his testimony in either case. (Ex. 8, 362, 401; Ex 38.)

m. Strikingly, in March of 1995 and prior to trial in the Reco Wilson case, defense attorney James Bisnow filed a discovery motion asking Prosecutor Jennifer Snyder to disclose any benefits or potential benefits and just as occurred in this case, she disclosed none and assured Mr. Bisnow that there were no reward or benefit issues. (Ex. 8, p. 355.) No mention was made by Ms. Snyder of the payment of any reward to Mr. Connor. (Ex. 8, p. 356.)

n. Evidence presented at a post-conviction discovery hearing in Mr. Wilson's case confirms that the LAPD has control over the reward system, that the City of Los Angeles has never denied a police request to issue a reward, and that the rewards are always paid after a conviction is obtained. (Ex 8, p. 377-378.)

o. Testimony previously given by Derrick Battle was read to the jury in this case wherein Mr. Battle stated that in 1997, Carl

Connor offered to split a reward payment in half with him if he would agree with Connor regarding his testimony in the Reco Wilson case. [RT, 35: 7074-7099] Mr. Battle rejected the offer believing that Connor was crazy "for one reason of lying" because he knew that Connor did not see what he claimed to have seen in his testimony. [RT, 35:7099] Mr. Battle was clear in his testimony that Connor was lying in his testimony in order to receive the reward. [RT, 35: 7099]

p. Petitioner further incorporates the facts and information set forth in Appellant's Opening Brief Issues I, II, and III.

q. Mr. Allen was prejudiced by the People's consistent lack of disclosure of the relationship between Carl Connor and the LAPD and the payment made to him contemporaneous with this testimony in this and other cases.

404. Witness Donnie Ray Adams also testified in expectation of getting beneficial sentencing treatment in an unrelated case. In January 1996, Adams was under federal conviction facing a life sentence. [RT 19, 4421-4425.] He came forward only after his arrest for the federal offense and was contacted by investigators regarding this case while awaiting sentencing. [RT 19, 4418, 4424] He agreed to testify in the hope that he would receive a benefit and "attempting to work some kind of deal" to lessen his sentence. [RT 19, 4422-4423.] Clearly Adams was under the impression that sentencing relief would be based on the efficacy of his

testimony. His impressions are buttressed by the above outcomes received by Jelks and Connor.

405. Witness Marcellus James testified that he was offered protection and relocation by detectives Tapia and McCartin, but refused the offer because he did not want to be considered a snitch. [RT 4047]

406. Prosecution penalty phase witness Keith Williams was interviewed while in jail by Detectives McCartin and Tapia and was promised that if he gave them a statement of sufficient quality, they would get him out of confinement. [RT, 31: 6349, 6354-5355.] He was later released from confinement with minimal time and no significant charges. [RT, 31: 6355]

407. Information regarding the benefits provided to Jelks and Connor, expected by Adams, offered to James, and received by Williams; and the extensive connection of Ms. Snyder to three interrelated cases wherein benefits were derived and not disclosed to the defense (Prosecutions of Reco Wilson, Freddie Jelks and Michael Allen) was not provided to the defense.

408. Detectives Sanchez, Tapia, Mathew and McCartin; and Prosecutor Snyder were involved in a web of cases wherein benefits and payments were provided for testimony and information. According to LAPD Detective Eugene Tapia, the investigation and prosecution of this

case was the "result of the state and federal task force targeting the 89 Family Blood Gang." (Ex. 34, p. 999.)

409. Because full disclosure of this information was not made to defense counsel in spite of the repeated requests, Michael was prevented from impeaching the testimony of Carl Connor and Freddie Jelks. Further, Michael was deprived of the opportunity to present a coherent affirmative defense to the charges and challenge Prosecutor Snyder's multiple conflicts of interest.

410. The People deprived Michael of his right to a fair trial by withholding evidence that it had illegally coerced, secured, and influenced witnesses to testify against Michael by promising legal and financial assistance, in the form of the deals and payments detailed above.

411. When these examples are considered in concert with the payment procedures outline in Claim 5 and Exhibits 8, 9, 10, 12 and 16, there exists substantial evidence of a payment and benefit pattern and practice that prejudiced Michael.

412. The pervasiveness of the payment and benefit procedures employed in this case and the related cases is verified by, Derek King, who declares that a crip witness named "slick" was paid for his testimony in the Chester White case, one of the special circumstances alleged against Mr. Allen. (Ex. 2, p. 12.)

413. Prejudice from the failure to disclose this information is evident from the trial court's denial of Attorney Lasting's requested special instruction on the matter of great care in which the jury should consider testimony that has been provided with the expectation of "personal advantage or lenient treatment." Attorney Lasting's instruction included the concept that testimony motivated or affected by interest should be viewed with "distrust." (RT 4919-4925.) The court denied the request based on Snyder's continued statements that no witness was offered or given a benefit.

414. Prejudice from the failure to disclose this information is also evident from the jury's skepticism about the motives for the prosecution's witnesses' testimony. On August 25, 2007, during discussions concerning the juror note "Is there any reward monies in any way associated with this case?" submitted to the court on the third day of the guilt phase deliberations. [CT, 4:830-831; RT, 26: 5263:5263-5272] In open court, jurors number five and six declared that "everybody was kind of wondering" [RT, 26:5272:9] and the jury actually "had lot of questions about reward." [RT, 26:5272:13-14.] At the conclusion of the day's proceedings after all of the other juror's had departed, jurors number four and five met and conferred privately about the matter and then demanded a private audience with the judge. [RT 26:5283-5284.)

415. Further evidence of the jury's lack of confidence in the prosecution's evidence emerged on August 27, 2007, the fifth day of guilt phase deliberations from the court's colloquy with the jury concerning hold out juror number eleven who was replaced over defense counsel's objection. [CT, 4:824, 828, 830, 833, 836-837, 842; RT, 26:5463, 5479, 5484]

a. Juror number eleven doubted the credibility of the prosecution's case and even though the juror's mind was not yet made up, the juror stated that "when the prosecution rested, she didn't have a case." [RT, 26:5314:3-5, 5317:9-11]

b. Juror number four also opined that "it was a mess and the evidence was all over the place." [RT, 26:5319:25-26]

c. Juror number two chimed in that ". . . what I'd heard had me very undecided . . ." and added that "more than one" juror was only semi convinced of appellant's guilt. [RT, 26: 5373:4, 5374:28-5375:1]

d. The jurors also advised that three jurors developed "the mindset from the beginning [that] . . . all the witnesses are unreliable, all the testimony is unreliable . . . [and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363:12-18]

416. Had the above information been disclosed at trial, evidence of these illegal deals, alone or cumulatively, would have exposed the prosecution's widespread misconduct and altered the outcome of the trial.

CLAIM SEVEN

THE PROSECUTION ENGAGED IN PREJUDICIAL MISCONDUCT DURING TRIAL IRREPARABLY SKEWING THE JURY'S DECISION-MAKING PROCESS.

The convictions and sentence of death were rendered in violation of petitioner's rights to fair, reliable, and rational determinations of guilt and penalty, to an individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to conviction beyond a reasonable doubt, to due process and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the prosecution engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct that was designed to and did in fact prejudicially deprive petitioner of the foregoing constitutional rights. The constitutional

error is both clear and fundamental and strikes at the heart of the trial process.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

417. Those facts and allegations set forth in Claims 5 and 6 of this petition and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

418. Those facts and allegations set forth in Appellant's Opening Brief Issues I and II are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts. (Appellant's Opening Brief pp. 16-25, 64-121.)

419. As detailed in Appellant's Opening Brief Issues I and II and Claim 6 set forth herein, the prosecution erroneously and prejudicially presented false testimony by Carl Connor.

a. Connor's testimony was both internally and externally inconsistent with his statements, grand jury testimony, and the testimony of the other percipient witness. (Appellant's Opening Brief pp. 64-121.) A reasonable review of this testimony clearly supports the conclusion it was facially false and contrived.

b. A cursory read of Connor's statement to Detective Sanchez overwhelmingly indicates that the information he was providing was rehearsed and scripted. (Ex. 24.)

c. Further, Connor's testimony was refuted by his time card at Don Knott Ford which reflected that he was at work at the time of the killings. [RT, 22: 4855-4860]

d. Connor testified that he was unaware of the reward in the Reco Wilson case at the time of his testimony therein, but this was refuted by the later testimony of Detective Sanchez that she placed a flier concerning the reward on his door after he had given a statement against Wilson and Mr. Allen. (Ex. 8, p. 401.)

e. Finally, according to Derek Battle, who testified in the prosecution of Reco Wilson, a case that Ms. Snyder was also involved in, Connor solicited him to support his testimony in exchange for splitting a reward. Further, Battle testified that he knew Connor was lying in the Reco Wilson case. [RT, 35:7074-7100]

420. The prosecution erroneously and prejudicially presented false testimony by Marcellus James who admitted on cross-examination that he actually did not hear Michael Allen make any admissions, a direct refutation of his testimony on direct examination. [RT, 18:4039-4047, 4043, 4069]

421. The prosecution engaged in a systematic and continuous plan to delay and prevent proper discovery of information ordered to be provided to defense counsel.

a. Defense counsel Orr formally moved for discovery on January 3, 1995. [CT, 1:219-230]

b. Defense counsel Orr filed a second motion on May 1, 1995. [CT, 2: 285-288]

c. Defense counsel filed a third discovery motion on September 11, 1995. [CT, 2:330-336]

d. The court ordered that all discovery be completed by December 15, 1995. [CT, 2:384]

e. On December 15, 1995, the court again ordered that "All discovery is to be turned over by January 5, 1996, unless there is a court order to the contrary," presumably referring to the sealed names of the grand jury witnesses that were not provided to the defense. [CT, 2:428]

f. On repeated occasions thereafter, the prosecution was ordered to produce all discovery and to comply with the court's orders (e.g. 2/8/96, 3/7/96). [CT, 3: 437-445]

g. On June 20, 1997, the identification of the sealed witnesses had still not been disclosed. [RT 801]

h. The trial started on July 23, 1997 and defense counsel Orr advised the court that he still did not know the names of all of the sealed and redacted witnesses. [CT, 3:695; RT 1793]

i. On August 1, 1997, the court ordered Ms. Snyder to turn over tapes not yet disclosed to defense counsel. [CT, 3:646]

j. Opening Statements were made on August 5, 1997. [CT, 4:780-781]

k. The prosecution failed to finish providing discovery until after commencement of trial on August 6, 2007, following the testimony of Carl Connor. [RT 3487] On such date, the court stated, "I'll make the order so it's unambiguous. We are in trial...All discoverable matters are to be turned over by the close of business today, regardless of orders that may have been made in other courts." [RT 3485]

l. The prosecution's continued failure to comply with discovery orders obviously inhibited Michael's defense.

422. The prosecution failed to find and produce a tape recording of Mr. Allen's custodial interrogation by Detectives Tapia, McCartin and Mathew conducted at Centinela State Prison on June 23, 1994. (Ex. 30; RT 217-218.)

423. The prosecution improperly made statements to the media that were read by the jury during the trial, thereby improperly coloring the guilt and penalty phase proceedings. (Ex. 13.)

a. During the guilt phase of trial, the prosecutor gave an interview to the LA Times regarding the case and the defendants. As a result of the interview, an article was published and Juror 11 read the article and was dismissed as a result. [RT, 18:3932-3969; Ex. 13.] Prosecutor Snyder did not want the juror to be replaced. [RT, 18:3950] The article and Snyder's involvement caused the dismissal of the juror. Such an action is blatantly improper.

b. Prosecutor Snyder gave other interviews to the media wherein she gave statements regarding the number of times she had attempted to prosecute members of the 89 Family Gang, the "60" killings the gang was responsible for, and claimed, "their m.o. is to intimidate and/or take out people who testify against not only their own members but [those of] affiliate gangs." (Ex. 13, pp. 522.) In a news article Allen's behavior was likened to a "scene straight out of mafia lore" in which Johnson sent Allen on a mission because he was just "recently released from youth authority." (Ex. 13, pp. 522.) These comments were made during trial and before the start of the penalty phase, thus having the obvious potential to poison the minds of the sitting jury. (RT 6821-6831.) As indicated above, jurors were reading these articles.

c. In other news articles, Snyder and members of the prosecution team boast about the efforts taken to conceal the identities of

witnesses from the defense because of the enormous danger posed by the defendants. (Ex. 13, p. 522-532.)

d. In news articles found in the LAPD files for this case, detectives including Mathew and DA Snyder noted the need to provide witness protection to witnesses including those in the Denise Jones murder case (in which Carl Connor testified). (Ex. 39.)

424. The prosecution improperly invoked the Bible, Ten-Commandments, prayer and admonition "thou shall not kill" in her cross-examination of Mr. Allen's mother and Johnson's mitigation witnesses. (RT 6763-6765, 6791-6792, 6667, 6678-6679.) A prosecutor's invocation of the Bible and Old-Testament laws is improper and has been clearly condemned by the California Supreme Court because "...such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107.)

425. The individual and cumulative effect of the prosecutor's misconduct as set forth in the foregoing paragraphs could not have been cured by objection and admonition of the trial court. The individual and cumulative effect of the misconduct alleged herein and in the earlier claims demonstrating the coerced, false nature of the prosecution's case and the prosecutor's repeated failure to disclose material favorable evidence,

prejudiced Petitioner and had a substantial and injurious influence on the jury's determination at the guilt and penalty phases of Petitioner's trial and deprived the proceedings of fundamental fairness.

426. To the extent that this Court concludes that trial counsel and/or appellate counsel failed to object to the various acts of misconduct and/or raise this challenge on appeal, despite the non-record facts presented in support of this claim, petitioner has been prejudicially deprived of effective assistance of counsel.

CLAIM EIGHT

SEVERAL INSTANCES OF UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL.

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and article 1, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination

based solely on record evidence and reason, not passion or prejudice by instances of juror misconduct in the course of the proceedings below.

There are well-established guidelines for juror conduct during trial -- guidelines contained in the jury instructions at every trial. Jurors may not prematurely discuss or decide a case prior to deliberations. Alternate jurors may not prematurely discuss the case with fellow jurors and may not be present during deliberations unless and until they are substituted for a sitting juror. Jurors must maintain an open mind throughout the deliberation process and may not adopt a rigid position at the outset of deliberations. It is misconduct for jurors to inject their own untested expert knowledge into the deliberations. By injecting his or her specialized knowledge of a matter into deliberations, a juror violates the defendant's Sixth Amendment right to confront and cross-examine witnesses and essentially becomes an unsworn witness at defendant's trial. Juror inattention or absence during the presentation of evidence or jury instructions is misconduct. Most importantly, jurors may not disregard the law or the court's instructions regarding the law. In particular, when instructed on the meaning of legal terms and concepts, as well as the limitations on the use of certain evidence, jurors must accept the definitions and explanations as offered to them by the court and must apply the law and use the evidence as set forth in the court's instructions.

Once misconduct is proven, prejudice is presumed. The presumption of prejudice is particularly strong in capital cases. The presumption is only rebutted by showing the allegations are false or establishing that there is no "substantial likelihood" that the misconduct "influenced . . . the vote of one or more of the jurors." (*People v. Marshall* (1990) 50 Cal.3d. 907, 950-51.)

Throughout the trial, the court repeatedly instructed the jury on their obligations and duties not to discuss the case with anyone apart from the other jurors during deliberations, to base their decisions only upon the evidence presented in the case, not to prejudge the case or determine the penalty before hearing all of the evidence to be presented. Despite these clear and emphatic admonitions, petitioner's jury failed to fulfill their obligation: (1) to fairly and impartially engage in deliberation, (2) to follow the court's instructions and deliberate using only the evidence which could properly be considered in making their decisions, (2) to avoid prejudging the case before the presentation of all evidence, (3) to avoid injecting their own untested specialized knowledge into the deliberation process, and (4) to avoid consideration of evidence extraneous to that presented at trial in making their determinations.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

427. Jurors #4 and #5 (the guilt foreman) met privately at the end of the fourth day of deliberations to discuss the behavior of juror #11. The following morning, the trial court described to counsel in chambers what had occurred:

> As the jury left at 4:00, the bailiff went to lock the room and there were two jurors left in the room. 4 and 5. [The jury] left at about 4:00 and it was probably about 4:10, or thereabouts, that [Jurors #4 and #5] were found back there. [RT, 26:5283-5384]

428. When the bailiff discovered them alone together in the jury room, they demanded an audience with the judge: "We want to see the judge. We need to see the judge." [RT, 26:5284] Even after the bailiff refused their request, directed them to put their concerns in a note and explained that it violated the court's rules requiring the presence of counsel at any such meeting, they continued to be demanding and insistent. [RT, 26:5284] "We don't want the lawyers. We want to talk to [the judge] now." [RT, 26:5284-5285]

429. When the bailiff continued to admonish them to put their concerns in writing, the jurors, including the foreman, further stated, "We don't have the courage to write it out. And if we don't deal with it today, we probably won't have the courage to deal with it tomorrow." [RT, 26:5285] The two jurors refused to leave a note, and ultimately the bailiff had to demand they leave. [RT, 26:5286]

430. The trial court individually questioned Juror #4 and Juror #5 (foreman) the next morning. Juror #5 told the court that he and Juror #4 had discussed their concerns about Juror #11 (previously an alternate) the previous day after the jury recessed. [RT, 16:5317-5318] He explained that while they remained in the jury room after the other jurors had left for the day, another of the jurors came in to get his badge and asked what they were doing. Juror #5 related that Juror #4 responded in an *untruthful* fashion; that they were *only* straightening up the jury room. [RT, 26:5319] In reality, Juror #5 and Juror #4 were discussing the nature of the deliberations, and specifically, the arguments of Juror #11.

431. Juror #5 described his meeting with Juror #4 and maintained that they did not discuss the facts of the case, the witnesses or the law. Juror #5 stated that because of the encounters Juror #4 had during deliberations with Juror #11, he "sensed" that she agreed with him about Juror #11. During a break in deliberations that day, he said he asked her if she felt the same way he did. When she said she did, they agreed that the situation should be brought to the court's attention, and they both agreed to remain after the jury left for the day in order to speak with the court. [RT, 26:5338-5339]

432. After Juror #5 was questioned by the court, counsel for co-defendant Johnson's counsel commented that:

> ... one of the court's instructions is that the matter not be discussed unless all jurors are present. It also appears that the foreman [Juror #5] and Juror #4 violated that order and engaged in juror misconduct ... by remaining in the jury room and continuing to have discussions about this case out of the presence of the other jurors." [RT, 16:5326-5327; see also 5330-5331]

433. Juror #4 was subsequently questioned by the trial court. She admitted that she and Juror #5 remained alone in the jury deliberation room the previous day, but she insisted that they did not discuss the facts of the case or the law. Rather, they discussed Juror #11, and what they perceived was his inappropriate conduct during deliberations. [RT, 26:5355-5356]

434. The defense argued that Jurors #5 and #4 should be removed for misconduct because they had violated the court's order to not discuss the case among themselves without all jurors present. Mr. Lasting articulated the defense position:

> It seems to me that what has happened here is that these 2 jurors were in the jury room. The foreman approached no. 4 and wanted to know if he thought there was a problem with deliberations and they forged at the break this tentative alliance in terms of how to attempt to get rid of a juror who disagreed with them in terms of the outcome of the case.
>
> They then hung back after the bailiff had directed the jurors to leave. They remained in the jury room to have a private, secret discussion in which they formed an alliance among themselves to the exclusion of the other jurors. And the other jurors were not present. [RT, 26:5441-5442]

435. Every person accused of criminal conduct has a federal and state constitution right to trial by a fair and impartial jury. (U.S. Const.

amends. VI, XIV; Cal.Const. art.I, §16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [88 S.Ct. 1444, 20 L.Ed.2d 491]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *People v. Diaz* (1984) 152 Cal.App.3d 926, 933 ["The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." In deliberating on questions of fact, the jury has the duty to follow the law in the trial court's instructions. (See Cal. Pen. Code, §1126.)

436. "To succeed [on a claim of jury misconduct], defendant must show misconduct on the part of a juror; if he does, prejudice is presumed; the state must then rebut the presumption or lose the verdict." (*People v. Marshall* (1990) 50 Cal.3d 907, 949.)

437. The facts illustrate the two jurors met privately and discussed the case. They knew that the position of Juror #11 was contrary to their position and met to remove Juror #11.

438. The jury was instructed with CALJIC 17.52, and in accordance with Penal Code sections 1121 and 1122, they were told that during periods of recess from deliberations "you must not discuss with anyone any subject connected with this trial and you must not deliberate further upon the case until all 12 of you are together and re-assembled in the jury room." [RT, 25:5096-5097] It is serious misconduct to violate this

duty. (See *In re Hitchings* (1993) 6 Cal.4th 97 [juror conversing with co-worker violates Pen. Code §1122 and constitutes serious misconduct.].)

439. The trial court acknowledged that Jurors #5 and #4 committed misconduct, but held their conduct was not grounds for dismissal. The court determined that the misconduct was harmless because the jurors were acting in good faith in discussing what to do about a juror who they believe had made up his mind about the case. [RT, 26:5446-5448]

440. Juror #3 provided the following additional information regarding the overt statements and behavior of Juror #5 and other jurors:

a. During both the guilt and penalty phase deliberations, Juror #3 held out until Juror #5 (the foreman) and others became visibly frustrated with her and finally convinced her to change her vote. (Ex. 44.)

b. Juror #5 specifically requested the readback of Freddie Jelk's testimony to convince Juror #3 to vote for guilt. (Ex. 44.)

c. According to Juror #3, Juror #5 visibly acted as if he was in charge of the room during deliberations and professed to be knowledgeable about the jury process. (Ex. 44.)

d. Juror #5 acted as though he was disgusted with Juror #3 because she had a hard time voting for death as to Mr. Allen. (Ex. 44.)

e. The jury openly discussed the idea that if the defendants were just sent to prison, they could continue their behavior of giving orders and carrying out crime from behind bars. (Ex. 44.)

f. In an effort to put pressure on Juror #3 to vote for death, Juror #5 continually stated openly in the jury room that the evidence showed that both defendants had the ability to continue ordering crimes and violence from behind bars. Juror #5 also stated openly on repeated occasions that he knew that when the deliberations were over, the jury would find out all of the other things the defendants did wrong and therefore they could feel okay about their votes for guilt and death. (Ex. 44.)

441. The clear coercion of Juror #3 and potentially other jurors by Juror #5 including the use of prior experiences, alleged personal expertise, and the false information that additional details concerning the defendants' acts would be made available after the deliberations, exemplifies clear misconduct and supports defense counsel's request at trial to dismiss Jurors #4 and #5.

442. It is clear that Juror #5 and other jurors relied on information and experiences not presented as evidence during trial and therefore not properly the subject of deliberations. Juror #5 held himself out to be an expert and coerced Juror #3 and potentially other jurors into voting for guilt and death by use of false statements and suggestions concerning evidence

not admitted. It is also clear that the original Juror #11 reviewed media information that was likely also reviewed by other jurors. (Ex. 44.)

443. Juror # 1's ex-wife opined that her former husband was very stressed and drinking heavily while seated as a juror in this case, openly talked about the case, and once discussed it with the police who were summoned to the house by her (juror's wife) during the time of the trial because he was drunk. (Ex. 44.)

444. Evidence Code Section 1150, subdivision (a) provides that: Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

445. It is settled that jurors are competent to prove "objective facts" under this provision. Thus, jurors may testify to "overt acts" — that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration."

446. Among the overt acts that are admissible and to which jurors are competent to testify are physical acts, the influence of improper outside forces and express statements the very making of which would itself

constitute misconduct. This would include a juror's statement that he considered the defendant's failure to testify, a declaration regarding a juror's erroneous legal advice to the rest of the jurors, a statement of undue pressure, or a statement of racial bias. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398, *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 410; *People v. Honeycutt* (1977) 20 Cal.3d 150, 154-158.)

447. Here, evidence of multiple acts of jury misconduct under the above areas is clear and reversal is mandated. This plethora of juror misconduct creates an irrefutable presumption of prejudice because the multiple instances of juror misconduct completely eviscerated petitioner's fundamental right to a fair trial compelling reversal.

CLAIM NINE

SEVERAL INSTANCES OF UNCONSTITUTIONAL AND PREJUDICIAL JUDICIAL MISCONDUCT OCCURRED DURING TRIAL.

The convictions and sentence of death were rendered in violation of petitioner's rights to fair, reliable, and rational determinations of guilt and penalty, an individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial,

relevant record evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to conviction beyond a reasonable doubt, to due process and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the trial court engaged in a pervasive, improper, and consistent pattern of misconduct that prejudicially deprived petitioner of the foregoing constitutional rights. The constitutional error is both clear and fundamental and strikes at the heart of the trial process.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

448. Judge Horan provided a beneficial sentence to testifying witness Freddie Jelks in a murder trial trailing this matter.

a. Trailing this case also before Judge Horan and also prosecuted by Jennifer Snyder, was the case of *People v. Cleamon Johnson and Freddie Jelks* (BA108967), also a death penalty case. (Ex. 11.) Johnson was a co-defendant in both this matter and the trialing matter.

b. The trailing matter was discussed extensively by the court and counsel in this matter to determine what limits would be placed on the cross-examination of Freddie Jelks. [RT, 16:3583] Judge Horan was well aware of the importance of Jelks' testimony in this case and potentially the trailing case. [RT, 16:3583-88]

c. During a discussion regarding the limitations on cross-examination of Jelks, Prosecutor Snyder stated that she told Jelks that "his case would be presented to the D.A.'s office and they would tell the D.A. that he was -- that he was a cooperative witness, et cetera, et cetera." [RT, 16:3588]

d. Later, Snyder also stated that after the police told Jelks they had evidence against him in the trailing matter, "he does give himself up and give up the other people that were involved in that particular case." [RT, 16:3589]

e. It was stated on the record that Jelks was a "cooperative witness" in both matters. [RT, 16:3588]

f. As challenged in Appellant's Opening Brief Issue IV, Judge Horan precluded the defense from inquiring at trial regarding the details of his pending murder case. (See Appellant's Opening Brief pages 185-189.) As a result, Jelks was allowed to testify that he was only testifying out of a desire to change the neighborhood, received and expected no benefit, and did not have a disposition on the trailing matter as

of the date he testified. [RT, 16 3514, 3628, 3638, 3727, 3748.] Jelks further testified that he was facing a lot of time in prison on the pending case and even possibly a life sentence. (RT 3628.) Judge Horan and Johnson defense counsel Lasting both noted that Jelks was facing a life sentence in the trailing matter. [RT, 16: 3606, 3609.]

g. Because of Judge Horan's ruling, Jelks testified repeatedly that nothing was promised to him in this matter or in the trailing matter and was only testifying as a "good citizen." [RT, 16: 3515, 3628, 3638]

h. In reality, Jelks did receive a benefit, in part from Judge Horan.

i. On May 11, 1998, in the trailing Johnson/Jelks matter, rather than a life sentence, Jelks received the low-term of three years plus an additional one-year enhancement. The result was that he was released from the court-room on that day based on his time served and the low sentence approved and awarded by Prosecutor Snyder and Judge Horan.

j. Jelks was released on the low-term time served sentence, in the words of Judge Horan, because of the danger to him, his lack of a serious prior criminal record, his efforts toward rehabilitation and most notably, "**his cooperation and giving truthful testimony in a prior trial in this [Horan's] courtroom.**" [Ex. 11, p. 503.] (Emphasis added.)

k. Clearly, the above lenient sentence was afforded Jelks because of his testimony in the instant case and Judge Horan's participation in both trials and awarding of a low-term sentence based on testimony in the prior trial was clearly a conflict of interest and judicial misconduct.

449. Those facts and allegations set forth in Appellant's Opening Brief Issues IV, XI and XX are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

450. The above instances of judicial misconduct create a presumption of prejudice that the State would be hard-pressed to rebut and completely eviscerated petitioner's fundamental right to a fair trial. This judicial misconduct raises an irrefutable presumption of prejudice, requiring a grant of relief.

CLAIM TEN

PETITIONER WAS DEPRIVED OF HIS RIGHT TO A JURY DETERMINATION OF FACTS NECESSARY TO SENTENCE HIM TO DEATH BECAUSE OF THE REPEATED DENIALS OF HIS REQUEST FOR SEVERANCE AND SEPARATE JURIES

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to trial by jury, due process, to be free of arbitrary and

capricious sentencing, effective assistance of counsel, an individualized sentencing proceeding, be free of cruel and unusual punishment, equal protection of the laws, the presumption of innocence, and a fair and impartial jury because Petitioner's jurors were forced to consider the penalty issues of Allen and Johnson together.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

451. Those facts and allegations set forth in Appellant's Opening Brief Issues XVI and XXI are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

452. When evidence admitted against a co-defendant is voluminous and extremely inflammatory, there exists a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (*People v. Garceau* (1993) 6 Cal.4th 140 ; *Zafiro v. United States* (1993) 506 U.S. 534, 544 [113 S.Ct. 933, 122 L.Ed.2d 317] (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt".) If a jury *wants* strongly enough to convict the defendant because of its hatred of the defendant's gang and the repugnant lifestyle it

represents, jurors will overlook any weakness in the prosecution's case because of their intense desire to punish the defendant because of his gang affiliation. In effect, the jurors' hatred toward the accused's life style will "fill in the gaps" in the prosecution and the accused may be convicted because of his status as a gang member, and not because of a crime he committed.

453. Under the well-established tenets of Eighth and Fourteenth Amendment law and under California law, Michael was entitled to have evidence of the co-defendant's bad acts excluded from consideration by the jury deciding whether Michael should be sentenced to death. (*People v. Boyd* (1985) 38 Cal.3d 762, 773; *Woodson v. North Carolina* (1976) 428 U.S. 153, 280, 305 [96 S.Ct. 2909, 49 L.Ed.2d 859] [the jury must focus on the defendant as a "uniquely individual human being"].) In a joint penalty phase trial, the judge must be careful to assure that evidence in mitigation or aggravation relevant to one defendant does not unduly prejudice the other defendant. The Eighth and Fourteenth Amendments to the federal Constitution require no less.

454. Further, as the United States Supreme Court noted in *Satterwhite v. Texas* (1988) 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284], "[t]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the sentencer." (*Id.* at 258.)

455. On repeated occasions, the attorneys moved for severance and separate juries. On August 26, 1996, Mr. Allen's "Motion to Sever Defendants" and "Motion for Separate Juries" was filed with the court. [CT, 3:470-482] The prosecution filed its response on November 4, 1996. [CT, 3:487-92] The following day (November 5, 1996) the court denied the "Motion to Sever Defendants" and "Motion for Separate Juries". [CT, 3:493; RT, 4:993] On August 11, 1997, Petitioner renewed his Motion to Sever based on *Aranda/Bruton* grounds prior to witness Donnie Ray Adams testifying. The motion was denied. [RT, 18:3932, 4038]

456. Given the highly damaging and inflammatory nature of the evidence introduced against the co-defendant, plus the prosecution's continued exhortation that Johnson was the shotcaller and others, including Allen, would do his bidding, the brief instruction by the trial court to consider the evidence separately as to each defendant was insufficient to overcome the prejudice resulting from the joinder of the penalty phase trials.

457. In additional to the arguments and facts set forth in appellant's opening brief supporting severance and separate juries, Petitioner alleges the following:

458. Juror #3 stated that the jury openly discussed on repeated occasions that evidence was presented that if both defendants did not

receive the death penalty, they could both continue their behavior of giving orders and carrying out crime from behind bars. (Ex. 44.)

459. Juror #5 put pressure on Juror #3 to vote for death as to Mr. Allen by continually stating that the evidence showed that the defendants had the ability to continue ordering crimes and violence from behind bars. (Ex. 44.)

460. No evidence was presented to suggest that Mr. Allen, at any time, ordered any crimes or any violence while either outside of confinement or in prison. All of the evidence presented as to orders of violence and control from within prison was offered only against Mr. Johnson. Clearly the errant use of this information against Mr. Allen occurred as a result of the denial of the severance requests.

461. Original Juror #11 was dismissed for reading a newspaper article. She stated "When I was seated as a juror Johnson was frightening because of his father, relatives and friends were in the courtroom and they didn't look like people you would want to mess [sic] with. Johnson consistently would stare at me and other jurors which was scary in itself. I was happy to get off the jury because I was afraid and didn't feel comfortable." (Ex. 42, p. 1049.)

462. Clearly the presence of Johnson and his family during the trial negatively impacted the jury's feelings of security in the courtroom and prejudiced Mr. Allen during the guilt and penalty phase deliberations.

463. For all the above reasons, relief must be granted.

CLAIM ELEVEN

PETITIONER WAS DEPRIVED OF HIS RIGHT TO A JURY DETERMINATION OF FACTS NECESSARY TO SENTENCE HIM TO DEATH

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to trial by jury, due process, to be free of arbitrary and capricious sentencing, effective assistance of counsel, an individualized sentencing proceeding, be free of cruel and unusual punishment, equal protection of the laws, the presumption of innocence, and a fair and impartial jury because petitioner's jurors were not instructed that all aggravating factors must be proven beyond a reasonable doubt, that aggravation must be found to outweigh mitigation beyond a reasonable doubt, that death must be found to be the appropriate penalty beyond a reasonable doubt and that they must unanimously agree on the circumstances in aggravation that supported their verdict.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

464. Those facts and allegations set forth in Claims 1, 2, and 3 of this petition and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

465. In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code § 190.3.) The jury must find the presence of one or more aggravating factors before the process of weighing aggravating factors against mitigating factors can begin.

466. In Michael's case, the trial court told the jury that there was no burden of proof during the penalty phase, that the determination of the appropriate penalty was a question of each individual juror based on aggravation and mitigation, that it could be guided by the factors listed in CALJIC 8.85, and that it was for the jury to consider the balance of the aggravating and mitigating factors. [CT, 5:1054, 1055, 1066; CALJIC 8.84.2, 8.85, 8.88] The court further rejected a series of defense requested instructions defining and additionally detailing the impact of potential mitigation on the decision of the jury. [CT, 5:1069-1080]

467. The trial court failed to require the jury to find unanimously the existence of an aggravating factor beyond a reasonable doubt[8] and simply instructed Michael's jury that the aggravating circumstances had to outweigh the mitigating to impose the sentence of death.

468. The trial court did not require the jury to find beyond the reasonable doubt that the aggravating factors outweigh the mitigating factors.

469. The trial court also failed to require the jury to find that death is the appropriate punishment beyond a reasonable doubt.

470. Recent United States Supreme Court authority undercuts the continuing vitality of California's current death penalty scheme with respect to sentencing procedures and determinations. In a trilogy of recent decisions - *Jones v. United States*, 526 U.S. 227 (1999) [119 S.Ct. 1215, 143 L.Ed.2d 311], *Apprendi v. New Jersey* (2000) 530 U.S. 466 (2000) [120 S.Ct. 2348, 147 L.Ed.2d 435] , and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428, 153 L.Ed.2d 556] - the United States Supreme Court demonstrated that the California death penalty scheme is unconstitutional because it does not assign to the prosecution the burden of proof beyond a reasonable doubt.

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[8] Except for Pen. Code, § 190.3(b), prior violent criminal activity, which was the only aggravating factor under California law that the jury was required to find beyond a reasonable doubt.

471. The Constitution requires the application of the reasonable-doubt standard in the penalty phase of a capital case as evidenced by the series of Supreme Court cases that began with *Jones v. United States, supra.*.

472. In *Jones*, the Court held that under the due process clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. *Jones v. United States, supra,* 526 U.S. at 243 n. 6.

473. In *Apprendi v. New Jersey*, the Court applied *Jones* to a state statutory scheme. *Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second-degree unlawful possession of a firearm. A related hate crimes statute allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. The New Jersey statute required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra,* 530 U.S. at 471-72.)

474. The United States Supreme Court found that sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey, supra*, 530 U.S. at 471-72.)

475. In *Ring*, the Court applied *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at 606.)

476. It considered Arizona's capital sentencing scheme, in which the jury determines guilt, but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. (*Ibid.*)

477. The Court concluded that *Apprendi* was fully applicable to all factual findings "necessary to . . . put [a defendant] to death," regardless of whether those findings are labeled "sentencing factors" or "elements" and whether made at the guilt or the penalty phase of trial. (*Ring v. Arizona, supra*, 536 U.S. at 609.)

478. The Court opined that: "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

479. Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first-degree murder with special circumstances.

480. Although a finding of a special circumstance, in addition to a conviction of first-degree murder, carries a maximum sentence of death (Pen. Code § 190.2), neither a judge nor a jury may impose such a sentence based solely on the guilt phase findings.

481. That statute "authorizes a maximum penalty of death only in a formal sense." *Ring v. Arizona, supra*, 536 U.S. at 604 (emphasis added) (quoting *Apprendi v. New Jersey, supra*, 530 U.S. at 541 (O'Connor, J. dissenting).)

482. In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors. (Cal. Pen. Code § 190.3.) These two additional factual matters are prerequisites to imposing a death sentence and it is this fact-finding that triggers *Apprendi*: these findings are

"essential to the imposition of the level of punishment that the defendant receives" – they increase the punishment beyond "that authorized by the jury's guilty verdict." (*Apprendi v. New Jersey, supra*, 530 U.S. at 541.)

483. The Supreme Court's intervening decision in 2002, in *Ring v. Arizona*, which overruled *Walton v. Arizona* (1990) 497 U.S. 639 (1990) [110 S.C. 3047, 111 L.Ed.2d 511], requires that California follow *Apprendi* in penalty phase determinations. The California Supreme Court's determination, made in reliance on *Walton*, that the jury's role as fact-finder is complete upon the finding of a special circumstance, is no longer tenable. California has failed to follow *Apprendi* and apply the reasonable doubt standard to penalty phase determinations. Both *Apprendi* and consistent application of Federal and California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

484. The trial court's failure to require a finding beyond a reasonable doubt as to the existence of any and all aggravating factors render petitioner's death sentence constitutionally infirm thus mandating a reversal and the imposition of a life sentence.

485. The trilogy of High Court cases renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*Apprendi v. New Jersey, supra*, 530 U.S. at 494.)

486. In California, the entitlement to impose a death sentence includes a "factual assessment" that the aggravating circumstances exist and outweigh the mitigating circumstances. If these factual assessments are resolved in favor of the defendant, he is ineligible for death consideration. (See Pen. Code § 190.3 ["the jury "shall impose" a sentence of confinement in state prison for a term of life without possibility of parole if mitigating circumstances outweigh aggravating circumstances]; see also *Boyde v. California, supra,* 494 U.S. at 377.)

487. Whether the weighing assessment is labeled an enhancement, eligibility determination or balancing test, *Ring, Apprendi,* and *In re Winship,* 397 U.S. 358 (1970) [90 S.Ct. 1068, 25 L.Ed.2d 368], require that this most critical factual assessment be made beyond a reasonable doubt.

488. The trial court's failure to require a finding beyond a reasonable doubt that death is the appropriate sentence renders Michael's sentence constitutionally void. The death sentence must be vacated and a life sentence imposed.

489. Michael's sentence must be reversed because the trial court failed to require a unanimous jury finding on facts necessary to imposition of a death verdict. *Apprendi* and *Ring* confirm that jury unanimity is required before a particular circumstance can be considered in aggravation at a capital trial.

490. The jurors were not instructed that their findings as to any of the aggravating circumstances were required to be unanimous.

491. The court even failed to require that a majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. As a result, the jurors in this case were not required to deliberate on critical factual issues. The failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner and slanted the sentencing process in favor of execution in violation of petitioner's right to a fair trial, a reliable and fair jury determination of penalty, and due process. [CT, 5: 1066-1067.]

492. A unanimity requirement is an integral element of the reasonable doubt standard that *Apprendi* and *Ring* hold is applicable to penalty phase findings essential to imposition of a death sentence.

493. The California Supreme Court's holdings that no unanimity is required is no longer valid. In overruling *Walton*, the United States Supreme Court has voided the California Supreme Court's ruling in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.

494. The failure to require unanimous -- or even majority agreement regarding aggravating circumstances undermines the reasonable doubt standard by vitiating the deliberative function of the jury, which guards against unreliable factual determinations.

495. The right to a unanimous jury verdict whenever facts are required to be found by a jury has deep roots in California law. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." If the United States Constitution, as interpreted in *Ring*, requires that a fact or set of facts be found by a jury, then California law requires that such finding be made by a unanimous jury.

496. The equal protection clause of the Fourteenth Amendment requires a unanimous verdict regarding aggravating circumstances. The failure to require that the jury unanimously, or even by a majority, find the aggravating factors true also stands in stark contrast to rules applicable in California to non-capital cases. California law requires a unanimous finding in all other contexts in which a jury is entrusted to determine a defendant's alleged criminal activity, including criminal conduct alleged to establish noncapital sentencing enhancements. Adoption of precisely the opposite approach in capital cases flies in the face of the United States Supreme Court's mandate that procedural protections afforded capital defendants must be more rigorous than those provided non-capital defendants and in petitioner's case, singles him out for less procedural protection than other individuals not charged with a capital offense.

497. The failure to impose a reasonable doubt standard and require unanimity as to penalty phase determinations is structural error that is not subject to harmless error analysis.

498. Similar to other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error here infected the very structure in which the capital sentencing proceeds and can never be harmless. (*Cage v. Louisiana* (1990) 498 U.S. 39 [111 S.Ct. 328, 112 L.Ed.2d 339].).

499. The failure to properly instruct on unanimity and the burden of proof is a structural error "without which [the penalty trial] cannot not serve its function." (*Sullivan v. Louisiana*, (1993) 508 U.S. 275, 281 [90 S.Ct. 1068, 25 L.Ed.2d 368].) It is, therefore, reversible per se.

500. Michael's penalty phase jury was instructed in accordance with California Penal Code section 190.3 that it "shall" consider and be guided by the presence of enumerated factors, including, "the circumstances of the crime of which the defendant was convicted." [CT. 5:1055]

501. To the extent this Court or respondent deems this issue to have merit, but to be one properly asserted on appeal, appellate counsel's failure to raise the issue on direct appeal would qualify as ineffective assistance of appellate counsel and Petitioner requests that this Court review the issue on the merits as a result thereof. Appellate counsel's

actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced petitioner.

CLAIM TWELVE

MR. ALLEN'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HIS DEATH SENTENCE WAS BASED ON INACCURATE AND UNRELIABLE EVIDENCE AND IS A DISPROPORTIONATE PUNISHMENT.

Mr. Allen incorporates by reference herein all facts, exhibits and claims of constitutional violations alleged elsewhere in this petition, and further incorporates the exhibits and declarations mentioned herein.

The convictions and sentence of death were imposed in violation of Mr. Allen's rights as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his statutory rights under the laws of the state of California, and international laws as set forth in treaties and judicial decisions, because he convictions and sentence were based on inaccurate and unreliable evidence, misleading argument, and are disproportionate to Mr. Allen's culpability.

The errors in this claim violate Mr. Allen's rights as set forth in the following cases (among others): *Jones v. United States, supra,* 527 U.S. at 373; *Johnson v. Mississippi* (1988) 486 U.S. 578 [108 S.Ct. 1981, 100 L.Ed.2d 575]; *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231]; *Ake v. Oklahoma* (1985) 470 U.S. 68 [105 S.Ct. 1087, 84

L.Ed.2d 53]; *Eddings v. Oklahoma, supra,* 455 U.S. at 104 ; *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393]; and *Woodson v. North Carolina, supra,* 428 U.S. at 280.

Mr. Allen alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to the Court's subpoena power, adequate funding, and a hearing on the merits of the claim:

502. The United States Supreme Court has repeatedly condemned sentencing procedures that inject unreliability into jury deliberations in capital cases. Under the Eighth Amendment to the United States Constitution, a criminal sentence must be proportionate to the crime the defendant committed. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at 578; *Caldwell v. Mississippi, supra,* 472 U.S. at 320; *Gardner v. Florida, supra,* 430 U.S. at 329 ; and *Woodson v. North Carolina, supra,* 428 U.S. at 280.)

503. The penalty of death is unique in its severity and finality. The United States Constitution therefore requires individualized sentencing in a capital case, which considers the character of the individual defendant as an "indispensible part of the process of inflicting the penalty of death." (*Woodson v. North Carolina, supra,* 428 U.S. at 304.)

504. The death sentence imposed on Mr. Allen is unconstitutional because it was not based on an individualized determination of his death

worthiness and was based on inaccurate, incomplete, and unreliable evidence. The jury's determination that Mr. Allen was deserving of the death penalty was based on incomplete, inaccurate, and unreliable evidence as the result of the failure of trial counsel to investigate, develop and present critical mitigating evidence or challenge the aggravating evidence, ambiguous instructions, and prosecutorial misconduct. The sentence of death was therefore imposed on Mr. Allen in violation of his right to a reliable sentence under the Eighth and Fourteenth Amendments.

505. Sentencing is a critical state of the proceedings at which a defendant is constitutionally guaranteed the right to effective assistance of counsel. (*Gardner v. Florida*, *supra*, 430 U.S. at 358; *In re Perez* (1966) 65 Cal.2d 224, 229-230.) In general, trial counsel is under a duty to ascertain that the sentence is based on complete and accurate information. (*People v. Cropper* (1979) 89 Cal.App.3d 716, 719; *People v. Vaielli* (1971) 15 Cal.App.3d 54, 62.)

506. Because the death penalty is qualitatively different from any other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.).) "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." (*Ake v. Oklahoma*, *supra*, 470 U.S. at 87

(Burger, C.J., concurring.).) "Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the person sentenced to be executed is afforded due process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (*Eddings v. Oklahoma, supra,* 455 U.S. at 117-118 (O'Connor, J., concurring.).)

507. As detailed in Claims 1, 2 and 3 of this petition, Mr. Allen's trial counsel failed to investigate, develop, and present evidence relevant to both the guilt and penalty phases of his trial. In addition to violating Mr. Allen's Sixth and Fourteenth Amendment rights to counsel, trial counsel's deficient investigation, development, and presentation of mitigating evidence infringed upon Mr. Allen's Eighth and Fourteenth Amendment rights to an individualized and reliable capital-sentencing determination. (See *Jones v. United States, supra,* 527 U.S. at 381; *Woodson v. North Carolina, supra,* 428 U.S. at 304-305.)

508. The person whom the jury believed it was sentencing to death bore little resemblance to Mr. Allen.

509. As set forth at length in Claims 1, 2, and 3 of this petition, the evidence presented to the jury did not adequately convey to the jury the traumas and stressors that Mr. Allen faced throughout his childhood, adolescence and young adulthood, nor the lack any protective factors in his

raising. The defense presented essentially no mitigation, when substantial mitigation was available had they properly investigated and prepared for the penalty phase of trial.

510. No qualified experts or social historians testified as to the physical, mental, cultural and economic person that was and is Mr. Allen. Instead, the jury heard stray fragments about Mr. Allen's life mostly from his mother -- who clearly was not an expert and was in fact a flawed and incomplete historian.

511. The death sentence that the jury recommended for Mr. Allen was thus disproportionate to his moral culpability. Reasonably competent counsel would have investigated, developed and presented evidence that would have convinced the jury as such.

512. Mr. Allen incorporated by reference the factual statements and exhibits in support thereof set forth in Claims 1, 2 and 3 of this petition that make clear that trial counsel's failure to investigate, develop and present mitigating evidence infringed upon Mr. Allen's Eighth and Fourteenth Amendment rights to a reliable and individualized capital-sentencing determination, and Mr. Allen's death judgment must be vacated.

CLAIM THIRTEEN

MR. ALLEN'S CONSITITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION HAVE BEEN VIOLATED BY THE DISPARITY IN RESOURCES BETWEEN PRIVATE APPOINTED COUNSEL AND AGENCIES APPOINTED TO REPRESENT CAPITAL DEFENDANTS IN POST-CONVICTION PROCEEDINGS AND BY THE DIFFERENCES IN PROCEDURES ON HABEAS CORPUS AND NON-CAPITAL DEFENDANTS.

Mr. Allen is deprived of the equal protection of law in violation of the Fourteenth Amendment and the effective assistance of counsel under the Sixth and Fourteenth Amendments because a private attorney has been appointed to prepare his petition for writ of habeas corpus. Similarly-situated condemned prisoners who are represented by the Habeas Corpus Resource Center or the Office of the State Public Defender have more resources devoted to their cases.

513. Private attorneys such as the one representing Mr. Allen in this petition have limits on their fees for investigation and writing of the petition. In addition, private attorneys were previously limited to a cap of $25,000 in expenses for experts and investigation. This cap was raised to $50,000 on January 1, 2008, but is still limited. (Gov. Code 6866, subd. (b); Supreme Court Guidelines for Fixed Fee Appointments, On Optional Basis to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court.) Attorneys at the Habeas Corpus Resource

Center and the Office of the State Public Defender have no such limitations.

514. The prior sum of $25,000 is completely inadequate for post-conviction investigation and development of this case. Even the $50,000 sum that this Court now authorizes for cases effective January 1, 2008, is not adequate to conduct the investigation and expert consultation warranted in this case. Moreover, the change in the financing scheme that was instituted at virtually the time Mr. Allen's petition was due (under this Court's presumptively-timely-filed rule) denies him due process, because his counsel's investigation decisions and capacities would have been much different had he known, at the beginning of habeas investigation three years ago, that the investigation costs allowance would be $50,000.

515. Further, Mr. Allen is also denied due process and equal protection by this Court's policy which required habeas counsel to agree to a fixed-fee payment for services at the outset of appointment. Because such an agreement was based on the circumstances of the case as counsel understood them at the time – essentially, before beginning one bit of investigation – it did not account adequately for information acquired through the investigation process that revealed the case was much more labor-intensive than anticipated. The alternative to this fixed fee arrangement would have been accepting the case on an hourly-fee basis. However, the limits placed on hours for which this Court will compensate

counsel for preparation of the petition is 500 hours -- an amount of time completely inadequate for the preparation of a case of this complexity. Attorneys working at the Habeas Corpus Resource Center and the Office of the State Public Defender are not subjected to such limitations, nor therefore does their representation of their clients commensurately suffer. This is all the more true because this Court is now willing to award Mr. Allen an additional $25,000 worth of costs with which to work -- for which counsel apparently (under the fixed fee agreement) will not be paid for any additional hours of work to conduct this investigation.

516. Mr. Allen is also deprived of equal protection of the laws because his appeal and petition for a writ of habeas corpus go only to the California Supreme Court. A defendant sentenced to life without the possibility of parole for the same crimes has three courts of original jurisdiction, and the potential for three different courts to consider his petition for a writ of habeas corpus. An appellant sentenced to life without the possibility of parole also has two forums for an appeal -- a Court of Appeal, and this Court for a petition for review.

517. Mr. Allen and all other condemned prisoners are prejudiced because their post-conviction challenges only go to one court -- the California Supreme Court, which clearly is more vulnerable to political pressure than other appellate courts (as evidenced by three members of the Rose Bird Court being voted out of office based on their death penalty

reversals). Mr. Allen is also prejudiced by review in this single Court only, because its appointments are more politically-based than appointment made to other appellate courts.

518. Mr. Allen's rights to equal protection are also being violated by the imposition of a deadline for filing a petition for writ of habeas corpus in a capital case. Having to file a petition within three years from the date of his attorney's appointment deprives Mr. Allen of equal protection of the laws because a prisoner sentenced to life without the possibility of parole has no such deadline restriction. Instead, those defendants have an amount of time that is reasonably necessary to investigate, develop, and write the petition. This deprivation is particularly prejudicial because those who have been sentenced to death need the most time to investigate and file such a petition.

519. The three-year filing deadline also deprives Mr. Allen of substantive due process because it is arbitrary and capricious and there is no rational reason, aside from apparent administrative convenience, to impose such a filing deadline on a condemned prisoner (especially when not imposed on non-capital prisoners). Counsel for Mr. Allen would have applied for extension of time to file this petition if the Court recognized such a procedure. But it does not.

520. Furthermore, Mr. Allen is deprived of due process in violation of the Fourteenth Amendment by this Court's review and

limitation on the resources sought by the attorneys who prepare the petition. A conflict exists in all cases -- including Mr. Allen's -- where private counsel must make application for funds to the same court that rules upon the petition itself. This conflict is avoided in the trial courts by having one judge hear the case, and other judge control the funding pursuant to Pen. Code § 987.9.

521. For the above stated reasons, Mr. Allen's constitutional rights have been violated and reversal is required.

CLAIM FOURTEEN

MR. ALLEN'S CONSTITUTIONAL RIGHTS ARE BEING VIOLATED BY THE CALIFORNIA SCHEME OF UNIFIED AND SIMULTANEOUS REVIEW IN CAPITAL CASES, WHICH ITSELF VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

Mr. Allen's convictions and sentence of death were imposed in violation of Mr. Allen's rights as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, analogous provisions of the California Constitution, his statutory rights under the laws of the state of California, and international laws as set forth in treaties and judicial decisions,. because of trial counsel's ineffective assistance at Mr. Allen's capital trial because California's system of unified and simultaneous review of Mr. Allen's case effectively prevents

Mr. Allen from raising claims of ineffective assistance of counsel on appeal, resulting in the prejudicial violation of Mr. Allen's constitutional rights.

Mr. Allen alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim:

522. Mr. Allen incorporates by reference herein all facts, exhibits and claims of constitutional violations alleged elsewhere in this petition, and further incorporates the exhibits and declarations mentioned herein.

523. The errors set forth in this claim violated Mr. Allen's constitutional rights as set forth in, among other cases, *Smith v. Robbins* (2000) 528 U.S. 259 [120 S.Ct. 746, 145 L.Ed.2d 756]; *Evitts v. Lucey* (1985) 469 U.S. 387 [105 S.Ct. 830, 83 L.Ed.2d 821]; *Douglas v. California* (1963) 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811]; and *Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175].

524. Mr. Allen has a statutory duty and a constitutional right to appeal his convictions and death sentence. (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139, following *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834.)

525. In a criminal defendant's case, the defendant's right to assistance of counsel derives from the Sixth and Fourteenth Amendments to

the United States Constitution, and article I, section 15 of the California Constitution. Where an indigent defendant has a statutory right to appeal, he or she has a constitutional right, under the due process and equal protection of the law provisions of the Fourteenth Amendment, to court-appointed counsel. (*In re Smith* (1970) 3 Cal.3d 192; *Evitts v. Lucey*, *supra*, 469 U.S. at 387; *Smith v. Robbins*, *supra*, 528 U.S. at 259.)

526. This Court requires that ineffective assistance of counsel claims - including claims of ineffective assistance on appeal - be filed in a habeas petition. (*People v. Tello* (1997) 15 Cal.4th 264, 266-267.)

527. In this capital case, to be presumed timely, the habeas petition must be filed while Mr. Allen's appeal is still pending and before an opinion has been issued by this Court. While this Court appears to maintain that there is not an actual due date for the filing of the habeas petition, in practice, the petition is indeed "due" within the set time periods, because a timeliness default may apply if the petition is filed after the 180 day or thirty-six month period has expired. A defendant who files an untimely petition risks losing his claims to relief.

528. Ineffective assistance of appellate counsel claims, however, do not arise and are not discoverable until after this Court has decided the appeal. Thus, there is not appropriate time under the California scheme of capital case review to raise claims of ineffective assistance of appellate counsel.

529. As a result, the California scheme of capital case review violates the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and the parallel provisions of the California Constitution. Mr. Allen's convictions and sentence of death must therefore be reversed.

CLAIM FIFTEEN

PETITIONER'S PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH AND HIS EXECUTION FOLLOWING SUCH CONFINEMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Petitioner's confinement is unlawful in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, and international law, covenants, treaties and norms because of his lengthy confinement under sentence of death (now over 10 years) and because his execution after such prolonged confinement would constitute cruel and unusual punishment. Both the mechanism for execution in California and carrying out petitioner's death sentence after the inordinate delay described in this claim would violate the Eighth and Fourteenth Amendments because confinement of petitioner under a sentence of death for this extremely prolonged period of time and the means of execution constitute cruel and unusual punishment

in that it subjects petitioner to extraordinary psychological duress as well as the severe physical and social restrictions that inure in life on death row, and because execution of petitioner so long after his conviction and judgment of death would be excessive, since the penalty would no longer serve the penological purposes of either deterrence or retribution, which are the only legitimate and constitutionally recognized justifications for capital punishment.

The errors set forth in this claim violated petitioner's constitutional rights as set forth in, among other cases, *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] and *Gregg v. Georgia, supra,* 428 U.S. at 153.

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim:

530. On December 12, 1997, Mr. Allen's Motion for a New Trial was heard and denied. The automatic Motion for Modification of the Verdict was denied. The court imposed the judgment of death as to Mr. Allen and advised him of his appeal rights. [CT, 5:1174-8, 1180-1197]

531. Mr. Allen's Notice of Automatic Appeal was filed with the Supreme Court per Penal Code section 190.6 on December 31, 1997. The opening brief in Mr. Allen's Automatic Appeal was filed in this Court on

January, 25, 2005. The Attorney General's Respondent's Brief was filed in this Court on March 24, 2006. Mr. Allen's Reply Brief was filed in this Court on December 26, 2006.

532. On April 13, 2005, Counsel Stephen S. Buckley was appointed for habeas corpus proceedings in this Court. Mr. Allen's habeas petition is being filed the week of April 7, 2008, prior to the presumptive timely filing date of April 13, 2008.

533. Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row; accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

534. The psychological torment of awaiting execution for a long period of time has been termed the "death row phenomenon." (See *Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (U.K. Privy Council) (1993); *Soering* v. *United Kingdom*, 11 Eur.Ct. H.R. (Ser. A) 439, 111 (Euro. Ct. of Human Rights) (1989); Renee E. Boxman, Comment, *the Road to Soering and Beyond: Will the United States Recognize the "Death Row Phenomenon?"* 14 Hous. J. Int'l L. 151 (1991).)

535. While the label is relatively new, the phenomenon it describes is not. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the

penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley* (1890) 134 U.S. 160, 172 [10 S.Ct. 284, 33 L.Ed.2d 835].)

536. In *Medley*, the period of uncertainty was just four weeks. As Justice Stevens observed, Medley's description should apply with even greater force in a case such as this, involving a delay that has lasted "many years." *Lackey v. Texas* (1995) 514 U.S. 1045 [115 S.Ct. 1421, 131 L.Ed.2d 304] (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

537. Two justices of the Supreme Court have urged repeatedly that certiorari should be granted to consider whether such prolonged confinement on death row, and execution after such confinement, violates the Eighth Amendment's prohibition on cruel and unusual punishments. (*Id.*; *Foster v. Florida* (2002) 537 U.S. 990 (Breyer, J., dissenting from denial of certiorari); *Knight v. Florida* (1999) 528 U.S. 990 [120 S.Ct. 459, 145 L.Ed.2d 370] (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida* (1998) 525 U.S. 944 [119 S.Ct. 366, 142 L.Ed.2d 303] (Breyer, J. dissenting from denial of certiorari); see also *Ceja v. Stewart* (9th Cir.1998) 134 F.3d 1368 (Fletcher, J., dissenting from order denying stay of execution).)

538. This Court found a similar argument persuasive in *People v. Anderson*:

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

(*People v. Anderson* (1972) 6 Cal. 3d 628, 649, cited in *Lackey v. Texas, supra*, 514 U.S. at 1046 n. 1 (Stevens, J., respecting denial of certiorari); but see, e.g., *People v. Frye*, 18 Cal.4th 894, 1030-1031 (1998) (rejecting *Lackey* claim).)

539. The "frightful toll" exacted "during the inevitable long wait between the imposition of sentence and the actual infliction of death" has thus long been a concern of Eighth Amendment jurisprudence. (*Furman v. Georgia, supra*, 408 U.S. at 288-89 (Brennan, J., concurring).) As Justice Frankfurter observed, the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." (*Solesbee v. Balkom* (1950) 339 U.S. 9, 14 [70 S.Ct. 457, 94 L.Ed.2d 604] (Frankfurter, J., dissenting).) As delays grow longer, and conditions on death row become more restrictive, the psychic toll, including insanity and suicide, also grows. (See *Knight v. Florida, supra*, 120 S.Ct. at 462 (Breyer, J., dissenting from denial of certiorari) (citing study showing 35 percent of Florida death row inmates had attempted suicide).)

540. Dr. Stuart Grassian, a leading expert on the psychological effects of stringent conditions of confinement explained in the case of a Connecticut inmate who sought to waive his appeals, "[t]he conditions of confinement are so oppressive, the helplessness endured in the roller coaster of hope and despair so wrenching and exhausting, that ultimately the inmate can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate."[9]

541. The average time under sentence of death, before execution, in the United States is over 10 years.[10] Michael has already spent more than 10 years on death row, and his automatic appeal has not even been decided yet.

542. The problem of delay is acute in California, which has the nation's largest death row.[11] Due to a chronic shortage of qualified lawyers, inmates must wait an average of about five years before even

[9] Death Penalty Information Center, *Time on Death Row*, available at www.deathpenaltyinfo.org/article.php?&did=1397.

[10] See U.S. Dept of Justice, Bureau of Justice Statistics Bulletin, T. Bonczar & T. Snell, Capital Punishment, 2003, p.11 (Nov. 2004).

[11] See U.S. Dept of Justice, Bureau of Justice Statistics Bulletin, T. Bonczar & T. Snell, Capital Punishment, 2003, p. 1(Nov. 2004) (California had 629 inmates on death row in 2003 compared to 453 for Texas and 364 for Florida). According to the Department of Corrections website there are currently 622 persons on death row in California.

being assigned a lawyer for appeal.[12] Moreover, because capital defendants in California who have been erroneously convicted or sentenced to death typically do not get relief until they reach federal court, they must wait many more years for errors to be corrected.[13]

543. Because of such delays, the death row population is becoming increasingly geriatric. In addition to the psychological toll of living on death row awaiting execution, inmates are developing serious age-related illnesses, including cancer, heart disease, and dementia. Medical care at San Quentin, which houses California's death row, has been found so "appallingly bad" that it is "dangerous" to ailing inmates.

544. Thus, petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row.

545. Petitioner's prolonged confinement under sentence of death, and his execution after such confinement, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

546. The Supreme Court has held that:

[12] Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L. Rev. 101, 105 & n.18 (2003).

[13] Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L. Rev. at 106 & nn.26-27 (California Supreme Court has lowest reversal rate in the country while federal courts reverse 62% of death sentences affirmed by the California Supreme Court).

> [t]he prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles, supra*, 356 U.S. at 100-101 (plurality opinion). *Roper v. Simmons, supra*, 543 U.S. at 551.)

547. "[A]t least since" its decision in *Trop*, the Court has "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" (*Id.* at 1198-99 (collecting cases).) The Supreme Court accordingly cited the international community's "overwhelming" disapproval of executing the mentally retarded and juvenile offenders in concluding that such executions also ran afoul of the Eighth Amendment. (*Atkins v. Virginia, supra*, 536 U.S. at 316 n.21; *Roper v. Simmons, supra*, 125 S.Ct. at 1198 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

548. The United States similarly stands virtually alone among the nations of the world in confining individuals for periods of many years

continuously under sentence of death. The international community is increasingly recognizing that prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (See *Foster v. Florida, supra*, 537 U.S. at 991 (Breyer, J., dissenting from denial of certiorari) ("[c]ourts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel") (citing *Pratt* and *Soering, supra*); see also *Knight v. Florida, supra*, 528 U.S. at 995-96 (Breyer, J., dissenting from denial of certiorari) (collecting cases). The Canadian Supreme Court recently cited such delays as "a relevant consideration" in its decision that extradition of a murder suspect to the United States without first obtaining assurances that the death penalty would not be imposed "violates principles of 'fundamental justice.'" (*Foster v. Florida, supra*, 123 S.Ct. at 472 (Breyer, J., dissenting from denial of certiorari) (citing *United States v. Burns* (2001) 1 S.C.R. 283, 353 ¶ 123). In so holding, the Canadian Supreme Court reversed the position it had taken in *Kindler v. Canada*, (1991) 2 S.C.R. 779 and *Reference re Ng Extradition*, (1991) 2 S.C.R. 858. The court explained that "[t]he arguments against extradition without assurances have grown stronger since this Court decided *Kindler* and *Ng* in 1991." (*Burns*, 1 S.C.R. at ¶ 131.)

549. Based largely on the "*Soering* principle," it has become the general practice of abolitionist nations to oppose extradition of criminal

suspects to the United States without assurances that the death penalty will not be imposed. (*Burns*, 1 S.C.R. at ¶ 83 (citing brief of Amnesty International); *Mohamed v. President of the Republic of South Africa*, 2001 (3) SA 893 (CC) ¶ 45 (Constitutional Court of South Africa).)[14] As of 2001, more than half the world's nations were abolitionist, including every Western democracy except the United States. (*Burns*, 1 S.C.R. at ¶ 91 (citing brief of Amnesty International).) This has had a significant impact in the United States.[15]

550. In the wake of Al Qaeda bombings of United States embassies in Africa, at least four suspects were extradited to the United States from Great Britain and Germany only after assurances were obtained that the death penalty would not be imposed. (See *United States v. Bin Laden*, 156 F.Supp.2d 359, 370 (S.D.N.Y. 2001).) The South African Constitutional Court ruled that its law enforcement officials had acted unlawfully in handing over one of the suspects, Khalfan Khamis Mohamed,

[14] James Finsten, *Extradition or Execution? Policy Constraints in the United States' War on Terror*, 77 S.CAL.L.REV. 835, 846 (2004); Daniel Givelber, *Innocence Abroad: The Extradition Cases and the Future of Capital Punishment*, 81 Or. L. Rev. 161 (2002).

[15] James Finsten, *Extradition or Execution? Policy Constraints in the United States' War on Terror*, 77 S.CAL.L.REV. 835, at 840-48; see also Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002; Exh 350, Steven Erlanger, *Traces of Terror: The Terror Trail; German Chancellor Hopes To Release Evidence Soon*, N.Y. Times, June 12, 2002 (discussing refusal of European Union countries to extradite suspects to the United States without assurances against the death penalty).

to the FBI without obtaining assurances against the death penalty, which the South African Court had previously held to be "cruel, inhuman and degrading punishment." (*Id.* at 364-65; *Mohamed*, (3) SA 893 ¶¶ 55, 68.) Mohamed was permitted to introduce as mitigating evidence at his penalty hearing a synopsis of the South African court opinion, along with the information that numerous co-defendants extradited from other countries would not be subject to the death penalty; he received a life sentence. (*Bin Laden*, 156 F.Supp.2d at 370-71.)

551. Nevertheless, some lower U.S. courts, including this Court, have rejected *Lackey* claims on the ground that delays in the imposition of the death penalty are inevitable:

> The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances. That this differs from the practice at common law, where executions could be carried out on the dawn following the pronouncement of sentence, see Pratt & Morgan, advance copy at 2, is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. Indeed, most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty. (*McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-67; see also *People v. Frye*, *supra*, 18 Cal.4th at 1030-1031.)

552. This reasoning is erroneous. Indeed, the acknowledgment that capital punishment cannot be reliably administered without subjecting death row inmates to agonizing limbo only further undermines the constitutionality of the punishment the state seeks to exact on Petitioner.

553. Thus, the Canadian Supreme Court's *primary* concern in *Burns* was the fallibility of the criminal justice system. The court reviewed the history of wrongful convictions in Canada, the United Kingdom, and the United States, taking note of death row exonerations in this country. (*Burns*, 1 S.C.R. at ¶¶ 95-117.) Death row exonerations now stand at 119.[16] This history, the Canadian court concluded, "provide[s] tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent." (*Burns*, 1 S.C.R. at ¶ 117.) The court agreed that "lengthy delays and the associated psychological trauma" were inevitable in the not always successful effort to avoid wrongful convictions. (*Burns*, 1 S.C.R. ¶ 122.) The inevitability of delay did not, however, provide an excuse for subjecting death row inmates to the psychological torment of the death row phenomenon, but rather was grounds for concluding that the death penalty itself was cruel and unusual punishment. (See *Id.* at ¶ 78 (death penalty is contrary to the prohibition on cruel and unusual punishment because it is "final," "irreversible," and "[i]ts

[16] Death Penalty Information Center, Innocence and the Death Penalty, available at www.deathpenaltyinfo.org/article.php?did=412&scid=6.

implementation necessarily causes psychological and physical suffering").) The Constitutional Court of South Africa relied on a similar rationale in concluding that the death penalty constituted "cruel, human and degrading punishment" under its constitution. (See *The State v. Makwanyane & Mchunu*, 1995(3) SA 391 ¶¶ 55-56 (CC) (Constitutional Court of South Africa) ("The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity is apparent.") (op. of Chaskalson, P.) (citing *Callins v. Collins* (1994) 510 U.S. 1141 [114 S.Ct., 127 L.Ed.2d 435] (Blackmun, J., dissenting) (concluding that "the death penalty experiment" in the United States "has failed").)

554. This developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well. To the extent that the death penalty cannot be reliably administered without subjecting inmates to the death row phenomenon, it violates petitioner's rights under the due process clause of the Fourteenth Amendment and the corresponding provision of the California Constitution.

The Purposes of Capital Punishment

555. Carrying out an execution after such prolonged confinement also fails to withstand Eighth Amendment scrutiny because it does not serve legitimate and substantial penological goals:

> [T]he penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes. . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable 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. (*Furman v. Georgia, supra*, 408 U.S. at 312-13 (White, J., concurring).)

556. The Supreme Court has "identified 'retribution and deterrence of capital crimes by prospective offenders'" as the two constitutionally-legitimate purposes served by the death penalty. (*Atkins v. Virginia, supra*, 536 U.S. at 319 (quoting *Gregg v. Georgia, supra*, 428 U.S. at 183).) Unless imposition of the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. *Id.* (quoting *Enmund v. Florida, supra*, 458 U.S. at 798); see also *Gregg v. Georgia, supra*, 428 U.S. at 183 (joint op. of Stewart, Powell, & Stevens, JJ.) ("The sanction imposed cannot be so totally without

penological justification that it results in the gratuitous infliction of suffering.").)

557. Thus, if the death penalty "serves no penal purpose more effectively than a less severe punishment, (*Furman v. Georgia, supra*, 408 U.S. at 280 (Brennan, J., concurring)), then it is unnecessarily excessive within the meaning of the Punishments Clause." (*Ceja v. Stewart, supra*, 134 F.3d at 1373 (Fletcher, J., dissenting); see also *Simmons, supra*, 125 S.Ct. at 1196-97 (finding that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders"); *Atkins v. Virginia, supra*, 536 U.S. at 319-20 (death penalty for mentally retarded individuals violates the Eighth Amendment because it does not serve the penological purposes of retribution and deterrence).)

558. As Justice Rehnquist has recognized, "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution." (*Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) [101 S.Ct. 2031, 68 L.Ed.2d 334] (Rehnquist, J., respecting denial of certiorari).) Similarly, the deterrent effect of capital punishment, if any, is undermined by inordinate delays between sentencing and execution. *Id.* at 959. ("When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts . . . lessen the deterrent effect of the threat of capital punishment . . ."). Actually executing a defendant under such circumstances is an inherently excessive punishment that no

longer serves any legitimate purpose. (See *Ceja v. Stewart, supra*, 134 F.3d at 1373 (Fletcher, J., dissenting); see also *Furman v. Georgia, supra*, 408 U.S. at 312 (White, J., concurring).)

559. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's arrest, conviction and judgment of death. (See *Knight v. Florida, supra*, 120 S.Ct. at 462 (Breyer, J., dissenting from denial of certiorari).)

560. Because it would serve no legitimate penological interest to execute Michael after this passage of time and because Michael's confinement for over 10 years on death row, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth and Fourteenth Amendments.

International Law

561. Petitioner's prolonged confinement and subsequent execution also violates international law. Customary international law, which is part of United States federal law, includes the right against "torture or other cruel, inhuman or degrading treatment or punishment." (*Restatement 3d of Foreign Relations Law of the United States* § 702 (1987).)

562. Article 7 of the International Covenant on Civil and Political Rights provides in part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

563. In 1992, the United States ratified the International Covenant on Civil and Political Rights ("the ICCPR"). In giving its consent to the ICCPR, the United States Senate made a declaration that several of the provisions of the ICCPR, including Article 7, are not self-executing. This declaration violates federal constitutional and separation-of-powers principles. It is also invalid because it conflicts with the object and purpose of the ICCPR and, therefore, violates the rule on reservations contained in the Vienna Convention on the Law of Treaties, and because declarations that a provision is non-self-executing do not apply to persons who attempt to invoke a treaty provision defensively. See, Claim M, incorporated fully herein by this reference.

564. Under the Supremacy Clause (article VI, clause 2) of the United States Constitution, the State of California is obligated to abide by and obey the provisions of the ICCPR.

565. Petitioner's confinement under threat of imposition of the death penalty and under a sentence of death, under the circumstances and conditions set forth in this claim constitutes cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR, which has the force and effect of federal law under the Supremacy Clause (article VI,

clause 2) of the United States Constitution, and customary international law, which applies directly in the United States.

566. Execution of petitioner after his prolonged confinement under threat of imposition of the death penalty and under a sentence of death, under the circumstances and conditions set forth in this claim would constitute cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR, which has the force and effect of federal law under the Supremacy Clause (article VI, clause 2) of the United States Constitution, and customary international law, which applies directly in the United States.

567. The process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later.[17]

568. The length of petitioner's confinement under threat of a death sentence and on death row, along with the constitutionally inadequate guilt

[17] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).

and penalty determinations in his case have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

569. Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official or at the direction of a public official.[18] Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction.[19] Petitioner has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law.

570. The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Petitioner's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death.

[18] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984)

[19] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984)

California Specific Considerations

571. Michael's judgment of death is unlawful and unconstitutional, in violation of the State statutory and constitutional provisions as well as the Eighth and Fourteenth Amendments to the United States Constitution because the methods of execution and the procedures used to administer lethal injection and lethal gas constitute cruel and unusual punishment and violate procedural due process. (See Order after Hearing, Morales v. CDCR, CV 061436 (Marin County Superior Court, Judge Taylor, 10/31/07.)

572. Prior to 1992, lethal gas was the sole means of execution provided for under California law. In 1992, California added, as an alternative means of execution, intravenous injection of lethal substances. The 1992 legislation allowed the inmate to select one of the two methods of execution. In 1996, the statute was amended to provide that, in the absence of an election by the inmate, the default method of execution would be by lethal injection.

573. A condemned prisoner is entitled to an execution free from unnecessary and wanton infliction of pain. A method of execution that involves a substantial risk of unnecessary and wanton infliction of pain is unconstitutional.

574. The California Department of Corrections and Rehabilitation (CDCR) has not complied with the legislative mandate and has not administered standards and protocols to ensure that a prisoner will avoid unnecessary suffering during the execution process. The CDCR has failed to comply with the Administrative Procedures Act, Government Code sections 11346.4 et. seq. The CDCR has only made available a vague description of the process of execution.

575. Lethal injection constitutes cruel and unusual punishment because the methods used have a substantial possibility of inflicting unnecessary suffering. Among other things: there is no set of procedures to ensure that the condemned prisoner will be free from unnecessary suffering; there is no minimal level of training for the personnel involved in the administering of the lethal injection; improper insertion of the intravenous line or catheter will cause extreme pain; and there is no requirement for trained medical personnel to be present, nor do the procedures provide guidelines for storage or handing of the chemicals involved.

576. The CDCR's procedures suffer from other flaws and do not adequately protect the prisoner from the risk of unnecessary pain and suffering. Execution by lethal gas constitutes torture and is brutal, agonizing and cruel. Use of a gas chamber is aberrational and rare and must

be considered incompatible with the evolving standards of decency that mark the progress of a maturing society.

577. For all of the above stated reasons, Michael's death sentence must be vacated permanently, or a stay of execution must be entered permanently.

CLAIM SIXTEEN

THE PENALTY PHASE INSTRUCTIONS WERE UNCONSTITUTIONALLY VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY THE FINDER OF FACT

Michael's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights to due process of law; to equal protection; to the mandatory enforcement of state laws; to heightened reliability at a capital sentencing; to a fair trial; to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and individualized determination of penalty; to a state death penalty law which genuinely narrows the class of persons eligible for the death penalty and justifies the imposition of a death sentence compared to others found guilty of murder; and to a finder of fact fully and appropriately instructed on the relevant law, including clear instructions defining the findings necessary to impose a judgment of death under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United

States Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution as well as petitioner's statutory rights, because California Penal Code section 190.3 is, and the instructions given in this case that were based on that section were, vague and incomprehensible and failed to guide the finder of fact's discretion.

The errors set forth in this claim violated petitioner's constitutional rights as set forth in, among other cases, *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Furman v. Georgia, supra*, 408 U.S. at 238; *Boyde v. California, supra*, 494 U.S. at 370 (1990); *Lockett v. Ohio, supra*, 438 U.S. 586; *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733; 77 L.Ed.2d 235]; and *Skipper v. South Carolina, supra*, 476 U.S. at 1; and *Hicks v. Oklahoma, supra*, 447 U.S. at 343.

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

578. The trial court was guided by CALJIC 8.85 which tracks the language of Penal Code section 190.3, factors (a) through (k), concerning the factors that the jury was to take into consideration in determining petitioner's sentence.

579. Factor (a), which directs the finder of fact to consider the "circumstances of the crime," is unconstitutionally vague not in an abstract

sense (see *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]), but because it fails to identify any circumstances or types of circumstances that the trier of fact may consider in order to distinguish the offense from other offenses not subject to the death penalty or to make clear that there may be mitigating aspects to the circumstances of the crime.

580. Furthermore, factor (a) allows the sentencer to consider the presence of *any* special circumstance findings. The sentencer's discretion is therefore not properly channeled because all capital cases have at least one special circumstance; using factor (a), the finder of fact cannot know how to distinguish a death-worthy case from one that is not death-worthy. For these reasons, the broad expanse of factor (a) did not constitutionally guide Petitioner's jury in determining whether death was the appropriate punishment. (*Furman v. Georgia, supra*, 408 U.S. at 237.)

581. The finder of fact's improper consideration of factor (a) evidence violated petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution, and to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and individualized determination of penalty under the Eighth Amendment to the United States Constitution. § 190.3(a).

582. The penalty instructions also failed to explain the nature and scope of mitigating evidence in a detailed manner. Particularly in the absence of written findings, there is grave danger that petitioner's finder of

fact had the same sort of misunderstandings that most jurors have been shown to have concerning the meaning of the sentencing factors[20] and that

[20] Even when instructed according to the statute, jurors can and frequently do misapprehend the rules set forth to guide their discretion in determining whether the death penalty is an appropriate sentence. A study of actual California jurors who have served in capital cases found:

> Many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it 'fit in' with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. . . . Other jurors recognized mitigating evidence as such but then rejected or limited its significance by imposing additional conditions on the concept that would make it difficult to ever influence a capital verdict. Thus, fully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant's responsibility for the crime itself. . . . In addition, 6 of the California juries in the study rejected mitigating evidence because it did not *completely* account for the defendant's actions.
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> C. Haney, Lorelei Sontag, & Sally Costanzo., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* 50 (No. 2) J. of Social Issues 149, 167-68 (1994) (emphasis in original).

The systematic study of actual capital-case jurors in many states by the Capital Jury Project demonstrates virtually without exception a serious lack of understanding on the part of these jurors of many of the concepts which are at the core of the Eighth Amendment restrictions on the death penalty. See generally William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1077-1102 (1995); Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223 (1995). The nature of these misunderstandings is such that they virtually always skew the process in favor of death. See Jane Luginbuhl & Julie

Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1176-77 (1995); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & Hum. Behav. 411, 428 (1994). One study summed up, "if the final penalty decision is death, there is a high probability [i.e., more than a "reasonable likelihood"] that this final penalty verdict is partially a product of the faulty interpretation of the law." Luginbuhl & Howe, *supra*, at 1180.

The empirical data demonstrates that common understanding of these principles is so likely to be wrong that petitioner's jury's understanding cannot be relied upon consistent with the Eighth Amendment's requirement of heightened reliability in capital sentencing. *Beck v. Alabama*, 447 U.S. 625 (1980).

The Capital Jury Project relied on the experience of actual jurors in death penalty trials, not mock juries or hypothetical cases. But even research of the latter type supports this claim:

> Because we studied individual rather than collective interpretations of these instructions, we could not address the issue of whether the lack of juror comprehension would likely be corrected in the course of penalty phase deliberation. However, several things seem to us to minimize this possibility. Nothing in the California instruction requires capital juries to reach consensus about the meaning of the instructions themselves, and there are no verdict forms that require them to agree on the factors that led them to their verdict. Moreover, the prevalence of misunderstanding that characterized both the overall definitions [of "aggravation" and "mitigation"] and the template of factors [(a) through (k)] in the California instruction suggests that even the collective intelligence of most capital juries is likely to be highly compromised on these issues. Indeed, based on our data, the likelihood of a capital defendant's life or death verdict being decided by a jury in which at least one member is completely inaccurate in his or her definition of aggravation or mitigation, and incorrect as to at least two specific factors that form the capital sentencing template in California (19% of our sample) is greater than 2 to 1. This compares to less than a 1 in 2 likelihood of such a jury containing a juror who is legally correct on both terms and completely accurate as to

it sentenced petitioner to die because of those misconceptions, in violation of his right to equal protection and to his rights to a fair trial and reliable, non-arbitrary and individualized penalty verdict reached through due process of law and protected by the Eighth Amendment.

583. To the extent that any error or deficiency alleged was due to trial counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, including but not limited to the errors and omissions alleged above, petitioner was deprived of the effective assistance of counsel. To the extent that any error should have been raised in petitioner's appeal, petitioner was deprived of the effective assistance of

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> the sentencing template (.04% of our sample). In addition, Ellsworth's (1989) research on the general issue of whether 'twelve heads are better than one' in improving jury comprehension of instructions indicated that while some errors of instructional interpretation are corrected in deliberation, about an equal number of correct interpretations are relinquished in favor of incorrect ones. Finally, interview data collected by Haney, Sontag, and Costanzo (1994) indicated that a number of basic instructional misconceptions were still held by actual capital jurors in California, long after they had deliberated and rendered their verdicts. (Haney & Lynch, *supra*, at 425 n.14.)

There is now "converging proof that the same kinds of misunderstandings occur in both experimental and real capital jury decision-making. Whether they are given these instructions in the quiet of the laboratory or the intense experience of the capital trial, whether they hear them from a researcher or a judge, and whether they report their understandings immediately or much later, people show serious comprehension problems." Valerie P. Hans, *How Juries Decide Death: The Contribution of the Capital Jury Project*, 70 Ind. L.J. 1233, 1239 (1995).

appellate counsel. Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced petitioner.

584. To the extent that any of the errors alleged in the present claim deprived petitioner of the benefits of state law in which he had a liberty interest, he was deprived of equal protection and due process of law under the state and federal Constitutions. *Hicks v. Oklahoma, supra*, 447 U.S. 346.

585. It is reasonably likely that the finder of fact applied instructions given in an unconstitutional manner. As such, the Eighth and Fourteenth Amendments mandate that petitioner's sentence be vacated.

CLAIM SEVENTEEN

THE DEATH PENALTY IN CALIFORNIA IS ARBITRARILY AND CAPRICIOUSLY SOUGHT AND IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE LAW AND THE RIGHT TO EQUAL PROTECTION

Michael's death sentence and confinement are unlawful and unconstitutional in that they were obtained in violation of petitioner's rights to equal protection of the laws, to due process, to the mandatory enforcement of state laws and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States

Constitution and article 1, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28, article 4, section 16(a), and article 5, section 13 of the California Constitution because the death penalty is imposed arbitrarily and capriciously depending upon the county in which the case is prosecuted.

The errors set forth in this claim violated Michael's constitutional rights as set forth in, among other cases, *Bush v. Gore* (2000) 531 U.S. 98 and *Hicks v. Oklahoma, supra*, 447 U.S. 343.

Michael alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

586. In *Gore*, the United States Supreme Court established that fundamental rights cannot be denied based upon arbitrary and disparate statewide "standards." The Court held that where a single state entity has the power to assure uniformity in implementing a fundamental right, there must be assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. In *Gore*, the fundamental right at issue was the right to vote, and the state entity was the Florida Supreme Court. (*Id.* at 109.) The United States Supreme Court found that the state court's authorization of standardless manual recounts of challenged votes, with standards differing from county to county, violated the Equal Protection Clause. (*Id.* at 110-11.) The Court also found an equal protection violation

even in the absence of discriminatory intent, where the discriminatory impact of having no statewide uniformity with regards to the implementation of a fundamental right was shown. (See *Id.* at 109-10.)

587. Pursuant to *Gore*, implementation of the death penalty in California violates the Equal Protection Clause because the decision whether to seek the death penalty against a potentially death eligible defendant (*i.e.* one where special circumstances have been charged) is left solely to the discretion of the prosecutor in the county where the crime was committed. In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of California Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. §§ 190.2 & 190.25. There are no effective restraints or controls on prosecutorial discretion in California. Each county may and does impose its own standards (or none at all), for deciding who will face death.

588. Despite the discretion vested in each district attorney in each county to make charging decisions, the California Attorney general is the chief law officer of the state, with supervisory power over every district attorney. "[I]t is the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Cal. Const. art. V, section 13; *Pitts v. County of Kern* (1998) 17 Cal. 4th 340, 357; see also Cal. Gov't. Code section 12550 (West 2004). Thus, just as in *Gore*, there is a single

entity (the California Attorney General) that has the power, as well as the duty, to assure uniformity in implementing a fundamental right (the fundamental right to life, as well as the rights to due process and freedom from cruel and unusual punishment). However, the Attorney General has instead allowed charging decisions to be made in a standardless and inconsistent fashion from county to county, without any assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

589. The disparate rates at which the death penalty is imposed in the various California counties shows the discriminatory impact of the Attorney General's failure to assure equal treatment and fundamental fairness in the state-wide implementation of the death penalty. In a study of the number of death verdicts per thousand homicides for the years of 1973-1999 in 19 California counties, each with more than five or more total death verdicts, the number of death penalty verdicts ranged from 62.07 death verdicts per 1000 homicides in Shasta County, 34.91 per 1000 in Stanislaus County, to 4.85 homicides per thousand in San Francisco County. (James Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, & Alexander Kiss, *A Broken System, Part II: Why There Is So Much Error in Capital Cases And What Can Be Done About It*, app. B, at 2-3 (2002).) This is not uniform treatment within the state; in some counties a life is worth more than in others.

590. In the 1990s, Alameda County was more prone to seeking death penalty judgments than many other counties in California.[21]

591. This study examined all California homicides committed between January 1, 1990, and December 31, 1999, using data from the Federal Bureau of Investigations and the California Office of Vital Statistics, as well as from other sources. It showed that Alameda County is fourth of 58 counties in terms of death sentenced inmates.[22]

592. But for the county in which the crimes occurred, Michael would not have been charged with capital murder, tried for capital murder, or sentenced to death.

593. The death penalty was not sought in cases involving similarly situated defendants in other California counties.

594. The prosecution's standardless charging practices and the fact that the decision to prosecute petitioner with the death penalty was made without uniform charging criteria also violated Michael's federal due process right to a state-created liberty interest under *Hicks* v. *Oklahoma*, *supra*, 447 U.S. at 346.

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[21] See, Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005).

[22] See, Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005).

595. For the foregoing reasons, Michael's death sentence must be vacated.

CLAIM EIGHTEEN

THE CALIFORNIA DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AND RESULTS IN IMPOSITION OF DEATH IN A CAPRICIOUS AND ARBITRARY MANNER

Michael's confinement is unlawful in that his convictions and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15 and 24 of the California Constitution, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits the imposition of death within that class in an arbitrary and capricious manner. In particular, petitioner's capital murder conviction violated the requirements of the Eighth and Fourteenth Amendments that the provisions of a state's death penalty statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder, and thereby resulted in the imposition of an arbitrary and capricious death judgment. The failure to narrow the class of persons eligible for capital

punishment deprived petitioner of his due process rights under the Fourteenth Amendment; it permitted arbitrary selection by the prosecution without consistent guidelines to ensure uniformity and reliability; and it violated the Eighth Amendment prohibition against cruel and unusual punishment.

The errors delineated in this claim violate petitioner's rights as set forth in, among other cases: *Furman v. Georgia, supra*, 408 U.S. at 238; *Gregg v. Georgia, supra*, 428 U.S. at 153; *Maynard v. Cartwright* (1988) 486 U.S. 356 [108 S.Ct. 1853, 100 L.Ed.2d 372]; *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 86 L.Ed.2d 231]; *Zant v. Stephens, supra*, 462 U.S. 862; and *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398].

Petitioner alleges the following facts in support of his claim, among others to be developed after adequate funding for investigation and experts, full investigation, discovery, access to this Court's subpoena power, and hearing on the merits of the claim.

596. Petitioner hereby incorporates by reference the Declaration of Professor Steven F. Shatz. [Exhibit 26.]

597. Petitioner was convicted of two counts of murder and sentenced to death. The special circumstances rendering petitioner eligible for imposition of a death sentence were: prior-murder and multiple murder.

598. The California death penalty statute under which Michael was convicted and sentenced to death fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed arbitrarily and capriciously. (*Furman v. Georgia, supra*, 408 U.S. at 313 (White, J., concurring) (death penalty statute must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not").) A capital murder statute must take into account the Eighth Amendment principles that death is different (*California v. Ramos, supra*, 463 U.S. at 998-99), and that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens, supra*, 462 U.S. at 877 n.15.)

599. California's death penalty statute, which was enacted by an initiative measure, violates the Eighth Amendment by multiplying the "few" cases in which the death penalty is possible into many. Further, it was enacted for precisely this unconstitutional purpose. The proponents of the initiative measure ("Proposition 7"), as part of their Voter's Pamphlet argument that the initiative statute was necessary, described certain murders that were not covered by the existing death penalty statute, and then stated:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive

> the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.* (1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7.")

600. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty. (*Sawyer v. Whitley* (1992) 505 U.S. 333 [112 S.Ct. 2514, 120 L.Ed.2d 269]; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-06 [107 S.Ct. 1756, 95 L.Ed.2d 262]; *Zant v. Stephens*, *supra*, 462 U.S. at 877-78.)

601. California's death penalty statute as written and applied fails to perform the constitutionally-required narrowing, and this Court's interpretations of the statute have actually expanded the statute's reach.

602. As written and applied, the California death penalty statute potentially sweeps the great majority of murders into its grasp and permits any conceivable circumstance of a crime – even circumstances that are diametrically opposed to each other (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.

603. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of

narrowing the class of murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute.

604. As of the date of the homicide charged in the present case (1991), 28 "special circumstances" existed under California Penal Code § 190.2, making a killer death-eligible (not including the catchall "heinous, atrocious or cruel" special circumstance, which was found unconstitutionally vague (see *People v. Superior Court (Engert)*, 31 Cal.3d 797, 801 (1982)).[23]

605. The over-inclusive nature of the death penalty law in California means that death eligibility is the rule, not the exception required by the Eighth Amendment. The number of special circumstances has continued to grow and is now over 30. Different types of felony-murder special circumstances are counted separately; for example, the robbery-murder special circumstance (see § 190.2(a)(17)(A)) is considered distinct from the rape-murder special circumstance. (See § 190.2(a)(17)(c).).

606. In *Furman v. Georgia, supra*, 408 U.S. at 238, the United States Supreme Court struck down the death penalty schemes of states including Georgia and Texas as unconstitutional, because they created too great a risk of arbitrary death sentences. This conclusion derived from the Court's understanding that, as to the Georgia scheme, only 15-20 percent of

[23] Ex 26, Declaration of Steven F. Shatz.

convicted murderers who were death-eligible were being sentenced to death, and that such schemes permitted too great a risk of arbitrariness to satisfy the Eighth Amendment. (*Furman v. Georgia, supra*, 408 U.S. at 386, n. 11 (Burger, C.J., dissenting); *id.* at 435, n.19 (Powell, J., dissenting); *Gregg v. Georgia, supra*, 428 U.S. at 182, n. 26 (1976) (plurality opinion); see also Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U.L.Rev. 1283, 1288 (1997) (hereafter "Shatz & Rivkind").)

607. Justice Stewart relied on Chief Justice Burger's statistics when he stated in his concurring opinion: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder ..." (*Furman v. Georgia, supra*, 408 U.S. at 309.) In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20 percent of those convicted of murder were sentenced to death in those states that authorized capital punishment." (*Gregg v. Georgia, supra*, 428 U.S. at 182, n. 26 (citing *Woodson*, 428 U.S. at 295-96, n. 31).) Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than fifteen to twenty percent of statutorily death-eligible

defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

608. In order to meet the concerns of *Furman*, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens*, *supra*, 462 U.S. at 878.)

609. It was the Supreme Court's understanding that, as the class of death-eligible murderers was narrowed, the percentage of those in the class receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline.

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. (*Gregg v. Georgia*, *supra*, 428 U.S. at 222 (White, J., concurring).)

610. In 2002, the Governor's Commission on Capital Punishment in Illinois, in recommending the elimination of fifteen of the twenty death-eligibility factors, explained the importance of the narrowing function:

> Reducing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied in Illinois, and provide greater clarity in the statute, while retaining capital punishment for the most heinous of homicides. . . . The continued expansion of the list of eligibility factors has placed significant burdens on the criminal justice system, as prosecutors and courts struggle to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system, and, more important, reflect a degree of arbitrariness, when decisions across the state are compared. (*Report of the Governor's Commission on Capital Punishment (April 15, 2002) at 67-68.*)

611. Recently, the Massachusetts Governor's Council on Capital Punishment articulated the flaws of capital-sentencing statutes, including California's, that fail to narrow the class of persons eligible for the death penalty:

> In many jurisdictions today, the statutory list of "aggravating circumstances" has expanded to the point that it now covers a substantial proportion, perhaps even more than half, of all first-degree murders. In California, for example, there are now 22 "special circumstances" that can lead to the imposition of the death penalty. In Illinois, there are now 21 such "aggravating factors;" the Governor's Commission in that state recently acknowledged the possibility that, due to the large number of eligibility factors, nearly every first-degree murder in Illinois could be eligible for the death penalty under one theory or another.
>
> This expansion of death eligibility is understandable, but regrettable. It typically occurs because particular heinous murders provoke a demand for the death penalty, which in turn leads responsive legislators to add new "aggravating circumstances" to the statutory

list. This process occurs repeatedly, and it is one-sided -- new "aggravating circumstances" are added to the list, but existing ones are never removed from the list.

The main problem with the expansion of death-eligibility is that the statutory list of "aggravating circumstances" is the one and only place, in the entire death-penalty system, where substantive limits can be imposed on the death penalty that are not discretionary. If the statutory list is overly broad, then the discretionary decisions of prosecutors, judges, and juries must carry the entire burden of ensuring that the death penalty is applied narrowly and reasonably consistently. If the statutory list includes virtually all first-degree murders, then discretionary decision-makers must carry the entire burden of selecting, from such a large pool, the small handful of the "worst of the worst" murders for which the death penalty will be imposed. Moreover, discretionary decision-makers often do not even get to see all of the cases in the pool -- juries, for example, see only one case, and thus cannot easily compare that case to other death-eligible crimes.

The same expansion of death-eligibility also contributes directly to the serious and well-documented problem of racial disparity in the application of the death penalty. When various decision-makers within the criminal justice system, and especially the jury (whose decisions are essentially unreviewable), possess too much discretion over capital sentencing within a large pool of death-eligible murders, then overt and hidden prejudices can influence the decision. By narrowly restricting the categories of death-eligibility to a small number of precisely defined and extremely heinous murders, and thereby restricting the discretion of capital-case decision-makers, the problem of racial disparity can be addressed in the most meaningfully possible way.

The Council concluded that the burden of narrowing a large pool of death-eligible murders down to the "worst of the worst" is simply too much to expect the

discretionary decision-makers to handle effectively. (*Report of the Massachusetts Governor's Council on Capital Punishment (May 3, 2004) at 10-11.*)

612. Professor Steven F. Shatz completed a study of California cases involving murder convictions in order to determine: a) the degree to which the special circumstances listed in California Penal Code section 190.2 limit death-eligibility for persons convicted of first degree murder; and b) what percentage of persons convicted of first degree murder who are statutorily death-eligible are sentenced to death, i.e., California's death sentence ratio. The full study is reported in Shatz & Rivkind. Professor Shatz has provided a declaration concerning certain results of the study as they pertain to petitioner's case.[24]

613. 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, supra*, 6 Cal. 4th at 467-68 (1993). There are, however, so many special circumstances, so broadly construed, that the special circumstances accomplish very little narrowing. There is some slight additional narrowing as a result of the exclusion of minors. (Pen.

[24] Ex 26, Declaration of Steven F. Shatz.

Code § 190.5). Professor Shatz's analysis takes into account this slight additional narrowing.[25]

614. Under the capital sentencing scheme in effect in 1987, 84% of first-degree murder cases in California met the factual requirements for the finding of a special circumstance. In other words, in 1987, almost 90% of first-degree murders were statutorily death-eligible under Penal Code section 190.2. The exemption of juvenile offenders from the capital-sentencing statute (see § 190.5) reduces the percentage of first-degree murderers eligible for the death penalty to approximately 81%.[26]

615. Empirical evidence shows that the stated goal of making every first degree murderer in California eligible for the death penalty has largely been achieved. During the five-year period 1988-1992, there were approximately 1,729 death eligible first degree murder convictions, and during the same period, 166 first degree murderers were sentenced to death. Thus approximately 9.6 percent of death eligible persons convicted of first degree murder were actually being sentenced to death pursuant to section 190.2 during the period 1988-1992.[27] During that period of time, approximately 11.4 percent of death-eligible offenses resulted in death

[25] Ex 26, Declaration of Steven F. Shatz.

[26] Ex 26, Declaration of Steven F. Shatz.

[27] This information was provided by the Attorney General in the course of discovery in *Karis v. Calderon*, No. CIV S-89-0527 (E.D. Cal.) Ex 26, Declaration of Steven F. Shatz.

sentences.[28] These findings are not peculiar to this five-year period. Between 1980 and 1984, approximately 9.5 percent of death eligible convicted first-degree murderers were sentenced to death.[29]

616. The State analyzed the appellate first degree murder cases used in Steven F. Shatz's study in *Fyre v. Woodford*, CIV S-99-0628 LKK JFM (E.D. Cal.), and in effect conceded that at least 67.6 percent of first degree murderers are death-eligible and that the death sentence rate is at most 14.2 percent.[30]

617. Professor Shatz also gathered data from 1978 to 2001, for a study of death sentencing in Alameda County, the county in which petitioner was sentenced to death.[31] During this 23-year period, approximately 12.6 % of death eligible first degree murderers were sentenced to death for Alameda County murders.[32]

618. A statutory scheme under which 84 percent of first-degree murderers are death-eligible does not "genuinely narrow" the class of death eligibility. (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319, *overruled on other grounds, Rohan ex rel Gates v. Woodford* (9th Cir.

[28] Ex 26, Declaration of Steven F. Shatz.

[29] Ex 26, Declaration of Steven F. Shatz.

[30] Ex 26, Declaration of Steven F. Shatz.

[31] Ex 26, Declaration of Steven F. Shatz.

[32] Ex 26, Declaration of Steven F. Shatz.

2003) 334 F.3d 803, 813.) Further, since only 11.4 percent (Shatz's calculations), 12.6 percent (Alameda Study), or even 14.2 percent (the State's own calculations) 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.

619. Penal Code section 190.2's failure to genuinely narrow the class of death-eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute that 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 this Court, the Section 190.3 factors have been used in ways so arbitrary and contradictory as to violate due process of law. Furthermore, this Court's interpretations of the Section 190.3 factors have created a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

620. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law, and the review of death judgments by this Court yields an affirmance rate higher than any other court in the country - - much higher than the affirmance rate in states such as Florida, Georgia, or Texas.

621. According to a study by the San Jose Mercury News, since 1997, this Court has reversed seven of the 67 death sentences for which it has produced full rulings, or 10 percent, compared to other state high courts which reverse death sentences at a rate of approximately 40 percent. (Howard Mintz, *State, U.S. Courts At Odds on Sentences*, S.J. MERC NEWS, April 15, 2002.)

622. Individual prosecutors in California are afforded complete unguided discretion to determine whether to charge special circumstances and to seek penalties of death, thereby creating a substantial risk of county-by-county arbitrariness and discrepancies based on race. (See *People v. Adcox* (1988) 47 Cal.3d 207, 275-76 (Broussard, J. concurring).)

623. As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of first-degree murder is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Furman, v. Georgia, supra*, 408 U.S. at 309-310 (Stewart, J., concurring).) Accordingly, Michael's death sentence must be set aside.

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CLAIM NINETEEN

PETITIONER'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL VIOLATIONS SHOWN IN THIS PETITION AND THE AUTOMATIC APPEAL

Michael's confinement is unlawful in that his convictions and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution because the errors complained of in this petition and the automatic appeal compounded one another, resulting in the prejudicial violation of petitioner's constitutional rights.

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

624. Each of the specific allegations of constitutional error in each claim and sub-claim of this petition requires the issuance of a writ of habeas corpus. Assuming *arguendo* that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated by this petition, and the claims raised in Michael's automatic appeal (No. S066939) compels reversal of the judgment and issuance of the writ.

625. When all of the errors and constitutional violations are considered together, it is clear that Michael has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair and accurate trial and his right to an accurate and reliable penalty determination, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

626. This Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal. 4th 800, 844, 953 (citations omitted).) As the Ninth Circuit has held, "[a]lthough no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1132.)

627. The prejudicial impact of each of the specific allegations of constitutional error presented in this petition and in the direct appeal must therefore be analyzed within the overall context of the evidence introduced against petitioner at trial. No single allegation of constitutional error is severable from any other allegation set forth in this petition and/or in petitioner's automatic appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of

the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381; see also *United States v. Wood* (10th Cir. 2000) 207 F.3d 1222, 1237.)

628. Petitioner hereby incorporates by specific reference the record on appeal, and each of the claims and arguments raised in the appellate briefing in his related automatic appeal (No. S066939), and any appendices and exhibits referred to therein, as if fully set forth in this paragraph. Alternatively, petitioner requests that the Court take judicial notice of the same.

629. Petitioner also incorporates by reference every claim of this petition, and the appendices and exhibits incorporated therein, as if fully set forth in this paragraph.

630. Petitioner's convictions, sentence, and confinement were obtained as the result of a myriad of errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including but not limited to the denial of his right to competent counsel and the prosecutorial misconduct at all phases of the trial.

631. Justice demands that petitioner's murder convictions, special circumstance findings and sentence of death be reversed because when considered cumulatively, the errors and violations alleged in the present petition and on his automatic appeal are prejudicial and rendered the trial fundamentally unfair and unreliable.

632. This is also true of state law violations which may not independently rise to the level of a federal constitutional violation. The cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and violate due process and equal protection guarantees under the Fourteenth Amendment and the right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination under the Eighth Amendment. (See *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 962.)

633. In light of the cumulative effect of all the errors and constitutional violations which occurred over the course of the proceedings in petitioner's case, Michael's convictions and death sentence must be vacated to prevent a fundamental miscarriage of justice.

CLAIM TWENTY

PETITIONER CANNOT LAWFULLY BE EXECUTED BECAUSE HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Michael's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under Article II, clause 2, and Article VI, clause 2 of the United States Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, their state

constitutional analogues, and international law, covenants, treaties and norms because petitioner's sentence of death was imposed without regard to international treaties and laws to which the United States is a signatory, and which obligate the United States to comply with human rights principles. In addition to being denied his right to the minimum international, federal and state law guarantees for a fair trial and a competent defense, Michael has also been denied his right under customary international law to appeal and habeas corpus review by an independent and impartial tribunal.

The errors set forth in this claim violated Michael's constitutional rights as set forth in, among other cases, *The Paquete Habana* (1900), 175 U.S. 677 [20 S.Ct. 290, 44 L.Ed. 320]; *Clinton v. City of New York* (1998) 524 U.S. 417 [188 S.Ct. 2091, 141 L.Ed.2d 393]; *Bowsher v. Synar* (1986) 478 U.S. 714 [106 S.Ct. 3181, 92 L.Ed.2d 583; and *INS v. Chadha* (1983) 462 U.S. 919 [103 S.Ct. 2764, 77 L.Ed.2d 317].

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

634. The State of California is bound by international law and treaties to which the United States is a signatory: "[A]ll treaties made, or which shall be 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. The United States Supreme Court has recognized that "[i]nternational 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, supra*, 175 U.S. at 700; see also *Restatement 3d Foreign Relations Law of the United States* § 111(1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); and *Id.* at § 702, comment c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts").)

635. The body of international law that governs the State of California's, and the United States's, administration of capital punishment includes, but is not limited to, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Against All Forms of Racial Discrimination, and the Vienna Convention on the Law of Treaties. The purpose of these and other treaties is to bind signatory nations, including

the United States, to the protection of the rights of all humans, including petitioner and others who have been accused of capital crimes. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." (*Restatement 3d Foreign Relations Law of the United States* §313, reporter's notes, at 184.)

636. As indicated above, the United States Senate has ratified the ICCPR. (International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The United States is therefore bound by the provisions of the Second Optional Protocol to the ICCPR, adopted by the United Nations General Assembly in 1989. The Second Optional Protocol provides for the total abolition of the death penalty, but allows state parties to retain the death penalty only in wartime, if a reservation to that effect was made at the time of ratifying or acceding to the Protocol. The United States was not at war at the time of petitioner's offense, and his sentence does not arise from convictions for crimes committed during a war.

637. The process by which the President of the United States and the United States Senate ratified the ICCPR, and the substance of the purported reservations and declarations placed upon its ratification, present important federal questions under the separation of powers doctrine as well as the Treaty Clause. The United States ratified the ICCPR on September 8, 1992, with five reservations, five understandings, four declarations, and one proviso. (S. Res. 4783-84, 102d. Cong., (1992).) One of the purported reservations was made to avoid the provisions of article 6 to the ICCPR, which guarantees the right to life and specifically prohibits the execution of juveniles. The United States's ratification of the ICCPR included a vague declaration "that the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." (S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political Rights.)

638. However, the federal Treaty Clause does not contain any language suggesting that the Senate can partially consent to a treaty or create a new one by placing conditions on it that materially alter the treaty

which is proffered by other nations. Nor does the alleged "reservation power" survive analysis under the United States Supreme Court's decisions regarding the separation of powers, culminating in *Clinton v. City of New York, supra,* 703 F.2d at 962 (line-item veto held invalid because the Constitution does not authorize the president "to enact, to amend or to repeal statutes"); see also *Bowsher v. Synar, supra,* 478 U.S. at 714; *INS v. Chadha, supra,* 462 U.S. at 919.

639. President Clinton subsequently issued an executive order adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. Executive Order No. 13107, "Implementation of Human Rights Treaties." President Clinton specifically referred to the ICCPR when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"[33]

[33]Exec. Order No 13107 states, in part:

"IMPLEMENTATION OF HUMAN RIGHTS TREATIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the *International Covenant on Civil and Political Rights* (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

"Section 1. Implementation of Human Rights Obligations.

"(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and

640. In addition to violating federal constitutional and separation-of-powers principles, the United States' attempt to condition its consent to the treaty with a "reservation" to the prohibition against executions violates international law because the "reservation" is inconsistent with the "object and purpose" of the treaty. The Vienna Convention on the Law of Treaties states that a "reservation" is not valid if it "is incompatible with the object and purpose of the treaty." (Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, 336-37; see also *Restatement 3d Foreign Relations Law of the United States* § 313(1)(c)) ("A state may enter a reservation to a multilateral international agreement unless the reservation is incompatible with the object and purpose of the agreement.") This rule of international law has been adopted by the International Court of Justice and the United Nations General Assembly. (See *Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide*, U.N. GAOR, 6th Sess., 360th plenary meeting, at 84, U.N. Doc. A/L.37 (1952).)

641. The "object and purpose" of the ICCPR is to bestow and protect inalienable human rights to citizens: "[e]very human being has the

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promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD."

(Exec. Order No. 13107, 63 Fed.Reg. 68991).

inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." (Article 6, para. 1, International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The right to life is a fundamental human right which is expressed throughout the ICCPR. There is nothing more contravening to the "right to life" than the death penalty.

642. In 1995, the United Nations Human Rights Committee concluded that the United States' reservation to Article 6, paragraph 5 was incompatible with the object and purpose of the ICCPR, and recommended that it be withdrawn. (See *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, U.N. Hum. Rts. Comm., 53rd Sess., 1413th meeting., at para. 14, U.N. Doc. ICCPR/C/79/Add.50 (1995).) "The Committee [was] particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purposes of the Covenant." (*Ibid.*)

643. Because the United States' "reservation" to Article 6, paragraph 5, violates the object and purpose of the ICCPR and its Second Optional Protocol, it is void. Since the "reservation" is void, the United States is bound by this treaty, and, pursuant to the Supremacy and Treaty Clauses to the United States Constitution and long established rules of international law, the State of California is prohibited from executing petitioner. (U.S. Const. art. VI., cl. 2; U.S. Const. art. II, cl. 2; International

Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171; *The Paquete Habana, supra*, 175 U.S. at 700; *Clinton v. City of New York, supra*, 524 U.S. at 417; *Bowsher v. Synar, supra*, 478 U.S. at 714; *INS v. Chadha, supra*, 462 U.S. at 919; Exec. Order No. 13107, 63 Fed.Reg. 68991 (December 10, 1998); S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political Rights.)

644. Those facts concerning petitioner's mental vulnerabilities that are set forth in Claims 1 and 2 and the supporting exhibits are incorporated by this reference as if fully set forth herein.

645. Customary international law has been part of the federal law of this country since its establishment. Well over a century ago, the United States Supreme Court affirmed that international law is part of the law of the United States. International human rights law is an established, essential and universally accepted part of life throughout the international community. Individuals, including United States citizens, possess remediable rights based on international law. Customary international law is defined as the "customs and usages of civilized nations."

646. An international norm constitutes legally binding customary international law when it is adhered to in practice by most countries and those countries follow the norm because they feel obligated to do so by a sense of legal duty or "*opinio juris*."

647. The prohibition against the imposition of the death penalty on mentally disordered individuals qualifies as an international norm or legally binding international law.

648. Currently 111 nations prohibit the execution of mentally disordered individuals by treaty, legislation or practice. In 1984, the United Nations Economic and Social Council (ECOSOC) adopted standards relating to the death penalty prohibiting the execution of pregnant women, new mothers, and persons who have become insane. (*Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Resolution 1984/50 (May 15, 1984) U.N. ESCOR Supp. (No. 1) at 33, U.S. Doc E/1984/84, Para. 3.) In 1989, the ECOSOC recommended that member states eliminate the death penalty for individuals suffering from mental retardation or extremely limited mental competence at the time of sentencing or execution. (*Implementation of Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Resolution 1989/64 (May 24, 1989) Para. 1(d).)

649. On June 25, 2001, the Parliamentary Assembly of the Council of Europe, an entity made up of 43 member nations from Europe and on which the United States enjoys observer status, condemned the execution of juvenile offenders, of persons suffering from mental illness, and of persons afflicted with mental retardation.

650. In February 2002, the Council of Europe adopted Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) extending the abolition of the death penalty to all circumstances, regardless of declarations of war. Thirty-five countries have signed and three countries have ratified the protocol.

651. For the past several years, the United Nations Commission on Human Rights officially has registered the position that the continued use of the death penalty against mentally disordered individuals in the United States is a violation of international law. Since 1999, the U.N. Commission on Human Rights has specifically urged "all States that still maintain the death penalty . . . not to impose the death penalty on a person suffering from any forms of mental disorder or to execute any such person." (See *The Question of the Death Penalty*, Hum. Rts. Comm., 61st Sess., Resolution 2002/104 (2002) E/CN.4/2002/L.104; *The Question of the Death Penalty*, Hum. Rts. Comm., 60th Sess., Resolution 2001/68 (2001) E/CN.4/RES/2001/68; *The Question of the Death Penalty*, Hum. Rts. Comm., 59th Sess., Resolution 2000/64 (2000) E/CN.4/RES/2000/64; *The Question of the Death Penalty*, Hum. Rts. Comm., 58th Sess., Resolution 1999/61 (1999) E/CN.4/RES/1999/61.)

652. The United Nations Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions has repeatedly found the United States

to be in contravention of accepted international standards relating to the execution of the mentally disordered.

653. In December 1996, the Special Rapporteur issued a report stating that the Rapporteur intervenes when capital punishment is imposed upon the "mentally retarded or insane." (United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, E/CN.4/1997/60 (Dec. 24, 1996) Para. 9(a).) In the addendum to the report, which addressed the actions of individual countries, the Rapporteur made specific findings with regard to the United States, concluding that the United States does not conform to the safeguards and guarantees contained in international instruments prohibiting the execution of the mentally retarded and the mentally ill. (*Id.* at E/CN.4/1997/60/Add.1 (Dec. 23, 1996).) In 2000, the Special Rapporteur urged "Governments which continue to enforce death penalties . . . to take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons." (United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, E/CN.4/2000/3, Para. 97, Jan. 25, 2000.)

654. The international law norm prohibiting the execution of mentally disordered individuals has become so widespread as to be peremptory, a *jus cogens* norm which is non-derogable.

655. Article 53 of the Vienna Convention on the Law of Nations defines *jus cogens* as: "A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (See Vienna Convention, *supra*, 1155 U.N.T.S. 331.)

656. As demonstrated by the treaties, pronouncements and practices described above, the prohibition of the execution of the mentally disordered has become as widespread and clear as the prohibition on slavery, torture, or genocide.

657. Except for the United States, the consensus of the world on this point is absolute, and there are no contrary expressions of opinion by any country or agency charged with the enforcement and interpretation of these documents.

658. As set forth in detail in Claims 1 and 2 of this petition and the facts set forth in the exhibits cited in and incorporated into those claims, Michael at all relevant times exhibited symptoms of major mental illness and organic brain damage. Michael suffered a variety of mental disorders and developmental disability that substantially impaired his ability to exercise judgment, reasoning, volition and impulse control throughout his life and at the time of the offenses and his trial. These impairments further make it medically clear that at the time of the capital offense, and trial,

Michael functioned in a substantially altered state of consciousness and without the ability to appreciate or control his actions.

659. Michael's death sentence violates binding customary international law and *jus cogens* and is therefore unlawful. The Court should modify the judgment by vacating the sentence of death, or afford Michael a full and fair evidentiary hearing at which he can prove his entitlement to relief under the federal constitution and separately under international law as incorporated into the supreme law of the United States.

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PRAYER FOR RELIEF

Wherefore, petitioner Michael Allen respectfully requests that this Court:

1. Take judicial notice of the contents of the certified record on appeal and pleadings filed in PEOPLE V. MICHAEL ALLEN AND CLEAMON JOHNSON, California Supreme Court case No. S066939, and of this Court's own file and record;

2. Request that the original appendices referred to in this Petition be transmitted to the Court by the clerk of the superior court (Cal. Rules of Court, rule 18);

3. Allow petitioner a reasonable opportunity to supplement the evidentiary showing of the claims presented here to include legal and factual grounds for claims which become apparent from further investigation, or from allegations made in the return or informal opposition to the petition, and to supplement or amend the petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

4. Allow petitioner leave to amend this petition to include any additional facts, new claims, or derivative sub-claims that may arise as a result of the production of the discovery that has been or will be ordered by the trial court in the instant case pursuant to the continuing discovery

process being pursued contemporaneously herewith under Penal Code section 1054.9 (See Ex. 43);

5. Issue a writ of habeas corpus or order respondent to show cause why petitioner is not entitled to the relief sought;

6. Grant petitioner sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the facts alleged in this Petition;

7. Grant petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

8. Order the Los Angeles County District Attorney and all agencies that assisted with or participated in the investigation and prosecution of Mr. Allen, to disclose all files pertaining to the allegations in this petition and Mr. Allen's case that are currently being withheld, and grant Mr. Allen leave to conduct further discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford Mr. Allen the means to preserve the testimony of witnesses;

9. Grant petitioner relief on the merits of his claim(s) after determining that there are no material facts in dispute or order an evidentiary hearing at which petitioner will offer the herein stated, and further proof of, the factual allegations stated above;

10. After full consideration of the issues raised in this petition, considered cumulatively and in light of the errors alleged on direct appeal, order that petitioner's convictions, special circumstance findings, and death sentence be set aside;

11. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and

12. Grant petitioner such further relief as is appropriate and just in the interest of justice.

DATED: April 7, 2008

Respectfully submitted,



Stephen S. Buckley

Attorney for Michael Allen

VERIFICATION

I, Stephen S. Buckley, declare as follows:

1. I am an attorney admitted to practice in the State of California. I was appointed on April 13, 2005, to represent petitioner Michael Damone Allen herein, who is confined and restrained of his liberty at San Quentin State Prison, in San Quentin, California.

2. I am authorized by virtue of this Court's appointment to file this petition for writ of habeas corpus on Mr. Allen's behalf. Many of the facts alleged are within my knowledge and not Mr. Allen's.

3. All facts alleged in the Petition, not otherwise supported by citations to the record, exhibits, or other documents, if any, are true of my own personal knowledge.

Executed under penalty of perjury under the laws of the state of California and of the United States on April 7, 2008, at Orange County California.



Stephen S. Buckley

CERTIFICATE OF WORD COUNT COMPUTATION
CAL. RULES OF COURT, RULE 8.204(C)(1)

The text of this Petition consists of 90,378 words as counted by the Microsoft Word Processing Program used to prepare this brief.

Dated: April 7, 2008.



Stephen S. Buckley
Attorney for Appellant

PROOF OF SERVICE

The undersigned declares that I am a citizen of the United States, over eighteen years of age, not a party to this cause, an attorney authorized to practice in the State of California, and my business address is P.O. Box 4093, San Clemente, California 92674.

That I personally served the original and ten (10) copies of the attached **Petition for Writ of Habeas Corpus** and the original and two (2) copies of the **Exhibits in Support Thereof** on the:

Clerk of the California Supreme Court
300 South Spring Street, Second Floor
Los Angeles, CA 90013

That I also served true copies of the aforementioned documents by mail as follows:

California Attorney General
Los Angeles Office
300 South Spring St., 5th Floor
Los Angeles, CA 90013

California Appellate Project
C/O Luke Hiken
101 Second St., 6th Floor
San Francisco, CA 94105

Mr. Michael Allen
P.O. Box J-03047
San Quentin, CA 94974
[By Personal Service w/in 30 days]

Mr. Brent E. Romney, Esq.
Appellate Counsel for Mr. Allen
101 S. Kraemer Blvd., Suite 240
Placentia, CA 92870

Office of the State Public Defender
c/o Andrew S. Love, Esq.
Appellate Counsel for Mr. Johnson
221 Main Street, 10th Floor
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed in Orange County, California on April 9, 2008.

Stephen S. Buckley