Appeal No. 09-15283

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY LEE DUVARDO,

Petitioner,

v.

GEORGE GIURBINO,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARILYN HALL PATEL
CASE NO. 05-05428

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

Rules

JURISDICTIONAL STATEMENT

Petitioner Jeffrey Lee Duvardo appeals from an order denying a petition for a writ of habeas corpus by a person in custody pursuant to a state court judgment. The district court had subject matter jurisdiction under 28 U.S.C. § 2254(a). The district court entered its final order denying the petition on January 6, 2009. ER 28. Petitioner filed a timely Notice of Appeal on January 28, 2009. ER 70; *see* Fed. R. App. P. (4)(a)(1)(A). On February 2, 2009, the district court certified for appeal three claims raised in the petition. ER 68. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

ISSUES PRESENTED

1. To obtain a murder conviction, the prosecution had to show that the Duvardos were killed on March 31, 1999, and that Petitioner killed them. The undisputed evidence demonstrated that the victims' level of decomposition was inconsistent with a March 31 date of death, and that Petitioner signed two attendance sheets on March 31 that require the signer to be present. Was the prosecution's evidence sufficient to support Petitioner's first degree murder conviction?

2. Expert witness Mark Safarik testified that Donald Duvardo "pled for his life" before he died, and that the killer knew where the house was, was related to the Duvardos, and killed them out of personalized anger. Expert witnesses are

not permitted to opine on the guilt of a criminal defendant. Did Safarik's testimony render the trial fundamentally unfair in violation of Petitioner's due process rights?

3. The prosecution showed that Petitioner had not divorced his first wife as of March 1999, and deceived both his first and second wives about the nature of his marital status. A due process violation lies if the prosecution proffers character evidence that lends itself to no permissible inferences. Did the admission of bigamy evidence violate Petitioner's due process rights?

STANDARD OF REVIEW

This Court reviews de novo the district court's decision to deny a petition for a writ of habeas corpus. *Winzer v. Hall*, 494 F.3d 1192, 1196 (9th Cir. 2007). Accordingly, neither the district court's order nor the manner in which it applied the Antiterrorism and Effective Death Penalty Act ("AEDPA") is entitled to any deference.

Under AEDPA, a federal court may grant habeas relief from a state conviction only if the state court's determination of the constitutional claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(d)(1)-(2). Where, as here, the state supreme court

denies review of the claim without comment, this Court reviews the last reasoned state court judgment. *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007).

Under 28 U.S.C. § 2254(d)(1), a state court decision is "contrary to" federal law if it "'*applies a rule* that contradicts the governing law set forth in [Supreme Court] cases.'" *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (en banc) (emphasis and brackets in original) (quoting *Price v. Vincent*, 538 U.S. 634, 640 (2003)). A decision is an "unreasonable application" of federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000). The Supreme Court has emphasized that a state court's decision may be an "unreasonable application" regardless whether any Supreme Court decision contains the same fact pattern. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

Under 28 U.S.C. § 2254(d)(2), a state court decision is based on an "unreasonable determination of the facts" if it is not supported by the record. *See Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003) (holding that state court's determination of the facts was unreasonable); *Anderson v. Terhune*, 516 F.3d 781, 788-90 (9th Cir. 2008) (en banc) (same). "Although this standard requires [the Court] to give considerable deference to the state courts, AEDPA deference is not a rubber stamp." *Anderson*, 516 F.3d at 786.

When the standard in Section 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 531 U.S. at 953. Thus, if the Court finds that the state court decision is contrary to or unreasonably applies federal law as determined by the Supreme Court, the Court decides the constitutional claim de novo. *Frantz*, 533 F.3d at 739. Finally, if the Court finds error, it may grant relief if the error had a "'substantial and injurious effect or influence'" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

STATEMENT OF THE CASE

On April 9, 2001, the Lake County District Attorney charged Jeffrey Lee Duvardo with two counts of first degree murder and two counts of elder abuse. *See* Cal. Penal Code §§ 187, 368(b)(1). The State alleged a multiple murder special enhancement under Penal Code § 190.2(a)(3).

The jury trial lasted eleven weeks. After five days of deliberation, the jury requested that the court reread the instructions defining first degree murder and prohibiting the return of a partial or non-unanimous verdict. *See* Reporter's Trial Transcript ("RT") 5291-303. The next day, the jury returned guilty verdicts on all counts. RT 5307-10.

The district attorney declined to seek the death penalty, and the Superior Court sentenced Petitioner to two concurrent terms of life imprisonment without

the possibility of parole. ER 29. Petitioner appealed, but the California Court of Appeal affirmed the conviction in the last reasoned state court decision. *See* ER 1-27. The California Supreme Court summarily denied review.

Petitioner filed unsuccessful state habeas petitions. ER 29. He then filed a petition for writ of habeas corpus in the District Court for the Northern District of California. The petition was stayed while Petitioner exhausted state court remedies as to some claims.[1] ER 29. After exhausting state court remedies, Petitioner filed an amended petition with seven claims. The district court denied the petition (ER 28), but found that Petitioner made "'a substantial showing of the denial of a constitutional right'" and certified three claims for appeal (ER 68 (quoting 28 U.S.C. § 2253(c)(2)).

STATEMENT OF FACTS

In 1999, Petitioner lived in Valencia, California, with his second wife Molly. ER 743. At the time of his parents' deaths, Petitioner was employed at a division of Boeing approximately an hour from his house. Petitioner's parents lived in Nice, California, some 463 miles to the north. ER 522. The State's case depended on proving that Petitioner traveled from Valencia to Nice and killed his parents on the morning of a particular day: March 31, 1999. *See* ER 857 (describing May 31

[1] There is no dispute that Petitioner adequately exhausted his state court remedies. ER 30.

as "a day when [Petitioner] would be able to do this with his tracks covered"); *see also* ER 863.

A. Discovery of the Victims.

Petitioner's parents, Donald and Maryann Duvardo, were last seen alive on March 30, 1999. On that day, the Duvardos' neighbor, Joseph Burke, saw Donald working in the garage attached to the Duvardo home. ER 2. Burke and his wife were in Santa Rosa all day on March 31. ER 2; RT 391. After returning home that evening, they phoned the Duvardos, but got no answer. ER 2. On April 2, Burke walked around the Duvardos' property, as he typically did when they were away, but noticed nothing unusual. *Id.*

On April 5, Deputy Sheriff Andrew Davidson performed a welfare check at the behest of the Duvardos' daughter, Janet. RT 541-42. Davidson noticed that lights were on inside the residence. *Id.* But he did not find "anything real suspicious." RT 544.

On April 6, Burke noticed that a rear deck gate, which the Duvardos rarely used, was open. ER 2. After spotting the Duvardos' van in their lighted garage, Burke entered the house through an unlocked sliding door on the back deck. *Id.* He discovered Maryann's body in the living room and left the house immediately. *Id.* Burke then told his wife, who was standing in the street, that he believed the Duvardos were dead and that she should call the police. *Id.*

B. The Crime Scene and Police Investigation.

Three Lake County police officers arrived on the scene to find "everything basically . . . ransacked." ER 4-5; RT 447. Closets, cabinets, and dresser drawers had been emptied. RT 447. Eventually, it was discovered that Maryann's purse and both victims' wallets were missing from the house (RT 592, 701), along with a checkbook (RT 1359). No prescription drugs were found in the house, even though Donald was taking various drugs at the time. ER 491.

Donald's body was in the laundry room, which is situated between the living room and the garage. ER 4. His head was against the wall, and his feet were pointed toward the door to the living room. *Id.* Blood was spattered on the wall behind him. RT 531. He had died from multiple stab wounds to the neck, chest, and abdomen. ER 6.

Maryann's body was face down in the living room, near a computer desk and a few feet from the front door. ER 4. Blood had pooled on the carpet underneath her body. *Id.* The top of the pool had dried, but the blood was still wet underneath. *Id.* Blood, also wet, stained her sweatshirt. *Id.* Maryann had died from a combination of blunt force trauma and multiple slash and stab wounds. ER 6. The prosecution's pathologist testified there may have been more than one assailant and it was impossible to determine whether Donald or Maryann was killed first. RT 2746.

Inside the house, the Duvardos' thermostat was set to seventy-four degrees and the heater was on. ER 3, 344, 413, 448; RT 392. Both Detective Corey Paulich and Deputy Michael Morshed found it "uncomfortably warm" inside (ER 448; RT 472), and Criminalist Michael Potts described the residence as warm. ER 344. The bodies exhibited roughly the same level of decomposition. ER 401.

Upon his arrival at the house, Detective Paulich was named lead detective (ER 408), because it was his "turn to be up for a major case" (RT 1543). Detective Paulich had never served as lead detective on a homicide case, and the Duvardo investigation was the second homicide he had worked on. ER 440.

Detective Paulich ordered several officers to collect evidence from the house and photograph the scene. ER 411. He also ordered that a video be made, but the officer assigned that responsibility failed to properly record the scene; he did not capture anything on tape until the next day, after "everything had been moved," including the bodies. RT 1636, 1641.

The police found a series of fingerprints inside the house that were not left by either victim or Petitioner. RT 1405-06. The prosecution's fingerprint expert was never asked to compare the prints to anyone's other than Petitioner's and the victims'. RT 1414. On the lot next to the Duvardos' residence, police found recently made tire impressions and a cigarette butt. RT 1217-18. Petitioner was not a smoker. ER 444.

Detective Paulich found that the front door was locked with a double-key deadbolt and that the windows were secure. ER 414. In the living room, a liquor cabinet stood open, displaying bottles of wine and spirits. ER 418. He examined the upstairs master bedroom and bathroom, but found the bathroom "untouched," and saw nothing of special interest in the sink. ER 423. Detective Paulich believed the crime scene looked like a staged burglary because many valuable items normally taken by burglars were left behind. ER 5.

After his initial search, Detective Paulich recruited "a group of kids" from a local high school to canvass the area around the house for additional evidence. ER 436-37. He testified that during further searching of the house, an officer photographing evidence found in the upstairs bathroom a towel "balled up" in the sink. ER 435. That officer testified that his roll of film documenting the towel "appears to be missing," and could not be located. RT 2296. Nonetheless, the State presented evidence that the towel belonged in the victims' kitchen, and that it contained a single spot of blood—approximately half-an-inch by an inch-and-a-quarter in diameter—identified as Petitioner's through DNA testing. ER 5, 9-10, 380. This towel led to Petitioner's arrest.

C. The State's Case.

The prosecution presented a self-described "circumstantial" case. ER 833. It theorized that Petitioner drove from his home in Valencia to Nice—"a round trip

of some 14-16 hours"—on the morning of March 31, 1999, killed his parents, and made it home by 6:26 p.m. to phone his wife. ER 2, 17-18. The State therefore bore the burden of proving beyond a reasonable doubt that: (1) Donald and Maryann Duvardo were killed on the morning of March 31, 1999; and (2) that Petitioner killed them.

1. Time of Death.

The prosecution's pathologist testified that he could not estimate the victims' time of death with any precision, concluding only that "an interval of days" elapsed between death and discovery. RT 2677. The State therefore relied on circumstantial evidence to establish that the Duvardos were killed on March 31.

To prove the date of death, the prosecution showed that clocks in the victims' kitchen and living room were an hour slow, suggesting that the Duvardos were not alive on April 4 to observe daylight savings time. ER 5. Additionally, the victims' mailbox contained mail dated from March 31 to April 7. ER 6. Finally, the Duvardos' answering machine had messages on it from March 31 and after. ER 5.

To establish that the murders occurred in the morning, the State demonstrated that the victims last accessed their email account on March 31 at 7:05 a.m., and did not retrieve their March 31 newspaper. ER 6. Further, Criminalist Potts testified that the victims' coffeepot was unplugged, but not

cleaned, and that two mugs with mold in them were found nearby.[2] ER 4, 344. The State also showed that a clock had fallen to the floor and had stopped at 10:25 because of a bent hand, although it conceded, "we don't know for sure that that's 10:25 a.m." ER 4, 854.

The prosecution proffered expert testimony that the murders likely occurred between 7:30 and 10:20 a.m. based on the damage to the clock and because the Duvardos often drove to the post office around 11:00 a.m. to get their mail. ER 170. The prosecution did not attempt to explain why, at that early hour, the liquor cabinet was open and Donald had at least one-and-a-half alcoholic drinks in his system when he died. RT 2756-58.

2. Petitioner's Alleged Involvement.

To make the case that Petitioner was the killer, the prosecution proffered (1) physical evidence; (2) circumstantial evidence bearing on the ability of Petitioner to travel on March 31; (3) expert profiling testimony; and (4) motive evidence.

[2] Unfortunately, no investigator tested the coffee to see whether it was decaffeinated. Police also never inventoried the contents of the Duvardos' van to see if they had been out of town on March 31 or thereafter, or the contents of the Duvardos' trash to see if the killer left behind any evidence. RT 1438-39. Nor did they test the drains of the Duvardos' sinks for blood or check whether the Duvardos' house plants had been watered recently. ER 461-62; RT 1356-57. Furthermore, investigators neglected to photograph the Duvardos' garage, which Detective Paulich admitted was a mistake. RT 1291.

a. Physical Evidence: The Towel.

At trial, the prosecution relied heavily on the one piece of physical evidence linking Petitioner to his parents' house: the towel with his blood found in the master bathroom. *See* ER 900 (arguing in closing that Petitioner "had to have picked that towel up off the kitchen island to stop the flow of his blood"). Despite the gruesomely violent scene depicted by witnesses, police found none of Petitioner's fingerprints in the house, nor did they find his blood anywhere but on the towel. ER 251; RT 1406. One of the State's witnesses testified that there were "too many variables" to ascertain how the blood got on the towel (ER 375), and that although the stain had not been laundered, the blood's age was impossible to determine (ER 383-84).

b. Circumstantial Evidence of Petitioner's Ability to Travel.

The prosecution also relied on circumstantial evidence of Petitioner's whereabouts on March 31. It established that Petitioner dropped off his car for repairs on March 30 at 8:05 a.m. and rented a replacement that he kept until April 1. ER 10. The State admitted rental records purporting to show that, during those dates, the car was driven 1,128 miles, 190 miles more than the distance of a round trip between Petitioner's home in Valencia and the victims' home in Nice.[3] ER 10-

[3] The records pertaining to that vehicle had numerous errors. The company log book showed that the car first arrived at the rental facility on February 18, 1999, but other records indicate that it was rented on February 17, 1999. RT 2389-

11. The State also established that although March 31 was a Wednesday and Petitioner's daughter usually stayed with him on Wednesdays, he knew as early as March 28 or 29 that she would be away camping on March 31. ER 12.

To preempt Petitioner's alibi that he was at work on March 31, the State proffered evidence that although Petitioner "scanned in" to gain entrance to the Boeing facility on March 29, March 30, and April 1, he did not do so on March 31. ER 11. The State also proffered evidence indicating that "it would not have been unusual for [Petitioner] to be absent from his office the entire morning or afternoon," and that Petitioner could have been away from his office for one or two days without his supervisor noticing. ER 11-12.

3. "Victimology" Profiling Testimony.

The State called FBI Agent Mark Safarik to testify as a "crime scene analysis expert." ER 7, 72-73. Safarik employed "victimology" to determine why the Duvardos were victims of a violent crime. ER 7. He explained his job as follows:

(continued…)

92. Moreover, employees frequently failed to properly record the car's mileage at the time of rental, time of return, or both. RT 2353-55, 2362-64. On one occasion, the mileage at time of rental *exceeded* the mileage at the time of return. RT 2373-74. Additionally, some contracts were missing from the files. RT 2375. Given the records' high error rate, a certified fraud examiner testified that she could not put any assurances on the accuracy of the information contained therein. RT 3699.

> What we do is analyze that behavior and we say that this person most likely would have personality characteristics like this, or like that, or behavioral characteristics like "A," "B," or "C." And then the law enforcement agencies use that information to help narrow the field of potential suspects, or give them a direction for the investigation of their case.

ER 110-111.

Petitioner objected to Safarik providing an analysis that veered from conclusions about the killer's physical characteristics into a psychological profile. ER 73-74.[4] The prosecution reassured the court that Safarik would not provide an "offender profile" (ER 74), because "he's not going to be able to tell you the offender characteristics and traits. It's – it's a helpful thing for law enforcement, not something he can testify to" (ER 86). The court expressed some concern that Safarik's testimony might "point[] to generally people who might be very close to the decedents. Which, if you once take the position that you're excluding, let's say the [Duvardos'] other son and the daughter, . . . I suppose it points, then, at the defendant." ER 101. Nonetheless, the court permitted Safarik to testify so long as

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[4] The defense objected that Safarik could:

> look at the knife . . . and say that it went in at a certain angle and in order for this knife wound to go in at this angle the person had to be taller or the person had to be left handed or something. That's physical, and that's fine. But if we're talking about . . . this knife would had to be inflicted by somebody that knew the victim and had to be inflicted by somebody who was angry with the victim, I have a problem with that.

ER 81-82.

he did not opine "that the person has to be 35 years old, having trouble, weighs so much, and all this sort of thing." ER 102-03.

To assign personality characteristics to the Duvardos, Safarik reviewed photographs, investigative reports, questionnaires about the Duvardos completed by family members, and other materials related to the case.[5] ER 7, 187. Based on those materials and statements made by people who knew the Duvardos, Safarik opined that, because the front door was locked and there was no sign of forced entry to the unlocked sliding door, "they were security conscious people."[6] ER 127-28, 129. Additionally, Safarik opined that "[t]here just really is no reason that they should have been targeted for a violent homicide." ER 129. He noted that the Duvardos lived on a cul-de-sac, which was "very isolated really. It would be very difficult to find this, I think, unless you knew where it was." ER 129-30.

From those opinions and from the information that the Duvardos' children provided in the questionnaires, Safarik concluded that "these are not people that would have allowed somebody into their home who they did not know. . . . So what I opined was that the Duvardos allowed whoever this was into the residence. They did not perceive this individual to be a threat." ER 132.

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[5] Safarik also visited the Duvardos' home, but not until the day before he testified. ER 154.

[6] In forming his profile, Safarik testified that he did not consider any reports about other individuals who were in the neighborhood at the time or who may have had access to the house after the Duvardos were killed. ER 159-60.

Safarik also reconstructed the crime for the jury, opining that "most likely," Maryann was attacked first and that "[s]he didn't realize the threat until it was too late." ER 7, 133. Safarik opined that Donald then:

> walked in . . . [and] saw his wife laying on the floor. . . . [O]f course now [he] perceives the threat, as the offender moves toward him. He backs up . . . into the laundry area, which is only about four feet away. There's no escape from this area. And now he's trapped. Probably pleading for his life.

ER 7, 137. Safarik testified it was unlikely that Donald was killed first because "what then you would have to believe is that while Don is being killed, assaulted, and he's pleading for his life, that [Maryann] is just sitting at the desk working." ER 138.

Safarik echoed the view that the burglary looked staged, but went much further than the other law enforcement witnesses. ER 8. Safarik opined that "staging . . . implies that there is a relationship of some sort between the offender and the victim" because a stranger would not "stage a crime scene." ER 151-52. Safarik testified that the same person who staged the crime scene also killed the Duvardos. ER 8, 159.

Finally, Safarik opined about the "level of anger" involved in the attacks. ER 152. He testified that the inflicted injuries were more than necessary to kill, which "suggests to us that the anger is personalized." *Id.* And "[i]n this case," what was "significant":

> is that you have this amount of anger, rage, focused on [Maryann], and then there's a break. Because then the offender then has to turn and focus on another victim. . . . But here you have someone who has the ability to sustain that rage from one victim, and turn, and then inflict that same . . . level of anger and inflict the same kind of injuries. . . . So to move that kind of anger from – or rage, however you want to call that, from one victim to another is . . . very significant.

ER 152-53.

4. Motive Evidence.

The prosecutor explained the State's theory of motive in his closing argument, telling the jury that Petitioner killed his parents because "[h]e got so tangled in his own web of deceit . . . that he became desperate to untangle himself. And he needed to do that in a way that did not expose his deceit, did not show the extent of his lies." ER 828-29. The prosecution argued that Petitioner murdered his parents so that his wife Molly would not find out that he was secretly borrowing money, that he told lies "about being a secret agent man," and that he was still married to his first wife. ER 829. Additionally, the prosecution argued, Petitioner wanted to prevent his parents from learning that he was not a covert government agent and that he had not yet divorced his first wife. *Id.*

In support of this theory, the prosecution showed that throughout 1998, Petitioner borrowed—or asked to borrow—money from a series of relatives and friends, including the victims, who loaned him $30,000. ER 13-14. Donald's sister, Novell Hendrickson, testified that Petitioner called her in November 1998

and was upset. RT 2862. He said that he had forged Molly's name on a trust deed and that she would divorce him. *Id.* He asked Hendrickson for $26,000, but she said she would have to discuss the loan with Petitioner's parents. RT 2683. The next day, Petitioner met with his parents and Hendrickson. RT 2864. Petitioner said he was involved in undercover work for the CIA, selling guns to foreign governments. RT 2866. The purchasers of one shipment of guns had short-changed him $200,000. RT 2866-67. Petitioner reported that he had paid back $150,000 with gems and gold bullion, and that if he did not have the remainder soon he would be killed. RT 2867. Analysis of the Duvardos' financial records shows that they took out a short-term loan, secured by a CD account, on November 24, 1998, for $30,000.[7] ER 14. The proceeds were paid by check to Petitioner. *Id.*

The prosecution also showed that, in 1997, Petitioner and Molly borrowed $7,500 from a friend, Edward Clevenger, which went towards the down payment on a house. RT 2127-28. That loan was repaid in July 1998. It showed that another friend, Ken Ferguson, lent Petitioner $10,000 in early 1998, after Petitioner said he would lose custody of his daughter if he did not pay some outstanding bills. RT 2140-41. Petitioner failed to return the money within a month and claimed health problems associated with chemical exposure in Vietnam prevented him

[7] Detective Paulich testified that, during an interview, Petitioner admitted borrowing the $30,000, plus another $10,000, from his parents and provided the same "secret agent" story when Paulich asked why he needed the money. ER 512, 515.

from repaying the loan. RT 2153. Ferguson testified that on one occasion, he called the police because Petitioner came to his residence, acted bizarrely, claimed he was going to die, and said he did not "know why [Ferguson was] treating him this way." ER 13; RT 2192-94. Molly became aware of the loan after that incident and repaid Ferguson in June 1999. RT 2156, 2194.

Additionally in 1998, Petitioner received $54,000, secured by a second mortgage on Petitioner's home, from another friend, Doug Bernards. RT 2234. Petitioner preferred that Molly not know about the loan, but Bernards said Molly would have to sign the documenting papers, which she did. RT 2246. Petitioner repaid the loan in three installments, with the last on March 1, 1999. ER 13.

In its cross-examination of Molly Duvardo, the State showed that Molly was unaware of some of her husband's financial dealings, including that he had borrowed money from his parents. RT 4518-19. The State showed also that, although she had been married to Petitioner since 1993 (ER 810), Molly was unaware that Petitioner and his first wife, Jan, had not formally terminated their marriage. ER 778. The prosecution got Molly to acknowledge that learning about her husband's bigamy was "shocking and surprising," and "upsetting" to her. ER 782, 790.

Jan testified that she and Petitioner separated in 1989 and that she initiated divorce proceedings in 1996 but did not complete the process. ER 305-06. After

her separation from Petitioner, they continued to file joint tax returns. ER 320. At one point, Jan confronted Petitioner about his relationship with Molly, and Petitioner told her that "it was a spiritual union," and that he was with Molly because "he had some sort of physical ailment where he felt that he might very possibly die, and he did not want to die alone." ER 332. Jan testified that after that conversation, she did not believe Petitioner and Molly had "officially gotten married." *Id.* Jan divorced Petitioner in March 2000. ER 321.

D. The Defense's Case.

Petitioner contended that that his parents were killed sometime after March 31, 1999. ER 15. Petitioner also presented an alibi defense, showing that he could not have killed his parents on March 31 because he was at work at the Boeing complex in Long Beach that day. *Id.*

1. Timing of the Deaths.

Dr. Lawrence, the defense's pathologist, opined that the bodies, which were discovered on April 6, did not appear to have decomposed for more than "three or four days." ER 15, 391-92. He rejected the State's estimated time of death because the bodies did not exhibit "anywhere near six days" worth of decomposition. ER 399.

Dr. Lawrence testified that after four or five days, "there would be a very bad odor in the house." ER 16, 391. Yet the Duvardos' neighbor testified that he

did not smell anything unusual when he entered the residence that morning. RT 416. Likewise, both Deputy Morshed and Detective Paulich testified that they did not notice an odor that they would associate with decomposition, despite getting very close to the bodies. ER 476; RT 476. Sgt. Patrick McMahon, who touched Maryann's body during the investigation, testified that he did not notice any decomposition. RT 527.

Dr. Lawrence based his opinion on an ambient temperature of seventy-four degrees: the temperature at which the Duvardos' thermostat was set at when the investigation commenced. ER 16. He acknowledged that the temperature in the unheated laundry room where Donald's body was found could have been cooler, and he did not know whether a draft from the front door could have reduced the temperature around Maryann's body. *Id.* He opined, however, that for the Duvardos to have died on March 31, the ambient temperature could not have been above 60 to 65 degrees. *Id.*; ER 399.

2. Petitioner's Whereabouts on March 31, 1999.

Petitioner proffered documentary evidence that he was in Long Beach on March 31 until at least 9:50 a.m. and would not have had sufficient time to travel to Lake County and back by 6:26 p.m., when he placed a call from home to Molly's office. ER 16-18. Petitioner worked as a Change Board Representative at Boeing's Long Beach complex. RT 1816. Part of his job was to attend two

morning meetings, held back-to-back each Monday through Thursday, from approximately 8:30 to 10:00 a.m.: the Change Review Board ("CRB") meeting and the Implementation Control Group ("ICG") meeting. ER 554-55. Both meetings were held on March 31, and each had an attendance sheet, which Petitioner signed. ER 17, 557.

Immediately after the meetings, the attendance sheets were returned to Anita Rogers, an administrative assistant. ER 566. Rogers, who "was usually chained to [her] desk" (ER 713), kept the CRB attendance sheets in a binder labeled "CRB agendas and minutes," which she stored in a closed, sometimes-locked, filing cabinet in her cubicle. ER 681, 723-24, 729. Rogers only saw Petitioner once every two or three months, and she never saw him skulking about her workspace. ER 729.

Rogers delivered the ICG attendance sheets to Jesse Torres, who kept them in his office for two weeks and then brought them to Kerry Frank, who locked them in a cabinet. ER 576, 688. Frank, who attended CRB and ICG meetings with Petitioner, testified that an employee must be present at the meetings to sign the attendance sheets. ER 558. He testified because Boeing considered it important that the forms accurately reflect meeting attendance, he was "positive that [Petitioner] was there" on March 31. ER 577.

Richard Clegg, who chaired the CRB meetings in March 1999, testified that Petitioner could not have accessed the attendance sheets after the meetings. ER 674. Clegg claimed that even he could not access the attendance sheets outside the meeting. *Id.* Clegg also testified that items on the March 31 CRB meeting agenda pertained to Petitioner's work and, thus, his unnoticed absence would have been unlikely. ER 670.

Petitioner also signed a change implementation plan ("CIP") approval sheet that was circulated at the March 31 ICG meeting. ER 563. His signature is dated March 31. ER 564. CIP approval sheets are maintained by individual analysts, so to sign such a document after the meeting, Petitioner would have had to find the analyst and post-date his signature. ER 566. Accurate dating of the form, however, "would be important to the analyst." *Id.*

The drive time between Petitioner's home in Valencia and the victims' home in Nice was disputed. Detective Paulich testified that it took him approximately six hours and forty-five minutes to make the one-way trip. ER 523-24. Petitioner's wife, Molly, testified that it took her about eight hours to drive from the Valencia residence to the Lake County jail where petitioner was housed, and that Nice was about five minutes from the jail. ER 752-54. The defense also admitted into evidence a "Mapquest" estimate that a round trip between Petitioner's residence and the victims' home takes seventeen hours and six

minutes. RT 4287. By all three estimates, Petitioner could not have left Boeing after attending his morning meetings, driven to Nice, and returned home in time to place the 6:26 p.m. call to Molly's office. Thus, Petitioner could have killed his parents only if, contrary to what the attendance sheets indicate, he was not at the Boeing plant that morning.

SUMMARY OF ARGUMENT

Petitioner Jeffrey Lee Duvardo was convicted for murdering his parents and sentenced to life in prison without parole, even though the prosecution could not refute medical and alibi evidence that contradicted its theory of the case. To overcome these critical shortcomings, which would have caused any reasonable trier of fact to acquit, the prosecution exposed the jury to inappropriate, irrelevant, and prejudicial testimony that rendered the trial unfair. An FBI profiler, cloaked in the guise of an expert, peppered his account of the crime with pure conjecture. This same "expert," relying on profiling techniques better suited for crime fiction than the courtroom, depicted the killer in a way that dovetailed with the prosecution's theme, leaving no doubt that the FBI believed Petitioner was guilty. Then, in a move whose relevance has not been adequately explained, the prosecution exposed Petitioner as a bigamist. The jurors were invited to infer that because Petitioner mistreated his own wife, he also treated his parents in a deplorable manner.

The California Court of Appeal's decision upholding Petitioner's conviction was contrary to and an unreasonable application of Supreme Court precedent, and involved an unreasonable determination of the facts. Under clearly established law, a prisoner is entitled to habeas relief if "upon the record evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt," even if the evidence is construed in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The prosecution predicated its case on the theory that Petitioner drove more than 1000 miles to his parents' house and killed them on one particular day: March 31, 1999. But undisputed evidence showed that the Duvardos died several days *after* March 31, and that, even if they died on March 31, Petitioner could not have killed them.

The bodies, when discovered on April 6, did not exhibit "anywhere near six days[']" worth of decomposition. ER 399. The prosecution conceded at closing that it could not explain the lack of decomposition. ER 852. In light of that devastating medical evidence, the prosecution's circumstantial evidence, which showed only that the Duvardos were away for several days before their date of death, provided an insufficient basis to convict Petitioner for murder.

Even if sufficient evidence established that the Duvardos were killed on March 31, 1999, powerful evidence demonstrated that Petitioner was at work that day. Petitioner was required to attend two work meetings on March 31, and his

signature was on the sign-in sheets for both meetings. The undisputed evidence at trial was that an employee could sign the sheets only if present. The prosecution lacked sufficient evidence of guilt to overcome that undisputed alibi evidence. The prosecution relied primarily on a spot of Petitioner's blood found on a towel in his parents' sink, but the prosecution could not prove that the blood was deposited on March 31. The only other evidence putting Petitioner in the vicinity of the killings were records showing that Petitioner logged enough miles on a rental car during the relevant time period to make the round trip to his parents' house. But those records were so fraught with error that a certified fraud examiner testified that they deserved no weight.

The prosecution's inability to prove, beyond a reasonable doubt, that Petitioner murdered his parents warrants habeas relief. But even if that evidence were sufficient, Petitioner is entitled to habeas relief because the prosecution rendered his trial fundamentally unfair by proffering impermissible testimony of a profiler from the FBI's Behavioral Analysis Unit. That profiler riled the jury by speculating about how the Duvardos died, including that Donald Duvardo "pled for his life." The profiler also made it plain that he believed that Petitioner was guilty because the killer knew where the house was, was related to the Duvardos, and killed them out of personalized anger. He thereby violated the clearly established rule that a witness cannot opine about the defendant's guilt. Put simply, a criminal

defendant has no opportunity for a fair trial when an FBI profiler, imbued by the mantle of authority, expresses his view that the defendant is guilty.

Further, the prosecution violated Petitioner's due process rights by proffering evidence that Petitioner is a bigamist, despite the lack of nexus between that conduct and the crimes at issue. At trial, the prosecution tied itself in knots explaining the purpose of this character evidence, taking the contradictory positions that Petitioner killed his parents to prevent them from telling his second wife about his bigamy and to prevent them from learning about his bigamy. That contradiction results from the simple truth that Petitioner's bigamy was irrelevant to motive and was introduced only to taint him in the eyes of the jury. In light of the emotionally powerful nature of that evidence, and the emphasis which the prosecution gave it, there is no doubt that Petitioner was prejudiced. The court's errors in admitting the improper profiling and bigamy evidence necessarily had a substantial and injurious effect on the verdict, and Petitioner's petition for a writ of habeas corpus should be granted.

ARGUMENT

I. THE TRIAL EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER.

The California Court of Appeal unreasonably applied Supreme Court precedent by holding that the trial evidence was sufficient to support Petitioner's first degree murder convictions. *See* ER 19-22. The Court of Appeal assumed that

March 31 was the only day on which Petitioner could have made the round trip from Valencia to Nice. ER 20. The Court thus understood that to establish Petitioner's guilt, the State had to prove two things: that the Duvardos were murdered on the morning of March 31, and that Petitioner traveled from Southern California to his parents' home on that day to kill them. Contrary to the Court of Appeal's conclusion, the State failed to prove either element.

To prevail on an insufficiency of evidence claim, a habeas petitioner must show that, "upon the record evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt," even if the evidence is construed in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 324. Pursuant to 28 U.S.C. § 2254(d), Petitioner must demonstrate that the state court unreasonably applied *Jackson*'s standard. *See Briceno v. Scribner*, 555 F.3d 1069, 1078 (9th Cir. 2009) (citing *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005)). Although circumstantial evidence and reasonable inferences drawn from it may support a conviction, *Schad v. Ryan*, --- F.3d ----, 2010 WL 92758, at *8 (9th Cir. 2010), "[s]peculation and conjecture cannot take the place of reasonable inferences and evidence," *Juan H.*, 408 F.3d at 1279.

A. No Rational Trier of Fact Could Find the Duvardos Were Killed Before Noon on March 31, 1999.

The Court of Appeal found sufficient evidence proving that the Duvardos were killed on March 31:

> The Duvardos were last seen March 30. From about 7:00 on the morning of March 31, they did not answer their phone, use their e-mail, or follow their habit of picking up their mail and newspapers each day at 11:30 a.m. On the last morning of their lives they had their coffee, but had not yet cleaned up the coffeepot. The clock in the bedroom had fallen to the floor when the home was ransacked and had stopped at 10:25. The medical evidence of time of death was inconclusive, but consistent with the People's theory of the case—that . . . the Duvardos were killed sometime on March 31 between 7:30 and 10:20 or 10:25 a.m.

ER 20. The Court of Appeal unreasonably applied *Jackson*'s standard in finding sufficient evidence to support the March 31 date of death because it relied entirely on evidence that either directly rebutted the government's theory (medical evidence), provided no support for the government's theory (clock and coffeepot), or was consistent with the overwhelming evidence that the Duvardos died days later (phone, e-mail, and mail).

Without analysis, the Court of Appeal asserted that the medical evidence supported the government's timeline. However, the only witness capable of estimating a time of death based on the victims' physical condition, pathologist Dr. Lawrence, testified that the victims were not dead more than three or four days when found on April 6. ER 390-92. Dr. Lawrence's uncontradicted testimony[8] was based on the bodies' early stages of decomposition and the fact that the house thermostat was set to seventy-four degrees. *Id.*

[8] The State's pathologist, Dr. Gill, testified that he could not determine the time of death beyond an "interval of days." RT 2677.

Dr. Lawrence explained that once the Duvardos were killed, an intense odor would have permeated the house within four or five days. ER 391. On April 6—seven days after March 31—not one of the first responders noticed an odor of decomposition. The Duvardos' neighbor, Joe Burke, who was the first person to enter the Duvardo residence after the killings occurred, testified that he did not smell anything when he discovered the bodies. RT 416. Likewise, Deputy Morshed testified that he got very close to the bodies, but smelled nothing unusual. RT 476. Detective Paulich testified that he smelled nothing that he associated with decomposition. ER 476.

Dr. Lawrence's conclusion that the murders were only three or four days old was buttressed by the wet blood below and on Maryann's body. ER 477. Indeed, Maryann's sweatshirt was so wet with blood that it had to be dried before being placed into an evidence bag. ER 478.

The district court characterized this physical evidence as "a difficult issue for the prosecution," ER 40, but it was far worse than that. In closing, the State acknowledged that it "[didn't] have an explanation for why the bodies didn't decompose as one might have expected." ER 923; *see also* ER 852. Of course, there *is* a straightforward explanation for the state of the bodies: the Duvardos were killed not on March 31, but sometime around April 2 or 3.

The State downplayed Dr. Lawrence's testimony by theorizing that the Duvardos exhibited only early signs of decomposition because they lay in pockets of cold air. But that theory was based on "[s]peculation and conjecture," not evidence and permissible inferences. *Juan H.*, 408 F.3d at 1279.

Dr. Lawrence testified that to explain the bodies' levels of decomposition, the air around the bodies would have had to be between sixty and sixty-five degrees.[9] ER 399. The State hypothesized that because Maryann was lying on the floor, there *could* have been a draft from the nearby door or wood stove. ER 852. The State, however, conceded that it had no evidence that the wood stove was open, even though the house was photographed and videotaped as part of the police investigation. *Id.* The police did not take the temperature of the air near Maryann's body, so there is no evidence that she was in a location some fifteen degrees cooler than the rest of the house, which the State's own witnesses testified was "uncomfortably" and "unusually warm." ER 344, 448; RT 472.

For the same reasons, it is bare conjecture that the laundry room was cold enough to explain Donald's level of decomposition. *See* ER 852. No witness for the State testified that the air temperature in the laundry room was colder than the rest of the house. Simply put, there is no evidence in the trial record that justifies

[9] Since the victims exhibited the same level of decomposition, ER 401, the State bore the burden of proving that *both* Maryann and Donald were in locations with ambient air temperatures between sixty and sixty-five degrees.

characterizing the medical evidence as anything but directly contrary to the government's theory of the case.

Nor does the non-medical evidence provide an adequate basis for any rational trier of fact to find beyond a reasonable doubt that the Duvardos were killed on March 31. The Court of Appeal noted that the Duvardos had not yet cleaned their coffee pot and a bedroom clock had stopped at 10:25. But even assuming the Duvardos were having their *morning* coffee, and that the clock stopped at 10:25 *a.m.*, that evidence bears only on the *time*, not the *day*, of death. It is impossible to conclude, based on the clock and the coffeepot, whether the Duvardos were killed on March 31, April 1, April 2, or some time thereafter.

That leaves Petitioner's conviction for murder dependent entirely on evidence that the Duvardos did not use their phone or their email or pick up their mail after March 30. ER 20. However, trial evidence showed that it was not unusual for the Duvardos to go on trips lasting for several days without informing others. *See* RT 405. They "could be gone on trips for days at a time," taking part in activities like square dancing. ER 183. Viewing the evidence—including the undisputed medical testimony that the prosecution otherwise cannot explain—in its totality, a rational trier of fact would have to conclude that the Duvardos did not retrieve their mail or use their phone or email after March 31 because they were away in the days before they were killed.

B. No Rational Trier of Fact Could Find Petitioner Was in His Parents' Home on the Morning of March 31, 1999.

To convict Petitioner for the murder of his parents, the prosecution also had to prove beyond a reasonable doubt that Petitioner was in his parents' house on the morning of March 31. According to the Court of Appeal, sufficient evidence supported that contention because:

> Defendant was an early riser, accustomed to getting up at 3:45 or 4:00 a.m. He had sufficient time to rise, drive the six or so hours to his parents house, kill them at 10:20 or 10:25 a.m., and drive back to Southern California—where he placed a call from his home phone at 6:26 p.m. On March 31 he already had the rental car, which he had secured the day before—when he had rented the car for two days while putting his own car in the shop for two hours' work. He put 1,128 miles on the rental car, which was roughly equivalent to the round trip between the rental agency and his parents' house. Defendant knew that Wednesday, March 31, he would not have his typical visitation with his daughter Nicole. He presumably also knew his wife would have a business meeting after work and would not be home until late.
>
> Although defendant claimed he had not visited his parents for a year, his blood was on a wadded up tower in the master bathroom—but the towel belonged in the kitchen. The towel, which had air dried, was lying in the sink—in the home of a meticulous housekeeper who would have put the towel in the laundry bin. This leads to the reasonable inference defendant was recently in the house and had cut himself during the vicious attacks and left the towel behind.
>
> Defendant could not substantiate his claim that he was working in Southern California when his parents were killed. He showed an interest in the sign-in sheets for March 31 and could have signed them after the fact. As we noted above, there is a conflict in the evidence whether a signature on a sign-in sheet necessarily means the signer was physically present at the meeting.

ER 21 (internal footnote omitted).

The Court of Appeal unreasonably applied *Jackson*'s sufficiency of the evidence standard because it discounted defense evidence that devastated the prosecution's theory. Petitioner proved that his signature was on two sign-in sheets for meetings held at Boeing between 8:30 and 9:50 a.m. on March 31, 1999. *See* ER 559-67. Contrary to the Court of Appeal's characterization of the evidence as in "conflict," it was undisputed that a person's signature would not appear on a sign-in sheet unless that person was present at the meeting.

Boeing employee Kerry Frank, who facilitated one of the two daily meetings that Petitioner was required to attend, testified that attendees must be present to sign the CRB and ICG attendance sheets. ER 557-58. Richard Clegg, who chaired the CRB meetings in 1999, confirmed that sheets were signed only at the meetings. ER 668. There has never been a known incident where a Boeing employee signed a CRB or ICG attendance sheet without being at the meeting. ER 634.

The "conflict" in the evidence identified by the Court of Appeal was that: (1) Petitioner made an ATM withdrawal at 8:56 a.m. on March 30, even though he signed into an 8:30 a.m. meeting that day; (2) another person signed Petitioner's name to an attendance sheet for a meeting on April 1; and (3) Petitioner once authorized his signature on a document by telephone. ER 17-18. According to the Court of Appeal, this evidence "conflicts with Frank's categorical assertion that a signature on a sign-in sheet must signify physical presence." ER 18.

But none of the purported "conflicts" identified by the Court of Appeal bear on the validity of Petitioner's alibi. If an attendee is present for *any* portion of a CRB or ICG meeting and signs in, he can leave and no notation will be made to the attendance sheet. ER 578. Indeed, on March 29, 1999, Petitioner scanned into the building where the CRB meeting was held at 8:28, signed into the 8:30 meeting, and scanned out at 8:57. ER 598. The most reasonable inference is that, on March 30, Petitioner went from the car rental agency to the meeting to sign in, and immediately left to make an ATM withdrawal. The March 30 records simply do not show that attendance sheets could be signed after the fact.

Likewise, it is insignificant that Jesse Torres, the chair of the ICG meetings, signed Petitioner's name on April 1, 1999. ER 568. The CRB and ICG chair will "occasionally" sign for an attendee, but that would "absolutely not" occur unless the chairperson sees the attendee in the meeting. *See id.*

Finally, Petitioner never authorized by telephone his signature on a *sign-in sheet*. Rather, the trial evidence showed that Petitioner once authorized his signature to a CIP approval sheet, a document circulated at ICG meetings but sometimes signed afterwards. ER 565-66.

In sum, the "conflict" that the Court of Appeal identified is illusory. Each piece of evidence confirms, rather than undercuts, Petitioner's proof that an attendee's signature on a CRB or ICG meeting sign-in sheet conclusively

demonstrates that the attendee was present. It is no answer to argue that Petitioner may have signed into the ICG meeting on March 31 and immediately left, because it did not begin until 9:35 a.m. ER 565. Petitioner could not have driven to Nice and back home in the nine hours between the beginning of the ICG meeting and 6:26 p.m., when he placed a phone call from home.

The Court of Appeal barely addressed the State's primary theory for undercutting the sign-in sheets: that Petitioner signed them after the fact. The Court likely did not emphasize that argument because it was predicated on bare conjecture. The State theorized that Petitioner could have gone to Anita Rogers' desk, found the attendance sheets, and signed his name some time after March 31. But no *evidence* introduced at trial supported that theory. Rogers only saw Petitioner once every two or three months, and he never entered her cubicle. ER 721, 729. It would have been notable had Rogers seen Petitioner skulking around her cubicle, but Rogers testified she never saw him do so. ER 729. A murder conviction cannot stand on the speculation that Petitioner consummated a clandestine mission to sign attendance sheets despite being absent from the meetings that they reflect.

In light of Petitioner's powerful alibi evidence, no rational trier of fact could conclude that the prosecution's towel evidence proves beyond a reasonable doubt that Petitioner was in his parents' house on March 31. The State's criminalist

testified that there were "too many variables" to determine how the blood got on the towel (ER 375), particularly since the towel was a "movable object" that could have become bloodstained anywhere (ER 384). He also testified that the age of the blood on the towel was undeterminable (ER 383-84), and that the bloodstain's shape and size was consistent with a nose bleed (ER 373).

The significance of the towel turned entirely on *when* the blood was deposited: at the time of the killing or earlier. In analogous cases that turn on when a fingerprint was deposited at a crime scene, this Court has held that the government must "present evidence sufficient to permit the jury to conclude that the objects on which the [physical evidence] appear were inaccessible to the defendant prior to the time of the commission of the crime." *Mikes v. Borg*, 947 F.2d 353, 357 (9th Cir. 1991). Under that standard, the government's proof is inadequate.

In *Mikes*, a habeas petitioner challenged his state court conviction for murder. Fingerprints on disassembled turnstile posts, which police concluded were used as the murder weapon, were identified as the petitioner's. *Id.* at 355. Other unidentifiable prints were also found on the posts. *Id.* at 356. This Court granted the habeas petition, reasoning that where fingerprint cases are "based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence" that the prints "were in fact

impressed at that time and not at some earlier date." *Id.* at 356-57 (emphasis in original). To meet that standard, the prosecution must present sufficient evidence that the object in question was inaccessible at other times to the defendant. *Id.* at 357. The Court emphasized that, because the burden of proof rests with the prosecution, the defendant "is under no obligation to illuminate any inferences from the fingerprint evidence that are consistent with his innocence. To put it more directly, the defendant need not explain how or when his fingerprints were placed on the object in question." *Id.* at 359. The Court granted habeas relief in *Mikes* because the prosecution could not rule out the possibility that the defendant touched the posts when they were on sale at a hardware store four months earlier. *Id.* at 358. In this case, the State cannot rule out the possibility that Petitioner deposited his blood on the towel before March 31, 1999. Petitioner had not visited his parents for approximately one year before the killings (ER 506), but no evidence suggests the blood was fresher than that.

The district court rejected analogy to *Mikes*, finding this case closer to *Taylor v. Stainer*, 31 F.3d 907 (9th Cir. 1994). In *Taylor*, this Court denied a habeas petition challenging a state court conviction that rested on the discovery of the petitioner's fingerprint inside the victim's windowsill. *Id.* at 908. The Court noted that the petitioner was a stranger to the victim and would not have had access to her window "absent some unusual circumstance." *Id.* at 909. The Court refused

"to extend *Mikes* to cover fingerprints that are found in places or on objects that were never accessible to the general public and that can be explained in a manner consistent with innocence only through far-fetched, unsupported speculation." *Id.* at 909-10.

Contrary to *Taylor*, the physical evidence here was found in a location readily accessible to Petitioner. Indeed, the innocent explanation found persuasive in *Mikes*—that the petitioner put his prints on the murder weapon while browsing at a random hardware store—is far less credible than the range of possible innocent explanations for how Petitioner's blood got on his parents' towel.

An innocent explanation is not foreclosed simply because the towel was found in a sink. The towel was "a readily movable object," and its value for proving wrongdoing is therefore "highly questionable." *United States v. Corso*, 439 F.2d 956, 957 (4th Cir. 1971). Petitioner's blood could have gotten on that towel in many ways. Indeed, the size of the blood stain was consistent with a nose bleed, hardly what one would expect if, as the prosecution surmised, Petitioner used the towel to "stop the flow of his blood" after committing two messy murders. "There is, in short, a total failure of proof" that the towel was inaccessible to Petitioner except on March 31, 1999. *Mikes*, 947 F.2d at 359.

The district court also distinguished *Mikes* as a case "address[ing] a situation where the *only* evidence linking a defendant to a crime scene or murder weapon

was a fingerprint." ER 35 (emphasis in original). The court found that, here, independent circumstantial evidence linked Petitioner to his parents' house on March 31, including "the excessive mileage on his rental car, his financial and marital secrecy motives to kill these particular people, and the evidence suggesting that the victims knew their killer." *Id.*

Even assuming the prosecution in *Mikes* predicated its case entirely on physical evidence, that petitioner lacked undisputed alibi evidence. Therefore, it cannot be said that the evidence supporting conviction is stronger here. Moreover, neither Petitioner's purported "motive" nor the "relationship" evidence bears on whether the prosecution proved that Petitioner was in Nice *on March 31*. Only the evidence that Petitioner drove his rental car 1,128 miles can justify reaching a different result here than in *Mikes*. But at trial, a certified fraud examiner, who had examined the rental company's records for the car that Petitioner drove, testified that the documents were so unreliable "that you cannot place any form of assurance . . . on the mileage" recorded therein. RT 3699. In fact, according to paperwork, the mileage on the vehicle was *reduced* between April 12 and April 14, 1999. RT 2373-374, 3691. Simply put, no rational trier of fact could conclude that unreliable car rental records and a bloodstain, for which there are innocuous explanations, are so much more powerful than unrebutted alibi evidence that the

prosecution proved beyond a reasonable doubt that Petitioner killed his parents on March 31, 1999.

II. THE PROSECUTION EXPERT'S PROFILING TESTIMONY VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

As the foregoing section demonstrates, the evidence against Petitioner was inadequate to sustain a murder conviction. To overcome the shortcomings in its case, the prosecution relied on FBI Special Agent Mark Safarik to link Petitioner to the killings. Safarik's testimony, which ranged from the speculative to the bizarre, denied Petitioner a fair trial. Safarik first inflamed the jury by repeatedly surmising that Donald Duvardo begged for his life. He then violated the cardinal rule against opining on the defendant's guilt or innocence, testifying that the killer was related to the victims, that he likely knew the location of the house, and that the victims did not regard him as a threat. A criminal defendant's right to a fair trial cannot endure when an "expert," imbued with the imprimatur of the FBI's Behavioral Analysis Unit, endorses a guilty verdict.

Erroneously admitted evidence warrants habeas relief "when it results in the denial of a fundamentally fair trial in violation of the right to due process." *Briceno*, 555 F.3d at 1077 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)). In examining the admission of expert testimony, this Court "is limited to determining whether [it] rendered the trial so fundamentally unfair as to violate due process." *Windham v. Merkle,* 163 F.3d 1092, 1103 (9th Cir. 1998). A trial

court's ruling violates due process if the evidence is "'of such quality as necessarily prevents a fair trial.'" *Id.* (quoting *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986)).

The Court of Appeal rejected Petitioner's various challenges to the admission of Safarik's profiling testimony, holding in relevant part:

> It is clear that a witness may not testify to an opinion of the guilt or innocence of the defendant, and an expert witness may not testify to conclusions and interferences which can just as easily be drawn by the jury. In other words, an expert witness is supposed to assist the jury's determination with expertise beyond common experience. Expert testimony is improper, and must be excluded "'*only* when it would add *nothing at all* to the jury's common fund of information. . . .'"
>
> Here Special Agent Safarik was only adding to the jury's common knowledge his expertise of crime scene reconstruction. His task was to assist the jury in interpreting the physical characteristics of the crime scene. . . . He did not testify to some fledgling scientific technique or to some "junk science" called "victimology." Indeed, what he dubbed "victimology" was only a small part of his testimony, and was only an analytical attempt to discovery why Donald and Mary Ann Duvardo became homicide victims. His testimony was as old as Sherlock Holmes, and was properly admitted to help the jury understand certain characteristics of the crime scene. The expert testimony did not specifically address the guilt or innocence of the defendant, but provided information beyond the jurors' experience that the jurors were free to accept or reject.

ER 25-26 (internal citations and footnotes omitted).

The Court of Appeal unreasonably applied the pertinent standard of law in concluding that Safarik's testimony was appropriate. Contrary to the court's view, Safarik's testimony violated several black-letter precepts governing the admission

of expert testimony. Although "federal habeas corpus relief does not lie for errors of state law," *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), the erroneous admission of Safarik's testimony warrants habeas relief because it "so fatally infected the proceedings as to render them fundamentally unfair," *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

Except in limited circumstances inapplicable here, "profiling" testimony is inadmissible to establish guilt. *See, e.g.*, *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991); *People v. Robbie*, 92 Cal. App. 4th 1075, 1085 (2001). In the typical profiling case, a law enforcement officer provides the jury with "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *Robbie*, 92 Cal. App. 4th at 1084 (quotation and citation omitted). The prosecution then invites the jury to infer guilt because the defendant shares some of those characteristics.

The Court of Appeal reasoned that Safarik's testimony was mere "victimology," as if that were preferable to generic profiling evidence. However, Safarik's testimony was far more offensive than typical profiling testimony. Here, the expert went beyond suggesting that this sort of crime typically occurs in a particular manner; he told the jury that this *particular* crime *actually* occurred in the manner he described. As a result, the risk associated with profiling testimony—that the jury will "conclude that, because the defendant manifested

some characteristics, he committed a crime," *Robbie*, 92 Cal. App. 4th at 1086-87—was amplified.

Safarik's testimony was so particular, and so obviously directed at Petitioner, that it crossed the line prohibiting expert witnesses from "'giv[ing] a direct opinion about the defendant's guilt or innocence.'" *Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2008) (quoting *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990)); *see also United States v. Alonso*, 48 F.3d 1536, 1540 (9th Cir. 1995) (citing authorities); *People v. Torres*, 33 Cal. App. 4th 37, 46-47 (1995).

Safarik testified that there was "no reason" for the Duvardos to be victimized by random violence. ER 129. He opined that the killer likely would not have found the house "unless [he] knew where it was." ER 130. Finally, he testified that there was "a relationship" between the Duvardos and their killer, and that the crime scene demonstrated that "personalized" anger motivated the killings. ER 143-144, 151. Nobody fit the characteristics described by Safarik other than Petitioner, and those characteristics dovetailed with the prosecution's theory of the case.

The Court of Appeal concluded that Safarik's testimony stayed within bounds because he did not "specifically address" Petitioner's guilt or innocence. But that is not the applicable standard. Although Safarik did not use the words "Petitioner is guilty," his testimony cannot be viewed as anything but an

expression of that opinion. The prosecution theorized that Petitioner traveled to his parents' house and killed them to prevent his wife, Molly, from discovering his financial dealings and dual marriages. Safarik's testimony left no doubt that he endorsed that theory.

In analogous cases, where the implication of witness testimony cannot be mistaken, the absence of a specific indictment of guilt has been deemed irrelevant. For example, in *Cooper v. Sowders*, 837 F.2d 284 (6th Cir. 1988), a prisoner filed a habeas petition based on the admission of a police officer's opinion about the inculpatory evidence. At trial, the arresting officer testified that no evidence linked any other suspect to the crime, and that "[t]he only evidence we found that would link anyone to this crime would be Mr. Cooper." *Id.* at 287. The State argued that because the officer did not specifically opine on guilt or innocence, no constitutional violation occurred. The Sixth Circuit rejected that argument, concluding that the jury would have interpreted the officer's comments about the defendant's arrest as an endorsement of guilt. *Id.* Because the "opinion-testimony had a direct influence on the jury's consideration of petitioner's guilt or innocence," the court found a violation of the right to a fair trial. *Id.*; *see also United States v. Quigley*, 890 F.2d 1019, 1023-24 (8th Cir. 1989) (finding admission of profiling testimony erroneous because "[w]hile [the expert] did not

directly say that he thought [the defendant] was guilty of the offense charged because he fit the profile, that was the clear implication of his testimony").

The expert testimony admitted here was far worse than the offending testimony in *Cooper* for four reasons. First, Safarik did not cabin his testimony to an explanation of why Petitioner was *arrested*. The prosecution used Safarik's testimony to bolster its otherwise-flimsy evidence supporting conviction.

Second, Safarik was not a mere police officer, but a member of the FBI's fabled Behavioral Science Unit, popularized in movies like "Silence of the Lambs." A beat officer's testimony "carries an aura of special reliability and trustworthiness." *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987) (internal quotation and citation omitted). But a jury is even less likely to challenge the expert opinion of an FBI profiler than that of a beat officer.

Third, in addition to Safarik's assessment of Petitioner's guilt, his testimony was riddled with speculation that inflamed the jury against Petitioner. Not only did Safarik implicitly suggest that Petitioner killed his parents, he twice opined that Donald "ple[d] for his life." ER 137. That "emotionally charged" testimony "served only to prey on the emotions of the jury." *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993).

Fourth, Safarik's testimony, predicated on the mislabeled "science" of "victimology" was "almost entirely unreliable"—the type of evidence that the

adjudicative process is incapable of debunking. *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)); *see also State v. Wright*, No. 0801010328, 2009 WL 3111047, at *7 (Del. Super. Ct. Sept. 14, 2009) (excluding as unreliable proposed testimony that murders were not random, were committed by someone known to victims, and that victims were selected by killer with underlying emotional conflict).

The unreliability of Safarik's testimony is evident from its content alone. Safarik testified that Donald pled for his life without any basis of knowledge; he claimed that the Duvardos' injuries indicated "personalized" anger, even though murders committed by strangers often exhibit overkill (*e.g.*, the Manson Family's Tate murders); and he opined that the Duvardos allowed the killer into their home and did not view him as a threat even though the only open point of access was the sliding door in *back* of the house. Safarik's conclusions were not science; they were speculation.

Nor could Safarik's unreliable testimony be challenged adequately through cross-examination. Criminal profiling has achieved great "renown" despite the "remarkably scarce" empirical evidence supporting its validity. Richard N. Kocsis & George B. Palermo, *Contemporary Problems in Criminal Profiling*, *in* CRIMINAL PROFILING 328-29 (2007) (available at http://www.springerlink.com/content/t4720q5j00421t10/fulltext.pdf). If the Court

of Appeal, an experienced panel of legal experts, felt no need to question the scientific underpinnings of "victimology" simply because it is "as old as Sherlock Holmes," ER 25-26, then a lay jury cannot be expected to critically analyze Safarik's testimony.

The deprivation of Petitioner's right to a fair trial cannot be excused on the ground that "[t]he United States Supreme Court has left open the question whether the Constitution is violated by the admission of expert testimony concerning an ultimate issue to be resolved by the trier of fact." ER 49 (citing *Moses v. Payne*, 543 F.3d 1090, 1105 (9th Cir. 2008)). As *Moses* recognized, testimony about *guilt* is distinct from testimony about other ultimate issues. *See* 543 F.3d at 1106. That distinction finds support in *United States v. Murdock*, 290 U.S. 389 (1933), *overruled in part by Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 70-73 (1964), which held that a trial judge committed reversible error by opining on the defendant's guilt. The Supreme Court's holding turned not on the speaker's status as judge, but the on the broader principle that "the decision of issues of fact must be fairly left to the jury." *Id.* at 394. Since Safarik's testimony violated that principle, *Murdock* supports habeas relief even though this case involved an expert witness rather than a judge.[10] *See Panetti*, 551 U.S. at 953.

[10] It is immaterial that this Court denied habeas relief in *Davis v. Craven*, 485 F.2d 1138 (9th Cir. 1973) (en banc), and *Gonsior v. Craven*, 449 F.2d 20 (9th Cir. 1971). In both cases, this Court found no constitutional error because the trial

Nor can the deprivation be excused due to lack of prejudice. When a law enforcement officer testifies about the defendant's guilt, prejudice is presumed. *United States v. Harber*, 53 F.3d 236, 242 (9th Cir. 1995). Under the circumstances, that presumption cannot be rebutted. As described in Part I of this brief, other evidence of guilt was fatally lacking. The closeness of the case was manifested in the several days of jury deliberations. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (longer deliberations weigh against a finding of harmless error because they suggest a difficult case). Significantly, the verdict followed a closing argument that relied heavily on Safarik's opinions. Throughout his closing, the prosecutor emphasized the themes of his expert's testimony, arguing, for example, that the killer was someone close to the Duvardos who acted out of personalized anger (ER 844-45). In light of the prosecution's weak case, and the testimony's central role in summation, admission of Safarik's inappropriate statements cannot be deemed harmless. *See United States v. Hay*, 122 F.3d 1233, 1236-37 (9th Cir. 1997) (erroneous admission of hearsay found prejudicial due to relative weakness of evidence against defendant without statement and prosecution's heavy reliance on statement during closing argument).

(continued…)

judge, after expressing his opinion of guilt, immediately made it clear to the jury that it was only a comment, which the jury was free to disregard, and the jury had to reach its own conclusion. *See Davis*, 485 F.2d at 1141; *Gonsior*, 449 F.2d at 22. No such caveat accompanied Safarik's testimony.

III. THE ADMISSION OF IRRELEVANT BIGAMY EVIDENCE VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Short on evidence proving beyond a reasonable doubt that the Duvardos were killed on a day when Petitioner could have committed the crime, the prosecution recognized that a jury that disapproved of Petitioner would be more likely to convict. Accordingly, the prosecution introduced over objection evidence that Petitioner was a bigamist. The State has yet to adequately explain how that evidence was relevant to whether Petitioner killed his parents.

The Court of Appeal's cursory conclusion that it "need not belabor" the bigamy evidence because it "was certainly relevant to defendant's motive for killing his parents" (ER 27), represents an unreasonable application of the well-settled principle that the admission of irrelevant "other act" evidence violates the defendant's due process rights. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 182 (1997); *McKinney v. Rees*, 993 F.2d 1378, 1384-85 (9th Cir. 1993).

Habeas relief is warranted when admission of other act evidence "rendered the trial so fundamentally unfair" as to deny the defendant due process. *Leavitt v. Arave*, 383 F.3d 809, 829 (9th Cir. 2004). A due process violation lies if the evidence bears only on character and "'there are *no* permissible inferences the jury may draw from'" it. *Id*. (emphasis in original) (quoting *Jammal*, 926 F.2d at 920). The prohibition on using propensity evidence to prove guilt has attained "constitutional status," *United States v. LeMay*, 260 F.3d 1018, 1025 (9th Cir.

2001), and is clearly established by Supreme Court precedent. *See Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (holding that the prosecution cannot resort to "evidence of a defendant's evil character to establish the probability of his guilt"); *Old Chief*, 519 U.S. at 182 ("There is . . . no question that propensity would be an 'improper basis' for conviction.").

Petitioner's due process rights were violated by the admission of testimony showing that he practiced bigamy because that evidence, while enormously prejudicial, gave rise to no permissible inferences. The prosecution convinced the trial court to admit testimony regarding Petitioner's dual marriages as motive evidence, arguing that Petitioner believed that his second wife, Molly, would leave him if she found out he was not divorced. RT 234. The prosecution argued that evidence of bigamy would not prejudice Petitioner because "[w]hile it could be considered a crime, I don't know when the last time somebody prosecuted one of those crimes . . . in the State of California." RT 223.

During trial, the prosecution proffered bigamy evidence through three witnesses. Jan Duvardo, Petitioner's first wife, testified that, in 1993 or 1994, she heard Petitioner had remarried and confronted him about it. RT 1952. Petitioner explained that he and Molly merely had a "spiritual union," which falsely led her to believe that Petitioner and Molly were not "officially . . . married." ER 332. She also testified that she did not divorce Petitioner until 2000. ER 321.

Detective Paulich testified that he found certificates for Petitioner's marriages to Molly and Jan on file in Los Angeles County, and those certificates were admitted into evidence. RT 2288-89. And Molly testified that she learned Petitioner was still married to Jan from Detective Paulich in June 1999. ER 777-78. Molly testified in cross-examination that Petitioner had told her years earlier that he was divorcing Jan. ER 806. The prosecution probed, in detail, Molly's reaction to learning that her husband was a bigamist, asking whether Molly found her husband's behavior "upsetting." ER 781-84, 790.

The prosecution then emphasized Petitioner's bigamy in closing, arguing that Petitioner killed his parents because he was afraid of Molly's reaction if he told her:

> [Y]ou know, I got some things I've got to come clean with here. Our marriage is no good, because I never got divorced, and you know that house that I sold, no, I never did that, and all that secret agent man stuff never happened. . . . He's not going to do that. He's living a lie. He's tangled this web up that he can't – so tight he can't get out of [it].

ER 872. In rebuttal, the prosecution argued that "[i]t's not just a financial motive, the point is the finances drive the bigamy. . . . He's got to find a way to keep her from finding out because he knows what's going to happen." ER 912; *see also* ER 926-27 (arguing that Petitioner's bigamy was "central" to his motive).

The proffered bigamy evidence had no logical connection to the killings. The State argued that Petitioner killed his parents to prevent Molly from learning

he was still married to Jan, but failed to explain how killing the Duvardos would forward that purpose. ER 872, 912. The only person who confronted Petitioner about his dual marriages was Jan. ER 331-32. By the prosecution's reasoning, Petitioner should have attempted to silence *her*. However, the evidence demonstrates that Petitioner and Jan shared an amicable relationship and spoke frequently in the months before the homicides. *See* RT 1941-44, 1947.

By contrast, no evidence demonstrated that the Duvardos knew about their son's bigamy. In fact, the prosecution contradicted its own theory of motive by suggesting in closing that Petitioner killed his parents to *prevent* them from learning about "the divorce not occurring." ER 829. The prosecution cannot have it both ways. Arguing that Petitioner killed his parents to prevent them from telling Molly, and to prevent them from learning, about his dual marriages defies logic.[11]

The prosecution likely had trouble articulating a logical connection between bigamy and motive because the evidence was introduced for a different purpose: to taint Petitioner's character in the jury's eyes, and thus make conviction in the absence of convincing proof more likely. *See State v. White*, 815 P.2d 869, 876

[11] The prosecution's alternative theory—that Petitioner killed his parents to prevent them from learning about his bigamy—is itself illogical. There was no evidence that anyone intended to reveal Petitioner's bigamy to his parents, and therefore no reason for Petitioner to kill his parents to prevent them from finding out.

(Ariz. 1991) (finding admission of bigamy evidence error because "it simply adds fuel to the jury's conviction that defendant is a 'bad man'"). The evidence was devastating to Petitioner because it invited the jury to conclude that, because Petitioner betrayed his own wife, he was capable of committing heinous crimes against his parents.

In *McKinney v. Rees*, this Court granted a writ of habeas corpus after the state proffered evidence that the defendant, who was convicted of killing his mother with a knife, had a knife collection, occasionally strapped a knife to his body, and used a knife to scratch the words "Death is His" on his closet door. 993 F.2d at 1382. The Court rejected the prosecution's stated purpose for introducing the evidence as "not logical" and found that no permissible inferences could be drawn from it. *Id.* at 1383-84. The Court held that introduction of the evidence was a due process violation because it was "emotionally charged," and because the evidence supporting guilt "was solely circumstantial." *Id.* at 1385. Under the circumstances, the Court concluded, it was more than reasonably likely that the inadmissible evidence caused the jury to convict "on the basis of [the defendant's] suspicious character and previous acts, in violation of our community's standards of fair play." *Id.* at 1385.

As in *McKinney*, the inadmissible bigamy evidence in this case was "emotionally charged." Bigamy is a universally condemned crime. "All fifty states

and the District of Columbia have enacted bigamy statutes that classify the crime as either a misdemeanor or a felony." Brieanne M. Billie, *The "Lost Boys" of Polygamy*, 12 J. GENDER RACE & JUST. 127, 131 (2008).[12] Under the law, bigamy is a "crime [of] moral turpitude," *Gonzalez-Martinez v. Landon*, 203 F.2d 196, 197 (9th Cir. 1953), that is, "a crime that (1) is vile, base or depraved and (2) violates societal moral standards," *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007) (en banc). As the prosecution understood, jurors are certain to associate bigamy with personal characteristics like depravity, deceptiveness, and heartlessness.

The taint left by such evidence is heightened by the lack of any direct evidence of Petitioner's guilt. As the prosecutor conceded in closing, this case was predicated on circumstantial evidence alone. ER 833. Indeed, the evidence of guilt is weaker here than in *McKinney*, where the police found a pair of the defendant's pants stained with the victim's blood. 993 F.2d at 1383 n.5.

Under the circumstances, it cannot be refuted that the bigamy evidence had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (quotation and citation omitted). This was a remarkably close case where the evidence of guilt was frail, if not legally inadequate. There is every reason to believe that the bigamy evidence, and

[12] Bigamy is a felony in California, punishable by fine and up to one year in prison. *See* Cal. Penal Code § 283.

the prosecutor's repeated references to it during closing, convinced the jurors to convict, not because the trial evidence proved guilt beyond a reasonable doubt, but because they reasoned that if Petitioner committed a crime of moral turpitude against his spouse, he was capable of other heinous acts against other family relations. That impermissible use of character evidence deprived Petitioner of "the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice." *McKinney*, 993 F.2d at 1386. Petitioner is entitled to a writ of habeas corpus.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be granted.

Dated: March 1, 2010

Respectfully submitted,

Jones Day

By: /s/ Nathaniel P. Garrett
Nathaniel P. Garrett

Attorney for Petitioner
JEFFREY LEE DUVARDO

STATEMENT OF RELATED CASES

Petitioner is aware of no related cases pending before the Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-15283

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,887 words.

Dated this 1st day of March, 2010.

By: /s/ Nathaniel P. Garrett
Nathaniel P. Garrett

CERTIFICATION OF ELECTRONIC AND OVERNIGHT SERVICE

I, Nathaniel P. Garrett, declare as follows:

As to **Petitioner's Opening Brief**:

I hereby certify that I electronically filed the above with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 1, 2010. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

As to **Petitioner's Excerpts of Record**:

I further certify that the above documents were placed in a sealed Federal Express envelope with an affixed pre-paid air bill, and caused the envelope to be delivered to a Federal Express agent for delivery on the parties below.

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Executed on March 1, 2010 at San Francisco, California.

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