
PETITION FOR EXECUTIVE CLEMENCY

MICHAEL A. MORALES

JANUARY 27, 2006

HEARING REQUESTED

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Michael Angelo Morales

January 27, 2006

TO THE HONORABLE ARNOLD SCHWARZENEGGER:

By this petition, Michael Angelo Morales requests that, pursuant to California Constitution, Article V, section 8(a), you exercise your authority to grant executive clemency and modify his sentence of death to a sentence of life in prison without the possibility of parole.

A. Introduction

Michael Morales is scheduled to die on February 21, 2006. That execution should not be allowed to go forward. To do so would send to death at the hands of the State a deeply repentant, sorrowful Christian, who has accepted full responsibility for a terrible crime that will haunt him forever. Unlike some who express no remorse for their offenses against humanity, Michael has not fled from his responsibility for the deed committed so many years ago in his reckless and drug-saturated youth.

To the contrary, year after year on Death Row, Michael has said, again and again, that he is indeed guilty and deserves severe punishment for what he did. Michael immediately and willingly accepted responsibility for his offenses, and he has expressed deep, profound sorrow for that guilt. Michael has long since returned to the faith of his youth, a faith he left behind to his grievous sorrow in his teenage years, but a restored faith commitment that leaves him in a transparently repentant state for the grievous wrong he committed as a youth.

A terrible injustice will now be wrought by the State of California should Michael's death sentence be carried out. This is not only a plea to the Governor for mercy; it is a plea for justice -- a plea supported by the trial judge who imposed the death sentence on Michael twenty-three years ago.

In an extraordinary turn of events that alone warrants an act of mercy in furtherance of justice, the sentencing judge in Michael's case has clearly and loudly spoken. His Honor's statement is not only powerful and persuasive, it goes to the very heart of our criminal justice system and to bedrock values of fundamental fairness dear to a civilized people. The undeniable fact is this: Michael's manipulative crime partner who instigated the events of a generation ago will continue to live out his life in prison. The prime mover who secured Michael's intoxication and subsequent participation was sentenced to life imprisonment. Michael, the unwitting inebriant, was sentenced to death.

And the courts stand by, permitting this to happen. Only the Governor can stop this profound injustice.

This unconscionable disparity -- life versus death -- is directly traceable to one source: the manifestly unreliable, poisonous testimony of a self-interested jailhouse informant. This should not occur in a rational, humane justice system that prides itself on integrity. Jailhouse informant testimony -- by its nature suspect -- has in this case now been proven to have been utterly, despicably false. But that mendacious testimony was as devastating to Michael at the sentencing phase of trial as it was palpably false. No enlightened society should impose its ultimate sanction based on perjurious testimony, now discredited by the very judge who heard the perjurer in open court boldly wag an accusing finger that condemned Michael to Death Row.

This we know to a moral certainty: The long-forgotten jailhouse informer was lying about Michael in the courts of California. Death should not be carried out based upon on a felon's calculated lie. That would be a terrible wrong. Our people are too great, and this State is too enlightened, to allow that awful, ultimate offense to be carried out in the corridors of San Quentin. To do so would bring shame and disgrace before a watching world on the entire criminal justice system of a great and good State, and in particular upon the regime of capital punishment as now administered by the Executive Branch of this State. That, we urgently submit, should not be allowed to happen.

Michael Morales, devout and penitent, humbly submits this petition for clemency to the constitutional officer who alone has power granted by the people to spare his life. As his clemency counsel, our plea on Michael's behalf is simple but profound: Michael Morales -- father of living children, son of living parents -- should likewise live. Allow him to live. That is our simple but fervent plea. His life is worthy. And justice would thereby be served.

Michael Morales's plea for mercy -- and for justice -- is eminently worthy of the Governor's inaugural exercise of his historic constitutional authority.

B. The Appropriateness of Clemency to Correct the Effects of False Evidence

Judge Charles R. McGrath “performed the most solemn duty a judge is asked to undertake” when he presided over Mr. Morales’s trial, independently reviewed the evidence and upheld the jury’s verdict sentencing Mr. Morales to death. (Exhibit 1, Letter from Judge McGrath – January 25, 2006 at 1.) Judge McGrath has just as conscientiously considered subsequently disclosed evidence that undermines “the cornerstone” of the capital murder charge against Mr. Morales, and has concluded that it warrants granting clemency for Mr. Morales. (*Id.*)

Not all murders are punishable by the death penalty. In contrast to the approximately 660 inmates on Death Row in California, there are over 20,000 non-condemned inmates who are serving sentences of life in prison. The disparity in punishment does not mean that the people of California accord less value to the life of the victim of a non-capital murder. Nor does it mean that our State is less sensitive to the terrible loss that is suffered in non-capital homicides. All homicides constitute a tragic loss of life, and the family of every homicide victim endures the numbing grief and incomprehensible sorrow of a world turned upside down when a loved one is violently taken from them.

The difference in punishment for capital and non-capital murders is based on the level of culpability of the offender. The death penalty is justified on constitutional and moral grounds as a punishment that is reserved for the worst of the worst. The law therefore speaks of “special circumstances,” meaning factors that transform the blameworthiness inherent in any act of murder into an even higher level of culpability, which permits the State itself to use lethal force.

The special circumstance the State relied on to make Mr. Morales eligible for execution was the “lying in wait” special circumstance. To prove “lying in wait,” the State must show that a defendant deliberately intended to commit murder and, further, that he concealed his intent during a period of “watchful waiting,” until he had an opportunity to attack his victim.

The indispensable evidence offered by the State to show that Mr. Morales had any pre-existing plan to commit murder, or that he concealed his plan while “lying in wait,” was the testimony of a jailhouse informant. The informant, Bruce Samuelson, testified that Mr. Morales made a detailed confession of his pre-planned intention to kill the victim. For good measure, Samuelson also testified that Mr. Morales boasted about the killing and tried to enlist Samuelson’s help in finding someone to kill two prosecution witnesses. Samuelson’s testimony convinced the jury and trial judge to convict Mr. Morales of premeditated murder while lying in wait, and to sentence him to death.

During federal court litigation in 1993, however, the California Attorney General inadvertently disclosed evidence demonstrating that Samuelson lied about Mr. Morales’s confession. Attempting to explain how he managed to obtain incriminating statements from Mr. Morales in a crowded jail cell block within earshot of other potential informants, Samuelson told the Attorney General in a tape-recorded statement that he and Mr. Morales had discussed the case only in Spanish. Samuelson purported to explain in detail how he said to Mr. Morales: “‘You’re [Morales] Hispanic, obviously by looking at you and your name being Morales, do you speak Spanish,’ and he said, ‘Yes.’” (Exhibit 18 at 21.) From that point forward, Samuelson claimed, “if we weren’t talking about his case, we would speak in English. And the rest of the time we would talk in Spanish . . .” (*Id.* at 24-25.)

Unbeknownst to Samuelson, or the Attorney General, Mike Morales grew up in an English-speaking household and it is undisputed that he does not speak Spanish. (Exhibit 19, Declaration of Lisa Flynn; Exhibit 20, Declaration of John Morales; Exhibit 21, Declaration of Josie Morales; Exhibit 22, Declaration of Leonard Lucero.) Thus, it was *factually impossible* for Mr. Morales to have made any of the statements attributed to him by Samuelson. Rather, Samuelson's unquestionably false explanation of how Mr. Morales made the alleged admissions conclusively confirms there *never were any admissions*, and Samuelson's trial testimony was wholly fabricated.

There are other, clear indications of Samuelson's perjury. The initial interrogation of Rick Ortega by the police and prosecutor revealed there had been no pre-existing plan or intention to kill the victim. Ortega wanted only to frighten her to prevent her from disclosing his romantic relationship with Randy Blythe. In turn, the results of a polygraph examination administered by a member of the prosecutor's staff revealed that Samuelson was lying. (Exhibit 23, Confidential Report by Francis M. Connolly.)

In addition to supplying the "special circumstance" that made this a death penalty case, Samuelson's false testimony was used at the penalty phase to undermine Mr. Morales's genuine remorse and regret for the victim's death. Mr. Morales admitted his responsibility and expressed his sorrow and regret *even before* his arrest. (RT 2781-82; 3180.) But the jury was instructed numerous times that it could rely upon Samuelson's testimony, and Samuelson's testimony alone, to reach its penalty verdict. (RT 3142-43; 3145.) Samuelson falsely testified that, almost two years after the crimes, Mr. Morales callously bragged about raping the victim and referred to her in vulgar and profane terms. (*See, e.g.*, RT 2338-2339.)

Samuelson also falsely testified that Mr. Morales solicited the murders of trial witnesses Patricia Flores and Raquel Cardenas while he was in the county jail awaiting trial. (RT 2341.) The false testimony unquestionably moved the jury to vote for death because "crimes to silence witnesses" are universally regarded as "the most dangerous sort because they attack the justice system itself." (Statement of Decision, Request for Clemency by Clarence Ray Allen, pg. 4.) Thus, Samuelson's lies exploited the jurors' intuitive belief that "[i]f the death penalty is to serve any purpose at all, it is to prevent [that] very sort of murderous conduct." (*Allen v. Woodford*, 366 F.3d 823, 863 (9th Cir. 2004).)

Until now, the falsity of Samuelson's testimony and its impact in tipping the scales toward death in Mr. Morales's trial have eluded review or correction by any court. In 1989, before habeas corpus counsel was appointed or could have investigated the issue, the California Supreme Court was not aware that Samuelson's testimony was false. The State Supreme Court therefore relied upon Samuelson's testimony as the sole evidence to support the lying in wait special circumstance. (*People v. Morales*, 48 Cal.3d 527

(1989).) When Mr. Morales then challenged Samuelson's testimony in habeas corpus proceedings in 1992, the State Supreme Court again did not have the evidence because the Attorney General's office had not yet conducted its tape-recorded interview with Samuelson.

In federal proceedings, the United States District Court for the Central District of California did not dispute that Samuelson lied, but excused the error with the stunning observation that "the United States Constitution does not guarantee a defendant a trial in which no witness lies." (Order Denying Petitioner's Motion for Partial Summary Judgment on Claims 43 and 44, at 12, filed Nov. 18, 1998.) The United States Court of Appeals refused to permit Mr. Morales to raise this issue on appeal, even though it acknowledged the absence of any reason to doubt that Samuelson lied about the manner in which he obtained Mr. Morales's purported confession.

Thus, until now, no judge has carefully considered whether the truthful evidence presented at trial was sufficient to meet the standards mandated by the voters of California for proof of a capital murder charge. Now, Judge McGrath, who sentenced Mr. Morales to death, has considered the evidence demonstrating that Samuelson lied about the alleged manner in which he obtained Mr. Morales's confession. Judge McGrath, who was in the best position to assess the importance of Samuelson's testimony, has made it clear that "Samuelson's testimony was indispensable to proving the lying-in-wait special circumstance finding upon which Mr. Morales's eligibility for a death sentence now rests, and proved critical in tipping the balance of aggravating and mitigating circumstances in favor of a death sentence." (Exhibit 1, at 2.) Judge McGrath has also made it plain "that impeachment of Mr. Samuelson's testimony with evidence of his untruthfulness in describing the circumstances of the purported confession would have rendered his testimony, and the prosecution's case, insufficient to support the death sentence." (*Id.*) For that reason, Judge McGrath has respectfully recommended that Mr. Morales be granted clemency.

Historically, by virtue of trial judges' unique and intimate familiarity with the evidence, issues and equities in capital cases, their recommendations to grant clemency have been accorded great weight by Governors. As reflected in the commutation decisions in Exhibit 31, the trial judge's recommendation has been followed even when the judge found no reason to believe "any of the witnesses for the state perjured themselves or gave false testimony." (Commutation of Sentence of William A. Young at 1; Commutation of Sentence of Edward Wesley Brown at 1.) By contrast, the trial judge's recommendation in favor of clemency for Mr. Morales rests on his conclusion that the testimony of the State's principal witness has contaminated the proceedings and threatened the integrity of the capital sentencing process. We respectfully submit that a recommendation based on such concerns presents the most compelling case for a grant of clemency.

C. Twenty Five Years of Remorse and Atonement

For the past twenty-five years, Michael Morales has provided “the clearest indication of complete remorse” – accepting full responsibility for his crime, making a “complete and sincere” expression of regret and undertaking daily atonement for his sins. (See Statement of Decision, Request for Clemency by Stanley T. Williams, page 5.)

Within hours of the offense, and after he regained his sobriety, Michael expressed his despair at having failed to prevent his cousin Rick Ortega from drawing him into a foolhardy attempt to frighten Terri Winchell. He voiced his sorrow for allowing events to go awry and for harming Terri Winchell. Michael’s expressions of dejected regret were made before his arrest, and were attested to by a prosecution witness. (RT 2782.)

During his sentencing in 1983, Michael Morales – then 23 years old – asked to address the court and accepted responsibility for taking Ms. Winchell’s life. He acknowledged his wrong and that it was a mistake. He spoke of his immediate and continuing regret for his actions. Michael acknowledged that he needed to change his attitude and himself:

“THE DEFENDANT: Okay. . . .it’s hard for me even to try to correct that wrong that I did. But I just wanted to say that – that I do regret it.

I – I regret it for one because as I know – or I can realize how much pain it must have caused the family. I have never – I never lost somebody that I really loved, but I can – I can imagine the pain it must have – must have caused. You might say that I do feel for them, but I can’t reach them.

And I also regret it because I know taking Miss Winchell’s life was wrong and I’d like to say even though I can’t bring back Miss Winchell, I was trying to correct that wrong by changing the wrong that caused it, which was my attitude and myself.

I am not trying to say that I am – I am an angel now, but I am trying to say that through my artwork I am trying to – tryng to get my life back on that right road. And little by little I – feel I am getting there. Luckily I have the support of my family in doing so. . . .

The artwork is good because in a way it’s the only way I have of showing my regret with – with more than just words, you know?. . . .

And what’s good about it, too, is that it’s benefiting myself and my family because if it works out I will have a chance to help my – my boys

and my little girl. If it doesn't work out, well I can always set myself another goal. . . .

. . . .

But in closing I just want to say that all in all I do regret the mistake that I did make." (RT 3180-81.)

The trial judge acknowledged the sincerity of Michael's remorse in considering his remorse as a mitigating factor at sentencing. (RT 3194.)

Michael Morales has continued to acknowledge his wrongdoing up to the present time, and has attempted to explain how he has tried to live his life as atonement for his actions:

Do I care that a person's life was taken? Of course I do. And I'm fully aware of what was lost and the harm done. And not just merely an intellectual recognition, but a heart appreciation of this sad and painful fact. And having experienced my own son being shot and paralyzed, I understand a little of what anguish can do to a person. My remorse isn't just to gain sympathy here and now. Its something I've expressed even before my arrest was made as the record will testify to. Unfortunately an apology, no matter how heartfelt, just doesn't carry enough potency in a situation like this to bring any real comfort or amend any of the wrong. So I've tried to do the only thing a person in my position can, and that's change my heart.

(Exhibit 2, Handwritten Petition for Clemency from Michael Morales.)

Michael has apologized, he has atoned for his actions, and he has accepted responsibility. As a result, he is most deserving of your mercy.

D. Michael Morales Behind the Walls of San Quentin

At the time of sentencing, the trial judge found Michael Morales was amenable to rehabilitation, maintained his religious faith, showed love and concern for his children, and engendered love from community members who would support and encourage him in pursuing his artistic talent. (RT 3194-95.) In his interview with the probation department, Michael promised that he would develop his artistic talents behind the walls if allowed to live and might seek to advance his education.

In 1983, Michael spoke candidly and from the heart to the sentencing judge. Michael recognized that he needed to and expressed the desire to change his attitude and himself. He stated his intention to immerse himself in his art work. He wanted his art to become a greater expression of his regret - greater than words. He sought and received

support from his previously estranged family -- his mother, his father, and his three siblings -- two brothers and sister. He wanted to establish regular contact with his three children, and hoped that if his art work progressed, it could somehow help them. (RT 3180-81.)

Michael's prison record has demonstrated that the trial judge's comments were on the mark and that Michael has made good on his promises. His behavior, faith and self-improvement are not products of a belated conversion. Michael does not brag about or seek recognition for either his positive influence on and relationships with others or his artwork; for him they are their own reward. His faith, bond to his parents, siblings, children and others in his life, self-rehabilitation, and education were recognized at his sentencing in 1983, and have been maintained in spite of his condemned status.

On June 30, 1983, Michael entered Death Row at San Quentin State Prison. He was stabilized by sobriety. The provision of art supplies and reading materials led to untapped creative and artistic talent. Regular visits from his parents, siblings, children, and later his grandchildren have given him purpose and resolve.

For over twenty-two years, Michael has compiled a nearly perfect conduct record. He has maintained a Grade A classification -- the classification for conforming prisoners -- from his first appearance before the Institutional Classification Committee in September 1983 until the present. (Exhibit 32, Disciplinary, Classification and General Chronos of Michael Morales). The "Disciplinary" portion of his prison file is nineteen pages long; fourteen of those pages concern reports of officers and doctors about a fistfight twenty-two years ago among four prisoners, including Michael. The incident did not result in a change in Michael's custody status or housing; the de minimus nature of the punishment handed down reflects the relative lack of gravity of the offense. (*Id.*)

*Two more pages are devoted to a January 1999 disciplinary write-up for intentionally delaying yard recall. According to San Quentin staff, every prisoner on the exercise yard to which Michael was assigned received an identical write-up.

The remaining three pages document Michael's refusal to stand at his cell door during a mandatory 4 p.m. count on January 16, 17, and 18, 1990 and again on December 8, 1996. Michael did not receive a serious rules violation report; he was counseled on three occasions and received a minor rules violation write-up on the remaining occasion.

In March 2002, prison correctional officers remarked that Michael "has programmed successfully [for] many years in East Block Grade-A." In December 2003, the Institutional Classification Committee members noted that "Morales has conducted himself positively within the Grade A Program." In April 2004, the East Block Lieutenant reported that Michael was "not a behavioral problem in the unit." (Exhibit 32.)

Michael's record in prison is far more than one of steadily staying out of trouble. It is one of affirmative growth. As promised, Michael furthered his schooling. For several months in 1986 and 1987, until lockdowns, teacher absences, and lack of continuity affected his desire to continue his academic studies, Michael took high school level English and Math courses. It appears that reports may be missing from his file because the first school report, dated September 30, 1986, contains the instructor's observation that "Inmate Morales continues his high standards of performance." He received A's in effort, conduct and cooperation, with his instructor remarking that he "is unusually meticulous in his writing; thorough and artistic. Morales is advancing steadily in his studies." At the end of June 1987, Michael again received all A's – this time in math – and received two high-school credits. (*Id.*)

Michael is an accomplished artist, and his talents reflect his reformation. Over the years, he quietly has finished numerous portraits and paintings for prison staff, family, and friends. (*See e.g.*, Exhibit 6, Portrait of his Daughter; Exhibit 7, Portrait of Stephen [Original Delivered to Dan Maguire]); Painting for Peter [Original Delivered to Dan Maguire]). His evolution is revealed in his art over the years – it shows animals, wilderness, portraits, and children playing. He is well-schooled in art history and contemporary art. He subscribes to magazines such as *Wildlife Art* and *Southwest Art*, and studies them carefully to broaden his knowledge and perspective.

In San Quentin, he continued to re-establish his relationship with God, a journey that began while he was confined in the county jail. He again embraced the religion of his childhood. About fifteen years ago, brothers and deacons within his church began a regular pilgrimage to San Quentin State Prison to study and share their faith. As a result, several years ago Michael was baptized at San Quentin, with church approval. Such approval is not automatic; the church must be satisfied, as it was in Michael's case, that the individual's faith is sincere, mature, committed, and secure. (Exhibit 4, Photographs of Michael Morales's Baptism.)

Again, without fanfare or publicity, Michael has made friends and touched the lives of people as far away as England. Closer to home, he has influenced cousins, friends, and siblings. He is a father and a grandfather. His three children – Isaac, David, Maria – are now in their late twenties. Despite the limitations inherent in incarceration, Michael has telephoned and written regularly to his children, encouraging them to stay in school and develop themselves into productive citizens. He has provided more firm and constant guidance and love than many parents who are not constrained by confinement. He has meant something special to each of the important individuals in his life:

- Josie Morales (Mother): "As you can imagine it has been very difficult seeing our son locked up. But even as hard as it's been, he always did the very best he could in his situation. He always wrote the kids, wanting them to know him, and to try and guide them the best he could. Yes, he has grown into a very loving and caring son, brother, and father." (Exhibit 13, Letter from Josie Morales).

- Isaac Morales (Son): “[Execution] may seem to bring relief or justice for some people but for others, (the victim, me, my brother and sister, our family) it makes life vacant and empty. The vacancy that I am referring to is the absence of my father’s presence on this earth.” (Exhibit 11, Letter from Isaac Morales.)
- Maria Morales (Daughter): “I have been in constant contact with my father through out the years. He is still part of my life today. Through the years he has taught me so much through letters. . . . He wrote about decisions I was making through out my life trying to guide me the best way he could, sometime through his own experiences. Till this day I can look back on those letters and learn from them, sometimes I think to myself why didn’t you listen to your Daddy.” (Exhibit 8, Letter from Maria Morales.)
- Morales-Millian Family (Son, Daughter-in-law, Grandchildren): “. . . I would like you to know that even though Mike has been on Death Row the past 25 years, he has had a great influence in his son David’s life. You see David was going down the wrong path as a rebellious teenager, but through Mike’s letters and advice throughout the years they had a great influence on him. . . . I thank Mike for still being there as a father to his boys even from behind the prison walls. He still showed him how to be a man and take the righteous path. . . . we are all upstanding members of society and have very strong morals and family values. Part of those teachings are from Mike. After we would receive a letter we would discuss them and keep every word to heart. (Exhibit 10, Letter from the Morales-Millan Family.)
- Lydia Lopez (Friend): “He has been there for me and my family always. When I lost my husband in 1987 he was always writing or calling to make sure that I was okay. When my three sons reached their teenage years he was there to talk to them or to give me advice on how I should handle certain situations. . . . He has helped my 22 year old daughter a lot. . . . He writes her and calls and talks to her about her ways she has come a long way with his help. . . . I feel that it would be catastrophic for him to die. He is needed so much by a lot of people, like his mom and dad, his children, his sister and brothers and all of the people he is in contact with even if it is only from behind those bars.” (Exhibit 16, Letter from Lydia Lopez.)
- Victoria Ponce (Friend): “He is a friend that helped me out in many ways. Honestly and truly he is a caring, loving, thoughtful man. . . .” (Exhibit 17, Letter from Victoria Ponce.)
- Yvonne Rivera (Cousin): “It impressed me that he looked up information in the Bible for some practical suggestions to give his own children guidelines, as he

knows personally how bad association can wreck one's life." (Exhibit 15, Letter from Yvonne Rivera.)

- Helen Keeler (Friend): "I have been through . . . life threatening illnesses, and Mike has always been there for me with kind words of support. . . Mike is well thought of by a great many people. . . ." (Exhibit 14, Letter from Helen Keeler.)
- Lillie Garcia (Maria Morales's Mother): ". . . putting Mike to death will not bring peace to no one. It will bring hurt and pain to those whom love him, especially my daughter. . . . Mike has always kept in touch with his daughter thru letters, phone call and visits. His letters to her were about giving her advice to get a good education to follow her dreams and have a spiritual foundation Mike has affected some of my family members by giving them advice that kept them from making bad decisions. For me I love Mike for the man he really is not the one that they speak about, I've never [known] that man." (Exhibit 9, Letter from Lillie Garcia.)

The life of a person who is so productive within the prison walls, who can reach outside the walls of San Quentin so positively, and who is so beloved by family and friends, is truly a life worthy of an act of grace.

E. The Effects of Drug Intoxication that the Jury and Judge Did Not Hear

Michael Morales's actions on January 8, 1981 were those of a very young man whose long-term estrangement from his family, home and church resulted in associations with older, but unstable youths who had drawn him into a downward spiral of increasingly serious, chronic substance abuse. Beginning with beer when Michael was approximately 16 years old, his older acquaintances then introduced him to fortified wines, binge consumption of beer, Seconal (a potent barbiturate), Amphetamine, Dexedrine, LSD, heroin, marijuana and eventually PCP (Phencyclidine). (Exhibit 27, Declaration of Pablo Stewart, at 4-5.)

Shortly after his twenty-first birthday, the tragic confluence of factors including Michael's abuse of PCP, and Rick Ortega's deliberate act of getting him intoxicated with alcohol, produced a psychotic disinhibited state in which Michael was not wholly aware or in control of his actions. (*Id.* at 8; Exhibit 30, Declaration of Patricia Felix.)

As explained by Dr. Stewart, Michael experienced a surreal quality to the environment when Ortega returned to pick him up with Terri Winchell in his car. Rick Ortega's and Ms. Winchell's voices had the same muffled, distant sound of voices Mr. Morales heard at a shopping mall the first time he ingested PCP, and he felt himself becoming increasingly agitated and paranoid. In turn, he responded on a purely reactive level to his paranoid interpretations of Ortega's and Terri Winchell's behavior, and was unable accurately to perceive, assess, or calibrate the nature of his reaction. Later,

Michael had only fragmentary memories of the ensuing assault. Immediately after the offense, Michael displayed symptoms and behaviors associated with severe PCP intoxication, complicated by alcohol. (Exhibit 27 at 6-7; Exhibit 30.)

Michael Morales has never suggested that his intoxication excused his responsibility for the victim's death. The fact remains, however, that PCP touched and ruined many young lives during the time of Michael's experimentation, addiction and chronic abuse. PCP is known to psychopharmacologists first and foremost as a psychotomimetic, i.e., a substance that induces psychosis. The hallmark of its effect on mental functioning is the ease with which users misinterpret or lose contact with reality. Physically disorienting, dissociative anesthetic effects further operate to make persons under the influence of PCP feel disconnected from their environment, and may produce random, violent, bizarre acts. (Exhibit 27 at 7.)

The jury did not hear about the psychosis-inducing effects of the drugs that Michael chronically abused and on which he was intoxicated on the night of the crime. During the initial intake interview with an investigator employed by his trial lawyer, Michael reported that he had been drinking "a lot" of beer and wine and had consumed a half a cigarette laced with PCP. (Exhibit 24, Declaration of Luana Horstkotte & Attachment.) Nevertheless, his trial lawyer did not obtain a drug history from Michael, did not investigate his drug abuse, did not request a drug or alcohol screen of the blood sample drawn from Michael, and did not consult an expert about the synergistic effect of alcohol and PCP or the likelihood that having ingested PCP, Michael's already altered mental status was significantly compromised by the rapidity with which he consumed a large quantity of a high potency alcoholic beverage. (Exhibit 27 at 8.)

The evidence that would have explained Michael's involvement in this bizarre and violent crime was not presented in state and federal post-conviction proceedings because neither court authorized his lawyer to investigate his poly drug abuse or hire an appropriate expert.

According to contemporaneous witnesses, Michael's behavioral changes when using PCP and alcohol were akin to "an allergic reaction," with even relatively small amounts of alcohol and PCP producing changes in posture, facial contortions, tensed muscles, agitation and physical aggression. By contrast, Michael was never observed to act aggressively or violently when he was not intoxicated with alcohol or PCP. (Exhibit 28, Declaration of Lillie Garcia; Exhibit 29, Declaration of Raquel Cardenas; Exhibit 25, Declaration of Julio Marquez; Exhibit 26, Declaration of Manuel Franco Vasquez; Exhibit 30, Declaration of Patricia Felix.)

The facts of the offense, witness observations of Mr. Morales and his own limited recall of events all provide consistent indications that the synergistic effects of PCP and alcohol resulted in a psychotic, disinhibited state which produced aberrant, homicidal behavior.

Michael recognizes that although his use of drugs and alcohol was not the choice of a mature adult, it was activity for which he must be held fully accountable. His intoxication and the resulting loss of control and harm to others have cost him his freedom. Michael's impaired mental state, however, was further evidence that he had not planned to take a life and the tragic outcome was the result of a chaotic series of events. It is an appropriate basis on which to exercise mercy.

F. The Anomaly of Mr. Morales's Death Sentence

Michael Morales's death sentence is anomalous on several levels: the architect and catalyst of the crime is serving a life sentence; race, ethnic, and gender bias indisputably infected the San Joaquin County District Attorney's charging decision; and other similar homicides occurring in the same time frame were not capitally charged by the District Attorney. No judge or factfinder at Mr. Morales's trial could address and redress these gross inequities because the factual support for each form of disproportionality was not available. Judicial redress remained functionally unavailable because of the narrow circumstances in which a court may afford relief. Consequently, executive clemency -- "the 'fail safe' in our criminal justice system"¹ -- is uniquely situated to redress this arbitrariness.

Every homicide is a terrible event, with unimaginable consequences for the family, friends, and community of the victim. In these ways, Mr. Morales's case is no different. His circumstances starkly stand apart, however, because unlike most California capital defendants Mr. Morales did not solicit, orchestrate, seek to or actually benefit from the crime. The one who did -- Mr. Morales's cousin Rick Ortega -- is serving a sentence of life without parole. Rick Ortega bears primary responsibility for Terri Winchell's death, although he did not physically kill Terri Winchell. This much is amply borne out by the police investigation and the records in the separate trials of Mr. Ortega and Mr. Morales. Mr. Ortega ensnared his cousin into his plan to frighten, threaten and stop Terri Winchell from spreading rumors about him. When Mr. Morales asked whether Mr. Ortega wanted to do something to her house, Mr. Ortega rejected that proposal. Moreover, Mr. Ortega got his cousin drunk and high so that he would help threaten and intimidate her. (Exhibit 30, Declaration of Patricia Felix at p. 6.)

But for the immaturity, and emotional and psychological instability of his cousin - Rick Ortega -- and Michael Morales's insobriety, this crime would not have occurred.

Neither Michael Morales's jury nor the trial judge, however, had the ability to insure that no harsher judgment was imposed upon Michael than Rick for one simple reason -- Michael Morales was tried first. And, the law of this state does not require that a fact-finder or judicial body consider the more lenient disposition of a co-perpetrator in determining the appropriate punishment. (*People v. Belmontes*, 45 Cal.3d 744 (1988).)

¹ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

This is the only opportunity Mr. Morales has to correct this grossly unfair differential treatment.

Similarly, at the time Mr. Morales's was charged and tried (1981-83), he was unable to prove what statistics now illustrate – the decision to capitally charge him was fueled by considerations of race, gender, and ethnicity. In San Joaquin County, between August 1977 and December 1986, prosecutorial policies indisputably had a discriminatory effect and purpose. An individual who killed a white person was twenty times more likely to be charged with capital murder than if the victim were Latino. In San Joaquin County, an individual who killed a female victim was fifty-seven times more likely to be capitally charged than if the victim were male. This obvious racial, ethnic and gender bias cannot be explained by constitutionally permissible factors. (Berk, *Arbitrariness, Capriciousness and Discrimination in San Joaquin County Capital Prosecutions, 1977-1986* (1996); see also, *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir. 2005).)

Again, the trial judge could not consider and correct the arbitrariness of Mr. Morales's capital charges or jury verdict because the factual predicate was not available to him. Now, however, the pattern of arbitrariness is known and available. Clemency is Mr. Morales's only avenue for correction of the unconstitutional statistical imbalances set forth above.

Finally, Mr. Morales's death sentence is arbitrary when examined against and set in the context of a random sampling of homicides charged in San Joaquin County in the months before and after Mr. Morales was arrested and charged:

- September 18, 1979: Andre Ware (19 year old African American) was beaten to death with a baseball bat by Robert Tursick (Caucasian male) while Ware attempted to flee for his safety after Tursick made racial slurs against Mr. Ware. Tursick was not capitally charged. (*People v. Tursick*, San Joaquin Superior Court Case No. S30576.)
- September 5, 1980: Ardelle Johnson (Caucasian male) murdered two month old Michael Johnson (Caucasian male) by repeatedly smashing his head against a door jamb, causing multiple skull fractures. Ardelle previously physically abused the baby. He was not capitally charged. (*People v. Johnson*, San Joaquin Superior Court No. S31652.)
- December 6, 1980: Frank Moppins (African American) murdered Norman Ellis (African American), a convenience store clerk, by shooting him twice in the chest while robbing him. The death penalty was not requested. (*People v. Moppins*, San Joaquin Superior Court No. S32128.)

- December 14, 1980: Maria O. Cruz (Latina) repeatedly beat Joanne Ortega (Latina) until she died from a subdural hematoma to the brain. Ortega had 75 bruises, all of which occurred within 48 hours of her death and none of which was accidental. Cruz was not capitally charged. (*People v. Cruz*, San Joaquin Superior Court Case No. S32222.)
- February 26, 1981: Paul Timberlake (African American) and two companions kicked in the door to the apartment of 91 year old Fausto Bautista (Latino) and beat him to death in order to commit a robbery. Capital charges were not pursued. (*People v. Timberlake*, San Joaquin Superior Court Case No. S32256.)
- August 13, 1981: Raymond Mayner (Caucasian) entered the room of 55 year old Terry Farrens (Caucasian female) through an open window, strangled her, and stole her cash and jewelry. A death sentence was not pursued. (*People v. Mayner*, San Joaquin Superior Court Case No. S32957.)

The facts and information contained in law enforcement's investigation, as supplemented and corrected in this petition belies any rational distinction between Mr. Morales's case and those of his San Joaquin County contemporaries. Moreover, according to the California Department of Corrections and Rehabilitation, as of June 30, 2005, 21,455 people were incarcerated in California for murder of which only 634 (2%) are condemned to death. In light of the "but for" role of Rick Ortega, Mr. Morales's atonement, and the quality and paucity of the evidence of death eligibility or first degree murder, Mr. Morales's case is more akin to those of the 98% of the convicted murderers currently in prison.

Again, this is not a wrong that was capable of redress by the trial judge or jury. Mr. Morales respectfully requests that clemency –“the historic remedy for preventing miscarriages of justice where judicial process has been exhausted”² be granted to redress these inequities.

G. Conclusion

We are mindful that even in light of Michael Morales's acceptance of guilt, his unquestionable remorse, atonement, and exemplary institutional record, a grant of clemency ordinarily might be viewed as contrary to the will of the people as expressed in our death penalty statute and the decision of the judge and jury. This is not the ordinary case. Rather, because of flaws in the legal proceedings, which the courts have felt powerless to correct, executing Michael “would frustrate the design of our sentencing laws, and would constitute a grievous and freakish injustice.” (Exhibit 1, Letter from the Honorable Charles R. McGrath, at 3.)

² *Herrera v. Collins*, 506 U.S. at 411-12.

These are the circumstances under which the power to grant executive clemency is intended to function as an integral, legitimate and necessary part of the overall capital sentencing process. For this reason, the same judge who sentenced Michael to death now explicitly supports the request to grant clemency in order “to enhance the fairness, uniformity and reliability of penalty determinations in capital cases.” (*Id.*)

Commuting Michael’s sentence to life without the possibility of parole therefore will have a positive impact beyond the walls of San Quentin State Prison. At the most personal level, of course, a grant of clemency will spare Michael’s family, particularly his parents, John and Josie Morales, his siblings Chris, Lisa, and Danny, his children Isaac, David, and Maria the anguish of an execution. At a societal level, a grant of clemency will also protect “the integrity of the judicial system, public confidence in the administration of the state’s power to impose death, and the rights of defendants to individualized sentencing decisions.” (*Id.*)

This is thus the rare – perhaps unique – case in which a grant of mercy in a capital case will honor both the law and the values of the people of the State of California.

For these reasons, this petition for executive clemency is humbly and respectfully submitted by Michael Morales, and is supported by his family, the Superior Court trial judge who sentenced him to death, his friends, his counsel, and the accompanying evidence.

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