SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	**No. S079656**
	)	
	)	
MIGUEL ANGEL BACIGALUPO	)	
	)	***Death Penalty***
	)	
On Habeas Corpus.	)	
	)	

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO FINDINGS OF REFEREE AND BRIEF ON THE MERITS

Reference Hearing, Contra Costa Superior Court
Honorable Richard C. Arnason, Judge

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES

COMES PETITIONER through counsel who submits this brief in response to Respondent's Exceptions To Findings of Referee and Brief On the Merits, November 30, 2009.

INTRODUCTION

The extensive facts presented during the lengthy evidentiary hearing before the Honorable Richard E. Arnason, establish that the prosecution (1) failed to disclose the names of a confidential informant and other witnesses and their statements which would have led to the development of a duress defense at the guilt phase and/or helped to establish mitigating evidence including duress at the penalty phase, (2) knowingly presented false and misleading testimony and argument, and, (3) improperly withheld exculpatory information from the defense. (Petition for Writ of Habeas Corpus, Claims G and I, June 11, 1999.) Respondent seeks to avoid the consequences by asserting the

baseless argument that the Referee's findings were based on legal errors and largely unsupported by the evidence. (Resp't Brief, at p. 1.)

A thread running through this matter is the fundamental right to a fair trial. By a member of the prosecution causing the withholding of exculpatory and mitigating information and evidence from the defense, any chance for a fair trial was rendered impossible. The prosecution failed to disclose the names of a confidential informant and other witnesses along with related reports and statements that would have supported duress and mental defenses at the guilt phase. Further, the concealed information would have led at the penalty phase to the development and presentation of powerful mitigating factors including duress and the mental deficiencies of Petitioner. As developed in the hearing before the Referee, Petitioner reasonably believed that he, his mother, and other family members would be murdered if he did not kill the Guerrero brothers. He acted under circumstances that were in extenuation for his conduct, and he suffered from a history of significant mental problems including organic brain damage. The guidelines of mitigating factors at the penalty phase provide in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(Penal Code §§ 190.3 (d),(f),(g),(h),(k).)

The prosecution and its agents also presented false and misleading testimony, and argument. Consequently Petitioner's murder conviction and sentence of death were obtained in violation of his right to compulsory process for obtaining witnesses in his

favor, to present guilt and penalty-phase defenses, due process of law, a fair trial, effective assistance of counsel, and to a reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, and Article I, sections 1, 7, 15 and 16 of the California Constitution.

STATEMENT OF CASE

Arrest and Trial Proceedings, 1983-1987

Petitioner was charged in the Santa Clara Superior Court for the simultaneous murders of Orestes and Jose Luis Guerrero, and related robbery, which occurred on December 29, 1983. (CTT[1] 331-332; *People v. Bacigalupo*, Santa Clara Super. Ct. No. 93351.) He was arrested that evening at his mother's home. Petitioner admitted killing the Guerrero brothers, but claimed he had done so under the threat of death by the Colombian Mafia. (*People v. Bacigalupo* (1992) 1 Cal.4th 103, 119.) He explained while still in the police car that he had been contracted to kill the brothers, and refused to give the name of anyone else involved except a lowly drug runner in the organization. (RTT[2] 3230; see also RTT 3386-3387, 3498.) At first, defendant denied his involvement in the jewelry store incident, but later he admitted killing the Guerrero brothers. Defendant made vague reference to a group he called the 'Colombian Mafia,' which he said had 'contracted' him to commit the double murder and threatened to kill him and his family if he did not do so. Defendant said he was to turn the stolen jewelry over to the Colombian Mafia in New York. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at pp. 123-124.) 'They told me because those people were already sealed.' They were already on a list and they told me if he didn't do it that they were going to kill his family and him, and they threatened him about telling the police. . . . Look, you go to this place that your mother knows and you're going to try to do this and kill them, and if you don't kill them we're going to kill you and your family. (RTT 3233.) En route to the police station, Petitioner led the arrest-

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[1] CTT refers to Clerk' Transcript at trial.

[2] RTT refers to Reporters' Transcript at trial, April 2-20, June 12, 1987. (RTT 3067-4077.)

ing police officer to bushes near the jewelry store where he had dropped the pistol used in the killings. (*People v. Bacigalupo, supra,* 1 Cal.4th at p. 121.)

The short trial began April 2, 1987. (CTT 326-346.) Neither a defense nor any evidence was presented on behalf of Petitioner. (CTT 342.) In the guilt-phase closing argument, the prosecutor, Joyce Allegro ridiculed the defense about any mafia involvement, falsely stating that it was a total fabrication. (RTT 3489.) "Now the evidence is very clear and it's susceptible of only one rational conclusion, that the defendant didn't receive any instructions from anyone about robbing and killing the Guerreros. Only his greed sent him there. . . . Only that led him to rob and kill the Guerreros." (RTT 3489-3490.) She stated there's no other rational explanation for the defendant's conduct. (RTT 3499.) The prosecutor assured the jury that there is absolutely no evidence of any organized crime being involved and that Petitioner was threatened. (RTT 3501.) The defense pointed out that the prosecution's theory was that Petitioner made up a story of being threatened. (RTT 3511.) In rebuttal the prosecutor stated that Petitioner was lying and thus his entire statement could be rejected, there was no evidence that he was in fear, and the jury should not speculate about something that did not exist. (RTT 3518-3519.) After three days of testimony, the jury returned guilty verdicts on April 9, 1987, following just 2 hours 45 minutes of deliberation. (CTT 337-338; RTT 3557-3560.) It also found true the special circumstances of multiple murder and murder during the commission of a robbery. (*Ibid.*)

The penalty phase began April 14, 1987, with closing arguments three days later. (CTT 326-332.) On April 20, 1987, the jury returned two death verdicts. (CTT 353-354.) The trial court denied the automatic motion to modify the death sentence on June 12, 1987, and sentenced Petitioner to death. (CTT 531-539.)

State Appellate Proceedings, 1991-1994

The conviction and death judgment were affirmed. (*People v. Bacigalupo, supra,* 1 Cal.4th 103.) The U.S. Supreme Court granted certiorari, vacated the state affirmance, and remanded the matter for reconsideration in light of *Stringer v. Black* (1992) 503 U.S. 222. (*Bacigalupo v. California* (1992) 506 U.S. 802.) The death judgments were again af-

firmed. *(People v. Bacigalupo* (1993) 6 Cal.4th 457.) Certiorari was denied. (*Bacigalupo v. California* (1994) 512 U.S. 1253.) In 1994 a habeas corpus petition was filed on behalf of Petitioner with the California Supreme Court. (Pet. for Writ of Habeas Corpus (May 10, 1994), *In re Bacigalupo*, Cal. Sup. Ct. No. S032738.) Relief was denied two days later. (Order, May 12, 1994.)

U.S. District Court, 1994-1999

A request for stay and counsel was filed federally on August 3, 1994. A stay of execution was issued. (*Bacigalupo v. Calderon*, U.S. Dist. (N.D.Cal.) No. C 94-2761 DLJ.) Following extensive proceedings, a habeas corpus petition was filed October 29, 1997. The federal court subsequently granted Petitioner's motion to strike the unexhausted habeas claims and stay the proceedings pending completion of the current habeas corpus proceedings before the California Supreme Court. (Order Striking Unexhausted Allegations from Petition, May 12, 1999.)

Habeas Corpus Proceedings, California Supreme Court, 1999-Present

Following the federal directive, the pending state habeas corpus petition was filed. (Petition for Writ of Habeas Corpus (June 11, 1999), *In re Bacigalupo*, Cal. Sup. Ct. No. S079656.) An order to show cause was thereafter issued as to Claims G and I, which concerned the prosecution withholding exculpatory evidence relating to a confidential informant:

> G. Prosecutorial Misconduct: Failure to Disclose the Names of a Confidential Informant and Other Witnesses and Their Statements Which Supported a Duress Defense at the Guilt Phase or Helped to Prove the Mitigating Factor of Duress at the Penalty Phase; Presentation of False and Misleading Testimony/Argument
>
> I. The Prosecution Improperly Withheld Exculpatory Information.

(Petition for Writ of Habeas Corpus, at pp. 143-149, 152-156; Order to Show Cause, Mar. 14, 2001.)

Following briefing, an evidentiary hearing was ordered. (Order, Dec. 17, 2003.) This Court granted Petitioner's motion for recusal of the Santa Clara County bench and a change of venue. (Order, Feb. 24, 2004; Motion for Disqualification of Santa Clara County Bench Or, In The Alternative, for A Change of Venue, Jan. 30, 2004.) The matter

was referred to the Honorable Richard E. Arnason, Judge, Contra Costa County Superior Court, for the purpose of conducting an evidentiary hearing. (Order, Mar. 3, 2004.)

Following extensive discovery and other proceedings, the presentation of evidence began in December 2005. With many interruptions to secure the presence of witnesses including one from Venezuela,[3] the testimony was concluded on September 27, 2007. (RT 1-3582.)[4] The order referring this matter for an evidentiary hearing, provides:

> Based on the record in this matter and good cause appearing:
>
> The Honorable Richard Arnason (Ret.), Judge of the Superior Court of California, County of Contra Costa, is appointed to sit as a referee in this proceeding. He is to take evidence and make findings of fact on the following questions regarding the case of *People v. Miguel Angel Bacigalupo* (Santa Clara Superior Court No. 93351; Judge Thomas C. Hastings):
>
> 1. What information did the prosecution obtain before or during petitioner's capital trial regarding a possible connection between one Jose Luis Angarita and the murders of Orestes and Jose Luis Guerrero? What, if any, of this information was given to the defense?
>
> 2. Did the confidential informant who testified at an ex parte hearing on September 6, 1985, tell a district attorney investigator or other member of law enforcement connected with this case that the informant had witnessed petitioner's meeting with Angarita and others a day or so before the murders? If so, did the prosecution convey this information to the defense? If the confidential informant told a district attorney investigator or other member of law enforcement about a meeting between petitioner and Angarita, was this information reliable?
>
> 3. Did the prosecution from any source, including those specified below, obtain any information that it did not provide to the defense that would have supported petitioner's claim to the police that he had killed Or-

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[3] The witness, whose identity is protected in this matter due to safety concerns, is identified as Joseph but elsewhere in prior pleadings his true name is used. He lives in Caracas, Venezuela. (RT 3335-3335.) Having been deported two decades earlier after serving a federal prison sentence, the witness was permitted to enter this country for the purposes of testifying through arrangements between Santa Clara County District Attorney's Office and the U.S. Department of Homeland Security. He testified September 26-27, 2007. (RT 3335-3562.)

[4] The evidentiary hearing (RT 1-3597), prior to oral argument, comprised 3,597 pages. It was three times longer than both the guilt and penalty phases of the 1987 trial. (RT 3067-4077; 1,010 pages).

estes and Jose Luis Guerrero acting under the Colombian Mafia's death threats to himself or his family?

(a) Interviews of Ronnie Nance or Steve Price?

(b) Interviews of the confidential informant?

(c) In connection with federal prosecutions for which the confidential informant furnished evidence?

4. If the prosecution withheld from the defense information (a) about a possible connection between Jose Luis Angarita and the murders of Orestes and Jose Luis Guerrero; or (b) about a meeting between petitioner, Angarita and others a day or so before the killings; or (c) that would have supported petitioner's claim to police that he killed the Guerrero brothers acting under death threats to him and his family, what penalty phase evidence not otherwise known or available to the defense at the time of trial would have come to light had the withheld information been disclosed?

5. Did a district attorney investigator or other member of law enforcement connected with this case instruct the confidential informant to withhold information at the ex parte hearing held on September 6, 1985? If so, what information, if any, did the confidential informant withhold at that hearing? Did the district attorney investigator testify truthfully at the hearing?

6. Is it likely that disclosure of the confidential informant's identity to the defense would have led to evidence not otherwise known or available to the defense at the time of trial that would have supported petitioner's claim to have acted under death threats from the Colombian Mafia? If so, what is that evidence?

7. At the time of trial, what information was known to the prosecution that would have supported a theory that petitioner was hired to commit the murders or that otherwise could have been used to impeach a penalty phase case in mitigation based on petitioner's having acted under duress?

(Order, Mar. 3, 2004.)

ARGUMENT

I. The Referee's Findings Are Entitled to Great Weight Because They Are Supported by Substantial Evidence and His Credibility Findings Are Entitled to Special Deference

A. Deference to the Referee Is Called for on Factual Questions

A referee's findings on factual questions, though not binding, are entitled to great weight when supported by substantial evidence. (*In re (Adam) Miranda* (2008) 43 Cal.4th

541, 554.) Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, as the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. (*In re Johnson* (1998) 18 Cal.4th 447, 461.) This Court has stated that the reason habeas corpus petitioners are required to prove their disputed allegations at an evidentiary hearing, rather than merely decide the merits of the case on declarations, is to obtain credibility determinations. (*In re Scott* (2003) 29 Cal.4th 783, 824.)

This Court has regularly accorded great weight and adopted referees' findings of fact in capital cases in which evidentiary hearings have been ordered. (See e.g., (*In re Miranda, supra*, 43 Cal.4th at p. 574 ["[R]espondent's exceptions to the factual findings contained in the referee's second report are not persuasive. Respondent neither disputes the existence and nondisclosure of the various items of evidence we asked the referee to inquire about, nor demonstrates that the referee lacked substantial evidence for his conclusions respecting their potential usefulness to the defense. As previously noted, in such circumstances the referee's findings are entitled to great weight."]; *In re Lawley* (2008) 42 Cal.4th 1231, 1241, 1246 [Where Referee's finding rejecting actual innocence claim was dependent on assessment of credibility of witnesses, Court employs deferential standard of review applicable to findings of fact to that conclusion. Referee apparently concluded that key witness could not be deemed reliable, or that a reasonable jury could have rejected the testimony that petitioner was uninvolved. "That conclusion is entitled to special deference."]; *In re Bolden* (2009) 46 Cal.4th 216, 229 ["Giving great weight to the referee's credibility determinations, and her factual findings based on those determinations, we conclude that petitioner has failed to prove by a preponderance of the evidence" his claims]; *In re Hardy* (2007) 41 Cal.4th 977, 991 ["The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations; consequently, we give special deference to the referee on factual questions" that turn on such assessments. Here, where the factual findings made by the referee, all of which were favorable to petitioner, turned heavily on credibility, the Court sustains and adopts them]; *In re Bell* (2007) 42 Cal.4th 630 [Petitioner's claims of false evidence and

actual innocence are denied where the referee's findings rested on credibility determinations, which are entitled to "special deference," and he "made explicit, detailed findings" in support of his conclusion]; *In re Scott*, *supra*, 29 Cal.4th at p. 824 ["The report, including its credibility discussion, is thorough and convincing, and fully responsive to our questions. We see no reason to overturn the referee's credibility determinations. Accordingly, we adopt his factual findings."]; *In re Johnson* (1998) 18 Cal.4th 447, 462 ["the referee's findings were of a factual nature and, therefore, are entitled to deference"].)

The Referee's findings in Miguel Bacigalupo's case are also entitled to great weight, and should be adopted by this Court. First, Judge Richard Arnason made specific credibility findings for the five key witnesses who testified at the hearing. (See Referee's Report, at pp. 2-5.) Also, as further evidence of the level of consideration Judge Arnason paid to all of the testimony and evidence presented at the lengthy hearing, he provided this Court with a summary of the testimony of 16 witnesses and eight court exhibits in a 157-page appendix attached to his report. (See Referee's Report, Appendix One.) Lastly, in his 39-page report, Judge Arnason carefully detailed his findings for the seven reference questions from this Court. As will be shown below, Judge Arnason's findings for all seven categories of reference questions are supported by substantial evidence. (See Argument III, 1-7, *infra.*) With the adoption of these findings, this Court should grant Miguel Bacigalupo legal relief on claims G and I, and set aside his death sentence on the ground that the prosecution withheld mitigating evidence supportive of the habeas corpus claim that he acted under extreme duress due to the threat of death from Jose Angarita, a Columbian drug dealer employed by Pablo Escobar.

II. The Referee Did Not Abuse His Discretion in Overruling the State's Hearsay Objections

Respondent argues that the Referee did not properly apply the rules of evidence at the reference hearing and erroneously admitted hearsay testimony. (Resp't Brief at pp. 63-75.) He is mistaken. The rules of evidence were properly applied in this case.[5] Al-

[5] This Court has ruled that a reference hearing following issuance of an order to show cause is subject to the rules of evidence as codified in the Evidence Code. (*In re Miranda* (2008) 43 Cal.4th 541, 574.)

though the state appears to be very eager to portray the Referee, Judge Arnason, in an extremely unfavorable light by alleging that the highly respected jurist was confused about the evidentiary rules,[6] in reality, the state simply failed to show that the statements were inadmissible hearsay. Upon inspection, the state's arguments fail. Petitioner argues that: (1) given the egregious prosecutorial misconduct that has occurred in this case, this is an appropriate case, if needed, to apply the forfeiture-by-wrongdoing doctrine; (2) the witness's statements the state objected to as hearsay were admitted for a relevant nonhearsay purpose, therefore any hearsay objection was properly overruled; (3) if any evidence is properly determined to be hearsay, it was admissible under an exception to the hearsay rule; (4) even if any hearsay evidence was improperly considered, there remains more than ample unchallenged evidence to support the Referee's findings, and/or the challenged evidence was not critical to the Referee's findings; (5) the challenged statements were reliable and relevant to critical mitigation and their exclusion from consideration would have violated Petitioner's rights to due process and the Eighth Amendment; and (6) their exclusion would result in severe prejudice.

A. Forfeiture-by-Wrongdoing Doctrine

As the Referee's findings support, the government has suppressed material in this case in violation of *Brady v. Maryland* (1963) 373 U.S. 83 for over twenty years. Under the equitable forfeiture-by-wrongdoing doctrine, the state should not now reap the benefit of its misconduct by seeking to exclude testimony based on hearsay, because through its own actions the main culpable witness became unavailable.

When Petitioner was arrested the day of the offenses in 1983, he told the police that he committed the offenses under duress, i.e., a Columbian drug dealer (Jose Angarita) threatened to kill him and his family if he did not commit the offenses. (RT 3230, 3232, 3234-3235.) The prosecution investigated Angarita and subsequently failed to turn over to the defense their tapes and reports of numerous witness interviews, which were

[6] Petitioner objects to the state denigrating Judge Arnason by attacking his age and intellectual abilities. Although he made important factual findings favorable to Petitioner, e.g., that the state suppressed *Brady* material, this should not provide the state with an excuse to callously attack the respected judge's reputation. Unless the Court so orders, Petitioner will not address the state's fallacious allegations about Judge Arnason.

all exculpatory. (Referee's Report, at pp. 18-19; 33-39.) The prosecution then went even further and shielded Angarita's ex-girlfriend from the defense by making her a confidential informant, and misrepresenting to the trial court the extent of the informant's knowledge about the homicides being a drug-hit-order. (Referee's Report, at pp. 28-32.) The prosecution also introduced the confidential informant to the Drug Enforcement Administration (DEA), which in turn paid her $5,000 to help arrest and convict Angarita, and when he was not to be found, she assisted in the federal arrest and conviction of five of Angarita's employees in his cocaine trade. (Referee's Report, at pp. 3, 17.) Finally at his trial in 1987, the prosecutor falsely argued that Petitioner deserved the death sentence because he lied about acting under duress, and in fact murdered the victims solely for their money. (RT 3075; 3485-89.) On direct appeal, this Court denied Petitioner's request to unseal the testimony of the confidential informant. (*People v. Bacigalupo*, Cal. Sup. Ct. No. S004764, Order denying Appellant's Application for Order Unsealing Part of Record, dated September 22, 1988.)

Now, over twenty years later, when Petitioner finally was afforded a hearing on the *Brady* violation, Respondent argues he cannot present testimony about what exculpatory evidence the state had in its possession and failed to disclose, because the testimony is allegedly based on hearsay. Due to the state's failure to disclose this exculpatory information in a timely manner at trial, the Columbian drug dealer became unavailable (by successfully fleeing the area, and most likely thereafter dying). (RRT 308, 392.) Regardless, absence from the hearing coupled with an inability to compel attendance by process or other reasonable means also satisfies the unavailability requirement. (Evid. Code § 240(a)(4).) Therefore, Angarita was unavailable to testify at the hearing, and numerous witnesses, including Angarita's ex-girlfriend, ex-wife, drug trade employees and associates all testified about circumstances leading up to and after Angarita's alleged drug-hit-order to Petitioner to murder the victims in this case.

Fed.R.Evid. 804(b)(6) codifies the common-law doctrine of forfeiture by wrongdoing as an exception to the general rule barring admission of hearsay evidence. (*Davis v. Washington* (2006) 547 U.S. 813, 833.) Under Rule 804(b)(6), a statement offered

against a party that has engaged or acquiesced in wrong-doing that was intended to, and did procure the unavailability of the declarant as a witness is admissible at trial.[7] It applies to the government as well:

> Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), cert. denied, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, *including the government.*

(Fed.R.Evid. 804(b)(6) advisory committee note [emphasis added].)

The rule, as enunciated by the high court, is based on two broad equitable principles: (1) "[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong"; (2) "but if a witness is absent by [a party's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." (*Reynolds v. United States* (1878) 98 U.S. 145, 158, 159.)

If needed, Petitioner urges this Court to apply the forfeiture-by-wrongdoing doctrine here. Given the extent of the state's misconduct for the last twenty-six years, and the State's interference and prevention of Petitioner's investigation and presentation of his duress defense at his capital trial and direct appeal, the state should forfeit any right to exclude for hearsay reasons, testimony of witnesses who were available and did testify at the evidentiary hearing.

B. The Statements Were Properly Admitted for a Relevant Non-Hearsay Purpose

The Referee properly admitted most of the statements the state objected to as hearsay, because they were admitted for a relevant nonhearsay purpose. This Court granted an evidentiary hearing and issued reference questions concerning Respondent's

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[7] The prosecution interviewed Jose Angarita twice on March 19, 1984, more than two months after the offenses, and failed to disclose these interviews to the defense. (Referee's Report, at pp. 15-16, 19, 39; Exhibits 23A & 23B.) The prosecution failed to adequately investigate Angarita and his involvement as a principle actor in these capital offenses. Angarita apparently fled the state or country, and at the time of the evidentiary hearing was reportedly deceased. (RRT 307: 27 - 308:7; 391:28 - 392:28.)

alleged *Brady* violation, i.e., whether Respondent failed to disclose exculpatory information supporting Petitioner's duress defense. To prove a *Brady* violation, Petitioner must show that the state suppressed favorable evidence that was material. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; see also *United States v. Bagley* (1985) 473 U.S. 667, 682 [evidence is "material" when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different]; *Kyles v. Whitley* (1995) 515 U.S. 419, 435 [materiality standard met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"].) This Court's reference questions focused on factual findings to prove or disprove this alleged state misconduct, *not* whether Petitioner's duress defense was, in fact, true. That is for a jury to weigh and decide—if and when it is presented to them. Much of the testimony the state objects to on hearsay grounds was admitted not for the truth of the matter asserted, but to show that the prosecution was in possession of exculpatory evidence and failed to disclose it to the defense.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute.[8] (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.) "[O]ut-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay. No special exception to the hearsay rule need be invoked for their admission; they are not within the hearsay rule at all." (1 Witkin, Cal. Evid. 4th (2000) Hearsay, § 5, p. 683.)

This Court has ruled in a variety of cases that an out-of-court statement was admissible as relevant nonhearsay evidence. Once its relevance is established and no undue prejudice is found, there is no bar to admitting such evidence. For instance, some "cases factually illustrate 'one important category of nonhearsay evidence—evidence of a de-

[8] "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.)

clarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'" *(People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [citation omitted].)

Additionally this Court ruled that evidence that a defendant's stepfather told police that he had been robbed of his car was not hearsay, because it was not admitted to prove he was robbed, but to prove that he tried to establish a false alibi and thus must have known that the defendant was going to commit a crime. (*People v. Crew* (2003) 31 Cal.4th 822, 841); see also *People v. Noguera* (1992) 4 Cal.4th 599, 624-625 [Exculpatory statements by defendant's girlfriend to neighbor, 911 operator, and investigating officers were offered to show plan by defendant and girlfriend to murder her mother and plant false trail of evidence indicating burglary and rape gone awry, and thus were not hearsay]; *People v. Boyette* (2002) 29 Cal.4th 381, 428-429 [trial court erroneously excluded as hearsay, testimony by defendant's mother of threats against her where defendant testified that such threats had led him to accept blame for the shooting to protect his family].) [9]

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[9] See also *People v. Young* (1964) 224 Cal.App.2d 420, 424 [driving while drunk; tape recordings of conversations with defendant at time, showing manner of speech, relevant on issue of intoxication]; *Younger v. State Bar* (1974) 12 Cal.3d 274, 286 [attorney charged with soliciting employment through cappers and runners; testimony that prior to dialing attorney's telephone number, C (an alleged runner) had said that attorney was in his office was not hearsay because it was offered to prove C's knowledge that attorney was there]; *People v. Duran* (1976) 16 Cal.3d 282, 295, footnote 14 [defendant had fled from stabbing scene, wished to bolster his state of mind testimony by introducing evidence of warnings from third persons, and was improperly prohibited from presenting that nonhearsay evidence]; *People v. Jurado* (2006) 38 Cal.4th 72, 117 [out-of-court declarant's question whether another individual could get gun for her was not hearsay; "a request, by itself, does not assert the truth of any fact"]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1391 [in murder trial in which prosecution witness testified as to his phone conversation with defendant in which defendant indicated he had killed victim, court erred in excluding, as hearsay, testimony of another witness who was present during conversation; testimony was not offered to prove that defendant was not involved with murder, but rather to impeach testimony of first witness as to what defendant had said]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224 [in prosecution for robbery,

Similarly, in Petitioner's case, many of the items of evidence the state asserted were hearsay were not offered to prove what the out-of-court declarant was stating. A number of the statements, for example, were offered to prove that the witnesses did in fact make the statements to the prosecution and that the state was on notice of this exculpatory information. As such, the statements were not hearsay. (See, e.g., *Simon v. Steelman* (1990) 224 Cal.App.3d 1002, 1006, fn. 3 [statement offered to prove that the statement was made, was not hearsay]; *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1189-1190 [statement offered to prove words were spoken, was not hearsay].)

In *People v. Lo Cicero,* this Court ruled that the defendant's proffered testimony as to statements by a drug dealer allegedly forcing him to sell drugs to an agent, were not hearsay and were admissible because they were not offered to prove the truth of the matter stated, *but to prove that the words were spoken* by the drug dealer to the defendant. *(People v. Lo Cicero, supra,* at pp. 1189-1190.) However, this Court determined that the erroneous exclusion was not prejudicial because Lo Cicero did not claim duress as a defense to his drug charges. (*Ibid.*)

Petitioner's case is analogous to *Lo Cicero*, except with a stronger showing of relevance. Petitioner did claim he was acting under extreme duress at the time of the offenses, and was offering the objected-to-testimony (that informants had told prosecution investigators that a drug dealer ordered the drug-hits and threatened Petitioner if he did not carry out the orders) to *prove that the words were spoken to the state, which then failed to disclose them to the defense*, not necessarily to prove that they were true. Therefore the testimony that the state objected to at the reference hearing was admitted not for the truth of the matter asserted, but for an admissible non-hearsay purpose. Evidence was presented that: (1) Petitioner was threatened by Angarita, a dangerous Columbian drug dealer; (2) Angarita ordered the killing of the victims in this case; (3) witnesses made relevant statements to the prosecution; and (4) the state then failed to turn over these witness interviews to the defense. However, that evidence does not rely on the truth of the

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carjacking, and counts stemming from police pursuit, bulk of police dispatch tape introduced by prosecution was not subject to hearsay objection as it was offered not to establish truth but to show how pursuit unfolded and to describe police officers' actions].)

matter asserted. At the reference hearing, Petitioner was *not* required to prove that Angarita actually intended to carry out a drug hit on the victims, or kill Petitioner and his family if he did not commit the double homicides, or even that Petitioner genuinely feared that Angarita would do so. This is for a jury to weigh and decide. Petitioner was required to prove that the state had possession of exculpatory information and failed to disclose it to the defense. This is a permissible nonhearsay purpose that was in accordance with the Court's reference questions to the referee.

The primary issues to be determined by the referee at the hearing were whether the prosecution had obtained the exculpatory information supporting a duress defense and if so, thereafter disclosed the information to the defense. Therefore, the content of the witness statements is not hearsay when the reference questions to the fact finder are, e.g., what information did the prosecution obtain and disclose to the defense? (Reference Order, Questions 1, 2, and 3); what relevant penalty phase information would have come to light if the state had not withheld evidence? (Question 4); what information did the confidential informant withhold? (Question 5); if the informant's identity had been disclosed what other relevant evidence would the defense have discovered? (Question 6); and, what information did the prosecution have that would have supported a duress defense? (Question 7). (See this Court's Reference Hearing Order, dated Nov. 25, 2003.) In those contexts, the *content* of the statements/information obtained or withheld is what is at issue, not its *truth*, and that is what this Court asked the referee to determine. They are the ultimate facts, and there was no evidentiary barrier to setting it forth at the reference hearing.

Additionally, on the issue of whether the undisclosed information was reliable (Question 2), the Referee could also allow relevant out-of-court statements to come in as nonhearsay circumstantial evidence of the reliability of a particular statement. That is, the fact that multiple declarants, perhaps with different interests, made similar or mutually reenforcing statements, could provide a basis for the Referee to conclude that a particular hearsay statement was reliable. Therefore, it was appropriate for the Referee to consider testimony concerning out-of-court statements for the limited purpose of evaluating the re-

liability of a particular witness's statement. (See, e.g., discussion below of testimony by witness Steve Price.)

Although this Court's Reference Questions 4 and 6 ask what penalty phase evidence the undisclosed information might have led to, the questions still allow for the referee's non-hearsay consideration of out-of-court-statement evidence, i.e., not whether the duress defense information was *true*, but what further favorable information would have been discovered by the defense. Again, it is for a jury to determine the weight and truth of the duress evidence, or even if not literally true, whether Petitioner had a reasonable or unreasonable belief he was acting under extreme duress. Additionally at any retrial, Petitioner would have the opportunity to present evidence for relevant non-hearsay purposes and under exceptions to the hearsay rule, such as declarations against penal interest. Any hearsay evidence of Angarita allegedly planning the murder of the victims or describing his dangerous drug cartel operation, were clearly statements against Angarita's penal interest.[10]

Additionally, to prove a *Brady* violation, Petitioner is not limited to only admissible evidence, but what relevant information it leads to. (See, e.g., *Paradis v. Arave* (9th Cir. 2001) 240 F.3d 1169, 1178-79 ["In [*Wood v.*] *Bartholomew*, the Court did not categorically reject the suggestion that inadmissible evidence can be material under *Brady*, if it could have led to the discovery of admissible evidence" —prosecutor's notes, although not admissible, could have been used to contradict a key medical witness and nondisclosure was *Brady* violation]; *In re Miranda* (2008) 43 Cal.4th 541, 576 ["*Wood* did not establish that inadmissible evidence can never be material for purpose of a *Brady* claim"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 919 [" The United States Supreme Court has never announced a bright line rule that only admissible evidence is 'material' for purposes of a Brady violation;" capital murder defendant jointly tried with codefendant

[10] "In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Frierson* (1991) 53 Cal.3d 730, 745 [citations omitted].)

could raise error in prosecutor's failure to disclose evidence relating to credibility of informant, even though informant's statements, which contained hearsay against defendant, were admissible as to codefendant only]; *United States v. Rodriguez* (2d Cir.2007) 496 F.3d 221, 226 fn.4 [Obligations under Brady do not depend on whether information to be disclosed is admissible as evidence in its present form. "The objectives of fairness to the defendant ... require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the defense."].)

The prosecution in this case improperly represented to the defense that Petitioner's claim that he was acting under extreme duress from Columbian drug dealer Jose Angarita's threats was baseless. (RRT 2603, 2606-2607, 2656, 2935-36; Ref. Exh. 17.) By doing so, the prosecution misinterpreted its role and committed misconduct:

> In the end, the trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. "It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is 'the criminal trial, as distinct from the prosecutor's private deliberations' that is the 'chosen forum for ascertaining the truth about criminal accusations.'" (*U.S. v. Alvarez* (9th Cir.1996) 86 F.3d 901, 905, quoting *Kyles v. Whitley*, supra, 514 U.S. at p. 440, 115 S.Ct. 1555; see also *People v. Hoyos*, supra, 41 Cal.4th at pp. 919-920, 63 Cal.Rptr.3d 1, 162 P.3d 528 [quotation omitted].) "To the extent the prosecutor is uncertain about the materiality of a piece of evidence, 'the prudent prosecutor will resolve doubtful questions in favor of disclosure.'" (*Alvarez*, at p. 905, quoting *United States v. Agurs* (1976) 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342.)

(*In re Miranda, supra*, 43 Cal.4th at p. 577.)

The following review of Respondent's objections to testimony based on hearsay at the reference hearing indicates that the referee did not err in admitting any of the following testimony. The referee admitted the evidence either for a valid non-hearsay purpose, under an exception to the hearsay rule, or because of due process and Eighth Amendments concerns under *Chambers v. Mississippi* (1973) 410 U.S. 284.

1. Steve Price[11]

The prosecution first objected on the basis of hearsay to Price's testimony concerning Gale Kesselman's involvement in Jose Angarita's drug operations, since it appeared it was based on Price's conversations with Ms. Kesselman and Angarita. The Referee granted the state's motion to strike. (RRT 775.)

Next, the prosecution objected on hearsay grounds to Price's testimony concerning Ms. Kesselman's transport of Angarita's cocaine from Florida to California. (RRT 776.) Counsel for Petitioner argued that since the state would be attacking Ms. Kesselman's reliability as a confidant of Angarita's, it was admissible for the purpose to corroborate her testimony about Angarita's drug trade. (RRT 777.) The Referee ruled that it could come in for the nonhearsay purpose "to show the information upon which he has knowledge, not what the information is, but for the basis of his knowledge on that. And that goes to the weight not the admissibility." (RRT 779.)

This portion of Price's testimony was based on knowledge from Price's direct involvement with Angarita's drug trade and Angarita's statements to him. It corroborated Ms. Kesselman's and Laureano's testimony about the existence and extent of Angarita's drug operation. In addition, Price's recounting of Angarita's statements describing his use of Ms. Kesselman to transport cocaine confirmed Ms. Kesselman's access to information about Angarita's illegal drug business, and hence circumstantially corroborated that part of her testimony.

Angarita's statements were admissible as statements against interest within the meaning of Evidence Code section 1230. "A party who maintains that an out-of-court statement is admissible under this exception as a declaration against penal interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) Angarita was unavailable because he successfully fled the area, and most likely thereafter died. (RRT 308, 392.) All of Angarita's descriptions of his illegal drug operations, including any al-

[11] See Resp't Brief, at pp. 63-64.

leged threats or contract-hits, would have subjected him to a risk of criminal liability, and thus qualified as statements against his penal interest. (And, in fact the prosecution admits it called the DEA to specifically investigate Angarita and his employees. See Referee's Report at p. 17.) In addition, since several witnesses (Ms. Kesselman, Price, Laureano, and Hovgaard) all repeated similar and consistent facts about Angarita's drug operations, the consistencies helped support the trustworthiness of Angarita's statements. Thus, Angarita's statements would have been properly admitted under this exception to the hearsay rule. (See *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 606-610 [Trial court abused its discretion by invading the province of the jury when it excluded third party culpability evidence on the basis that the testifying witness was not credible—hearsay testimony admissible under declaration against penal interest].)

Therefore, Angarita's statements were relevant, they supported the credibility of Price as a witness, and the statements attributed to Angarita and Ms. Kesselman that admitted to involvement with illegal drug operations would have been properly admitted as statements against penal interest. In addition, the statements could have been admitted for the non-hearsay purpose of showing what information Price could have provided to the defense, if the prosecution had not suppressed their witness interviews supporting Petitioner's duress defense.

Lastly, even if some of the objected-to statements were improperly admitted, Respondent does not argue that the Referee relied upon them for his findings in his report. Also, there was more than enough unchallenged or admissible evidence presented at the hearing about Angarita's drug operation and Ms. Kesselman's involvement in his illegal activities, so that any error was harmless.

2. Julie Hovgaard[12]

The prosecution objected to Hovgaard's testimony concerning a conversation she had with her ex-husband Angarita regarding his involvement in his Columbian family's illegal drug and gem businesses. (RRT 1044.) Petitioner's counsel argued that it was admissible for the limited purpose to corroborate Ms. Kesselman's testimony, and was

[12] See Resp't Brief at pp. 64-67.

relevant to a dispute as to whether it was known at the time of the capital offenses whether Angarita was involved in any illegal businesses. The Referee allowed the witness to answer the question, subject to a motion to strike. (RRT 1045.) The state, however, never moved to strike the answer, and thus waived its objection.

The prosecution objected again on hearsay grounds to a question about whether Anagrita explained to Hovgaard how the drugs he was bringing into the United States were being distributed. (RRT 1049.) The Referee allowed her to answer, but stated that since she did not directly observe the illegal dealings, that that would affect how the court would weigh the credibility of her testimony. (RRT 1050.) Again, Angarita's statements describing his family's illegal drug business would have qualified under the hearsay exception, statements against penal interest, and hence admissible on that basis. (See similar argument under Steve Price's testimony, *supra.*) Lastly, Respondent did not argue that these statements were critical to the Referee's findings of fact in his report. Any possible error is harmless.

3. Luis Laureano

The prosecution objected on hearsay grounds to a question about whether Laureano heard Petitioner make any statements concerning Angarita, the victims, and [threats to] Petitioner and his mother. (RRT 3545.) Given that evidence of Petitioner acting under Angarita's death threats was proof of statutory mitigating Factor (g)—(acting under extreme duress), the Referee admitted the testimony based on *Chambers v. Mississippi, supra,* 410 U.S. 284.[13] (RRT 3549; see Referee's Report, at p. 2.) Laureano then testified that just before the murders occurred, Petitioner tearfully admitted to him that Angarita threatened to kill his family, starting with his mother, if he did not kill the victims in this

[13] The Referee referred to a Mississippi case that concerned a reversal under due process grounds because three people who heard another person confess to the crime were not permitted to testify because of the state's hearsay rules. He clarified at the outset of his Report that in mentioning *Shealdon v. Mississippi*, he meant *Chambers v. Mississippi* (1973) 410 U.S. 284. (Referee's Report, at p. 2; see RRT 3546, 3549, 3561.) See also Section C, *infra*, for a discussion of *Chambers* and the violations of Petitioner's rights to due process and under the Eighth Amendment that would ensue were this Court to bar consideration of relevant and reliable mitigation evidence.

case. (RRT 3554.) The Referee properly admitted the statements under *Chambers*. (See Section C, *infra*.)

Alternatively, the statements would have been admitted as evidence of Petitioner's then existing state of mind, or circumstantial evidence of his state of mind. (See e.g., *People v. Karis* (1988) 46 C.3d 612, 635 [defendant's statement during conversation with friend, not under any compulsion to speak, properly admitted as trustworthy under state-of-mind exception to hearsay rule]; *People v. Farr* (1967) 255 C.A.2d 679, [court held that on retrial, defendant's memo about loving relationship with his wife/murder victim would be admissible unless there was evidence to indicate lack of trustworthiness; flatly rejecting such evidence as 'self-serving' must be deemed no longer valid—the more elastic standards of section 1252 control]; *People v. Duran* (1976) 16 Cal.3d 282, 295, fn. 14 [defendant who had fled from stabbing scene, wished to bolster his state of mind testimony by introducing evidence of warnings from third persons, and was improperly prohibited from presenting that nonhearsay evidence].)

4. **Karen Schryver**[14]

The prosecution objected on hearsay grounds to attorney Schryver's testimony concerning what steps led her to find the confidential informant witness Gale Kesselman. Specifically Schryver recounted the witnesses she spoke with and what they told her, which in turn led her to Ms. Kesselman. The court properly allowed the testimony in for a limited non-hearsay purpose, i.e., not for the truth of what the witnesses told Schryver, but for what actions Schryver took to find Ms. Kesselman after speaking with the witnesses (Ron Nance and Steve Price). Whether the information from these witnesses was true or not, it verified that Ms. Schryver was not acting on any *Brady* information previously disclosed to the defense, but rather an independent investigation that started from scratch, which eventually led to witness Kesselman. (RRT 522-525.)

Next, the state objected on hearsay grounds to a question about Schryver's meetings with Petitioner's three trial counsel and in particular whether any of the alleged *Brady* material was turned over to them. The Referee allowed the testimony for a legiti-

[14] See Resp't Brief at pp. 73-74.

mate non-hearsay purpose—to show the information that Schryver relied upon for her opinions and conclusions as a (lay and expert) witness. (RRT 2937-40.) The state also argues that the Referee inappropriately relied upon Ms. Schryver's "hearsay" testimony for findings in Question One. (Resp't Brief, at pp. 73-74.) This is incorrect—the Referee relied upon lead trial attorney John Aaron's testimony, along with that of appellate and habeas counsel: "The court's finding is supported in part on the fact that neither the trial attorney, the appellate attorneys nor the habeas attorneys, ever saw the transcripts or the recordings of these matters until years after Petitioner's trial had ended." (Referee's Report, at p. 19.) Mr. Aaron, who actually took the case to trial, testified that the alleged *Brady* material was not disclosed to the defense team. (RRT 885-998; 2607-16; 2651-52.) Ms. Schryver testified that she reviewed all trial counsel files and also found none of the alleged *Brady* material (RRT 2739-84), and based on that review, initiated an investigation into the duress defense matter herself. This is substantial evidence for the Referee to rely upon that the alleged *Brady* material was not turned over to the defense team.[15]

5. Alayne Bolster's Interview Report of Ron McCurdy[16]

Respondent objects to the admission into evidence of trial defense investigator Bolster's report of an interview with district attorney investigator Ron McCurdy. (Resp't Brief, at p.74; Ref. Exh. 19.) However, Respondent fails to disclose that he registered *no* objection to its admission at the hearing, and thus has waived any objection. (See RRT 1148:16-17 [" MR. FARRIS: Your Honor, I have no objection to these going into evidence."].) Hearsay is admissible in the absence of an objection, and once in evidence, a witness may be examined on it. (*People v. Fatone* (1985) 165 Cal. App.3d 1164, 1171-1172; see also *In re Hardy* (2007) 41 Cal.4th 977, 995 [Respondent forfeited claim that witness's testimony was not credible by failing to object that statements were hearsay at hearing].) Additionally, Bolster had no recollection of her interview with

[15] In the unlikely event that this Court finds that the independent testimony of preliminary hearing counsel Jim Thompson and interim pre-trial counsel Michelle Forbes is necessary to the resolution of this claim, Petitioner motions this Court to reopen the evidentiary hearing to take the witnesses' testimony or depositions.

[16] See Resp't Brief, at pp. 74-75.

McCurdy, so the report was properly admitted under the doctrine of past-recollection-recorded during her testimony. (RRT 1148-56.)

Respondent also argues that the Referee improperly relied upon hearsay in the McCurdy report in his factual findings for Question # 3. (Resp't Brief, at p. 75.) First, Respondent did not object to the admission of the McCurdy report at the hearing, so cannot now object to the Referee relying upon it. (See *In re Marquez* (1992) 1 Cal.4th 584, 599 [Hearsay declarations admitted without objection may be relied upon in support of referee's factual findings].) Nor did Respondent call McCurdy as a witness to refute any statements in the Bolster report, once it was admitted. In addition, the Court's reference Question #3 asks whether the prosecution obtained any information from any source that it did not provide to the defense that would have supported Petitioner's duress defense. In this connection, the Referee properly relied upon the McCurdy report for a nonhearsay purpose: to show that the prosecution had some information that prosecution trial witness Karlos Tijiboy was connected to Angarita. (Referee's Report, at p. 23.) Whether this is true or not, was not in issue, only whether the prosecution had some information to suggest the connection.

C. Exclusion of Reliable Hearsay Evidence of Mitigation Relevant to Punishment Would Violate Petitioner's Rights to Due Process and Under the Eighth Amendment

Under the Eighth and Fourteenth Amendments, a defendant in a capital case must be permitted to present all relevant mitigating evidence to demonstrate that he deserves a sentence of life rather than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-114.) "The jury 'must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271.) *Lockett* specifically held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (438 U.S. at p. 604.)

California law permits the defense to present evidence at the penalty phase relevant to aggravation and mitigation, including evidence of a duress defense, as well as defendant's character, background, history, and mental condition. (Pen. Code §190.3.) Early on, California has permitted a broad inquiry into the defendant's background and character. (See *People v. Nye* (1969) 71 Cal.2d 356, 371-372.) The penalty jury looked "at the individual as a whole being" to determine the appropriate sentence. (*People v. Morse* (1964) 60 Cal.2d 631, 647.)

The standard for what is relevant mitigating evidence is broad. "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284; *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345.) Once this threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to the defendant's mitigating evidence. (*Boyde v. California* (1990) 494 U.S. 370, 377-378.) Thus the state cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death. (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441.)

Under this legal framework, the evidence the state suppressed—witness interviews describing Angarita and the alleged drug hit, and the testimony of Angarita's girlfriend, ex-employee and associates at the reference hearing, is clearly relevant mitigation evidence within the meaning of Penal Code section 190.3, factors (a), (d), (g) and (k), including Petitioner's state of mind before, during and after the shooting, and the fact that upon arrest, he admitted to the police that he committed the offenses under duress from a Columbian drug dealer's threats. The reports and testimony contain evidence of the circumstances of the offense, his duress defense, and his character and mental state. The state's use of state hearsay rules to prevent a penalty jury from hearing relevant mitigating evidence would deprive Petitioner of due process and a reliable penalty determination.

In *Chambers v. Mississippi, supra,* 410 U.S. at p. 302, the state's hearsay rules prevented the defendant from introducing evidence from three witnesses who would have

testified that another person had independently confessed to them. The Supreme Court reversed the conviction on due process grounds, concluding that Chambers' defense was less persuasive then it might have been had the other man's confession been admitted. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id.* at p. 302.)

In *Green v. Georgia* (1979) 442 U.S. 95, the Supreme Court applied the same principle to a capital penalty phase proceeding. There, Green and co-defendant Moore were tried separately for rape and murder. At his penalty proceeding, Green sought to show he was not present when the victim was killed and had not participated in her death. He tried to introduce Moore's confession to a third party who had testified for the prosecution in Moore's trial. According to the third party, Moore told him that he had committed the murder when defendant was not present. The trial court refused to allow this testimony in Green's penalty trial because it was hearsay. The Supreme Court held that regardless of Georgia's hearsay rule, the exclusion of this evidence violated Green's right to due process. "The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability. . . . In these unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id.* at p. 97 [citations omitted].) Besides the circumstances under which the statement was made which indicated its reliability, the Court noted that "[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it." (*Id.* at p. 97.)

This Court has recognized that under *Green* the "[e]xclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable." (*People v. Phillips* (2000) 22 Cal.4th 226, 238; see also *People v. Lucas* (1995) 12 Cal.4th 415, 464 [Due process violation may arise if the defendant shows the trial court excluded "crucial evidence bearing persuasive assurances of trustworthiness."]; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1003) [Error in exclud-

ing codefendant's statements that defendant tried to dissuade the codefendant from engaging in crime because statements bore strong indicia of reliability]; *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754, 760-63 [Due process right to present a defense was violated by trial court's order excluding evidence on hearsay grounds of alternate suspects]; *Holmes v. South Carolina* (2006) 547 U.S. 319, 326-31 [exclusion of defense evidence of third-party guilt denied defendant of fair trial]; *Sears v. Upton* (2010) 130 S.Ct. 3259, 3263 & fn.6 ["[T]he fact that some of such [mitigating] evidence may have been 'hearsay' does not necessarily undermine its value- or its admissibility-for penalty phase purposes."].)

In Mr. Bacigalupo's case, certainly the reference hearing testimony supporting a duress defense is "highly relevant to an issue critical to punishment" since it provides strong support for California's statutory mitigation factor (g)—acting under extreme duress. In addition, the government itself considered Angarita's girlfriend's information reliable enough to give her confidential informant status, and to refer her to the DEA to assist, with payment, the federal agency in their investigation of Angarita and conviction of his employees. (Referee's Report, at p. 17.) In this case, this Court would violate Petitioner's due process and Eighth Amendment rights if it refused to consider as mitigation the testimony and evidence supporting Petitioner's duress defense at the reference hearing. The evidence is reliable and relevant to a critical issue at the penalty phase.

Additionally, there is an independent state law basis for admitting hearsay evidence. Exceptions to the hearsay rules are not limited to those enumerated in the Evidence Code. (*In re Malinda S.* (1990) 51 Cal.3d 368, 376.) California appellate courts have the authority to recognize non-statutory exceptions to the hearsay rule, although this Court has urged that courts use caution in doing so. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 27; *People v. Ayala* (2000) 23 Cal.4th 225, 268.) In *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 27, this Court left open the question of whether an exception for "critical reliable evidence" in capital cases should be recognized. This is an appropriate case for consideration of such an exception, because (1) the evidence is critical to a statutory mitigating circumstance in Petitioner's case, (2) the evidence is reliable as the

Referee found at the reference hearing, and because the state interviewed the witnesses and the government relied upon the confidential informant to give *in camera* testimony in this case *and* paid testimony against Angarita's employees in a federal drug case, and (3) the state created the problem in the first place, by suppressing the evidence and thus contributing to Angarita's unavailability at trial. If needed, Petitioner urges the Court to apply the capital case exception here.

D. The State's Suppression of Evidence of Petitioner Acting Under Extreme Duress Resulted in an Unfair Advantage to the State

Due to the state's suppression of evidence of Petitioner's duress defense, the state was able to successfully argue that Petitioner had purposely lied to the police about acting under duress of a drug dealer's threats, and instead had murdered his benefactors for the sole purpose of robbing them and fleeing the state to resume his "party" life in New York. (RT 3075; 3485-89.) Petitioner was not given an opportunity to present evidence and argue that what he had told the police upon arrest (i.e., that he was acting under extreme duress), was indeed true: a dangerous Columbian drug dealer named Jose Angarita had ordered Petitioner to murder two drug acquaintances of his, or he would kill Petitioner and his parents before the first of the year (January 1, 1984). (RT 3230, 3232, 3234-3235.) The offenses occurred on December 29, 1983. (*People v. Bacigalupo*, 1 Cal.4th 103, 119.) As the Ninth Circuit has stated:

> California was allowed to present . . . the Government's theory of the case to the jury. Chia should have been afforded a similar opportunity. "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." *Crane [v. Kentucky* (1986)*]* 476 U.S. [683] at 690, 106 S.Ct. 2142. It was unfair for the trial court to permit California to present evidence as to its theory behind Chia's actions, but to deny Chia the same opportunity and right.

(*Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1005.)

Similarly, due to the prosecution's misconduct in this case, the government was afforded an unfair advantage at trial: they were allowed to argue their false theory behind Miguel Bacigalupo's actions, i.e., that he lied and callously killed his benefactors for money, while simultaneously preventing him from presenting compelling evidence of his own duress defense theory, i.e., under threat of death for himself and his family he was

forced to kill the victims by a dangerous Columbian drug cartel member. Therefore, Petitioner suffered severe prejudice from his inability to counter the prosecution's theory that he was a greedy liar blaming his deeds on a fictitious mafia and the inability to corroborate his defense that he was acting under extreme duress as stated truthfully when arrested. In assessing prejudice for an ineffective-assistance-of-counsel claim, the Supreme Court emphasized as significant aggravating evidence the fact that the defendant acted alone as the sole perpetrator in a robbery-murder:

"On the other side of the scales, moreover, was the evidence of the aggravating circumstance the trial court found: that Van Hook committed the murder alone in the course of an aggravated robbery. . . .Van Hook's confession made clear, and he never subsequently denied, both that he was the sole perpetrator of the crime and that '[h]is intention from the beginning to end was to rob [Self] at some point in their evenings activities.'" (*Bobby v. Van Hook* (2009) 130 S.Ct. 13, 20, (citation omitted).)

E. The Referee Did Read the Trial Transcripts

Respondent argues that portions of the Referee's Report are not entitled to deference because the Referee failed to read the trial transcripts before making his findings. (Resp't Brief at 96-97.) Respondent is simply wrong. First, there is no proof that the Referee did not review any trial transcripts before drafting his findings. Also, a review of the reference hearing transcript shows that Respondent did not request the Referee to read the trial record or take judicial notice of any witness' prior testimony, therefore waiving any such objection. Additionally, although the consideration of a witness' former testimony at a reference hearing is at times permitted, it certainly is not a requirement, unless necessary to resolve the factual questions this Court posed to the Referee. (See e.g., *In re Ross* (1995) 10 Cal.4th 184, 205; *In re Cox* (2003) 30 Cal.4th 974, 998.) In this case, given the specific reference questions directed to the Referee, a review of the trial transcript was not necessary. Should this Court need to review prior testimony to make a legal determination, this Court has stated it will do so independently. (*In re Hardy* (2007) 41 Cal.4th 977, 993.)

Respondent additionally argues that the Referee failed to consider Dr. John Brady's testimony at trial. (Resp't Brief at 98-100.) First, Respondent failed to request the Referee to take judicial notice of Dr. Brady's testimony, and did not request that Dr. Brady testify, thus waiving any objection. In addition, there is no proof that the Referee did or did not consider Dr. Brady's testimony. In his appendix to his report, the Referee merely summarizes Dr. Fred Rosenthal's testimony. (Referee's Appx. at p. 120.) Dr. Rosenthal stated that he did not consider Dr. Brady's testimony and report because he was not properly trained. (*Id.*) Petitioner has alleged that Dr. Brady, although a licensed psychologist, was previously trained in criminology, and that he misrepresented his educational degree to trial counsel and during his trial testimony. Petitioner has also alleged that Dr. Brady, as a psychologist, was not qualified to render an opinion about Petitioner's brain damage, because he was not specially trained in a field to render such an opinion, such as psychiatry, neurology or neuro-psychology. This was an adequate basis for Dr. Rosenthal not to rely on Dr. Brady's report.

III.

The Prosecution Failed to Disclose the Names of a Confidential Informant, and Other Witnesses, Concealed Their Statements, Knowingly Presented False and Misleading Testimony and Argument at Trial, and Withheld Exculpatory Evidence from the Defense.

[*See* Referee's Report, June 25, 2009, pp. 1-39.]

Judge Richard E. Arnason determined, upon conclusion of the lengthy evidentiary hearing, that the prosecution (1) failed to disclose the names of a confidential informant and other witnesses and their statements which would have led to the development of a duress defense at the guilt phase and/or helped to establish mitigating evidence including duress at the penalty phase, (2) knowingly presented false and misleading testimony and argument, and, (3) improperly withheld exculpatory information from the defense. (Referee's Report, pp. 1-39; Appendix One To Report of Referee, pp. 1-157.) The Report and Appendix are an exhaustive review of the facts presented during the lengthy evidentiary hearing and those adduced in the lower court. In an effort to avoid the consequences of the wrongs committed by the prosecution, Respondent attempts to avoid

the result by making the absurd assertion that they are "largely unsupported by the evidence." (Resp't Brief, at p. 1.)

1. The Prosecution Possessed Evidence Prior to and During Petitioner's Capital Trial Regarding a Direct Connection Between Jose Luis Angarita and the Killing of Orestes and Jose Luis Guerrero That Was Not Provided to the Defense.

[*See* Question 1, Referee's Report, at pp. 6-19.]

Question One, first question

Judge Arnason heard all the witnesses, observed their demeanor, and reviewed the extensive exhibits. He made independent findings as to their credibility. (Referee's Report, (Findings on Witness Credibility) at pp. 2-5.) Yet, Respondent attempts to avoid squarely addressing Question 1 posed by this Court, by attacking Gale Kesselman even though she was determined to be credible by both the Drug Enforcement Administration (DEA) and the prosecution. (*Id.*, at p. 3.)

The questions posed by this Court are whether the prosecution possessed evidence "regarding a possible connection between one Jose Luis Angarita and the murders of Orestes and Jose Luis Guerrero" and whether "this information was given to the defense." (Order to show cause, Mar. 3, 2004.) Judge Arnason found that there was a connection, and the prosecution withheld information from the defense. (Referee's Report, at pp. 6 & 19.) Specifically, Judge Arnason made findings of fact, substantiated by evidence, that:

> The prosecution obtained information before or during trial connecting the homicides of the Guererro Brothers to Jose Angarita and Jose Angarita's drug trafficking world. The prosecution had information that Jose Angarita had ordered the homicides. Jose Angarita told CI-2 [Ms. Kesselman] that the murders were drug-related revenge killings or contract hits on behalf of a South American drug cartel arising out of a dispute about an old drug debt. Jose Angarita also told CI-2 about his own role in the murders, namely that he was in [sic] an instrument in the murders.

(Referee's Report, at p. 6)

The Referee also found that the prosecution had information about a meeting in San Francisco between petitioner and Jose Angarita on the night before the murders. (*Ibid.*) The majority of the information connecting Angarita and the murders of the

Guererro brothers comes from Ms. Kesselman who repeated to the prosecution what Angarita told her. (Referee's Report, at p. 6.) At the time that Ms. Kesselman gave her testimony she was ill and it took a significant effort on her behalf to travel to Martinez to testify. She appeared to the court to take her duties as a witness seriously and considering her testimony as a whole the court found that she made a credible witness. (Referee's Report, at p. 3.)

Respondent argues at great length about almost everything but never directly denies, and therefore implicitly concedes, that the prosecution had information regarding a possible connection between Angarita and the murders. For example, respondent argues "while there may have been overlap between cases owing to Kesselman, there was no *link* between the cases, and Williams was not conducting a drug investigation, just a murder investigation." (Resp't Brief, at p. 106.) This argument is only remotely relevant to the question posed by this Court and the Referee made his findings with regards to this issue only in part to substantiate his finding that Sandra Williams was not a credible witness. The Referee found in detail that:

> [A]lthough at the hearing before this court Sandra Williams consistently discounted and/or denied any drug connection to the killings, by the time of petitioner's trial she knew that the Angarita drug operation was subject to a federal investigation and subsequent prosecution over a 10 kilo sale that CI-2 had set up. At the successful completion of the federal case CI-2 was given $5,000 in cash, indicating that federal authorities had found CI-2 credible.
>
> . . . .
>
> Sandra Williams made sure an agent from the DEA was present for the March 31, 1984 interview because she thought the drug information pertaining to Jose Angarita's drug trafficking operation was important. On April 26, 1984 Sandra Williams contacted DEA agent Alvarez about this case. As late as July, 1984 Sandra Williams was in contact with the DEA about drug intelligence in this case, again suggesting her awareness of the connection to drug trafficking in this case.
>
> Thus, there was ample information or evidence known to the prosecution in 1984 and up to petitioner's trial that Jose Angarita and his circle, including Luis Laureano, Karlos Tigiboy, Maria Angarita and her husband, David Soto, were involved in drug trafficking in the San Jose area. Therefore, the court finds that Sandra Williams's repeated testimony

in these proceedings that she was not investigating a drug case, but only a homicide case, is not supported by the record and not credible.

(Referee's Report, at pp. 17-18.)

The Referee also found significant Ms. Kesselman's involvement in both the drug case and the Guerrero case because "it helps to establish a link between the homicides and Angarita's drug trafficking organization. Ms. Kesselman testified that the theme of the meetings with Sandra Williams and the DEA were all in 'one basket' and interrelated." (Referee's Report, at p. 8.) Moreover, as late as "July 3, 1984, approximately the first trial date set in this case, Sandra Williams met or communicated with the DEA concerning drug intelligence in this case." (Referee's Report, at p. 14.) The Respondent's argument trying to disprove any link between the cases misses the point and only serves to exemplify the lengthy recitations of conjecture and inaccurate summations of the Referee's findings that run throughout the 197-page state brief.

The Referee also found that for a period of time the prosecution itself took the position that Jose Angarita was a suspect in the Guerrero killings and that they were "hits" arranged by him. Sandra Williams, who worked for the Santa Clara DA's office as a criminal investigator and was the lead in investigating this case, even recorded information that Angarita was a suspect and she wrote a note to Detective John Kracht, also employed by the Santa Clara DA's office, that the murder of the Guerrero brothers was possibly a "hired-hit." (Referee's Report, at p. 16.) It is also significant that the Referee did not find Williams to be credible. The Referee made the following findings about Sandra Williams' credibility:

> The court does not find Sandra Williams's testimony credible. There are many reasons for the court reaching this conclusion.
>
> She repeatedly exaggerated and gave evasive and misleading testimony, often not answering a question. She adopted what in certain instances amounted to an untenable interpretation of the evidence. She was not truthful in parts of her testimony, and relied heavily on personal character attacks on Kesselman.
>
> For example, one would never know from Sandra Williams's testimony in this case that at one point in the early investigation of the case Sandra Williams herself believed the murders were drug-related murders for hire case. (RT 798: 1-2.) She made a presentation at the DA's office on

> the theory that Jose Angarita was behind the hit and that it was carried out for financial gain. Furthermore, she it clear to CI-1 that she considered Jose Angarita the kingpin, the shot caller, the boss behind the murders and she wanted him. (RT 865: 5-10; RT 819: 3-14.) Indeed, Kracht's notes and report support this view that Jose Angarita was the direct focus of Sandra Williams's investigation for some period of time. (See, e.g. May 16 entry, Ex. 25, p. 1728; RT 2305: 9 - 2307: 21.)
>
> Finally, the court finds Sandra Williams's testimony as a whole was not conducive to finding and ascertaining the true facts in this case.

(Referee's Report, at p. 4.)

This Court has found such behavior by a law enforcement to be especially problematic, observing that: "Perjury by law enforcement officials is particularly pernicious. Our entire criminal justice system is built around the belief, and necessity, that law enforcement officers will testify truthfully . . . Deliberate, cynical perjury by law enforcement officials strikes at the very core of our system of law. It manipulates and thereby perverts the entire judicial process." (*People v. Beardslee* (1991) 53 Cal.3d 68, 110.) The Referee carefully and substantially supports his findings with regards to Sandra Williams' lack of credibility as well as the exculpatory evidence she withheld, which established a connection between Angarita and the killing of the Guerrero brothers. (Referee's Report, at pp. 16-18.)

Detective John Kracht's notes (Ex. 25, Appendix One, at p. 149.), which were also withheld from the defense, provide evidence that the prosecution knew of information supporting the claim that the "murders were revenge killings." (Referee's Report, at pp. 10-12.) The Referee found that "Kracht's notes also show that the prosecution had information that petitioner was possibly acting as the agent of Jose Angarita." Mr. Kracht recorded this information in his notes, which is quoted at length in the Referee's Report:

> Undersigned officers were directed by Lt. Don Trujillo to attend a meeting at the SCC DA's office called by Inspectors Williams and McCurdy. [Para.] *It was suggested that an investigation be undertaken into the possibility that Miguel Padilla* [Petitioner] *murdered Orestes and Jose Luis Guerrero acting as the agent of Jose Angarita.* (Emphasis added.)

(Referee's Report, at p. 11.)

Also memorialized in Kracht's notes was information the prosecution had "that the murders were related to drug trafficking." (Referee's Report, at pp. 13-14.)

Question One, second question

The second part of Question One of the Reference Order asks: "What, if any, of this information was given to the defense?" The Referee found that with the exception of the information in Exhibits 19 and 34, none of the information from the confidential informants and other witness statements "possessed by Sandra Williams and disclosed to Joyce Allegro and known to the prosecution team was given to the defense." (Referee's Report, at p. 19.) For example, the prosecution suppressed Mr. Kracht's notes which connected Jose Angarita to the killing of the Guerreros. (Ex. 25, Appendix One, at p. 149.) In fact Karen Schryver,[17] the attorney who previously represented Petitioner, had not even seen the detective's notes until she was handed them by counsel while on the stand in the evidentiary hearing. She found it outrageous that the information in John Kracht's notes had not been disclosed. (Referee's Report, Appendix One, at p. 105.) Ms. Schryver testified that neither she, Gardner nor Johnson had any of this information until the defense got discovery in this habeas proceeding pursuant to this Court's order to show cause. (RT 2765:28 – 2766:9.) (*Ibid.*)

Furthermore, the Referee found that the "fact that Jose Angarita was a suspect in this case was never disclosed to the defense." (Referee's Report, at p. 16.) Not only was the information withheld, but the "prosecution through Sandra Williams affirmatively told the defense that the information the defense had about any putative connection between the killings and a drug-related contract hit was not correct." (Referee's Report, at p. 19.)

The court further found that the "prosecutor's claim that [the information and evidence] *had been provided in discovery to have no basis in fact.*" (*Ibid*, emphasis added.) The finding that the information was not given to the defense is established in part by the fact that "neither the trial attorney, the appellate attorneys, nor the habeas attorneys ever saw the transcripts or the recordings of these matters until years after

[17] In the Appendix to the Referee's Report, the summary of Karen Schryver's testimony is contained on pp. 102-108 & 110-118.

Petitioner's trial had ended." (Referee's Report, at p. 19.) According to this Court, "the duty to disclose exists regardless of whether there has been a request by the accused, and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

Respondent does not directly dispute this fact and no evidence is provided that the prosecution disclosed or gave any of the information detailed in the Referee's report to the defense. In fact the prosecution suppressed the information:

> Karen Schryver testified that she asked all prior trial attorneys in the case if there were any tapes in addition to the tape recording of petitioner and *they said no*. (RT 2938: 2 – 11 (emphasis added).) [Petitioner's] attorneys were all motivated to get discovery and were dismayed to find out that they were presented with very little information. (RT 2939: 13 – 23.)
>
> All three trial attorneys (Forbes, Thompson, Aaron) and investigators (Alayne Bolster, Kuebel) with whom Karen Schryver spoke were surprised that Sandra Williams was not completely forthcoming about the investigation in the case and that there was information that was not disclosed by Sandra Williams or the prosecutor Allegro. (RT 2939: 24 – 2942: 15.)

(Referee's Report, Appendix One, at p. 117.)

Further, "the majority of the information connecting Jose Angarita to the murders came from [Ms. Kesselman], who repeated to the prosecution what Jose Angarita told her." (Referee's Report, at p. 6.) Her identity was concealed from the defense. "[Ms. Kesselman] also had personal knowledge about the trip to San Francisco the night before the murders and had personal knowledge about Jose Angarita based on her observations of Angarita's demeanor and body language in the pre- and post- homicide periods." (*Ibid.*) Therefore, the suppression of Ms. Kesselman's identity and taped interview prevented the defense from pursuing and presenting evidence to the jury about Jose Angarita's connection to the killings and thereby deprived Petitioner from receiving a fair trial.

2. Ms. Kesselman Told Sandra Williams That She Had Witnessed Petitioner's Meeting with Jose Angarita on the Day Before the Murders; the Prosecution Failed to Convey This Information to the Defense; and Ms. Kesselman's Information Was Reliable.

[*See* Question 2, Referee's Report, at pp. 20-21.]

Question Two, first question

The Referee found that Ms. Kesselman informed Sandra Williams "that she had witnessed petitioner's meeting with Jose Angarita in San Francisco the night before the Guerrero brothers were murdered." (Referee's Report, at p. 20.)[18] The Referee's findings are based in part on the fact that he found Ms. Kesselman to be a credible and serious witness and therefore believed her. As detailed above and throughout the Referee's Report, Sandra Williams is not a credible witness and the court found that her testimony was not reliable. As discussed above, the Referee's findings of fact should be given special deference when they are based on his or her credibility determinations. Moreover, his findings on this question are supported by the evidentiary record.

Respondent objects to the court's finding by asserting that the "full scope of the information provided by Ms. Kesselman in 1984 is contained in her taped interview." (Resp't Brief, at p. 124.) This is not true. Sandra Williams testified during the hearing that she contacted the chief of security at the Hyatt hotel in San Francisco as a follow up on information supplied to her by Ms. Kesselman about the San Francisco trip, thereby proving that she had been given information on this matter prior to the taped interview. (RT 1770: 20 – 1771: 8.) (See also Referee's Report, Appendix One, p. 54.) Therefore, the Respondent's objection to the court's finding is contrary to the record.

Additionally, Ms. Kesselman had "many contacts with Sandra Williams on this case; three or four times a week from the beginning of the investigation of the case and then for about six months. (RT 296:24 – 297:22.) The double murder and the drug case involving Jose Angarita were all interrelated. (RT 297:23-28.)" (Referee's Report, Appendix One, at p. 3.) Ms. Kesselman's testimony on this question is summarized as follows:

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[18] See Referee's Report, Appendix One, *inter alia* pp. 2-3; 6-7, 12-13, & 18.

> CI-2 told all these matters to Sandra Williams at the Ben Lomond meeting. (RT 688: 25-27.) Jose Angarita told CI-2 that he, Jose Angarita, had been an instrument in carrying out the orders to have these brothers' lives extinguished; these orders came from Colombia. (RT 689: 6-28.) This upset Jose Angarita. (RT 690: 4-5.) Whoever instructed Jose Angarita to carry out these orders did so because of some old bad debt from Peru or Colombia or other dispute; Jose Angarita did not give details. (RT 690: 11-20.) Jose Angarita identified the man CI-2 met in San Francisco as the person who did the killing. (RT 690: 27-691: 1.) Jose Angarita asked CI-2 if she saw the man on T.V., who was Miguel, [petitioner] and said you need to see him because it's the guy we met in San Francisco last night. (RT 691: 2-10.) CI-2 told all this to Sandra Williams in 1984. (RT 691: 11-16.)

(Referee's Report, Appendix One, at p. 18.)

Question Two, second question

The Referee found that the "prosecution did not convey this information to the defense." (Referee's Report, at p. 20.) The information withheld included the following:

Ms. Kesselman had told Sandra Williams that she drove to San Francisco with Jose Angarita and Luis Laureano and that they picked someone up whose name was Miguel and whom she subsequently identified as Petitioner. "The man [Petitioner] got into the back seat with Jose Angarita. [Ms. Kesselman] drove them around and Jose Angarita and the man talked in Spanish for five minutes in the back seat." (*Ibid.*) Mr. Laureano sat in the front seat with Ms. Kesselman and did not participate in the conversation. Afterwards they dropped Petitioner off in front of the same Nob Hill hotel where they had picked him up and they then returned to San Jose at around 2:00 am. ThePetitioner was supposed to go to a meeting in San Jose the next day at 2 pm, the same day the Guerrero brothers were killed. Ms. Kesselman believed the Petitioner killed the Guerrero brothers. Jose Angarita told Ms. Kesselman that the man they had met in San Francisco [Petitioner] had done the killing. Williams showed Ms. Kesselman a photograph of Petitioner and Ms. Kesselman identified Petitioner as the person Jose Angarita had met in San Francisco. (*Id.* at p. 21.)

Additionally Steve Price (aka CI-1 or John), who was a runner in the cocaine business and familiar with Angarita's operation, testified that Ms. Kesselman told him that she and Jose Angarita had picked up Petitioner in San Francisco at the airport and

that he was the hit man who killed the two jewelers in San Jose. (Referee's Report, at p. 21; Referee's Report, Appendix One, at pp. 18-20.) Price also testified that Williams "was more interested in Jose Angarita than the petitioner. (RT 800:15 - 801:8.)" (*Ibid.*) This testimony was admitted for nonhearsay purposes as fully briefed above.

Sandra Williams' partner, John Kracht, also had a note about the San Francisco meeting, writing that "Angarita called Frank and Laurie Martinico looking for [Ms. Kesselman] as he wanted a ride to San Francisco the night before the murders. They met Petitioner at the Hyatt hotel; the person's name was Miguel. He was to be in town at 2 p.m. the next day." (Referee's Report, at p. 21; Referee's Report, Appendix One, at pp. 150-152.) Finally, Joyce Allegro knew about the San Francisco meetings as well and "she testified that she thought information about the meeting had been provided in discovery." (Referee's Report, at p. 21.) In fact, the information had not been provided.

Respondent agreed that the information was not provided to the defense. (Resp't Brief, at p. 124.)

Question Two, third question

The Refereefound that the information Ms. Kesselman told Sandra Williams about the meeting between Petitioner and Angarita was reliable because in addition to finding Ms. Kesselman to be a credible witness, it was also corroborated by the testimony of Joseph [Luis Laureano]. (Referee's Report at p. 21.) And to the "extent there is a discrepancy in the record between who was in the car for the trip to San Francisco, the court finds that Luis Laureano was in the car and not Jose Angarita's cousin Augustine." (Referee's Report, at p. 10.)

Moreover, the Referee found Mr. Laureano to also be a credible witness noting that it would have been easy for him to decline involvement in the hearing but that "he showed great character and moral strength in meeting this challenge." (Referee's Report, at p. 5.) The court further cited reasons for his credibility determination of Mr. Laureano including the following:[19]

> [Laureano] had no knowledge that petitioner had been given the death penalty. He learned this 24 years after the fact. (RT 3536: 17-23.) At

[19] Throughout the transcript Luis Laureano is referred to as Joseph.

> great personal risk from Jose Angarita, whom he knew was powerful in the drug trade, and Colombian drug cartel, he nonetheless testified. (RT 3337: 23-3339:2.) Testifying also put his family at risk from the Colombian drug cartel. (RT 3349: 22-3350: 16.)
>
> It was difficult for Joseph to come from Venezuela to testify as his daughter was in the hospital with a virus. (RT 3424: 16-20.) Asked why he was willing to go through such difficulty to testify, Joseph replied: . . . it's more than just testifying. It is to feel good about myself, to feel good about myself . . . . I decided to come here in spite of everything that I'm going through. (RT 3424: 24-27.)
>
> Joseph also had a moral imperative to testify in the case. (RT 3424: 28-3425:1; RT 3425: 6-17.)
>
> In sum, while Joseph faced daunting and even life-threatening obstacles, he nonetheless overcame those obstacles and testified in these proceeding. The court find's Joseph's testimony credible.

(Referee's Report, at p. 5)

Respondent objects to the Referee's finding of reliability arguing that it was reasonable based on Ms. Kesselman's description of Petitioner for the investigators to conclude that the man Angarita met in San Francisco was not Petitioner. (Resp't Brief, at p. 127.) This is because Ms. Kesselman described the man as having acne scars on his face, real bushy eyebrows, and a beard or facial growth like stubble; based on this description, John Kracht and Sandra Williams determined that the man was not Petitioner. (Resp't Brief, at p. 127.) However, this argument does not justify withholding valuable and exculpatory information from the defense nor is it a valid objection to the Referee's findings.

Respondent also objects to the Referee's finding on the grounds that it is "nonsensical." (Resp't Brief, at p. 128.) Respondent asserts that the information is not reliable because it would be absurd for Angarita to "forego his stable of hired assassins and [choose] the Petitioner, a twenty-two year old amateur without a car or money." (*Ibid.*) This argument has no basis in fact and is pure conjecture.

3. The Prosecution Had Information Supporting Petitioner's Claim That He Had Killed Orestes and Jose Luis Guerrero Acting Under the Colombian Mafia's Death Threat.

[*See* Question 3, Referee's Report, at pp. 22-23.]

The Referee found that although Steve Price did not provide information about death threats from the Colombian Mafia, Ronnie Nance told the prosecution about the Colombian cartel and this information was not provided to the defense. (Referee's Report, at p. 22; Referee's Report, Appendix One, at pp. 153-159.) Ronnie Nance was arrested after he tried to rob Jose Angarita's cousin's house and he spoke to authorities, which allowed Sandra Williams to track down Ms. Kesselman. (Referee's Report, Appendix One, at pp. 2 & 33.) Mr. Nance "told the prosecution that one of the brothers in the store owed a lot of money and ripping off the jewelry was to take care of that debt." (Referee's Report, at p. 22.) After reviewing all the evidence and listening to witness testimony, the Referee made the following findings of fact establishing that the prosecution had information that Jose Angarita had ordered the hit:

> The prosecution already had, and disclosed, Nance's statement that petitioner was forced to make a hit for the Colombian Mafia because they threatened to kill his parents. This appears to have been orally communicated to the defense. However, the prosecution had other information from Nance about the Colombian cartel not provided to the defense, namely the information in Exhibit 29.
>
> Nance told the prosecution that one of the brothers in the store owed a lot money and ripping off the jewelry was to take care of that debt. Nance indicated he learned this from a girl and a guy, namely CI-2 and Steve Price. The girl was the girlfriend of the man who ordered the hit. He was a Colombian, whom Nance had met one time. The man brought into the country kilos of drugs at a time. That man was Jose Angarita. Jose Angarita brought into the country in kilos of cocaine at a time. Jose Angarita was Colombian. Thus, the prosecution had information that Jose Angarita had ordered the hit.
>
> Nance said Jose Anqarita had taken CI-2 all over the United States in his drug business. Nance, CI-2 and Price were drinking when CI-2 mentioned something about a jewelry store. She said it was unfortunate. She said one of the brothers was working with her boyfriend for a long time and he had lost a large quantity of cocaine. Accordingly, CI-2 said to Nance that Jose Angarita hired someone to take care of it. According to CI-2, the person was supposed to have murdered just one brother, but the other

brother also was there, so he was killed. Some jewels were taken to mask the crime.

The prosecution knew that the murders were possibly carried out with the aid of Jose Angarita. On April 16, 1984 Kracht wrote that the undersigned were directed by Lt. Trujillo to attend a meeting at the DA's office. Inspectors Williams and McCurdy gave a presentation associating Jose Angarita, a former employer of Orestes Guerrero, with cocaine trafficking. They indicated that they had tentatively associated Miguel Padilla with Angarita on the evening before the double murder, and had been told by several persons that the homicides were a "hit" carried out at the direction of another. The other that they suspected was Jose Angarita.

Jose Angarita was associated with the Medellin drug cartel. (RT 267 - 268.) The cartel was known for its violence. (RT 793: 9 - 17.) Jose Angarita was very powerful in the drug business. (RT 812: 24 - 819: 15.) It was suggested that an investigation be undertaken into the possibility that Miguel Padilla murdered Orestes and Jose Luis Guerrero as the agent of Jose Angarita.

The prosecution had evidence that Karlos Tigiboy was connected to Jose Angarita's drug operation. Ron McCurdy disclosed that fact to the public defender investigator. (See Exhibit 19, first paragraph: "While researching Karlos [Tigiboy] , they [the DA's investigators] discovered that he had a link to Jose Angarita who was thought to be a dope dealer".) Thus, while there was no direct connection through Tigiboy with the Colombian Mafia, there was information known to the prosecution connecting Tigiboy to Jose Angarita. In turn, there was ample circumstantial evidence or information known to the prosecution connecting Jose Angarita to the Medellin drug cartel from CI-2. Thus, there was circumstantial information connecting the murders to Jose Angarita and the Colombian drug cartel which the prosecution knew about through Nance and CI-2 and their own investigation of Tigiboy.

The court notes that CI-2 never testified that Jose Angarita had ordered the murders. Nance was the source for this information. Rather, her testimony supplied the prosecution with information in 1984 that Jose Angarita was instrumental in the murders and that they arose from a South American drug cartel. The prosecution knew of Jose Angarita's connection with the Medellin drug cartel. Jose Angarita told CI-2 in so many words that this was a contract killing. The murders were over an old drug debt between some other cartel members or family. Jose Angarita was ordered to assist this man who killed the Guerrero Brothers. Jose Angarita was sorry for how he was put in a situation where he was the instrument of making some type of arrangements for the killing of the Guerrero Brothers.

(Referee's Report, at pp. 22-23.)

Significantly, in addition to leading authorities to Ms. Kesselman, Mr. Nance also provided prosecutors with Luis Laureano's name. (Referee's Report, Appendix One, at p. 155.)

Had the defense been able to identify and locate Mr. Laureano,[20] they would have learned that the Guerrero brothers had stolen two kilos of cocaine from Angarita and this would be useful to show a motive for Jose Angarita to order the execution of the brothers. (Referee's Report, Appendix One, at pp. 115 & 131.) Mr. Laureano testified that "he would often go to the Guerrero brothers' shop with Angarita because they were involved in Jose Angarita's drug trafficking business." (Referee's Report, Appendix One, at p. 131.) Mr. Laureano also testified that the "Guerrero brothers hid some of Jose Angarita's cocaine and money in their store . . . Angarita was angry about the Guerrero brothers stealing 2 kilos; he said nobody was going to make a fool out of him . . . [and he indicated that] he was going to have them killed." (*Ibid.*) Mr. Laureano explained that "Jose Angarita had to show everybody around him that he was a strong person; nobody was going to escape from his hands. So killing people who crossed him was what Jose Angarita meant." (*Ibid.*)

Mr. Laureano personally experienced Jose Angarita's violent tendencies when he and his family became the target of the drug lord's threats. In 1984, Mr. Laureano was arrested for attempting to sell 10 kilos of cocaine to an undercover DEA agent after they were provided with information from a federal informant (Ms. Kesselman). Mr. Laureano explained his experience as summarized by the court:

> Joseph had later discussions about benefits he might receive from the DEA, namely they would drop the charges if he would work for them. Joseph did not accept the offer. (RT 3413:18-27.) Joseph did not take the deal because of his fear that his family and himself would be harmed (or killed). (RT 3413:28 – 3415:4.)
>
> When Joseph was in county jail he received a letter which threatened to kill him and his wife. (RT 3415:11-27.) His wife came to visit him and said two of Jose Angarita's men were watching the house at all hours of the day. (RT 3416:19 – 23.) His wife also began to receive threats. (RT

[20] In the Appendix to the Referee's Report, the summary of Luis Laureano's testimony is contained on pp. 128-141.

> 3416:24 – 26.) Joseph was terrified because he had seen such threats carried out. He knew that Jose Angarita would kill his family and him if he provided information to officials about him. (RT 3417:1 – 7.)

(Referee's Report, Appendix One, at p. 133.)

Mr. Laureano's testimony supports Petitioner's state of mind at the time of the killings, i.e. that the Colombian Mafia had threatened to kill him and his family if he did not kill the Guerrero brothers. In a similar account to that of Laureano's, Petitioner told the San Jose Police:

> I know big people, I don't want to give you too much information, because if I go to jail they will kill me . . . . They stabbed me, they have tried to kill me and I have tried to do the same, because that is the law, that is the law, and I have to survive . . . . They contracted me, the Mafia, or else they were going to kill me. I can give you the name of one of them, but I can't give you all their names, because they are going to kill me . . . . Let me explain to you, if they tell you that they are going to kill your mother, or that they are going to kill your father, and you don't know who it will be, because there are a lot of people, what are you going to do? . . . Because they killed my brother, they killed my sister, and I know who they were . . . . I can't say because they will kill my mother and stepfather, and they are all I have in this world.

(People's Trial Exhibit 34 [Recording of Miguel A. Bacigalupo's statement to San Jose Police, Dec. 29, 1983], RTT 3230-3236.)

Had the jury heard this evidence, they would have known that the threat was real. Indeed, the information suppressed by the prosecution would have directly supported Petitioner's duress defense at the guilt phase and would have helped to prove the mitigating factor of duress at the penalty phase. Critically, a reasonable probability exists that had the information learned from Mr. Nance, Ms. Kesselman, and Mr. Laureano among others been provided to the defense and presented to the jury, then Petitioner would not have received the death sentence. Instead, the prosecution ridiculed Petitioner's story and told the jury he was a liar deserving of the death sentence.

Mr. Aaron, trial counsel for Petitioner in 1987, testified that: "The DA painted Petitioner as a killer and a liar.[21] In Aaron's experience, a jury would be upset if a

[21] In the Appendix to the Referee's Report, the summary of John Aaron's testimony is contained at pp. 20-27 & 96-100.

defendant lies about his actions. This sort of thing could affect a jury verdict." (Referee's Report, Appendix One, at p. 22.) Moreover, Mr. Aaron did not know that Mr. Laureano said that Jose Angarita had threatened to kill Petitioner's family to ensure Petitioner's cooperation in killing the Guerrero brother nor did he know that Mr. Laureano had said that "petitioner would be justified in taking Jose Angarita's threats seriously." (*Id.* at p. 97.)

4. The Prosecution Withheld From The Defense Information (A) About A Possible Connection Between Jose Luis Angarita And The Murders Of Orestes & Jose Guerrero; (B) About A Meeting Between Petitioner, Angarita And Others A Day Or So Before The Killings; And (C) That Would Have Supported Petitioner's Claim To Police That He Killed The Guerrero Brothers Acting Under Death Threats To Him And His Family. Penalty Phase Evidence Not Otherwise Known Or Available To The Defense At The Time Of Trial Would Have Come To Light Had The Withheld Information Been Disclosed.

[*See* Question 4, Referee's Report, at pp. 24-28.]

The prosecution withheld significant information from the defense that would have led to crucial mitigating evidence at the penalty phase. In arguing against the findings of Judge Arnason, Respondent misrepresents the facts. It is not true that "the only information not provided to Petitioner was the taped interview, in which Kesselman described the trip to San Francisco." (Resp't Brief, at p. 133.) Of equal importance is that the concealed evidence alone, had it been known by the defense, would have materially changed the defense presentation at the penalty phase. It would have given credence to Petitioner's statement to the police that he was acting under duress when he killed the Guerrero brothers—that he and his family would be murdered if he did not carry out Angarita's orders to shoot the brothers. That would have led to a wealth of evidence corroborating Petitioner's admissions. That would have resulted in extensive evidence as to the mitigating factor of duress.

Substantial mitigating evidence, as detailed above, would have been developed and presented at the penalty phase, but for the prosecution concealing crucial information from the defense. If defense counsel had known what the prosecution possessed, credible facts would have been urged as to why Petitioner should not be executed. That would

have included not only proof of duress, but also a wealth of other mitigating evidence. As it was, the defense had nothing other than Petitioner's uncorroborated word.

After hearing all testimony, reading all exhibits and listening to recorded interviews, Judge Arnason determined:

> [T]he court finds that the prosecution withheld from the defense information about a possible connection between Jose Angarita and the Guerrero Brothers murder and withheld information about a meeting (the San Francisco meeting) between petitioner, Jose Angarita and others a day or so before the killings. This information would have supported petitioner's penalty phase claim to the police that he killed the Guerrero brothers acting under death threats to him and his family. The connection with Jose Angarita would have included Jose Angarita's connection to drug trafficking. . . .
>
> The following information *and/or* evidence would have come to light at the penalty phase had the withheld information been disclosed.
>
> The trial attorney, Aaron, would have used evidence of what he called the duress defense at the penalty phase of petitioner's trial. Evidence about duress would be useful or helpful because it is a statutory factor in mitigation.
>
> The defense would have presented evidence that anyone who had experienced a violent trauma in their life would be more frightened by a new threat to their family. The defense would have presented evidence that petitioner had experienced violent trauma in his life. Trial counsel would have portrayed petitioner as a frightened 21-year-old who, while he did kill, was at least honest about it.
>
> If the trial attorney had information corroborating the duress defense, he would have probed deeper into petitioner's mental state to understand why he acted as he did. Since the DA painted petitioner as a killer and a liar the evidence would have been useful to rebut those claims. The defense would have been able to present evidence to the jury that there was a bigger fish pulling the strings of the marionette in this case.
>
> The defense would also have had the benefit of being able to argue there was an uncharged perpetrator in a case, thereby raising a doubt in the jury's mind about certain matters. This evidence might have had a positive impact on the jury.
>
> Assuming there was a defendant who was accused of a double homicide but who claimed he committed the deeds because people in the drug trafficking world ordered the defendant to commit the offense, the defense would determine if the people in the drug world could make good on their threat and present evidence on this point. Presenting evidence linking the

drug overlord to the Medellin cartel would be useful in showing how ruthless the cartel could be and whether any threat should be taken seriously. The defense would have interviewed or attempted to interview the intermediary between the cartel and the defendant as part of developing a defense.

It is not uncommon in these sorts of investigations to find additional witnesses to corroborate the defense. The ex-wife of the drug overlord might lead to further investigative leads; it is not unprecedented for this sort of contact to reveal additional sources of information. The trial attorney would also have sought to get any documents the DA had to assist the defense investigation. There could have been followup on the connection between the drug overlord and the cartel by making requests to the federal government regarding narcotics enforcement information it may have concerning the Medellin cartel and Jose Angarita.

A defense that was corroborated by facts other than petitioner's own words would be more powerful than a defense of defendant's word alone. It would have been important at the penalty phase to establish that someone else directed the homicides since this would be important to show petitioner's state of mind and that he was in fear of his life.

It would have been important to show that the overlord had a propensity to engage in ordering homicides because such knowledge would have been important to show the petitioner's state of mind. The defense would have presented evidence of a connection between the overlord (Jose Angarita) and the overlord's intermediary (Tigiboy) which potentially could have corroborated defendant's statement to the police.

The defense would have conducted a different preparation for the penalty phase. The defense would have identified, located and interviewed or attempted to interview Luis Laureano. The DA would have had to provide discovery concerning Laureano. The defense had no idea that Luis Laureano knew so much about the Guerrero Brothers murders, Jose Angarita's connection to the murders, his ruthlessness and his drug organization. Laureano's information would have corroborated what CI-2 had said, including the San Francisco meeting at a hotel the day before the Guerrero Brothers were killed. This would have strengthened the duress defense at the penalty phase.

Luis Laureano indicated the Guerrero Brothers stole 2 kilos of cocaine from Jose Angarita. Knowing this would have been useful to show a motive for Jose Angarita to order the execution of the brothers. Luis Laureano also knew that Jose Angarita had a history of hiring assassins and committing acts of violence against those who crossed him *and/or* the cartel. The defense would have attempted to locate and interview Jose Angarita.

From Luis Laureano the defense would have learned that Jose Angarita was angry at the Guerrero Brothers and he wanted to have them killed. Given his experience with Jose Angarita and his anger over the stealing of the 2 kilos of cocaine, the defense would have presented evidence that Luis Laureano believed that Jose Angarita went forward and ordered the killing of the brothers. The defense would have shown that in a separate conversation between Luis Laureano and Jose Angarita, Jose Angarita said he was going to kill the Guerrero Brothers because they had stolen money and drugs from him.

The defense would have presented evidence that there was a prior relationship between petitioner and Jose Angarita. The defense would have presented evidence about Jose Angarita's propensity for violence.

The defense would have presented evidence that petitioner had a conversation with Luis Laureano wherein petitioner said that Jose Angarita told him, petitioner, that he had to do a job for Jose Angarita and that if he did not do it Jose Angarita was going to kill his family members, beginning with his mother. The defense would have presented evidence that this conversation was before the Guerrero Brothers were killed. . . . Petitioner's eyes were filled with tears. Luis Laureano told him not to do it. This was the last time Luis Laureano saw petitioner. The defense would have used this very dramatic evidence.

Disclosure of any connection between Jose Angarita and the murders of the Guerrero Brothers would have led to the disclosure of Kracht's notes. The defense would have used the statement in Exhibit 25 attributable to Jose Angarita that this was not a robbery/murder. The information would have been used to show that petitioner was not a greedy, cruel murderer who pathetically lied about the case all the while trying to shift the blame on some fictional Mafia person. The defense would have used the statement in Kracht's notes that Sandra Williams and Ron McCurdy had tentatively associated petitioner with Jose Angarita the night before the homicides and that the homicides were carried out as a hit or for financial gain at the direction of another, namely Jose Angarita.

The defense would have presented evidence linking Jose Angarita to the Colombian drug cartel. The defense would have had and used the statement that the Guerrero Brothers deaths were for an old drug debt, that it was for revenge and financial reasons. The defense would have learned and used the fact that Jose Angarita had a motive to have the Guerrero Brothers killed.

The defense would have presented evidence about the pending state and federal drug prosecutions against the Angarita organization. The defense would have learned that Jose Angarita had been interviewed by Sandra Williams. Counsel would have wanted to know the contents of this

interview. The defense would have learned of the Nance attempted robbery and the statements by Nance implicating Jose Angarita in the homicides. The defense would have learned that both Jose Angarita and Luis Laureano were trying to get back a book or drug ledger seized during the Nance attempted robbery, thereby connecting these two individuals to a common drug trafficking business.

Shortly after the Guerrero Brothers were killed, Jose Angarita fled the country. Jose Angarita talked to Luis Laureano about the killing of the Guerrero Brothers. Jose Angarita told Luis Laureano that he had to leave the country as soon as possible because the police had marked him for the deaths of the brothers. The defense would have tried to show this flight as evidence of guilt on behalf of Jose Angarita.

The defense would have obtained the information in the statement from DiLeonardo, who in turn got the information in the statement from Sgt Hensley who got it from Nance. That information was that the Guerrero Brothers were executed following a failed drug deal.

Once a viable duress defense became available the defense would have pursued psychiatric and psychological avenues showing thereby that petitioner was a more vulnerable target to people like Jose Angarita. A complete mental evaluation of petitioner would have been undertaken.

The defense would have presented evidence from a forensic psychiatrist to show how petitioner would cope with the pressure of a demand from a person in authority. They would use the expert to show that petitioner has an IQ of 83, which is borderline retardation.

The defense would have shown that petitioner suffered from serious brain damage and neurological and psychiatric impairment prior to and during the time he committed to present offenses. The defense would have presented evidence that petitioner suffered from chronic and severe physical abuse in utero, during childhood, and afterwards. The defense expert would have opined that petitioner had mental illness and mental problems based on numerous injuries to his head. Petitioner's brain damage was aggravated by his drug use. The evidence would have shown that petitioner suffered from long periods of depression, which may be connected to organic brain tissue damage. Individuals with these conditions, such as petitioner, have difficulty with thinking about complex ideas. Evidence would have been presented through expert opinion that petitioner could not cope with different complexities.

The defense would have presented evidence that petitioner was vulnerable to influence because of low self-esteem. He would not be able psychologically to resist anyone in a position of authority. Evidence would

have been presented that petitioner could not figure out what would be in his best interest and act independently.

The defense would have presented the documentation referred to in Exhibit 49 that petitioner was arrested and beaten on the head in New York, resulting in disorientation and an inability to walk. The expert would have discussed petitioner's automobile accident where he suffered serious head trauma, which probably aggravated the brain damage. After the accident petitioner lost his sight for a lengthy period, had difficulty with his motor coordination and walking, and would fall down; all are indications of brain damage. According to the expert, once the brain was injured or damaged it becomes a lifetime condition.

The expert would have disclosed that petitioner told him that the same people who had murdered his brother in New York, drug dealers from a Colombian mob, had ordered him to kill these other people.

(Referee's Report, at pp. 24-28.)

Respondent argues at length in an effort to put a different interpretation of the facts than what was found by the Referee. However, Judge Arnason heard and observed all witnesses and even questioned them regarding various points. He read all documents presented, and even listened in court to the lengthy audio interviews presented by the prosecution. Judge Arnason was in a far better position to evaluate the evidence than counsel for Respondent, who did not attend any of the hearing.

Respondent further argues that "[t]he referee's findings also improperly credit the conclusions of Dr. Rosenthal . . ." (Resp't Brief, at pp. 141-142.) Such a statement flies in the face of well-established facts. There was extensive evidence before the Referee that Petitioner suffers from severe mental illness including organic brain damage and borderline retardation with a full scale IQ of 83. Respondent called no witnesses to attempt to refute such findings.

Evidence of Petitioner's mental illness was presented during the evidentiary hearing in part to answer the obvious question as to why he would follow an order to kill on the threat of death to himself and his family, when a normal person would hopefully seek other ways out of the hellish dilemma such as going to the authorities. Petitioner suffers from serious neuropsychological impairment and organic brain dysfunction. Every aspect of his life was affected by the mental illness, and any attempt to understand

him or his actions must take into consideration the brain damage. Based on the results of a complete neuropsychological evaluation, there is substantial evidence that he suffers from cognitive and sensory-motor deficits associated with neuropsychological impairment.

Evidence of Petitioner's brain damage and serious mental impairment and the effect upon his actions, was before the Referee from a prominent psychiatrist:

> 274. Given Miguel Angel's cultural background, life experiences, brain damage and impaired mental functioning, the threat he perceived at the time of the crimes—the virtual annihilation of his immediate family—by members of organized crime, would have placed an enormous and almost unbearable amount of stress on his already compromised system. Given his life history described above, from his abused and poverty-stricken childhood in Peru, to the streets of New York City, to the orphanage in Spain, to his prison sentence in New York, his own brother's murder, and his past involvement with members of organized crime, there is every indication that his cumulative life experiences, combined with his impaired mental state, led him to believe that he and his family were under a very real and serious threat of death with very limited, or no options for escape. Tragically, Miguel Angel was caught in circumstances in which he believed he had to protect and save his mother, while at the same time he was faced with a social and moral dilemma of such a magnitude that he was incapable of solving it.

(Ref. Exh. 47, Declaration of Renato D. Alarcon, M.D.,[22] May 11, 1999 [Exh. A, Pet. for Writ of Habeas Corpus].)

Jonathon H. Pincus,[23]M.D., a noted neurologist, evaluated of Petitioner in 1997. His findings included significant organicity:

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[22] Renato D. Alarcon, M.D., is Professor and Vice-Chair, Department of Psychiatry and Behavioral Science, Emory University School of Medicine, Atlanta, Georgia. He is also Chief of Psychiatric Services and Director of the Mental Health Service, Atlanta Veterans Administration Medical Center.

[23] Jonathon H. Pincus, M.D., is Professor and Chairman of the Department of Neurology, Georgetown University, School of Medicine. Since 1987 he has been the Chief of Neurology and Director, Parkinson's Clinic, Georgetown. Dr. Pincus is a Diplomate of the American Board of Psychiatry and Neurology, having been first certified in 1967. He served on the faculty of Neurology, Yale University, 1964-1986. He received his M.D. from Columbia College of Physicians and Surgeons, followed by an internship in medicine at the Downstate Medical Center, State University of New York,

23. In sum, Mr. Bacigalupo's neurological history presents strong indicia of neurological damage. This includes: in-utero abuse due to the beatings his mother suffered; in-utero malnutrition and subsequent malnutrition as a child; direct and constant beatings as a child and adolescent; continued and numerous head trauma as a result of injuries to the head as a young adult; and substantial drug use. The combination and severity of these incidents in Mr. Bacigalupo's history likely contributed to retarded and/or lapsed physiological development and neurological damage.

. . . .

32. Significantly, Mr. Bacigalupo exhibited signs of brain damage on five tests. Of the five, four indicate severe frontal lobe brain damage. It is very unusual for one individual to exhibit all four of these frontal lobe damage signs. Three of these frontal lobe tests are release reflexes, or release responses that are prominent in a newborn infant. These reflexes disappear with maturation of the central nervous system but can reappear in degenerative diseases associated with loss of brain activity.

. . . .

40. Serious frontal lobe damage produces profound behavioral alterations in an individual. The frontal lobes control behavior, planning, modulation, changes in response and innovation. Damage to this region causes disinhibition, impulsiveness, loss of tact, a lack of empathy, and an inability to plan and execute sound judgment. Mr. Bacigalupo fails to plan ahead, has difficulty understanding the feelings of others, makes tactless, coarse remarks, and often acts on impulse. Some of the symptoms of frontal lobe damage are similar to what an extremely intoxicated person would exhibit. Consequently when a person suffering from frontal lobe damage, such as Mr. Bacigalupo, uses alcohol and drugs—his condition is exacerbated much more than in the normal person. Frontal lobe dysfunction is often present in many idiopathic psychiatric diseases, such as depressive disorders, schizophrenia, and obsessive-compulsive disorder. Mr. Bacigalupo is a severely impaired individual—not only does he suffer from serious brain damage, but he is also psychotic with delusions and most likely suffers from a serious mood disorder.

Conclusions

41. It is my opinion to a reasonable degree of medical certainty that Mr. Bacigalupo suffers from serious brain damage and neurological and psychiatric impairment. Most certainly, he suffered from these impairments prior to, and at the time of, the capital offenses for which he has been convicted.

Brooklyn, and a Residency in Neurology at Yale New Haven Hospital and Yale University School of Medicine.

42. Furthermore, it is my opinion, which I hold to a reasonable degree of medical certainty, that the etiology of the neurological impairments suffered by Mr. Bacigalupo is his chronic and severe child physical abuse and maltreatment, and traumas to the head.

(Ref. Exh. 49, Declaration of Jonathan H. Pincus, M.D., Feb. 22, 2006.)

Petitioner was also neuropsychologically evaluated in 1997. The findings included an I.Q. of 83 and confirmed the neurological damage:

6. At the request of counsel for Miguel Angel Bacigalupo, I conducted a comprehensive neuropsychological evaluation of Mr. Bacigalupo at San Quentin State Prison on March 10th, 11th, 18th and 26th, 1997. On these dates, Mr. Bacigalupo was seen for approximately fourteen hours. I administered a full battery of standard neuropsychological tests, conducted a mental status examination and clinical interview. The purpose of such a comprehensive assessment was to determine the existence, severity and effect of organic brain damage and cognitive impairments and to evaluate Mr. Bacigalupo's performance in light of possible etiological factors including inherited brain dysfunction, pre- or perinatal trauma, and acquired brain injuries.

. . . .

9. . . . There are also indications that the impairments are lateralized to the left hemisphere of the brain. . . .

(Ref. Exh. 48, Declaration of Dale G. Watson, Ph.D., Aug. 15, 1997 [Exh. 88, Pet. for Writ of Habeas Corpus].)

Fred Rosenthal,[24] M.D., Ph.D., a forensic and clinical psychiatrist, evaluated Petitioner during the pendency of the present habeas corpus proceedings and previously while the direct appeal was pending before the California Supreme Court. He too found the existence of brain damage, especially in the frontal lobe, and that Petitioner suffered from severe mental problems. (RT 2993.) "With the extent of his brain damage and marginal IQ, "he had difficulties with thinking—with complex ideas. . . . He can't cope with many different complexities. He would have difficulty reasoning in extensive ways

[24] Fred Rosenthal, M.D., Ph.D., specializes in clinical and forensic psychiatry. He received his M.D. from Stanford University, 1960, a Ph.D. in education and clinical psychology, University of California at Berkeley, 1956, and a M.A. in clinical psychology from Stanford, 1954. He has extensive experience in neurophysiology, and was an assistant and then associate professor of physiology at New York Medical College. Dr. Rosenthal is a Diplomat, American Board of Psychiatry and Neurology, a member of the American Academy of Psychiatry and Law, etc.

about complicated ideas." (RT 2997.) To the point of the facts of the case at hand, "he would be somewhat vulnerable to influence." (*Ibid.*) There is considerable evidence including even Petitioner's own admissions, that he followed the order of Angarita to kill the Guerrero brothers, in order not to see his family killed. Dr. Rosenthal observed that normal people would try an alternative solution that did not include shooting someone. But that is beyond Petitioner's mental abilities. "[H]e would be vulnerable, not only to the pressure, but he would not be able to think of other reasonable ways of going about trying to solve this problem." (RT 3008.) It was brought out that Petitioner's mental problems should have been presented at trial both in support of a mental defense, a defense of duress, and in mitigation at the penalty phase. Not bringing it out "would do him a disservice." (RT 3009.) Petitioner has "confusion in his thinking . . . he seemed to get confused easily, and that's consistent with brain injury and his background." (RT 3012.)

The following mitigating factors all relate to Petitioner's mental difficulties:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(Penal Code §§ 190.3 (d),(f),(g),(h),(k).)

Dr. Rosenthal was asked about duress being specified in section 190.3(g), in addition to being available as a defense at the guilt phase. He strongly opined that in the unusual circumstances of this case, such information should have been provided to the jury. [I]f

someone is facing the death penalty, anything that might have a bearing on what happened . . . should be addressed. (RT 3013.)

The Referee succinctly reviewed and addressed the mental-state aspects of the case:

> Fred Rosenthal is a physician who specializes in psychiatry. CRT 2979: 28 - 2980: 3.) Fred Rosenthal has both a Ph.D (in psychology) from Berkeley and a MD from Stanford. (RT 2980: 9 - 19.) Fred Rosenthal has testified as a forensic psychiatrist in murder cases for both sides. (RT 2982: 2 - 9.) Petitioner's attorney Gardner hired Fred Rosenthal in 1990. CRT 2982: 18 - 2983: 6.) Present counsel again hired Fred Rosenthal a few years ago. (RT 2983: 7 - 9.)
>
> Fred Rosenthal interviewed petitioner at San Quentin. (RT 2983: 21 - 26.) In addition to the interview, Fred Rosenthal reviewed his patient's background. (RT 2983: 27..,. 2984: 9.) Fred Rosenthal qualified as an expert in psychiatry and psychology. (RT 2984: 14 - 28.)
>
> Fred Rosenthal was shown Ex. 47, a declaration of Renato Alarcon, MD, dated May 10, 1999. (RT 2985: 2 - 12.) Fred Rosenthal has had an opportunity to review Ex. 47. (RT 2985: 24 - 2986: 1.) The document contains petitioner's family background from birth and early childhood, including residency in Mexico City, New York City, Madrid, back to New York, back to Spain, etc. (RT 2986: 5 - 11.) Alarcon was at the time a professor and vice chair of the Dept. of Psychiatry at Emory University and a native of Peru. (RT 2986: 12 - 20.) Fred Rosenthal used Ex. 47 in arriving at his opinion. (RT 2986: 21 - 24.)
>
> Ex. 48 is a declaration of Dale Watson, a psychologist; Fred Rosenthal relied on this declaration in forming his opinion. (RT 2986: 25 - 2987: 4; 2988: 2 - 5.) Watson has a Ph.D in psychology, a prerequisite to working in the area of forensic psychology. (RT 2987: 10 - 24.) Fred Rosenthal testified that he often uses other experts before forming an opinion. (RT 2988: 6 - 24.) Watson had administered a series of standard tests on petitioner. (RT 2988: 25 - 2989: 13.) Watson found petitioner had a full scale IQ of 83; verbal IQ of 80 and performance IQ of 88. (RT 2989: 14 - 25.) It is normal for Fred Rosenthal to have a psychologist test a patient and then for Fred Rosenthal to use the psychologist's test results. (RT 2990: 26 - 2991: 7.)
>
> An IQ of 83 is borderline retardation, not low enough to indicate retardation, but it is below normal. (RT 2991: 25 - 2992: 2.) Such a person does not function at the level of the normal population. (RT 2992: 3 - 9.)
>
> Fred Rosenthal also relied on Ex. 49, which is a report from a neurologist, Dr. J.H. Pincus, MD, who performed an extensive neurological examination of petitioner. (RT 2992: 12 - 28.) Pincus found what Fred

Rosenthal suspected, namely that petitioner has brain damage. (RT 2993: 15 - 21.) Pincus also found that petitioner suffered from serious brain damage and neurological and psychiatric impairment prior to and during the time he committed the present offenses. The etiology was the chronic and severe physical abuse he suffered in utero, during his childhood and afterwards. (RT 2994: 2 - 21.)

Fred Rosenthal found Dr. Pincus very credible, except for the fact he had not gone to Stanford. (RT 2994: 22 - 2995: 9.) These three reports and the findings by these 3 doctors all support Fred Rosenthal's separate findings on petitioner. (RT 2995: 23 - 2996: 3.)

Fred Rosenthal opined that petitioner has mental illness and mental problems based on numerous injuries to his head. (RT 2966: 4 - 9.) Petitioner's brain damage was aggravated by his drug use. (RT 2996: 8 - 10.) He suffers from long periods of depression which may be connected to organic brain tissue damage. (RT 2996: 12 - 22.) Individuals with these conditions, as with petitioner, have difficulty with thinking about complex ideas. (RT 2997: 14 -19.) He can't cope with different complexities. (RT 2997: 20 - 21.) He is vulnerable to influence because of low self-esteem. (RT 2997: 24 - 28.) He would not be able to resist anyone in a position of authority. (RT 2998: 1 - 4.) He couldn't figure out what would be in his best interest and act independently. (RT 2998: 7 - 13.)

Fred Rosenthal was aware that petitioner suffered from abuse from an early age. (RT 2998: 16 - 24.) And that petitioner was in a serious automobile accident where he suffered serious head trauma which probably aggravated the brain damage. (RT 2998: 26 - 2999: 5.) After the accident petitioner lost his sight for a lengthy period, had difficulty with his motor coordination and walking, and would fall down; all indications of brain damage. (RT 2999: 13 - 21.)

He also suffered very significant beatings when he was a child. Such children often end up with emotional problems of some kind. (RT 3000: 7 - '18.) There was documentation referred to in Ex. 49 that petitioner was arrested and beaten on the head in New York, resulting in disorientation and an inability to walk. Fred Rosenthal testified that once the brain is injured it is more readily injured by further trauma, such as the New York episode. (RT3000: 19 - 3001: 4.) Not only did petitioner have brain damage but it was constantly aggravated and intensified. (RT 3001: 5 - 3002: 6.)

Petitioner also had a history of blank episodes of possibly epileptic origin; also a history of seizures. (RT 3002: 23 - 3003:12.) So, to summarize, petitioner has some pretty serious mental problems. (RT 3003: 13 - 18.) Once the brain is damaged, it's a lifelong problem. (RT 3004: 2 -19.)

Counsel described a hypothetical that parallels this case: a big drug dealer who had previously ordered other people killed told petitioner to kill two people or his family would be killed. Fred Rosenthal was asked to analyze petitioner's response: Petitioner would fear reprisals and go ahead and do what appeared to be the simple solution and not think of reasonable alternatives to save himself. (RT 3008: 4 - 13.)

Fred Rosenthal opined that if these facts are so, i.e., the duress and the severe mental problems of the petitioner, they would have to be brought out in court in order to provide a defense. (RT 3008: 13 - 3009: 4.) Not bringing out the mental state of petitioner would be doing him a serious disservice, in Fred Rosenthal's opinion. (RT 3009: 5 - 20.) Fred Rosenthal testified petitioner told him the same people who had murdered his brother in New York, drug dealers from a Colombia mob, had ordered him to kill these other people. (RT 3009: 21 - 26.)

Petitioner has problems dealing with issues of complexity. (RT 3011: 7 - 24.) Petitioner seems to have frontal lobe damage. (RT 3015: 2 - 9.) Counsel was asked to explain a note sent between petitioner and the defense investigator in which petitioner asks the investigator to explain what it means when an objection is sustained. Fred Rosenthal testified that this is not an example of memory loss but a lack of vocabulary because of low IQ; petitioner doesn't understand complicated words. (RT 3016: 1 -12.)

Cross.

Fred Rosenthal has not written a report of his examination of petitioner. (RT 3019: 3 - 5.) He has notes, however. (RT 3019: 8 - 20.) It was inconsistent with petitioner's mental condition for him to make up a complex organized scenario, or lie, about the duress circumstances of the crime. (RT 3021: 24 - 3022: 11.)

Redirect.

A psychologist, John Brady, testified at trial that petitioner had no brain damage. (RT 3027: 5 - 13.) In fact, Brady was not a psychologist, but a criminalist. (RT 3027: 23 - 27.) Fred Rosenthal did not consider Brady's report and testimony in forming his 'own opinion because he felt it was improper for Brady to make such an opinion. (RT 3030: 14 - 3031: 2.)

Ex. 52 marked for identification, the note from petitioner previously alluded to. (RT 3031.) Fred Rosenthal did not find his client to have problems understanding him or communicating with him. (RT 3033: 3 - 6.) Petitioner's not understanding concepts like sustained and overruled was consistent with the problems which petitioner had and which Fred Rosenthal had found. (RT 3033: 22 - 26.)

(Referee's Report, Appendix One, at pp. 117-119.)

The evidence overwhelmingly established that the prosecution withheld significant information from the defense that would have led to crucial mitigating evidence at the penalty phase.

5. Sandra Williams, A District Attorney Investigator, Instructed Gale Kesselman, A Confidential Informant, To Lie To The Court By Withholding Vital Information At An *In Camera* Hearing On September 6, 1985, And Ms. Williams Did Not Testify Truthfully At That Hearing.
[*See* Question 5, Referee's Report, at pp. 28-32.]

Question Five, first question

The Referee found that "Sandra Williams instructed [Ms. Kesselman] to withhold information at the *in camera* hearing on September 6, 1985 and not to testify to all relevant facts." (Referee's Report, at p. 28.) In making a determination that Williams was not truthful, the Referee made the following findings of fact:

> Prior to the *in camera* hearing CI-2 and Sandra Williams went over the issues in the case. Sandra Williams told CI-2 not to testify about her beliefs that the murders were contract killings orchestrated by Jose Angarita and involving the petitioner. Sandra Williams convinced CI-2 that CI-2 did not really have any factual knowledge whatsoever about the murders. If asked, Sandra Williams told CI-2 to reply by saying she had no direct knowledge that it was a contract killing in spite of the fact that Jose Angarita had told her that he was an instrument in those murders.

(Referee's Report, at p. 28; Referee's Report, Appendix One, at p. 4.)

Sandra Williams, as a law enforcement official, instructed Ms. Kesselman "to conceal the truth at the *in camera* hearing if asked certain things." (Referee's Report, at p. 29.) As a result, Ms. Kesselman did not disclose anything of what she testified to at the evidentiary hearing even though prior to the *in camera* hearing she had told Williams about Jose Angarita giving her information that these murders were murders for hire. (*Ibid.*) In response to this information, "Sandra Williams told [Ms. Kesselman] that if she were asked if she had any knowledge, definitive knowledge of the fact that it was a contract killing, or any way related to a contract killing, she should answer no." Ms. Kesselman testified that Williams "convinced her that legally, 'or by the letter of the law,' all she knew was speculation and that she had no real knowledge that it was a contract killing." (*Ibid*; Referee's Report, Appendix One, at p. 9.) Ms. Kesselman felt

uncomfortable testifying that she had no knowledge of the Guerrero killings being a contract murder but she did so because Williams' explanation convinced her that it was what she should do. (Referee's Report, Appendix One, at p.9.) The information withheld as a result of Williams' instructions not to testify truthfully, relate in part to the following incorrect answers:

> CI-2 knew what Jose Angarita had told her and what she had observed.
>
> Jose Angarita had told her in so many words that this was a contract killing. CI-2 believed that Jose Angarita had knowledge about the murders. CI-2 told Sandra Williams about these matters before the *in camera* hearing.
>
> CI-2 admitted she lied at the *in camera* hearing when she responded no to the following question: Did he give you any specific information that he knew it was a revenge killing. She testified she lied because Sandra Williams had convinced her that she had no direct knowledge and because Jose Angarita's statements were not her knowledge.
>
> CI-2 testified that she lied at the *in camera* hearing in her following response: She [Sandra Williams] told me that she received information that Angarita might be involved in some way., you know, on a contract killing. I said to her 'No way.' I said that it was a friend of his, and that as far as I knew, you know, he was just upset that they were killed.
>
> CI-2 admitted she lied during the *in camera* hearing in her response to the following question: "What did you tell Miss Williams, if anything, about what you know about the case, to wit, Just what I mentioned here.
>
> She testified she also lied in her response to the following question: Did you leave any of the things out mentioned here, to wit, Not that I recall.
>
> CI-2's testified further that her answer no to the question Did he [Jose Angarita] indicate to you that he had any information or reason to believe that there was, other than the scene itself, that it could be a contract or -- excuse me, that it could be a revenge killing? was not true. She had lied because Sandra Williams told her specifically that in reality, as far as the law goes, she, CI-2, had no knowledge of revenge or contract killings, but only knew what she had been told. Sandra Williams told her this was not definitive evidence.

(Referee's Report, at pp. 29-30.)

The Referee further found that Williams' instructions to Ms. Kesselman "not to testify as to facts suggesting that the murders were contract hits or revenge killings . . . shows an awareness on Sandra Williams' part that Ms. Kesselman's testimony would in fact help to establish, or at least connect, the theory that the murders were contract killings or revenge hits related to drug trafficking." (Referee's Report, at p. 18.) Finally, contrary to Respondent's contentions, the court found that the inconsistencies in Ms. Kesselman's testimony and statements were actually *minor and immaterial.* For example, "it was not material whether Ms. Kesselman remembered Petitioner's name ('Miguel') during the first interview on March 31, 1983." (*Ibid.*) (Emphasis added.) In contrast, however, the court found that the inconsistencies in Sandra Williams' testimony to be numerous and of major significance not only to material issues of fact but also to the Referee's determination of her overall credibility as a witness. (Referee's Report, at pp. 16-18.)

Respondent objects to the Referee's findings on this question by citing to a 2001 interview with John Kracht where Ms. Kesselman recants parts of her declaration. (Resp't Brief, at pp. 144-146.) However, the court found credible her 2006 testimony on this matter as summarized below:

> CI-2 met with John Kracht on May 15, 2001. (RT 575: 6 - 9.) CI-2 was ill at the time and felt intimidated. (RT 575: 13 - 21.) CI-2 was sick so she just didn't want to be bothered. (RT 575: 22 - 26.) CI-2 didn't recall the three recorded May interviews exactly. (RT 577: 1 - 5.) While shown a transcript of the interview, CI-2 testified that she was tired and never read it; she only read the first or second pages. (RT 577: 6 - 21.)
>
> CI-2 was under medication at the time of the interview, antibiotics, a pain killer and Valium. (RT 578: 11 -16.) She did not have any trouble reading the 1997 declaration she signed for Linda Schryver. (RT 577: 28 - 578: 27.)
>
> CI-2 felt intimidated because John Kracht told her she could get into trouble by changing what she originally said in 1984 from her 1997 statement. (RT 579: 8 - 22; 580: 11 - 581: 11.) CI-2 stated that her 1997 statement differed from her 1984 statement in that she included the statement that Sandra Williams told her to make sure she said nothing about it being a contract killing to the judge if he asked. (RT 579: 23 - 580: 10.)

CI-2 didn't know if it was at or during the interview on May 15, 16 or 18, but she had basically had it [with John Kracht] and so she lied to him to get him to go away. (RT 581: 22 - 582: 8.) She told John Kracht that everything she said to Linda Schryver was a lie. (Id.)

John Kracht asked CI-2 to read from her 1997 declaration, so CI-2 read the following statement: I remember that Sandy Williams told me not to mention the possibility that the Guerrero brothers' murders were contract hits ordered by Jose. (RT 584: 6 - 25; Ex. 5, p. 7: 21 - 23; Ex. 1, para. 12, p. 5.) CI-2 didn't recall reading that statement. (RT 585: 6 - 8.)

CI-2 also didn't recall making the following statement to John Kracht in her 2001 interview: I told - I told this woman that - that at one time that I - that I wondered if that was the case, but I never told her -I never told Sandy Williams specifically that I had knowledge for sure that it was a contract killing. That - that my suspicions, from what they were talking about, that maybe that was a possibility, but I never had I've never had any knowledge that it was a contract killing, period. (RT 585: 19 - 586: 2; Ex. 5, p.8: 4 - 10.) CI-2 also does not recall saying And I never told Sandy that. (RT 586: 3 - 4; Ex. 5, p. 8: 12.)

CI-2 denied she said to John Kracht I remember that Sandy told me not to mention the possibility of the Guerrero brothers' murders were contract hits ordered by Jose. (RT 586: 17 - 587: 2; Ex. 5, p. 9.) After reading this passage CI-2 didn't recall saying No. I did not say that. (RT 587: 24 - 27; Ex. 5, p. 9.) CI-2 said her response to Sandra Williams, Sandy never told me that. Sandy never told me that is untrue. (RT 588: 11 - 14; Ex 5, p. 9.) CI-2 explained that she lied to John Kracht at the 2001 interview: Just as I told you a few minutes ago, I felt intimidated. I was ill and I wanted - I finally just got tired of his interview. And I told him what he wanted to hear so he would leave. (RT 588: 15 - 20.)

CI-2 testified she did not know why Linda Schryver put in the statement: Q. 'Why did the woman put it in? A. I don't recall. (RT 588: 26 - 28; Ex. 5, p. 9.) CI-2 testified that she was lying when in her interview with John Kracht she stated [Ex. 5, p. 11] Sandy never told me that to say or not to say, ever. (RT 589: 21 - 28.)

CI-2 testified she was truthful in her interview with John Kracht, Sandra Williams, Ron McCurdy and Alvarez in 1984 [Tx = Ex. 3; audio CD, recording of interview = Ex. 43]. (RT 597: 26 - 598: 2.) This interview was quite some time before her *in camera* testimony with Judge Ambler. (RT 598: 6 - 9.) CI-2 had touched upon the subject of withholding the truth several times before the *in camera* hearing. (RT 598: 20 - 27.) Sandra Wil-

liams was trying to convince CI-2 to say, No I have no knowledge of these things where I really felt that I did. (RT 598: 28 - 599: 4.)

CI-2 suspected, and told Sandra Williams, that Jose Angarita was involved in the killing of the Guerrero Brothers based on what he said and certain behaviors. (RT 600: 17 - 601: 4.) CI-2 found these statements and actions to have a lot of credibility to that point. (RT 601: 5.) CI-2 believed Sandra Williams was following up on the information she supplied. (RT 601: 7 - 10.) CI-2 did not withhold any information in the 1984 interview. (RT 602: 2 - 4.)

(Referee's Report, Appendix One, at pp. 11-12.)

Respondent's assertion that the Referee's findings are not supported by the record is simply false and misleading. Judge Arnason carefully observed and listened to Ms. Williams' testimony and he thoroughly reviewed all the evidence, after which he found Ms. Williams' credibility to be a serious problem. (Referee's Report, at pp. 4-5 & 16-18.) The evidence shows that as a result of Ms. Williams' interference, Ms. Kesselman withheld crucial information at the *in camera* hearing. The suppression of information denied the defense of an opportunity to learn of Ms. Kesselman's identity, which would have allowed them to investigate and present existing evidence connecting Jose Angarita to the Guerrero killings. Such an unfair consequence "cannot be allowed to occur as a result of a dereliction of their duty by law enforcement and prosecutorial authorities sworn to protect [the justice] system. And it should not be cloaked in silence if scrutiny by the justice system is to stand as a reminder of that duty." (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1236.)

Question Five, second question

Question five additionally inquires: "What information, if any, did the confidential informant withhold at that ex parte hearing?" In response, the Referee refers to the information discussed in Question Two, second question. (Ref. Report, at p. 30.) The Respondent's objections to the Referee's finding on this question fall outside the scope of this Court's Reference Order and are irrelevant to the Referee's determination on this point.

Question Five, third question

The third question asks: Did the district attorney investigator testify truthfully at

the September 6, 1985, ex parte hearing? The Referee made the following finding in response:

> It appears to be undisputed, and the district attorney at the hearing offered to stipulate, that Sandra Williams did not say anything about the San Francisco trip and meeting at the September 6, 1985 *in camera* hearing. In addition, the court finds that Sandra Williams did not testify truthfully at that September 6, 1985 *in camera* hearing.
>
> For example, Sandra Williams was not truthful when asked What information did you receive from Gail Kesselman? Sandra Williams answered At that time, she told me that it was negative as far as her giving Ronnie Nance any information that Angarita had been involved in the killing or had ordered the killing, no information as far as that.
>
> Sandra Williams did not testify truthfully when she testified at the *in camera* hearing that CI-2 had no information about the murder case. This claim is not supported by the record as a whole, including the taped interview of CI-2, Exhibit 3. CI-2 testified that she told Sandra Williams that Jose Angarita told her, CI-2, that the man they met in San Francisco had killed the Guerrero Brothers.
>
> Her answer to the question did she indicate in any way that Jose Angarita had any specific knowledge that it was a revenge killing? namely, no was not truthful. Sandra Williams was not truthful in her answer to the next question: Did she indicate in any way that Jose Angarita said that he had heard from any source that it was a revenge killing? when she answered no.
>
> The pattern continued with the next two questions: Did she say in any way that Jose Angarita had any knowledge that it was a contract killing? and Did she say in any way that Jose Angarita had heard from anyone or from any source that it was either a revenge killing or a contract killing? Sandra Williams answered those questions by saying no. The court finds Sandra Williams was not truthful in her answer to both of these questions. The court finds that Jose Angarita had informed CI-2 that the killings were contract and/or revenge killings and CI-2 had told this to Sandra Williams.
>
> When asked whether CI-2 was giving her opinion about these matters or was saying what Jose Angarita said, Sandra Williams answered: She was giving a lot of opinions .... Williams never answered the question about what Jose Angarita said to CI-2. Yet, at one point Steve Price and Ronnie Nance also heard what CI-2 had said and placed sufficient credence in what she said to go to one of Jose Angarita's apartments to rob the apartment's residents of money and/or drugs. They certainly did not understand what CI-2 said to be speculation or mere opinion. Steve Price worked for or with Jose Angarita in the drug sales business; he knew what Jose Angarita was about.

Sandra Williams also avoided answering some questions directly. For example, Sandra Williams, when asked if she told Judge Ambler about CI-2 telling her that she, CI-2, and Jose Angarita went to Union Square a day or so before the murder, answered by asking You mean, on that page or at any time in here , and testified Well, he was supplied with a copy of the taped interview which discussed that on the -- on the tape. Sandra Williams did not answer the question or gave such an evasive answer as not to answer the question when she had actual knowledge from CI-2 of such a trip -- or at least CI-2's statement that CI-2 had made such a trip.

When pressured about the trip to Union Square and whether she disclosed that to Judge Ambler, Sandra Williams testified I didn't regurgitate everything that was in that interview, because he was given a tape recording of the interview. Sandra Williams did not answer the question.

As noted above, the DA offered to stipulate that Sandra Williams did not say anything about the San Francisco trip at the *in camera* hearing. When asked again if she mentioned the San Francisco trip and the fact that CI-2 said the man they met in San Francisco looked like a picture CI-2 had seen of the defendant, Sandra Williams testified: No, because I'm -- I don't believe she said that. That's the way you're saying it. That's not what she said. The court finds that Sandra Williams had shown a picture of petitioner to CI-2.

In response to Question Five as a whole, the court concludes and finds that Sandra Williams was not truthful at the in camera hearing. The court further concludes and finds that Sandra Williams persuaded CI-2 into giving misleading and incomplete testimony at the in camera hearing.

(Referee's Report, at pp. 30-32, emphasis added.)

Once again Respondent objects to the Referee's findings on credibility grounds alleging that Sandra Williams is credible while Ms. Kesselman is not. As fully supported by the record and discussed throughout the Referee's Report, Williams was simply not truthful. This is the Referee's finding of fact based on both Williams's demeanor and the repeatedly inconsistent content of her testimony as well as her evasive answers.

Respondent also objects to the Referee's findings by arguing that the reason Williams did not mention the San Francisco meeting was because she was not asked about it. This is a ridiculous argument. First, the defense was excluded from the *in camera* hearing and so the examination was conducted solely by Deputy District Attorney Thomas Farris who also represented the state in the hearing ordered by this Court. Second, Mr. Farris did ask Ms. Williams, "What information did you receive from Gale Kesselman?" To

which Ms. Williams responded: "At that time she told me that it was negative as far as her giving Ronny Nance any information suggesting Angarita had been involved in the killing or had ordered the killing, no information as far as that." (Referee's Report, Appendix One, at p. 146.) Finally, Ms. Williams' answer to this question was misleading and untruthful. Ms. Kesselman did have information linking Jose Angarita to the killing and she shared this information with Ms. Williams. Moreover, Ms. Kesselman was present and she did hear Ms. Williams give the foregoing false testimony.

The Referee's findings on this question are supported by the record.

6. Disclosure of Ms. Kesselman's Identity Would Have Led The Defense to Critical And Previously Unavailable Evidence Supporting Petitioner's Claim That He Acted Under Death Threats from The Colombian Mafia.
[*See* Question 6, Referee's Report, at pp. 32-33.]

In response to this question, the Referee found that the "disclosure of the confidential informant's identity to the defense would have led to evidence not otherwise known or available to the defense at the time of trial. This evidence would have supported Petitioner's claim to have acted under death threats from the Colombian Mafia." (Referee's Report, at p. 32.) Additionally, the confidential informant's identity was of paramount importance since the "majority of the information connecting Jose Angarita to the murders came from CI-2, who repeated to the prosecution what Jose Angarita told her." (Referee's Report, at p. 6.) Disclosure of Ms. Kesselman's identity would have led to "all the evidence surrounding the person of Jose Angarita and his drug business, including his connection to Pablo Escobar[25] and Medellin cartel." (Referee's Report, at p. 32.) Such evidence would include statements from individuals like Luis Laureano who testified to Angarita's reputation for violence and for carrying out death

[25] Pablo Escobar (1949-1993) was a Colombian drug lord and leader of the Medellin Cartel. In 1989 Forbes magazine listed him as the seventh richest person in the world. (*See* Forbes, Sept. 17, 2002.) He was regarded as probably the most powerful drug lord in history. Escobar's brutality was legendary: he was considered responsible for the killing of three presidential candidates, an attorney general, a justice minister, 30 judges, 457 policemen, and others. (Ct. Exh. 42, M.Bowden, *Killing Pablo* book excerpt; see also Bowden, *Killing Pablo: The Hunt for the World's Greatest Outlaw*, Atlantic Monthly Press 2001.) Eventually he controlled over 80% of the cocaine shipped to the United States. There are a number of films and articles about him.

threats, which would be important to establishing Petitioner's state of mind and that he feared for his life and the lives of his family. (Referee's Report, Appendix One, at pp. 85 & 133.) Judge Arnason found that:

> [I]f CI-2 had been disclosed the defense would have learned the identity of Luis Laureano, located his person and learned of his information about Angarita and the double homicides. The defense would have learned from Luis Laureano that Jose Angarita was angry at the Guerrero Brothers for losing 2 kilos of cocaine and that Jose Angarita wanted to kill the Guerrero Brothers. The defense would have learned from Luis Laureano (who learned this from petitioner) that Jose Angarita had threatened to kill petitioner's family if petitioner did not kill the Guerrero Brothers. Further, the defense would have developed additional evidence concerning petitioner's mental state and health.

(Referee's Report, at p. 33.)

Mr. Laureano further testified that he was introduced to Petitioner by Jose Angarita and told that Petitioner had just arrived in California and would be working for him. Mr. Laureano thought "petitioner seemed extremely young and naïve . . . [and] did not have the slightest idea of what he was getting into." (Referee's Report, Appendix One, at p. 130.)

In sum, the Referee found that if Ms. Kesselman's identity had been disclosed to the defense, it would have led to and included "all the evidence known to the prosecution on these matters and which was the subject of Questions, One, Two, and Three . . . [t]he court, therefore, incorporates its finding of fact on Questions One, Two, and Three supra, herein as if fully set forth." (Referee's Report, at p. 32.) The Referee also incorporated his findings from Question Four. (Referee's Report, Appendix One, at p. 155.) The court also found that such disclosure presupposes disclosure of the interviews with Ms. Kesselman, Ronnie Nance, Jose Angarita, and Mr. DiLeonardo contained in Exhibits 2, 3, 23A, 23B, 29, and 50. (See *Id.,* at pp. 143-157.)

During the evidentiary hearing, Petitioner's previous counsel testified as to the impact that Ms. Kesselman's identity would have had in discovering and presenting evidence in support of Petitioner's defense. John Aaron, trial counsel for Petitioner in 1987, provided that:

The only defense Aaron had at the guilt stage was the so-called duress defense based on petitioner's statement to police when he was arrested. (RT 889: 10 - 28.) He had no corroborating evidence. (RT 890: 1 - 4.) The prosecutor belittled the defense. (RT 890: 18 - 22.) The prosecutor claimed petitioner fabricated the defense. (RT 890: 23-891:9.)

Aaron did not know that a confidential informant had testified that the killings were carried out at the direction of a big time drug dealer. (RT 892: 9 -16.) This fact was not disclosed to Aaron prior to trial. (Id.) Aaron knew nothing about some South American dispute for which the killings were retaliation. (RT 892: 17 - 22.) If Aaron knew there was evidence corroborating the duress defense, he would have investigated it and presented it at both the guilt and penalty phases of the trial. (RT 893: 4 - 894: 5.)

Aaron knew that there was a confidential informant who indicated this was a mob or drug hit, but the defense motion to obtain the informant's identity was denied. (RT 895: 14 - 896: 5.) Aaron did not know Jose Angarita was a major drug dealer, though he had seen his name in some police reports. (RT 898: 2 - 10.) Aaron was aware of a report prepared by Alayne Bolster in which Alayne Bolster reported that Sandra Williams said this whole hit business was a red herring. (RT 898: 11 - 23.)

Aaron also did not have any information that petitioner met Jose Angarita shortly before the killings. (RT 899: 2 -5.) Had he known this information Aaron would have investigated it. (RT 899: 9 - 14.)

Aaron reviewed Exhibit 17, a 3-page standard Santa Clara public defender investigation report authored by Alayne Bolster in this case dated February 21, 1986. (RT 902: 7 - 17.) In the report Alayne Bolster wrote "Sandy [Sandra Williams] states she interviewed a confidential informant who knew Jose Angarita. She was able to uncover no connection between Orestes; his brother, the jewelry shop, and Angarita. Orestes simply rented a room from Angarita and Burke . . . . ." (RT 903: 2 7.) Alayne Bolster also wrote "Sandy [Sandra Williams] states the only connection she knows of between Miguel Padilla and Angarita is that Miguel mentioned that he, got a ride from the mountains from Jose. This was when he was entering the county illegally. She doesn't know if it was the same Jose." (RT 903: 11 - 16.)

Alayne Bolster recorded the following statements: "Sandy [Sandra Williams] states she didn't find out anything about Angarita running a drug business. She suspected it, because someone said that they thought he did. Someone said Jose's uncle was the Chief of Police in Bogota, Columbia. Sandy called the DEA and checked this out, and they told her that there was no connection." (RT 903: 22 - 27.) "Sandy [Sandra Williams] stated her opinion that Defendant had not been ordered by anyone to kill the Guerrero brothers, but was simply trying to obtain enough money to return to New

York." (RT 904: 2 - 5.) "Sandy [Sandra Williams] was dismayed when I told her the things I had learned from Ron McCurdy. She stated that much of the information he gave was incorrect." (RT 904: 8 - 10.)

[These statements were introduced not for the truth of the matter asserted but to explain why Aaron didn't do certain things. (RT 905: 11 - 16.)]

Aaron would have wanted the facts about Jose Angarita and his possible connection to the killings. (RT 904: 18 - 905: 4.) If Aaron had found out that Sandra Williams was telling his investigator lies, he would have been extremely upset. (RT 905: 21 - 26.) It is unethical, in Aaron's opinion, to mislead the defense. (RT 906: 7- 10.)

Aaron was never given the name of CI-2 before or during trial. (RT 907: 9 - 25.) Aaron did not know there was a connection between Jose Angarita, CI-2 and a Colombian drug cartel. (RT 908: 13 - 16.) He was never advised at any time pretrial by the prosecution and its agents, that the DEA was investigating Jose Angarita or his drug network. (RT 908: 20 - 28.) At no time did Aaron learn that Sandra Williams was interviewing witnesses and referred to the killing as a hit or a contract killing. (RT 909: 1 -7.)

Aaron did not know that San Jose law enforcement had told the probation department that a person for whom ["John"] they were preparing a report was involved in a drug related homicide. (RT 909: 8 - 13.) Aaron recalls that the tenor of the DA's opening statement was that petitioner was motivated by greed and viciousness. (RT 911: 11 - 17.) Aaron recalled that the prosecutor argued in guilt phase closing argument that petitioner's attempt to lay the blame for the murders on the so-called Peruvian mafia was a total fabrication. (RT 912: 10 -17.)

If Aaron had evidence that the motivation for the murders was not greed, he would have presented it. (RT 913: 22 - 914: 3.) Aaron would have presented evidence to refute the DA's claim that the defense of duress from a mythical Peruvian coercion was fabricated if he had such evidence. (RT 914: 18 - 915: 1.) Aaron testified that the defense was hindered by not having all the evidence. (RT 915: 2 - 22.)

Aaron's defense was limited to petitioner's own words, which the DA claimed was not supported by any evidence. (RT 915: 23 - 916: 9.) Had Aaron known of any additional evidence refuting the DA's argument that no evidence supported petitioner's position, he would have objected to the DA's argument. (RT 916: 13 - 917: 24.) Aaron was never given any report or information regarding drug ledgers from Jose Angarita's network. (RT 918: 4 - 11.) He was not given any report concerning a meeting between Jose Angarita and petitioner the night before the murders. (RT 918: 12 - 21.)

> Aaron was not given any information that CI-2 had a close relationship with Jose Angarita. (RT 918: 22 - 26.) The fact that federal authorities had successfully used CI- 2 in their drug prosecution would have been important to Aaron since it corroborated her account. (RT 919: 11 - 22.) The fact that federal drug enforcement officials gave CI-2 $5,000 after their prosecution would bolster her account in this case, Aaron opined. (RT 919: 23 - 920: 19.)
>
> If Aaron had evidence that corroborated the duress defense he would have presented it during the guilt phase. (RT 922: 1 - 923: 18.) If Aaron had information corroborating the duress defense, he would have probed deeper into petitioner's mental state to understand why he acted as he did. (RT 924: 3 - 925: 9.)

(Referee's Report, Appendix One, at pp. 20-22.)

When recalled, Mr. Aaron further testified that he had "made a good faith reliance on the representations of Sandra Williams" that the confidential informant was a dead end. If Mr. Aaron had known the confidential informant's identity he would have pursued her and whatever evidence she had. Mr. Aaron also testified that if he had been given her identity, he and his staff would have kept it confidential. (Referee's Report, Appendix One, at p. 99.)

Cliff Gardner, who represented Petitioner from 1988 to 1994, testified that during his habeas investigation he could not find any information that would have led to the discovery of Ms. Kesselman's identity. "After Gardner was appointed he made a motion both in the trial court and in the California Supreme Court to unseal the *in camera* transcript, but both motions were denied. (RT 2748: 24 - 2749: 5.)" (Referee's Report, Appendix One, at p. 103.) As summarized by the court, Mr. Gardner further testified as follows:

> Cliff Gardner recalled the duress defense in the case. (RT 2818: 21 - 25.) Cliff Gardner never found a witness to corroborate the duress defense. (RT 2818: 26 - 2819: 2.) Cliff Gardner was aware that CI-2 was eventually discovered. (RT 2819: 3- 6.) Cliff Gardner did not know that Luis Laureano was later discovered in Venezuela and he corroborated CI-2's information that this was a killing that was orchestrated by someone very big in the drug business. (RT 2819: 10- 17.) If Cliff Gardner had this information, it would have been part of his habeas. (RT 2819: 18 - 25.)
>
> Cliff Gardner did not receive any discovery in the case; rather he took possession of the original file from Aaron. (RT 2819: 26 - 2820: 10.) It

was represented to Cliff Gardner that the entire file was turned over. (RT 2820: 11 -14.) If there were any tapes, the PO gave them to him. (RT 2820: 15 - 25.)

When Cliff Gardner withdrew, CAP attorney Karen Schryver took over the case. (RT 2820: 26 - 2821: 2.) Cliff Gardner turned over everything to Karen Schryver. (RT 2821:3-11.)

Cross.

Cliff Gardner reviewed all the police reports as part of his work on the case. (RT 2821: 21 - 26.) *Cliff Gardner did not recall any references to recorded interviews in the police reports.* (RT 2821: 27 - 2822: 3.) *If a tape was important Cliff Gardner would obtain it.* (RT 2822: 4 -14.) If Cliff Gardner received a log of tapes received from the police or prosecution, he would have forwarded it to Karen Schryver. (RT 2822: 25 - 2823: 2.) *Cliff Gardner had no recollection of any tape recordings at all.* (RT 2923: 3- 7.)

(Referee's Report, Appendix One, at p. 109, emphasis added.)

Karen Schryver also testified that when she inherited this case, there was no evidence regarding the identity of Ms. Kesselman or the information she had provided to prosecutors, which she believed was critical to Petitioner's defense:

Karen Schryver recalled there was a tape of petitioner's initial interview with the police upon arrest. (RT 2740: 15 - 2741: 2.) She did not recall any other tapes. (Id.) There were no tapes of CI-2. (RT 2741: 4 - 6.) There was no transcript of any interview with CI-2. (RT 2741: 7 - 9.) There was not a tape of Jose Angarita. (RT 2741: 13 -15.) There was no tape of Ronnie Nance. (RT 2741: 16 - 18.) There was no transcript of law enforcement interviews with Ronnie Nance. (2741: 19 - 21.)

. . . .

Karen Schryver had not seen Ex. 3, a transcript of the CI-2 interview, until the State filed it in 2002. (RT 2746: 8 - 15.) Karen Schryver never heard the tape of the interview, Ex. 43. (RT 2746: 16 -19.) Karen Schryver did not have Ex. 25, John Kracht's notes, in her discovery materials. (RT 2746: 21 - 24.) If she had the materials in Ex. 25, it would have made her job in finding CI-2 easier. (RT 2746: 25 - 2747: 10.) Karen Schryver found CI-2 in 1997 in Mississippi. (RT 2747: 16 - 27.) After Gardner was appointed he made a motion both in the trial court and in the California Supreme Court to unseal the in camera transcript. Both were denied. (RT 2748: 24 - 2749: 5.)

It was 8 to 9 years after the case went on appeal that Karen Schryver found CI-2. (RT 2749: 15 - 20.) If, as an officer of the court, the trial court had given her the identify of the informant with the restriction that she not

disclose it, Karen Schryver would have been able to abide by that condition. (RT 2750: 22 - 27.)

. . . .

The defense had no idea that Luis Laureano knew so much about the Guerrero Brothers murders, Jose Angarita's connection to it, his ruthlessness and his drug organization. (RT 2756: 8 - 22.) Luis Laureano's information corroborated what the CI, CI-2, had said. (RT 2756: 23 - 27.) It would have been a good thing to have had this information for petitioner's trial rather than obtain it a decade later after presuming the DA had met his or her Brady obligation. (RT 2756: 28 - 2757: 13.) Unlike Alayne Bolster, who relied on and took Sandra Williams's representations that the duress defense was a dead end, Karen Schryver did not take what Sandra Williams said in her report at face value. (RT 2757: 25 - 2758: 26.) While Alayne Bolster knew Sandra Williams basically had thrown in the sponge, Karen Schryver did not because that was not the way the adversarial process worked. (RT 2758: 27 - 2759: 9.)

This information would have been critical to petitioner's defense because it directly supported the duress defense. (RT 2759: 16 - 27.) The information would have been applicable to both the guilt and penalty phases of the case. (RT 2759: 28 - 2760: 4.)

. . . .

Karen Schryver did not have any information that at the time of the killings CI-2 was living with Jose Angarita. (RT 2763: 12 - 19.) Karen Schryver did not have the fact that CI-2 had two conversation with Jose Angarita about the killings. (RT 2763: 20 - 25.) Karen Schryver was familiar with the fact that the case was tried as a robbery/murder. (RT 2763: 27 - 2764: 3.) She did not have the statement in Ex. 25, attributable to Jose Angarita, that it was not a robbery/murder. (RT 2764: 4 - 11.)

This information would have been absolutely critical to the defense because the prosecution argued aggressively, both in opening and closing, that petitioner was a greedy, cruel murderer, who pathetically lied about the case and tried to shift the blame to some fictional Mafia person all for a few thousand dollars. (RT 2764: 12 - 23.) Now years later Karen Schryver uncovered evidence that supported and corroborated petitioner's duress defense and which had been suppressed. (RT 2764: 24 - 2765: 3.) Karen Schryver did not know (based on Ex. 25) that the Guerrero Brothers killings were for an old drug debt, that it was for revenge and financial terms. (RT 2765: 4 - 13.)

(Referee's Report, Appendix One, pp. 102-105.)

The Respondent objects to the court's findings on the grounds that they are flawed and unsupported because they rely on the Referee's findings from Questions One through Four, which they also assert are erroneous and flawed. Respondent also objects to the findings based on their recycled claim that the taped interviews of Nance, DiLeonardo, and Angarita were already available to the defense, as was the Bolster memo on McCurdy. This is not true, as evidenced by Ms. Schryver's testimony above, the court's findings which are supported by evidence and the fact that the defense did not have any taped interviews other than the Petitioner's. (See e.g. Referee's Report, Appendix One, at p. 108.) Respondent's remaining objections are in large part premised on these erroneous assumptions, all of which are unsupported and contrary to the Referee's findings.

Moreover, Respondent argues that Ms. Kesselman's identity would not have benefitted the defense because they already had this information from the Petitioner himself. This objection misses the point entirely. As discussed above by Petitioner's previous counsel, his entire defense was supported by nothing more than his own uncorroborated words and the prosecution made matters worse by repeatedly telling the jury he was a liar when they knew there was evidence corroborating his account but which they withheld.

In sum, had the prosecution disclosed the identity of Ms. Kesselman it would have allowed the defense to present witnesses and evidence that were known to the prosecution and that would have corroborated Petitioner's claims. Instead, the prosecution suppressed evidence and misled the defense as to the existence of exculpatory evidence that would have been instrumental in both the guilt and penalty phases of Petitioner's trial.

7. At The Time Of Trial Extensive Information Was Known To The Prosecution That Would Have Supported A Theory That Petitioner Was Hired To Commit The Killings Or That Otherwise Could Have Been Used To Impeach A Penalty Phase Case In Mitigation Based On Petitioner's Having Acted Under Duress.

[*See* Question 7, Referee's Report, at pp. 33-39.]

The Referee describes a wealth of concealed information, possessed by the prosecution over four yeas prior to the 1987 trial, establishing that Petitioner committed

the killings at the direction of Jose Angarita. (Referee's Report, at pp. 33-39.) Had there been disclosure, the evidence could have been used at the penalty phase to establish that Petitioner acted under duress. (*Ibid.*)

The Referee heard and observed all the witnesses during the lengthy evidentiary hearing, read the exhibits, and listened to all tapes. Yet, Respondent argues that the meticulous and lengthy findings are wrong. (Resp't Brief, at pp. 158-171.) There is no reasonable basis for such an argument. In fact the prosecution hid information from the defense which would have proven that Angarita was the puppeteer who orchestrated the revenge killings of the Guerrero brothers over a drug transaction, and used the mentally ill Petitioner to carry out his plan under the threat of death. This would have been powerful mitigating evidence at the penalty phase. Further, it would have thwarted the prosecutor's knowingly false argument[26] to the jury in which she ridiculed Petitioner by saying that he lied in telling the police that he and his family would have been murdered if he did not carry out the shooting. (RTT 3518-3519.)

In responding to the Court's Question 7, the Referee stated:

> The information known to the prosecution which would have supported a theory that petitioner was hired to commit the murders included petitioner's statement, what Ronnie Nance told law enforcement and the DA investigator ("them"), what CI-2 told them, what DiLeonardo told them, what Sandra Williams knew, what John Kracht knew, what Ron McCurdy knew and what Joyce Allegro and the prosecution knew.
>
> The court agrees with the District Attorney that no additional information has been unearthed at this hearing which could have been used to impeach a penalty phase case in mitigation based on petitioner's claim he acted under duress.
>
> The information known to the prosecution team that would support a theory that petitioner was hired to commit murder largely revolves around

[26] In the guilt-phase closing argument, the prosecutor, Joyce Allegro ridiculed the defense about any mafia involvement by falsely stating "his story was a total fabrication." (RTT 3489.) "[T]he evidence is very clear and it's suscepible to only one rational conclusion, that the defendant didn't receive any instructions from anyone about robbing and killing the Guerreros. Only his greed sent him there." (RTT 3489-3490.) She stated "there's no other rational explanation" except robbery for the homicides (RTT 3499) and "there's absolutely no evidence" of any mafia being involved and there was thus no duress. (RTT 3501.)

what was known about Jose Angarita and his drug business and its connection to the double homicides. . . .

Information from CI-2.

The prosecution had the information described in Questions 1 and 2 which CI-2 had supplied to Sandra Williams. The court will not repeat all of that information here. In brief summary, the prosecution had information that CI-2 had said that the person she and Jose Angarita met in San Francisco was petitioner. It also had information that Jose Angarita told CI-2 that the person from San Francisco whom she had met killed the Guerrero Brothers. The prosecution had information that Jose Angarita claimed to have been an instrument in the killings; that the motive was not robbery but revenge over a South American drug debt.

Petitioner's Statement.

Petitioner's statement to the police was that upon arrival in this country, Karlos Tigiboy sought him out and said he knew petitioner was involved with the Colombian mafia and that he wanted him to do a job. Petitioner also said Tigiboy ordered him to do this hit on the Guerrero Brothers and supplied him with a gun. As part of the solicitation to commit the murders, petitioner was threatened that if he did not do it, his mother, step-father and he would be killed before New Year.

The DA's investigators had developed a link between Karlos Tigiboy and Jose Angarita, whom they thought at the time was a drug dealer.

Nance's Statements.

The prosecution also had the statements of Nance, including the statement memorialized in Exhibit 19 in which Alayne Bolster wrote: "Ron [McCurdy] states in the Padilla case the defendant had indicated that he was forced to make a hit for the Colombian mafia, because they threatened to kill his parents."

The prosecution also had information from Nance that Jose Angarita had ordered petitioner to murder the Guerrero Brothers. (Exhibit 29.)

Since everything that Nance knew about the threat from a mafia to kill petitioner's parents came from CI-2, CI-2 had that information. CI-2 gave this information to the prosecution.

Exhibit 19 was defense attorney work product and was not disclosed to the prosecution. However, the exhibit is sufficient circumstantial evidence for the court to make a factual finding that CI-2 at some point in time gave this information to the prosecution.

Additional Information About Jose Angarita and the Murders. Including Information from Sandra Williams.

Sandra Williams learned the name of Jose Angarita by March 6, 1984. She interviewed him on March 19, 1984. Jose Angarita was concerned that the victim's family was accusing him of having something to do with the homicides. Jose Angarita told Sandra Williams that he had a sister, Maria Angarita, who lived in the area and a brother-in-law, David Soto. On March 22, 1984 Sandra Williams learned that Maria Angarita and David Soto were arrested at the San Francisco airport with 2 kilos of cocaine.

The prosecution had information that Jose Angarita was a big drug dealer with connections to the Medellin cartel. The prosecution had information that the Guerrero Brothers worked for Jose Angarita. The prosecution also had information that the Guerrero Brothers had lost a large quantity of cocaine, and for that reason Jose Angarita ordered their murders.

Sandra Williams interviewed CI-2 on March 31,1984, and then again several times in April. One April, 1984 interview was taped. At the time of the taped interview, Sandra Williams believed Jose Angarita was a drug dealer.

By April 16, 1984 Sandra Williams indicated to law enforcement (and therefore the prosecution) that there was a possible connection between the homicides and Jose Angarita. Throughout March and April of 1984, Sandra Williams investigated whether there was another person other than petitioner behind homicides.

Sandra Williams had further meetings with the prosecution on April 30, 1984, May 1, 1984 and May 3, 1984.

By the time of petitioner's trial Sandra Williams knew there was a federal prosecution involving Luis Laureano and Jose Angarita.

The prosecution had information from DiLeonardo that the killings were over a failed drug deal.

In short, the prosecution knew 1.) there was a handwritten note by Sandra Williams stating that the killings were a hired hit; 2.) petitioner's statement that he was forced to kill the Guerrero Brothers; 3.) Nance's statement that it was a hit lest petitioner's family be murdered; and 4.) CI-2's statement that it was a contract hit, all supporting the theory that petitioner was hired to commit the murders.

Joyce Allegro's and the Prosecution Team's Knowledge and Information.

Joyce Allegro was the lead prosecutor in petitioner's trial. It was her practice to listen to any tape in a case before trial. The court finds she listened to the tape recording of CI-2 (Exhibit 43), the recording of the Dileonardo interview (Exhibit 50 being a transcript thereof), and the Nance

interview (Exhibit 29 being a transcript thereof). She was familiar with Sandra Williams's note stating that the homicide was a hired hit.

Joyce Allegro recorded her own responses to the Supreme Court's Questions in this case. Based on her handwritten responses (Exhibit 32, tab 1) to the Supreme Court's Question One, Joyce Allegro was familiar with the Angarita interview, the Nance interview and the CI-2 interview. Thus, she knew the gravamen of CI-2's claims, including the San Francisco meeting, the identification of the man in San Francisco as the killer, his identification with petitioner, and the claim that the murders were a contract hit possibly arising out of a South American drug debt.

A number of Joyce Allegro's other responses to the Supreme Court's Questions are also significant. In her handwritten answer to Question Two Joyce Allegro indicated she believed at the time of this hearing that the San Francisco meeting was disclosed to the defense. Thus, Sandra Williams must have disclosed that information to Joyce Allegro sometime between 1984 and the beginning of petitioner's trial when discovery was complete.

Joyce Allegro believed, based on her written response to Question Three, that all the information from Ronnie Nance and CI-2 was speculative. Again, this indicates and the court finds that Joyce Allegro was in possession of the information from these sources which otherwise indicated that petitioner was hired to commit the murders.

Joyce Allegro's written responses to Question Three and Question Four that the evidence "would not have been allowed," or was "speculative," also supports the court's finding that Joyce Allegro knew of this evidence.

The court further finds that Joyce Allegro knew that CI-2 was shown petitioner's photograph by Sandra Williams and CI-2 indicated that the man she and Jose Angarita met in San Francisco was the defendant/petitioner.

The court further finds that while Joyce Allegro believed, based on her' handwritten answer to Question Five, that Sandra Williams did not instruct CI-2 to withhold information at the in camera hearing on September 6, 1985, Joyce Allegro knew about the San Francisco trip and meeting. She also knew that there was no reference to the trip and meeting during CI-2's testimony at the in camera hearing.

The court finds that Joyce Allegro knew of the statements in the prosecution file which included, but are not limited to the following:

1.) From Exhibit 34, under April 16, 1984, *"U/Os* were directed by Lt. Don Trujillo to attend a meeting at the Santa Clara County District Attorney's office called by Inspectors Williams and McCurdy. It was suggested that an investigation be undertaken into the possibility that Mi-

guel Padilla murdered Orestes and Jose Luis Guerrero, acting as the agent of Jose Angarita."

2.) From Exhibit 34 under April 18, 1984: "Inspectors Williams and McCurdy provided a confidential informant. . . . The informant, relying on statements Jose Angarita made after the murders, suggested that revenge and not murder was the motive and that the incident that was revenged happened some years ago."

3.) From Exhibit 34, under April 18, 1984: "Attorney ... Dll.eonardo was contacted because of statements attributed to him describing the murders . . . as a contract killing . . . . DiLeonardo . . . was so informed by '" Sgt. Hensley, a detective handling the case against Ronnie Nance, charged with the attempted robbery of a drug trafficker. DeLeonardo said that business records of the drug trafficking were seized . . . ."

4.) From Exhibit 34, under April 19, 1984: "He [DiLeonardo] said that the characterization of the homicides as drug related executions had been made by Ronnie Nance."

5.) From Exhibit 34, under April 19, 1984: "With Inspector Williams interviewed Ronnie Nance. . . .He attributed the description of the murders as 'executions' to the confidential informant interviewed the day before."

The court finds that the prosecution was aware of the information contained in Exhibit 34 and incorporates that exhibit as if fully set forth herein. This exhibit was disclosed to the defense.

The court finds that the prosecution team had the following information prior to and during trial from Kracht's notes in Exhibit 25, including, but not limited to:

1.) "They [Sandra Williams and Ron McCurdy] indicated that they had tentatively associated Miguel Padilla with Angarita on the evening before the double murder and had been told by several persons that the homicides were a hit or carried out for financial gain at the direction of another. The other that they suspected was Jose Angarita."

2.) The statement by Angarita: "Some friends of mine were just killed. They say it was a robbery, but it wasn't." The motive lay in "something that happened some years ago." Angarita phrased the revenging in financial terms—a debt that was repaid.

3.) The statement under April 16, 1984: "US [undersigned] were directed by Lt. Trujillo to attend a meeting at the DA's office. Inspectors Williams and McCurdy gave a presentation associating Jose Angarita, a former employer of Orestes Guerrero, with cocaine trafficking."

4.) The statement under April 18, 1984 that the attorney DiLeonardo said that he did not say that the double murder had been a "hit" but the in-

formation came from Santa Clara Police Department Sergeant Hensley, who in turn received the information from Ronnie Nance.

5.) The statement memorialized under April 19, 1984: "With Inspector Williams the U/S interviewed Ronnie Nance at the SCC jail. He said that he was solicited to rob a number of people identified to him as conspirators in the drug organization of Jose Angarita. The person who identified these prospective victims to Nance was Gale Kesselman [CI-2]. She told him also that the killings were executions related to drug trafficking."

6.) The statement memorialized on Bates page 001733 of Exhibit 25 that attorney DiLeonardo talked to Santa Clara Police Department Sergeant Hensley regarding his client Luis Laureano's property (ledgers). During the conversation DiLeonardo stated the jewelry store robbery/murders weren't a robbery in nature but a hired hit.

The court finds that Joyce Allegro knew that certain drug trafficking business ledgers were seized at the Nance attempted robbery site. The court finds that the prosecution had information prior to and during trial than both Jose Angarita and Luis Laureano were keen on obtaining the return of these ledgers.

The court finds that Joyce Allegro erred in her claim in these proceedings that the statements of Nance and Angarita and information about the San Francisco meeting information were turned over to the defense in discovery. This information was not turned over in discovery.

The court finds that Joyce Allegro's investigators had attempted to ascertain whether there was a Peruvian mafia. The investigators would not have pursued this inquiry if the prosecutor had not instructed them to do so. Thus, the prosecutor knew of the claim that the homicides potentially were drug related, and arose from either the Colombian or Peruvian mafia. To the extent there is ambiguity in the record about what South American drug cartel was involved, the court finds that it was the Colombian drug cartel otherwise known as the Medellin drug cartel.

The court finds that Joyce Allegro and the prosecution team considered Jose Angarita a suspect at some point in 1984 and this fact was never disclosed to the defense.

The court finds that the prosecution knew that Sandra Williams had attempted in 1984 to identify the room at the hotel in San Francisco where CI-2 said petitioner met Jose Angarita.

(Referee's Report, at pp. 33-39, emphasis added.)

Respondent's disagreements with the extraordinarily detailed findings of the Referee are contrary to the facts and should be rejected.

CONCLUSION

The abundance of information possessed by the prosecution well in advance of trial would have been gold in the hands of the defense. That it was suppressed was inexcusable and violated the very essence of the right to a fair trial. Compounding the error was the concealment of exculpatory information that would have made a material difference in the investigation, the resulting defense presented, and mitigating evidence presented at the penalty phase. The confidential informant, Gale Kesselman, confirmed that had she been contacted by the trial attorney, she would have revealed what she divulged during the hearing before the Referee. "*Had my identity been disclosed to the lawyers for Miguel Bacigalupo, I would have told them all that I have described above.*" (Ref. Exh. 1, *supra,* emphasis added).)

Petitioner was denied the right to a fair trial, due process of law, effective assistance of counsel, to present a defense, to subpoena witnesses for the defense, and to a reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments. Consequently, he is entitled to a new trial. The findings of the Referee should be accepted by this Court, and the Petition for Writ of Habeas Corpus granted.

Dated: December 17, 2010

Respectfully submitted,

ROBERT R. BRYAN
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached **Petitioner's Response To Exceptions To Findings of Referee and Brief On the Merits** uses a 13-point Times New Roman font and contains 30,324 words.

Dated: December 17, 2010

Respectfully submitted,

ROBERT R. BRYAN
Attorney for Petitioner

DECLARATION OF SERVICE BY MAIL

I declare that I am over 18 years of age, not a party to the within cause; my business address is 2107 Van Ness Avenue, Suite 203, San Francisco, California 94109-2572. Today I served a copy of the attached

Petitioner's Response To Respondent's Exceptions To Findings of Referee and Brief On the Merits

upon the following by mailing same in an envelope, postage prepaid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 17th day of December 2010, at San Francisco, California.

CHERYL J. COTTERILL