No. S107782

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID ESCO WELCH, On Habeas Corpus	Related to Former Automatic Appeal Case No. S011323 Alameda Co. Superior Court No. 90396 (Hon. Stanley Golde Presiding)

REPLY TO RETURN TO ORDER TO SHOW CAUSE

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[1]/ Due to an unusual, severe snowstorm in the Seattle area, the original declarations which should have been picked up by Federal Express on November 28, 2006, were not picked up until November 29. The copies of this document thus contain a faxed and photocopied version of Exhibit 129 and a photocopied version of Exhibit 130. The originals of these declarations will be included in the original reply, if they arrive by November 30, or will be provided to the court shortly thereafter.

TABLE OF AUTHORITIES

FEDERAL CASES

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No. S107782

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	**Related to Former Automatic Appeal Case No. S011323**
DAVID ESCO WELCH,	)	
On Habeas Corpus	)	**Alameda Co. Superior Court No. 90396 (Hon. Stanley Golde Presiding)**

REPLY TO RETURN TO ORDER TO SHOW CAUSE

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

By this verified reply and traverse, petitioner DAVID ESCO WELCH, by and through his attorneys of record, Wesley A. Van Winkle and Stephanie Ross, responds to the return to the order to show cause as follows:

1.

By this reference, petitioner expressly incorporates each and every material fact alleged in the petition for writ of habeas corpus and Exhibits 1 through 128 filed in support of the claims and facts alleged in the petition (*In re David Esco Welch*, S107782) as if each fact and allegation contained therein were fully set forth in this reply. (*People v. Romero* (1994) 8 Cal.4th

728, 739; *In re Sixto* (1989) 48 Cal.3d 1247, 1256; *In re Lewallen* (1979) 23 Cal.3d 274, 277.) Petitioner further expressly incorporates by this reference the facts and evidence contained in exhibits 129 through 130 filed in support of this reply as though fully set forth herein, and also expressly incorporates the factual and legal discussion contained in Petitioner's Reply to Informal Response to Petition for Writ of Habeas Corpus and the attached supporting memorandum of points and authorities and exhibits as though fully set forth herein. (*In re Gay* (1998) 19 Cal.4th 771, 781.) Petitioner further incorporates by this reference all exhibits filed at any time following the filing of the petition in this matter.

2.

Petitioner, through counsel, admits that he is confined in the California Department of Corrections pursuant to a judgment of conviction and sentence of death imposed by the Alameda County Superior Court in Case No. 90396, as alleged in respondent's Part III, but denies that the judgment is valid or the commitment is lawful. Petitioner, through counsel, admits that the jury convicted him of six special-circumstance murders, two attempted murders, and possession of a firearm by an ex-felon, as alleged in respondent's Part II, but denies committing these offenses. For reasons more fully set forth in the petition and supporting exhibits, and incorporated herein, petitioner alleges that his convictions were unlawfully obtained in violation of his state and federal constitutional rights including, but not limited to, the right to be tried before an impartial tribunal and a jury untainted by extrinsic evidence or other misconduct, the right to the effective assistance of counsel in the penalty phase, and, the right to due process of law and the disclosure by the prosecution of all material exculpatory and impeachment evidence.

3.

Petitioner admits that this Court's Order to Show Cause ("OSC") filed November 16, 2005, requires respondent to show "why the relief prayed for should not be granted on the grounds of jury misconduct as alleged in claims (sic) 6 and of ineffective assistance of counsel as alleged in claim 18 of the petition for writ of habeas corpus filed June 24, 2002." (*In re Welch*, S107782, OSC filed November 16, 2005.) Petitioner denies that the OSC was limited to and/or implicitly signified the denial of any claims alleged in the petition, all of which were predicated in whole or in part on the bases for relief identified in the OSC. As set forth in greater detail in paragraph 8 herein, petitioner denies that there are any disputed factual issues requiring an evidentiary hearing and alleges that respondent has failed to state facts sufficient to show cause why the relief requested should not be granted.

4.

Petitioner denies each and every allegation of respondent's Part I, consisting of four paragraphs.[1] Without limitation of the foregoing denial, petitioner further specifically denies each of the following allegations: that he shot the individuals listed in the first paragraph of respondent's Part I; that he "incorrectly believed" Dexter Mabrey to be his son; that he shot Leslie Morgan and "left him for dead;" that "two members of the family

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[1] / Although the return to the order to show cause "becomes the principal pleading" in a habeas proceeding and is "analogous to a complaint in a civil proceeding" (*In re Lawler* (2002) 23 Cal.3d 190, 194), respondent's return is largely a polemic. Paragraph I, which purports to be a statement of facts, contains a level of argumentative sarcasm which is inappropriate in such a pleading. In addition, while respondent's statement of facts is supported by citations to this

escaped before petitioner got to their rooms;" that petitioner was "hunting" for Barbara Mabrey and muttering "where is the bitch at;" that Barbara Mabrey had "incurred petitioner's wrath and threats upon her family" when she confirmed she would testify at a preliminary hearing scheduled for the day after the killings, that Barbara Mabrey "ran out the back door when the shooting started and called police from her neighbor's house," that "Barbara's son Stacey Mabrey hid in a closet and also survived to testify about the night his siblings, guests, and niece were murdered," that the family's house was being observed by an Oakland Police patrol unit that night, that petitioner had been "watching the house and police surveillance from further up the hill" and "moved in at change of shift to follow through on his threats," or that petitioner "used his cousin's fireplace to destroy evidence, including his clothing." Petitioner further denies that the foregoing statements are supported by this court's opinion, as represented by respondent's citations.

5.

Petitioner denies respondent's allegation that "the jury did not commit misconduct" and respondent's allegation that "if any misconduct occurred as alleged, it could not have been prejudicial." (Return at p. 5.) Petitioner affirmatively alleges that the misconduct occurred, and not only alleges that the misconduct constituted a structural error requiring reversal per se but also that the misconduct was in any event prejudicial.

Petitioner denies that respondent accurately sets forth the correct legal principles applicable in this case. Respondent alleges that "[j]uror misconduct raises a presumption of prejudice that may be rebutted by proof

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court's opinion in the direct appeal, the cited pages do not contain facts supporting many of respondent's argumentative assertions.

that no prejudice occurred 'or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct.' (Return, at p. 5, citing "*In re Hitchings* (1993) 6 Cal.4th 97, 119; but see *Smith v. Phillips* (1982) 455 U.S. 209, 217 [the defendant bears the burden of establishing not only juror misconduct but prejudice when pursuing a collateral attack on his judgment]."") Petitioner denies that this standard states the correct applicable law and affirmatively alleges that juror misconduct of the type alleged here is a structural error which is reversible per se without resort to prejudice analysis.

This court has repeatedly held that when juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict must be set aside if there appears merely a "substantial likelihood" of juror bias. (*People v. Nesler* (2002) 16 Cal.4th 561, 578; *In re Carpenter* (1995) 9 Cal.4th 634, 653.) A "substantial likelihood" of juror bias appears in one of two ways: "(1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*People v. Nesler, supra*, 16 Cal.4th at pp. 578-579.)

If there is a substantial likelihood of juror bias, the reviewing court "must set aside the verdict, no matter how convinced we might be that an unbiased juror would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*Id.*, at p. 579; see also

In re Carpenter, *supra*, 9 Cal.4th at pp. 653-654; *Harrington v. California* (1969) 395 U.S. 250, 254 [recognizing that "we must reverse if we can imagine a single juror whose mind might have been made up" on basis of inadmissible extrinsic evidence]; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, n. 2 (en banc), cert. denied, 525 U.S. 1033 (1998) ["the presence of a biased juror introduces a structural defect not subject to harmless error analysis"].)

Petitioner denies respondent's allegation that "the jurors followed the trial court's instructions to consider the evidence developed at trial," and also denies that any assumption that the jurors followed their instructions can be made under law. (Return, at p. 5.) Petitioner further denies respondent's allegation that the evidence had "little – if any – effect on their deliberations." (Return, at p. 5.) Petitioner affirmatively alleges that the bailiff's communication of extrinsic evidence was presumptively and actually prejudicial, compelling the relief requested. Petitioner further denies respondent's assertion that either the presumption of Evidence Code section 664 or "the benefit of the doubt" (Return, at pp. 5-6) can be applied to the conduct of the bailiffs in this case. (*Maddox v. United States* (1892) 146 U.S. 40; *Parker v. Gladden* (1966) 385 U.S. 363.) To the contrary, because the presence of a single biased juror is a structural error denying the defendant's constitutional right to an impartial jury, "[d]oubts regarding bias must be resolved against the juror." (*United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1114.) Petitioner admits that the defense presented evidence of petitioner's urination in the stairwell during the penalty phase (Return, at p. 5; RT 5949), but denies that this in any way ameliorated the error or prejudice from the error at the guilt phase. Petitioner affirmatively

alleges that the bailiff told the jurors that petitioner urinated in the stairwell and showed jurors where this occurred.

Petitioner denies that he has "fail[ed] to establish impropriety" or that "the subject matters of the alleged misconduct were abundantly clear to anyone paying attention in court." (Return, at p. 6.) Petitioner denies respondent's unsupported speculation that the smell of the urine was evident to the jurors, and further denies that the "entire Mabrey family" had been threatened with death and torture for months or that petitioner ever "made good on his threats." (Return, at p. 6.) Petitioner again denies that "all parties are subject to a presumption of performance of duty" (Return at p. 6), and affirmatively alleges that he has alleged facts sufficient to establish misconduct. The misconduct includes, but is not limited to: social contact with the bailiff during proceedings; juror receipt of material extrinsic evidence; consideration by the jurors of material, extrinsic evidence from media; the determination of guilt and sentence prior to deliberations; and the participation of alternates in deliberations.

Petitioner denies that respondent's alleged "additional evidence" shows that "the bailiff and back-up bailiff protected the jurors from extraneous influences." (Return at p. 6.)

Petitioner denies each and every allegation set forth in the declaration of John Dimsdale and alleges that Mr. Dimsdale was motivated to make the statements in his declaration out of personal and professional self-interest and a strong bias against petitioner. Petitioner alleges that Mr. Dimsdale was and is an employee of the sheriff's department and is accused of committing misconduct which could result in negative repercussions pertaining to his continued employment. Petitioner alleges that Mr. Dimsdale accordingly has a powerful motivate to assist respondent

in disproving the allegations. Petitioner further alleges that new evidence shows Mr. Dimsdale bears a substantial personal animus toward petitioner and his post-conviction defense.

In the declaration of investigator Susan Montez (Exhibit 129), Ms. Montez reports that she met with Mr. Dimsdale on April 30, 2006 at his home in Antioch, California, and identified herself as an investigator working on petitioner's case. When Mr. Dimsdale declined to be interviewed. Ms. Montez thanked him and left. However, Mr. Dimsdale followed her to her car, grew angry, red-faced, and confrontational, and shouted that if anyone deserved the death penalty it was petitioner.

Petitioner denies that "the jurors were scrupulously protected from outside influences" (Return, at p. 6), and affirmatively alleges that jurors were exposed to extrinsic information. Petitioner denies that the bailiff did not "provide the extraneous information alleged to have been provided in Claim 18." (Return, at p. 6.) Rather, Petitioner affirmatively alleges that the extrinsic information was gleaned directly from the bailiff and from media. Petitioner denies that the bailiff protected "the jury from outside influences" (Return, at p. 6), and instead affirmatively alleges that the bailiff himself was just such an outside influence. Similarly, petitioner denies that bailiff did not provide "outside information to any juror or alternate." (Return, at p. 6.)

Petitioner denies that the bailiff "would not have permitted the jurors to discuss outside information or discuss the case outside of deliberations." (Return, at p. 6.) Petitioner affirmatively alleges that the jurors were so permitted. Petitioner denies that "no bailiff would have been with the jurors to identify the source of any urine smell they may have encountered in the stairwell." (Return, at p. 6.) Petitioner affirmatively alleges that the

bailiff discussed the smell in the stairwell with the jurors, and that this occurred when he was in the stairwell or another location. Petitioner further alleges this communication constituted material, extrinsic evidence regardless of where the communication occurred.

Petitioner denies that bailiffs did not participate in the conversation at the jurors' lunch table. Petitioner denies that "there was no baby shower for the bailiff's wife." (Return, at p. 6.) Juror Joanne Gonzales recalls such a shower taking place during a two-hour lunch break with the bailiff's wife being present. (Exhibit 11, Declaration of Joanne Gonzales.) Moreover, petitioner alleges that Mrs. Dimsdale was in fact pregnant and gave birth to a child during the pendency of the trial.

Petitioner denies that "no juror or alternate ever reported feeling threatened by Mr. Welch" (Return, at p. 6), and further denies that any of the steps or procedures set forth in respondent's supporting declarations were taken. Petitioner further denies respondent's allegation that "the accuracy and truthfulness of the declarations is in serious doubt" and also denies respondent's allegation that "alternate jurors did not deliberate." (Return, at pp. 6-7.) Alternate Juror Wells not only recalls deliberating but also recalls many of the specifics of the deliberations, and Juror Cruz also recalls Mr. Wells being present during deliberations. (See Exhibit 8, Declaration of Joseph Cruz, at p. 1; Exhibit 35, Declaration of Bernard Wells, at p. 1.)

Petitioner further denies each and every allegation of the declaration of Herbert Walters, Jr., the backup officer. Without limitation of this denial, petitioner further specifically denies that Sergeant Walters never informed the jurors about petitioner urinating in the stairwell (Return, at p. 7), that Sergeant Walters never revealed or discussed outside information

with the jurors (*ibid.*), that the bailiff, the backup officer, and Judge Golde, handled courtroom outbursts and concerns expressed about juror safety in the manner alleged in the declarations submitted by respondent (*ibid.*); or that neither officer provided information to the jurors or alternates about where the witnesses lived. (*Ibid.*) Petitioner alleges that Sergeant Walters shares the same self-protective motivations and biases as Mr. Dimsdale, as set forth above.

Petitioner affirmatively alleges that respondent has failed to interview any of the jurors or alternates. Petitioner further alleges that because the bailiff and backup officer were not present at deliberations and had no personal knowledge of the facts, respondent has failed to state facts giving rise to a factual dispute and has failed to show cause why the relief requested in petitioner's claim 6 should not be granted.

6.

Petitioner denies respondent's assertion that defense counsel "were not ineffective," and affirmatively alleges that counsel performed ineffectively and that it is at least reasonably probable that a more favorable result would have been obtained but for counsels' unprofessional errors and omissions. Petitioner further denies that the question of whether counsel were ineffective is controlled solely by *Strickland v. Washington* (1984) 466 U.S. 668, as respondent asserts, and alleges that more recent authorities, including but not limited to *Williams v.* Taylor (2000) 529 U.S. 362, *Wiggins v. Smith* (2003) 539 U.S. 510, and *Rompilla v.* Beard (2005) 545 U.S. 374, control in cases of penalty phase ineffectiveness. Petitioner further alleges that the standard of care applicable to capital counsel is established by the "well-defined norms" of the American Bar Association's Guidelines for the Appointment of Performance of Counsel in Death

Penalty Cases. (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) Pursuant to those norms, capital counsels' penalty phase investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (*Ibid.*, emphasis in original.)

Petitioner denies that "extensive social history information was collected and analyzed by the defense team and provided to the mental health experts who testified at trial." (Return, at p. 8.) Petitioner further denies respondent's allegation that "almost every relevant detail asserted in the petition was acquired by the defense investigators in advance of trial." (Return, at p. 8.) To the contrary, petitioner alleges that the petition and its incorporated exhibits establish beyond question that counsel obtained and presented very little evidence pertaining to petitioner's social history and obtained almost none of the information included and incorporated in the petition.

Apart from her own hearsay declaration reported alleged telephone conversations with trial counsel, conversations which were in any event uninformative, respondent presents absolutely no new factual material in support of this portion of the return. Respondent's discussion of social history information focuses solely on respondent's argumentative interpretation of some of petitioner's exhibits, which she alleges were reviewed by the two mental health experts who testified at trial. (Return, at pp. 8-9.) Respondent submits no declarations or affidavits of either expert stating whether they actually reviewed these documents or explaining what documents they allegedly reviewed. However, according to the reporter's transcript, both Dr. William Pierce and Dr. Samuel Benson reviewed some school and law enforcement records pertaining to petitioner and also

reviewed some of the testimony from the trial itself. (RT 5930-5931 [Pierce testimony]; RT 6011-6012 [Benson testimony].) Both experts also conducted interviews with petitioner.

Petitioner denies that the experts reviewed all of the material submitted with the petition. However, it is clear that even if these experts reviewed some of the material included as exhibits to the petition, neither expert ever interviewed any member of petitioner's family, any of petitioner's friends or acquaintances, any of petitioner's teachers or school principals, any of petitioner's former cellmates, or indeed, any other person with information pertaining to petitioner, nor did either expert review any reports of any interviews with any such person conducted by a defense investigator. Petitioner further alleges that no one else connected with the defense performed any substantial social history investigation either. No mitigation expert was ever hired, and investigators conducted virtually no social history interviews, apart from a handful of contacts with persons whose knowledge of petitioner was extremely limited. Other than a single report of an interview with petitioner's father, no investigator ever prepared a report of an interview with any potential social history witness.

By contrast, and contrary to respondent's contentions, the petition includes the declarations of the following notable social history witnesses, among others: Ms. Treslyn Block, petitioner's former girlfriend (Exhibit 4); Mr. Marco Franco, principal of Sobrante Park Elementary School, which petitioner attended as a child (Exhibit 9); Mr. David Angelo Irving, a former jail inmate housed with petitioner prior to trial (Exhibit 12); Mr. Dwight Jackson, another former jail inmate housed with petitioner at the time of trial (Exhibit 13); Ms. Jackie Jackson, a teacher who knew petitioner (Exhibit 14); Ms. Sarah Perrine, petitioner's maternal aunt

(Exhibit 21); Ms. Phebia Richardson, a health consultant and teacher liaison at Sobrante Park Elementary School (Exhibit 23); Mr. Konolus Smith, a childhood friend and neighbor of petitioner (Exhibit 26); Mr. Randy Street, a childhood friend and neighbor of petitioner (Exhibit 29); Mr. Allen Turk, a former Folsom Prison inmate who was housed with petitioner (Exhibit 31); and David Welch IV, petitioner's son (Exhibit 32).[2] These declarations paint a powerfully mitigating picture of petitioner. None of these people were ever interviewed by trial counsel, their investigators, or their experts.

Respondent's return never mentions any of these declarations or persons, with the single exception of Sarah Perrine, petitioner's maternal aunt. With respect to Ms. Perrine, respondent alleges that her declaration "was not available at trial, because petitioner did not want his family members participating in a social history investigation." (Return, at p. 8.) Petitioner denies the allegation that Ms. Perrine's testimony or declaration was not available at trial, an allegation which is completely unsupported by the record or by any new factual material presented by respondent. Petitioner further denies the suggestion that petitioner or his family are somehow at fault for counsel's unprofessional failure to conduct a mitigation investigation.

In support of her assertion that Ms. Perrine's declaration was not available at trial, respondent cites pages 37-38 and 48-49 of the Marsden hearing of November 8, 1988. Neither citation ever mentions Ms. Perrine. Pages 37 and 38 do not even suggest that petitioner or his family members declined to cooperate with a social history investigation, but shows only

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[2] / Petitioner also presents an additional social history declaration as exhibit 130 to this reply. (Exh. 130, Declaration of Glenn Riley.)

that petitioner did not want to be interviewed by psychiatrists or psychologists in the jail visiting room because petitioner believed the room was being monitored with listening devices. (RT 38.) No mention was made petitioner's "family members" at all. At pages 48 and 49, trial counsel stated that his only contact with petitioner's "family" was to request that they speak to a woman named Jackie Leismeister "who is helping us prepare a sociological background." (RT 48.) However, from context, it appears clear that the only members of petitioner's family counsel actually contacted were petitioner's parents. (RT 48-49.) Counsel asserted that these two people "don't want to cooperate," but also proposed to apologize to them for any "undue stress" he had caused them, suggesting that counsel recognized the contacts with them had been as "insensitive" and badly handled as petitioner himself asserted. (RT 48-49.) Petitioner then explained to the court that his parents thought the psychologist wanted to "evaluate them" and wanted to know why they should be speaking to psychologists when "my attorneys haven't made an adequate environment or conference where only psychologists talked to me. I'm the one that's supposed to be evaluated." (RT 49.) Plainly, counsel had failed to explain to petitioner or his parents why the defense experts needed to interview petitioner's parents.

The portions of the record cited by respondent thus not only fail to mention Ms. Perrine but also do not even begin to suggest that petitioner or his "family members" were in any way at fault for counsel's failure to conduct an adequate social history investigation. These portions of the record show that petitioner was willing to be evaluated by psychologists but wanted the evaluation to be conducted in a confidential area. These portions of the record also make clear that counsel mishandled contacts

with petitioner and his parents and that petitioner's parents misunderstood why counsel wanted them to be interviewed because counsel failed to explain to them the purpose of the interviews. The record does not show that Ms. Perrine or any "family members" other than petitioner's mother and father were ever contacted by the defense.

Petitioner further alleges that respondent's speculative contention that petitioner interfered with counsel's investigation or ordered his family members not to cooperate with that investigation is flatly contradicted by the declarations themselves. In nearly all of the declarations of the above named persons, the declarant states under penalty of perjury that he or she was not contacted by the defense at the time of trial and states that if he or she had been contacted he or she would have willingly provided the information in the declaration and would have willingly testified to that effect. (See Exhibits 9, 12, 13, 14, 21, 23, 26, 29, 31, and 32.) Having failed to contact any of these individuals and having failed to overcome or contradict their sworn statements that they would have testified at trial, respondent's unsupported and improper speculation that petitioner somehow prevented counsel from contacting these people must be disregarded.

Furthermore, petitioner further alleges that even if petitioner or his "family members" had failed to cooperate with counsel, as a matter of law it still would not excuse counsels' failure to conduct a mitigation investigation and present mitigation witnesses. The law places the responsibility to investigate mitigating evidence upon counsel, not on the defendant, and two decades of authorities from across the nation establish beyond question that counsel may not blame the defendant for his or her failure to investigate. (*Rompilla v. Beard* (2005) 545 U.S. 374, 377

[counsel must conduct mitigation investigation "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available"]; see also, ABA Guideline 10.7(a)(2) [trial counsel required to conduct an independent investigation to obtain all reasonably available evidence in mitigation even if the defendant does not provide assistance, objects to the presentation of mitigating evidence, and/or refuses to testify]; *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) [trial counsel ineffective for failing to adequately investigate and present mitigating evidence even though the defendant instructed his attorneys not to call any family members or acquaintances to testify at the penalty phase]; *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir. 1986) [attorney required to investigate mitigation evidence even if defendant instructs him not to and refuses to testify]; *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) [defendant's alleged "waiver" of right to present mitigating evidence invalid because counsel had not adequately explained what mitigation evidence was; also, the state court's holding that counsel's duty to investigate mitigation was absolved by defendants lack of cooperation was an unreasonable application of *Strickland]; Carter v. Bell*, 218 F.3d 581 (6th Cir. 2001) [fact that family was uncooperative and defendant was strongly opposed to presenting mitigation evidence does not relieve counsel of duty to investigate]; *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997) [even where defendant *lies* to counsel, counsel must still conduct investigation to determine whether defendant's story is credible].)

Respondent also completely fails to respond to the wealth of social history information pertaining to petitioner's exposure in infancy to lead and other hazardous neurotoxins, the likely etiology of petitioner's profound brain damage. (Exhibits 15, 38, 53-83, 126.) All of this

information, including the publicly available records of the appalling building code violations in the nightmarish tenement dwelling in which petitioner lived for the first years of his life, was available at the time of trial. Similarly, the neurological damage caused by exposure to neurotoxicants in infancy was well known at the time of trial. (See, e.g., *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1256.) Respondent does not even bother to claim—nor can she-- that petitioner is somehow at fault for counsel's failure to investigate any of this information. Like her failure to contradict or confront any of petitioner's social history declarations, respondent's failure to contradict or even address these exhibits effectively concedes the issue of counsel's ineffectiveness

Petitioner denies each and every allegation in the remainder of respondent's part VI (Return, at pp. 8-9.) Without limitation of the foregoing denial, petitioner specifically denies that petitioner forbid his family members from talking to defense counsel.[3] Petitioner further denies that petitioner, who was in jail at the time, exercised control over his family members or anyone else. (Return, at p. 9.) Petitioner further denies that counsel made reasonable decisions about how much investigation to

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[3] / Petitioner objects to and moves to strike respondent's declaration on grounds of hearsay not within any exception, relevance, lack of foundation, vagueness, and lack of personal knowledge on the part of the hearsay declarant. (Respondent's Exhibit C, Declaration of Catherine Rivlin.) Specifically with respect to paragraph 3 of that declaration, and even assuming arguendo that respondent has accurately summarized Mr. Selvin's hearsay statements, Mr. Selvin did not arrange to personally interview petitioner's "family members" and thus lacks personal knowledge of whether appointments were made with petitioner's "family members," who those family members were, whether they "showed up" for the interviews, whether they "refused to cooperate" with the social history investigation, or whether they acted in accordance with "petitioner's wishes."

undertake, that "extensive" information was gathered, or that counsel made reasonable decisions on how to use the information gathered.

Petitioner affirmatively alleges that respondent has failed to interview any of the social history declarants, has failed to address or contradict any of petitioner's evidence, has failed to state facts giving rise to a factual dispute, and has failed to show cause why the relief requested in petitioner's claim 18 should not be granted.

7.

Except as otherwise indicated, petitioner denies each and every allegation of the return, denies that petitioner's confinement is legal, and denies that petitioner's constitutional rights have not been violated.

8.

Petitioner alleges that respondent has failed to meet the burden of showing cause why the relief prayed for in claims 6 and 18 should not be granted, and that therefore the requested relief should be granted.

This court is not required to expend the "scarce judicial resources" necessary to conduct an evidentiary hearing until respondent alleges specific facts that dispute the factual allegations in the petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 482-483.) The return must "recite the facts upon which the denial of petitioner's allegations is based and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed." (*Id.*, at p. 480.) If such evidence is unavailable, respondent bears the burden of pleading *with specificity* in the return "(i) why information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why a party believes in good faith that certain alleged facts are untrue." (*Id.*, at p. 485.)

The return in this case wholly fails to meet respondent's burden. With respect to petitioner's claim of juror misconduct, respondent relies entirely upon two declarations from bailiffs, but made no effort to contact any of the jurors whose declarations are the basis of petitioner's claim, fails to deny or provide any basis for believing those declarations are untrue, and has not explained why she has not done so. With respect to petitioner's claim of penalty phase ineffectiveness, respondent has alleged no new facts *at all* challenging the statement of any social history declarant or any exhibit pertaining petitioner's exposure to neurotoxicants in infancy, his poverty, his brain damage, or his nightmarish childhood. Respondent completely ignores the numerous social history declarations and other exhibits and instead: (1) critiques the documentary evidence allegedly available to trial experts, and (2) asserts that petitioner or his family members were at fault for failing to cooperate with counsel. With respect to item (1), petitioner denies respondent's self-serving interpretation of the documentary evidence but affirmatively alleges that this is not in any event the material upon which petitioner's claim primarily rests. With respect to item (2), respondent's contention that petitioner is somehow at fault for counsel's failure to conduct a competent investigation is not only false as a matter of fact, but even if true it would as a matter or law fail to show cause why the relief requested in claim 18 should not be granted. Respondent's return is simply not responsive to the allegations in the petition, nor has respondent shown due diligence or explained why she cannot respond to the allegations.

Having failed to satisfy her burden of pleading facts demonstrating the existence of a genuine material dispute, respondent is not entitled to an evidentiary hearing. (*In re Sixto* (1989) 48 Cal.3d 1247, 1252.) Because

respondent has offered only a general, unsupported denial, this court may and should resolve petitioner's claims on the basis of the current record. (See, *In re Lewallen* (1979) 23 Cal.3d 274, 278 [respondent's general denial that the trial judge had imposed an excessive sentence permitted court to decide merits of claim based on record, including the defendant's unrefuted assertion that his sentence substantially exceeded that imposed on first-time offenders].)

Accordingly, petitioner denies that there are any disputed factual issues requiring the appointment of a referee or an evidentiary hearing with respect to either claim. (Return, at p. 9.) In the event this court should decide that an evidentiary hearing is warranted with respect to one claim, petitioner alleges that he is still entitled to relief requested with respect to the other claim.

In addition, if this court determines that an evidentiary hearing is warranted with respect to either claim, petitioner alleges that substantial bias against petitioner exists within the Alameda County Superior Court and criminal justice system, and that it would be inappropriate and improper to hold such a hearing in that county. As described in the petition, prior to and throughout the trial, petitioner was subjected to extraordinarily prejudicial publicity, persistent abuse at the hands of employees of the sheriff's department, highly improper conditions of confinement, and other prejudicial treatment which makes an evidentiary hearing in that county inappropriate. Accordingly, any evidentiary hearing should be held in another county.

9.

WHEREFORE, petitioner respectfully requests that the court:

a. Hold oral argument and grant petitioner relief on these pleadings;

b. Grant petitioner an evidentiary hearing in the event the court determines that relief will not be granted in petitioner's favor on these pleadings;

c. Order that any such evidentiary hearing be conducted in a county convenient to the parties and counsel other than Alameda County;

d. Grant petitioner discovery so that additional facts may be discovered and proffered in support of all claims raised by petitioner;

e. Grant petitioner the right to avail himself of the subpoena power of this court for witnesses and documents not otherwise obtainable;

f. Reconsider whether to issue an order to show cause on the numerous other issues raised by petitioner in the petition for writ of habeas corpus and supplemental petition for writ of habeas corpus and issue an order to show cause on those claims forthwith;

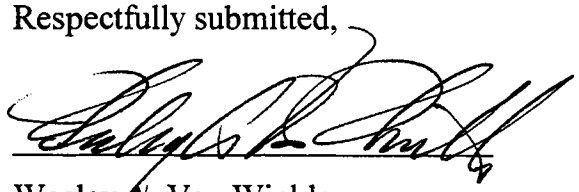
g. Reconsider the numerous issues raised on the direct appeal in light of the facts and evidence submitted in support of the petition and supplemental petition for writ of habeas corpus;

h. After full consideration of the issues raised, vacate the judgment and sentence imposed in Alameda County Superior Court Case No. 90396; and

i. Grant petitioner such further relief as is appropriate and just in the interests of justice.

Dated: November 29, 2006

Respectfully submitted,



Wesley A. Van Winkle

For Wesley A. Van Winkle and
Stephanie Ross
Attorneys for petitioner,
DAVID ESCO WELCH

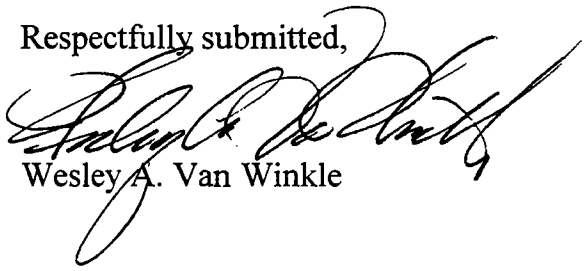
VERIFICATION

I am an attorney at law duly licensed to practice in all courts of the State of California. My office is in Alameda County. I am counsel for petitioner in this action, who is restrained of his liberty and confined in a California State Prison at San Quentin, California, a county different from the county in which counsel practices. I am authorized to file this reply on petitioner's behalf.

I have read this reply and as to all facts not otherwise supported by citations to the record, exhibits, or other documents, know the contents of this reply to be true and correct.

I declare under penalty of perjury the above is true and correct. This verificatioon was executed on November 29, 2006, at Berkeley, California.

Respectfully submitted,



Wesley A. Van Winkle

Exhibit 129

DECLARATION OF SUSAN MONTEZ

I, Susan Montez, declare as follows:

1. I am a licensed private investigator. In 2005 and 2006, I traveled to the Bay Area to locate and interview former jurors, alternate jurors and Alameda County Sheriff's Department personnel who were involved in the trial of David Esco Welch.

2. On April 30, 2006 I met Deputy John Dimsdale outside his house at 5355 Cherokee Way, Antioch, CA. I identified myself, told him I was an investigator working with the attorneys representing David Welch and asked if he would speak to me about the Welch trial. He asked if I was representing David Welch and I said yes. He said he would rather not, and turned away from me. My usual practice is that if someone does not want to talk to me, I respect that and leave the person alone. I thanked Mr. Dimsdale and began to cross the street to my car.

3. Mr. Dimsdale then followed me out into the street. He asked where I'd gotten his address. I told him I am an investigator. He appeared to accept that answer and then said, somewhat agitatedly, "You know what really gets me about this? What's your last name?" As I told him my name again, I took a step backwards and he stepped toward me. A woman who was washing a car outside the Dimsdale home said, "John, stop." I again informed Mr. Dimsdale I was an investigator. He said, "And the attorneys?" I told him the attorneys are Stephanie Ross in Washington and Wes Van Winkle in Berkeley. Before I was finished he interrupted me. I

could see he was getting very upset; his face was red and his voice was rising. He said, "What really gets me is how he's got all of you guys snowed. If *anyone* deserves the death penalty, it's *HIM!*" Mr. Dimsdale made pointing gestures to emphasize his point, and stood close to me in an angry, confrontational stance. My personal observation was that he hated David Welch. The woman again said, and louder this time, "John, *stop!*" I quickly walked to my car and left.

4. In 2005 and 2006, I was able to locate and speak with most of the jurors and alternates who had given declarations in the habeas petition, *In re David Esco Welch*, No. S107782, filed in this Court on June 24, 2002. I introduced myself to each juror or alternate, told him or her that I was an investigator working for the attorneys who represent David Welch and informed each one that they were under no obligation to speak with me. I asked each person if anyone from the attorney general's office had contacted them, and each person's answer was no. I went through each person's declaration with them, line by line. In each case, the declarant reviewed and endorsed his or her declaration without any changes.

I declare under penalty of perjury under the laws of the State of California and the United States that all of the foregoing is true and correct.

Dated: November 28, 2006 Susan Montez
Susan Montez

Exhibit 130

DECLARATION OF GLENN RILEY

I, Glenn Riley, hereby declare:

1. I am the former neighbor and childhood friend of David Esco Welch, who I called "Moochie." I was born January 5, 1955. I grew up in the Sobrante Park neighborhood of Oakland, and I knew David's mother and father, Minnie and David Welch, Sr. I was three years older than Moochie, and I always tried to look out for him, because he got picked on and beat up a lot. Moochie was never right in the head. It was common knowledge in our neighborhood that he had mental problems. Mr. Welch, Moochie's father, was abusive to him. He regularly beat Moochie and often hit him in the head. I recall an incident when Moochie was 17 years old and, unprovoked, Mr. Welch threw a cup of hot coffee on him.
2. At the time of Moochie's trial, no one from the defense ever contacted me. I would have been willing to talk to Moochie's defense counsel about all of the facts I have related above. I would have testified about those things if I had been requested to do so, at Moochie's trial.

I declare under penalty of perjury under the laws of the State of California and the United States that all of the foregoing is true and correct.

Glenn Riley

CERTIFICATE OF SERVICE BY MAIL

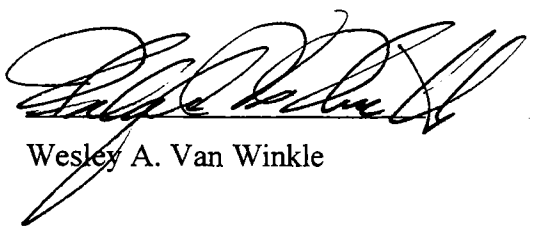
I declare that I am over the age of eighteen years and am employed in a law office in the City of Berkeley, County of Alameda, State of California. On this date, I personally filed this Reply to the Return to the Order to Show Cause, together with ten copies thereof, at the California Supreme Court. I also served the parties in said cause either by personal service or by placing true and correct copies thereof in envelopes or packages with postage thereon fully prepaid in the United Sates mail at Berkeley, California, addressed as follows:

Catherine Rivlin, Esq.
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

I have further arranged to make personal service on my client at the following address on or before December 30, 2006:

Mr. David Esco Welch
P.O. Box E-25702
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 30, 2006.



Wesley A. Van Winkle