SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID ESCO WELCH, On Habeas Corpus	No. S107782 CCCSC No. 070855-2 Contra Costa Superior Court, Department 4 Hon. Mary Ann O'Malley, Referee

SUPREME COURT
FILED
JAN 02 2013
Frank A. McGuire Clerk
Deputy

REPORT AND RECOMMENDATIONS OF THE REFEREE

Questions Presented

On June 12, 2007 the California Supreme Court ordered the Referee to hold an evidentiary hearing, which was held on September 13, 2010 through April 11, 2011, and to make findings of fact responsive to the following reference questions:

1. During petitioner's trial, did the bailiff engage in improper communications with any of the jurors that exposed them to information prejudicial to petitioner? If so, what were those communications?

2. Did trial counsel adequately investigate potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse? If trial counsel's investigation was inadequate, what additional information would an adequate investigation have disclosed?

3. If an adequate investigation would have yielded evidence that petitioner suffered serious child abuse, would a reasonably competent attorney have introduced such evidence at the penalty phase of the trial? What rebuttal evidence reasonably would have been available to the prosecution ?

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Testimony and Exhibits

At the hearing, the Referee heard and considered the live testimony of the following witnesses:

Deputy John Dimsdale, bailiff for Judge Stanley Golde during petitioner's trial, retired
(ERT[1] 1336-1372.)

Deputy District Attorney James Anderson, prosecutor at petitioner's trial, retired
(ERT 1746-1769.)

Joanne Gonzales, member of petitioner's jury
(ERT 1299-1335.)

Carol Finley Hayward, member of petitioner's jury
(ERT 1374-1388.)

Sally Ann Jessie, member of petitioner's jury
(ERT 1389-1400.)

Bernard Wells, member of petitioner's jury
(ERT 1457-1473.)

Joseph Cruz, member of petitioner's jury
(ERT 1407-1456.)

Thomas Broome, former trial counsel for petitioner
(ERT 194-271.)

Robert Cross, former trial counsel for petitioner
(ERT 273-295.)

Harold Adams, guilt phase investigator for counsel Broome and Cross
(ERT 678-684.)

Spencer Strellis, lead counsel for petitioner
(ERT 535-541.)

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[1] The Referee refers to the Evidentiary Hearing Reporter's Transcript as "ERT," and to the Trial Reporter's Transcript as "TRT."

Alexander Selvin, co-counsel for petitioner
(ERT 453-534.)

Dr. William Pierce, clinical psychologist retained by trial counsel Strellis
(ERT 303-385.)

Dr. Samuel Benson, neuro-psychiatrist retained by trial counsel Strellis
(ERT 386-449.)

Russell Stetler, expert in penalty phase investigation retained by petitioner
(ERT 1165-1248.)

James Thomson, expert retained by petitioner
(ERT 1007-1063, 1114-1161.)

Dr. Julie Kriegler, clinical psychologist retained by petitioner
(ERT 1663-1743, 1769-1787.)

Dr. Pablo Stewart, psychiatrist retained by petitioner
(ERT 627-676.)

Dr. Karen Froming, neuropsychologist retained by petitioner
(ERT 693-865, 1063-1114.)

Dr. Daniel Martell, forensic neuropsychologist retained by respondent
(ERT 951-954, 1827-1855.)

Minnie Welch, petitioner's mother
(ERT 1521-1600.)

Sarah Perine, petitioner's maternal aunt
(ERT 1253-1288.)

Cathie Thomas, petitioner's sister
(ERT 1602-1644.)

Konolus Smith, petitioner's maternal uncle
(ERT 574-623.)

Roy Milender, petitioner's childhood friend
(ERT 552-571.)

Glen Riley, petitioner's childhood friend
(ERT 1474-1507.)

Kendra Ing, licensed investigator and mitigation specialist for petitioner
(ERT 956-968.)

Laura Rogers, associate counsel and investigator for petitioner
(ERT 968-977.)
Therese Scarlet Nerad, licensed investigator and mitigation specialist, for petitioner
(ERT 978-1002.)

David Esco Welch, petitioner
(ERT 1890-1896.)

The Referee admitted the following exhibits submitted by petitioner: N-1, Tabs 1-87, Tabs 88-99; and N-3, Tabs 100-117; M-1 and M-2.

The Referee admitted the following exhibits submitted by respondent: 2, 2A; a hard copy of select portions of the trial record, which were referenced in respondent's briefs; the trial transcript in the form of PDF files, to which both petitioner and respondent made reference their briefs.

The petitioner offered into evidence the declarations of social history witnesses. The Referee admitted them into evidence not for the truth of their contents, but for the purpose of establishing the basis for the experts' opinions.

Findings of Fact and Conclusions.

I. Question 1: During petitioner's trial, did the bailiff engage in improper communications with any of the jurors that exposed them to information prejudicial to petitioner? If so, what were those communications?

A. Credibility Findings Regarding Question 1.

To set the framework of the responses to the questions posed by the Supreme Court, the Referee will first discuss findings of credibility. After carefully listening to the evidence and observing the demeanor of the witnesses, the Referee has made determinations regarding the credibility of the witnesses who testified at the hearing.

Carol Finley Hayward:

Carol Finley Hayward, a juror in the trial, testified that the jurors along with the alternates met in the jury room upstairs and were

escorted down a stairway to the courtroom. (ERT 1375-1376.) The main bailiff was John Dimsdale and they would speak to him when they needed something. (ERT 1376.) He never discussed the facts of the case with any of the jurors, nor did any other bailiff. He did nothing to influence them. (ERT 1379-1380.)

She recognized her signature on the card the jury gave to Deputy Dimsdale but does not recall giving a gift. (ERT 1377-1379.) She also remembered a potluck wedding shower they gave for a fellow juror named Kim during the lunch hour. (ERT 1387.)

She remembered a fellow juror having a heart attack during the trial and being replaced by one of the three alternates. One of the three alternates was an African American man who worked at Safeway. (ERT 1384.) She did not recall any urine in the stairway. (ERT 1380.) The Referee finds Ms. Hayward's testimony credible.

Sally Ann Jessie:

Sally Ann Jessie, a juror in the trial, testified that she does not remember any of the bailiffs but that one bailiff was mainly in charge of the jury. (ERT 1390-1391.) The main bailiff never said anything about the facts of the trial. The bailiff never mentioned anything about witnesses who were available to testify but did not come to the trial. (ERT 1394.) She vaguely remembers something about someone being threatened but can't say who the source was. She felt she might have been recalling the surviving victim's testimony during the trial that she felt threatened. (ERT 1395-1396.) She vaguely remembered the bailiff's wife was pregnant and that she gave him a gift, but didn't remember what it was. She recognized her signature on the card the jurors gave the bailiff. (ERT 1391, 1394, Exhibit 2A.) The Referee finds Ms. Jessie's testimony credible.

Joanne Gonzales:

Joanne Gonzales, a juror in the trial, testified that she remembered a bailiff and his name was John. Ms. Gonzales recalled that there were other bailiffs; she was not sure how many others there were, but John seemed to be around more. (ERT 1300.) She did not recall if one bailiff was the primary bailiff. She remembered his wife was going to have a baby and they had a luncheon in the deliberation room for him. She does not recall who organized it and who was present for it. The jurors brought food and gave him either a gift card or a bond. She recognized her signature on the card for him. She believes each

juror contributed $5.00 or something like that. She recalled one of the jurors had a heart attack and another broke her hip or leg skydiving. (ERT 1301-1304.) She did not recall a juror named Kim or a juror who was getting married.

Ms. Gonzales testified that Deputy Dimsdale did not speak about any subject involved in the case, and said nothing about witnesses who were available but did not testify or would not testify, or any witness being threatened. (ERT 1305.) Neither Deputy Dimsdale nor any other bailiff did anything to influence her vote. (ERT 1308.) Ms. Gonzales remembered urine in the stairway and someone saying "be careful, it's wet here. It looks like someone's urinated." She did not know who said that or how the urine got there. She formed no opinion about how it got there; she did not know how Petitioner got to the courtroom. (ERT 1305-1306, 1333.)

On cross examination Ms. Gonzales was asked questions regarding where the jury met each day, how they were escorted to court, the number of alternates, the number of days the jury deliberated, what time they broke for lunch and who took them to lunch. She was shown minute orders to refresh her recollection and read them out loud during the hearing. It was clear to the Referee that Ms. Gonzales had no independent recollection of these events. (ERT 1312-1327.) The Referee also believes that Ms. Gonzales was confused about the luncheon, believing it was for Deputy Dimsdale when in fact (based on other credible juror testimony) it was a potluck wedding shower the jurors held for a fellow juror named Kim.

Ms. Gonzales did recall going to lunch with the other jurors during deliberations and that the bailiffs sat at another table next to the jurors. (ERT 1329.) She also remembers shopping at a store similar to Pier One during a lunch break. (ERT 1330-1331.) Other than the events about which Ms. Gonzales had no independent recollection, and her confusion about who was honored at the potluck lunch, the Referee finds Ms. Gonzales's testimony credible.

Bernard Wells:

Bernard Wells, an alternate juror in the trial, testified that all the jurors met in the jury room upstairs. After they had all arrived, they waited for the bailiff to take them downstairs to the courtroom. (ERT 1464-1465.) On one occasion some of the jurors smelled urine in the staircase. The bailiff, who escorted them downstairs, said it was probably from the prisoners going to court before the jury came down.

(ERT 1465.) Mr. Wells recalled two bailiffs, one African-American and one Caucasian, and that the wife of one of the bailiffs was pregnant. (ERT 1469-1470.) Mr. Wells heard that the witnesses in the trial felt threatened. He believes he heard this in the jury room from the other jurors. He testified, however, that since the trial he has had open heart surgery and it has affected his memory a little bit. (ERT 1470-1471.) Mr. Wells recalls that the ladies on the jury gave the bailiff a gift. He contributed some money but does not know when it was given or if there was a shower. (ERT 1470.) Upon leaving the witness stand, Mr. Wells said "I kind of got compassion for him, sorry", referring to Petitioner. (ERT 1473.)

The Referee gives very little weight to the testimony of Mr. Wells due to the clear bias he showed toward Petitioner upon the conclusion of his testimony and his admission that his memory had been compromised by his open-heart surgery. In addition, no witness at the hearing corroborated Mr. Wells's belief that he heard other jurors in the jury room say witnesses were threatened.

Joseph Cruz:

Joseph Cruz, a juror in the trial, testified that he remembered one particular bailiff that was assigned to the jurors but does not remember his name (ERT 1409). The bailiff would escort them to lunch and they would talk, but would just shoot the breeze because they knew they couldn't discuss the case. (ERT 1410.) He recalled the jurors and two alternates would meet upstairs prior to the trial. He wasn't sure if it was one or two floors above the courtroom. He wasn't sure if it was the bailiff or someone else who escorted them to the courtroom. (ERT 1411-1412.) He remembered going to lunch during deliberations at a restaurant in Jack London Square called the Gingerbread House, but could not recall any other restaurants. He wasn't sure if the alternates joined them for lunch. (ERT 1416.) When asked if the bailiff sat with the jurors, Mr. Cruz replied "yeah, they were with us. I don't recall where they sat though. They sat with us or they sat at a separate table. I think maybe, yeah." (ERT 1416:16-20.)

Mr. Cruz testified that the week before his testimony, the petitioner's attorney and investigator visited him and showed him a copy of the card the jury gave Deputy Dimsdale; that refreshed Mr. Cruz's memory that the bailiff was having a baby. (ERT 1416-1417.) When asked if his relationship with the bailiff was on a first-name basis, Mr. Cruz replied "I believe so," but he wasn't sure that the bailiff knew the jurors' first names. Mr. Cruz believes there was a gift with the card but

does not recall what it was. (ERT 1418-1419.) He does not recall any event where the card was presented to the bailiff. When asked if there was a party or a shower Mr. Cruz replied, "I kind of recall that. I think there was some kind of thing that we had. Not -- not only now that you had mentioned this, you know, that we had maybe a little party. I -- did we have cake or something like ---- I'm not sure, with balloons." (ERT 1420:13-21.) Then Mr. Cruz testified he wasn't sure if they had a cake. (ERT 1421:2-8.) He also does not remember where this may have taken place. (ERT 1421.)

Mr. Cruz recalled someone telling the jury that someone had urinated in the stairwell. He believed speaker was a bailiff, but did not recall if it was Deputy Dimsdale. When asked if he saw it or smelled the urine he replied "I didn't see it, but I don't----I----we may have recalled smelling it I'm not sure. (ERT 1421:15-27.) He didn't recall the circumstances in which it was mentioned. When asked if it was during a time they were being brought into the courtroom down the stairwell, Mr. Cruz replied, "down the stairwell, yeah. I believe-now I kind of remember cause we were ---- cause we were ---- it was ---- the time had gone ---- elapsed, and we took a little bit more time going downstairs. I think that's what it was, I believe. And then I ---- that's I believe ---- I believe that's when I believe they told us that this is what happened." (ERT 1422:9-19.)

Mr. Cruz was then asked whether, after the bailiff said this, Mr. Cruz recalled any of the jurors making a statement expressing an opinion about the urine in the stairwell. Mr. Cruz believed "there was a statement like -- as far as why would he do that in the stairwell? And maybe it's to detract from him that -- his competency. And he's not in his right mind, something like that." (ERT 1423:5-18.) Petitioner's counsel then asked for clarification that this was a juror who may have made that statement. Mr. Cruz responded: "I don't ---- I don't remember it was a juror who made the statement. I ---- let's see. But I recall that being said." (ERT 1423: 19-23.) Petitioner's counsel then followed up with whether the bailiff might have said that, and Mr. Cruz responded "could have been the bailiff, yes." (ERT 1423: 27-28, 1424:1.) On cross-examination Mr. Cruz stated that when he first heard about the urine he was told Petitioner was responsible for it. When asked who said that, Mr. Cruz replied, "I don't ---- could have been the bailiff. I'm not sure." He was then asked if it could have been another juror, and Mr. Cruz replied, "That I'm not sure, but I don't think it was the juror." (ERT 1438: 19-28, 1439:1-9.) He also did not recall testimony during the trial about Petitioner urinating in the stairwell. (ERT 1439.)

Mr. Cruz testified that there was some talk about whether someone associated with petitioner might harm witnesses, and if petitioner had the capability of doing that. Mr. Cruz could not recall how that conversation came about except possibly the loud noise that occurred in the audience portion of the courtroom. It sounded like a book dropping. Mr. Cruz thinks there was a discussion afterwards among the jurors about the noise and the jurors' protection and safety. He does not recall who started the conversation. (ERT 1442-1443.)

Mr. Cruz recalled the prosecutor coming in and explaining some things to the jury because the jury was a little bit shaky. They were concerned if Petitioner had contacts outside and whether they should be concerned to go out to their cars. (ERT 1425-1426.) Mr. Cruz recalls that this conversation took place during the trial, not in the courtroom and with no other lawyers present. The judge was not present and there was no court reporter. (ERT 1431-1433.) He does not believe the prosecutor spoke to the jury after the trial was over. (ERT 1435.)

The Referee does not find Mr. Cruz's testimony credible. Mr. Cruz appeared confused on the witness stand. He was also easily led on the witness stand. He paused after nearly every question and his answers were extremely equivocal. In addition, his testimony as to statements made attributing the urine in the stairwell to Petitioner, and any threats made to witnesses, were not corroborated by any other juror or witness. Finally his recollection that Mr. Anderson met with the jury alone during the trial to reassure them of their safety completely and directly conflicts with Mr. Anderson's testimony and lacks any indicia of reliability.

Robert Cross:

Robert Cross, an attorney, assisted Mr. Broome in representing petitioner for a few months. (ERT 273, 284.) Mr. Cross testified that before he was an attorney, he had been a deputy sheriff in Alameda County from 1965 to 1976. During that time he worked as a bailiff for two judges. (ERT 276.) Courtrooms were located on the third, fifth and seventh floors and the jury assembly rooms for each of those courtrooms were located on the even numbered floors above the courtroom. Department 9 was on the fifth floor. The inmates would be brought down from the sixth floor to the courtroom through the stairwell. If the court was not ready for the inmate, the inmate would be held in the stairwell. (ERT 277-280.) The Referee finds Mr. Cross to be a credible witness.

James Anderson:

Mr. Anderson, the prosecutor in the trial, testified that he is now retired after having worked at Alameda County as a deputy district attorney for 35 years. He knows a lot of judges on the Contra Costa County bench, and has known the Referee for 15 years. (ERT 1746.)[2] Prior to the time the jury reached a death verdict, Mr. Anderson had no contact whatsoever with the jury other than in open court. At no time prior to the jury reaching a death verdict did he ever go into the jury room and discuss anything with the jury. He did have a discussion with the jury in the jury room after the death verdict. (ERT 1747.) In every case Mr. Anderson has had with Judge Golde, the judge thanks the jury for their service and tells them they are absolved of the prohibition about discussing the case with anyone. If they want to discuss the case with any of the parties, they should let the bailiff know and he will inform the parties the jury wishes to speak with them. Mr. Anderson was contacted by the bailiff and told that the jury wanted to meet with him. Petitioner's attorneys, Mr. Strellis and Mr. Selvin, declined to go. (ERT 1748.) In the jury room, Mr. Anderson discussed how long the appeal would take and procedural matters. He also believes he discussed any repercussions from their verdict. In the fourteen capital cases Mr. Anderson has tried, jurors have asked to speak with the lawyers in all but two cases. (ERT 1749.)

Based upon the observations of Mr. Anderson's demeanor and the content of his testimony, the Referee finds him to be a credible witness. He readily admitted he is a strong proponent of the death penalty. He also admitted that he has used inflammatory language towards death penalty defendants. (ERT 1750.) He testified that he had Petitioner's photo on the wall of his office along with five other men who had received death verdicts. (ERT 1752-1753.) Members of his office called it the "wall of shame." (ERT 1753.) Mr. Anderson was shown a copy of an article from the East Bay Free Weekly entitled, "The Death Squad" and asked if he recalled saying certain things in the article. Mr. Anderson testified that he was quoted in the article and had no dispute with the accuracy of the quotes. (ERT 1755-1758.) He also readily admitted that during closing argument he referred to the petitioner as an ugly human being and a miserable violent thug. (ERT 1764.) Mr.

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[2] The Referee believes she first met Mr. Anderson when he was a member of a panel that the Contra Costa County District Attorney's office used to evaluate new contract attorneys. The Referee was a contract attorney applying for a permanent position in 1986. Since that time, the Referee has seen Mr. Anderson less than a handful of times at legal social events. All credibility determinations in this matter are based on the testimony at the hearing.

Anderson clearly has expressed strong feelings as a prosecutor who tried cases against those eligible for the death penalty, but the Referee does not find that his strong feelings infect his credibility on the specific facts at issue here. To the contrary, the Referee finds his testimony credible.

John Dimsdale:

John Dimsdale, the bailiff in petitioner's trial, testified that he was assigned to Judge Stanley Golde in Department 9 for three years. He was the primary bailiff for Judge Golde during petitioner's trial. Deputy Herb Walters assisted him. (ERT 1336-1337.) Before court the jurors assembled on the 6th floor in the jury room. Once assembled, they would advise the floor deputy they were all present. (ERT 1338.) The floor deputy would then notify Deputy Dimsdale and escort the jury to the stairwell leading directly down to the courtroom. Deputy Dimsdale did not escort the jury to the courtroom as he was responsible for the defendant, who had already been escorted to the courtroom. (ERT 1339.)

The court bought lunch for jurors once they started deliberating. Deputy Dimsdale would ask the jurors what kind of food they wanted, then call the restaurant and make a reservation. If the restaurant was outside of walking distance, he would transport the jurors in a van with another deputy. (ERT 1340-1341.) He and the other deputy would sit at a table next to the jury's table.

Deputy Dimsdale testified that his daughter was born on June 29, 1989, and the jury gave him a savings bond for her as a gift. (ERT 1341.) This testimony conflicted with earlier statements by Deputy Dimsdale. When he was interviewed at the Alameda County District Attorney's Office in 2006, he denied receiving a gift from the jury. And again when he spoke with Mr. O'Connor from the District Attorney's Office about a year ago, Mr. Dimsdale did not recall receiving the gift. A couple of days prior to his testimony in this hearing, however, he and his wife went through all the cards they received when their daughter was born. They then found the jurors' card with the savings bond for $75.00 inside. The savings bond was purchased on July 7, 1989. The bond had never been cashed. (ERT 1342-1343.) Deputy Dimsdale brought the card and the savings bond to court. (ERT 1443, Exhibit 2A) At the time of the hearing, he did not recall when he received the card and did not remember his wife ever being present with the jurors when he received the gift. He also does not remember the jurors having any

party or shower to celebrate the birth of his daughter. (ERT 1334-1345.)

Deputy Dimsdale recalls the jurors mentioning urine in the stairwell. (ERT 1346.) Petitioner was brought to the courtroom before the jurors arrived through the same stairwell. (ERT 1350.) Deputy Dimsdale recalled urine in the stairwell frequently, as many as 20 times during the Welch trial. He formed no conclusions that it was Petitioner urinating in the stairwell. (ERT 1360.) Deputy Dimsdale was then asked to review portions of the trial transcript regarding Petitioner urinating in the well. (ERT 1361.) "THE COURT: He's upset at you for urinating in the well." (TRT 3157.) Reading this from the transcript did not refresh Deputy Dimsdale's recollection, although he did not doubt the accuracy of the transcript. He was then shown another portion of the transcript. (ERT 1362.) "THE COURT: I also want the record to show that yesterday, on June 1st, as you exited the courtroom, you urinated in the well. As you were leaving, you banged the well wall." (TRT 4985.) This reminded Deputy Dimsdale that he brought the fact that Petitioner had urinated in the well to the attention of Judge Golde. (ERT 1362.)

Deputy Dimsdale did not talk to the jurors about anything that had to do with the case, and specifically denied taking about additional witnesses who could not come and testify, or who had been threatened. (ERT 1348.)

The Referee finds Deputy Dimsdale's testimony to be credible and supported by the other witnesses. The fact that he did not recall receiving a card and savings bond from the jurors when asked about it seventeen years later does not detract from this Referee's opinion that he was a credible witness.

Petitioner offered into evidence the declarations of two jurors (Richard Mignola and David Larson) who did not testify at the evidentiary hearing. Petitioner also offered into evidence declarations of the jurors who did testify at the hearing. The Referee did not consider those declarations because they are hearsay. In answering question 1, the Referee relied on the live testimony of the witnesses.

B. Findings of Fact and Conclusions On Question 1

The Referee finds that none of the bailiffs assigned to petitioner's trial engaged in any improper communications with any of the jurors that would have exposed them to information prejudicial to petitioner. Former Deputy John Dimsdale was the "primary" bailiff in the courtroom at the time of

petitioner's trial. He was assisted by Bailiff Fred Hives. Herbert Walters and Kurt Von Savoy assisted Deputy Dimsdale in escorting the jury to lunch during deliberations. (ERT 1335-1337, 1351-1353.)

No Communication Suggesting Welch Urinated. There was no credible evidence that any of the bailiffs communicated to the jurors that petitioner had urinated in the stairwell. Before court each morning, the jurors would assemble in the jury room, located on the seventh floor. Once all the jurors were assembled, the floor deputy would escort them to the stairwell leading directly down to the courtroom. The jury was aware that all in-custody inmates, including petitioner, used the same stairwell. Deputy Dimsdale did not escort the jury down the stairwell as he was required to remain in the courtroom with petitioner. (ERT 1336-1339.)

Juror Gonzales recalled urine in the stairwell and someone saying "be careful, it's wet here. It looks like someone urinated." She did not know who said it or how the urine got there. (ERT 1305-1306.) Juror Wells recalled smelling urine in the stairwell on one occasion and that the bailiff said it was probably from the prisoners going to court before the jury came down. (ERT 1465.) Juror Cruz recalled someone telling the jury that someone had urinated in the stairwell. He also recalled a statement made as to why petitioner would do that and maybe it was to detract from his competency, but couldn't recall who made the statement or the circumstances in which it was made. (ERT 1423.) But Juror Cruz's account was not credible; as the Referee explained above, Juror Cruz's testimony was equivocal, he was susceptible to suggestion, and his account stood alone and was in conflict with the consistent accounts of other more credible witnesses.

The Referee finds that former Deputy Dimsdale did believe, during the trial, that petitioner had urinated in the well. On April 10, 1989, the court out of the presence of the jurors told petitioner that "the bailiff" was upset with him for urinating in the well and warned petitioner to control his bladder problems. (TRT 3157-3159, 3171; Exhibit 86.) On June 2, 1989, the court stated again, on the record out of the presence of the jurors, that on June 1, 1989 petitioner urinated in the well as he exited the courtroom. (Exhibit 86.) But there is no credible evidence that this concern, communicated to the trial court, was ever communicated to the jurors.

The jury was exposed to information about petitioner's urination from other sources at trial. Petitioner's expert, Dr. Pierce, testified petitioner had urinated in a courtroom well during the course of trial which Dr. Pierce considered "bizarre behavior." (TRT 5949, 5982-5983, Respondent's Attachment D.) Also, in closing argument the Deputy District Attorney made reference to the petitioner's pattern of urinating. (TRT 6118.) If any juror

believed that the petitioner was the source of the urine, that belief likely came from the trial testimony.

No Communication Suggesting Witness Threats. The Referee finds that none of the bailiffs communicated to the jurors that petitioner and/or his supporters had threatened witnesses. During the trial, Barbara Mabrey testified that petitioner had threatened and assaulted her. (TRT 4201-4219.) That explains the recollection (albeit vague) of Juror Jessie that someone was threatened (ERT 1395-1396); the recollection (albeit impaired by later memory problems) of Bernard Wells that other jurors in the jury room said the witnesses in the trial felt threatened (ERT 1471); and the recollection of Joseph Cruz that there was some talk about whether witnesses could be harmed by someone associated with petitioner. (ERT 1443.) James Anderson, the prosecutor in the Welch trial, also testified that he spoke to the jurors after the case was completed and answered their questions regarding any repercussions to them regarding the verdict, including their safety. (ERT 1749.) That too explains the vague juror memories about safety and threats. There is no evidence that the bailiff was the source of any information about threats. The evidence is to the contrary: Both Juror Gonzales and Deputy Dimsdale specifically denied that Deputy Dimsdale spoke to jurors about witnesses who were available but did not or would not testify or that any witness was threatened. (ERT 1305.)

No DA Communication with Jurors During Trial. The Referee further finds there were no improper communications between deputy district attorney, James Anderson, and the jurors during the course of the trial. Mr. Anderson denies any such communication, and the only witness who suggested there was such a communication was Mr. Cruz, who was not credible on that point. The Referee finds Mr. Cruz was confused and misrecalled the post-trial discussions with Mr. Anderson as having occurred during trial.

II. Questions 2 and 3.

A. Credibility Findings Regarding Questions 2 and 3

After carefully listening to the evidence and observing the demeanor of the witnesses, the Referee has made determinations regarding the credibility of the following witnesses who testified at the hearing.

Alexander Selvin:

Alexander Selvin, an attorney, assisted Mr. Strellis in representing petitioner in this case. He testified that he worked as a Deputy District Attorney in the Alameda County District Attorney's office for sixteen

years. He left the office to work in private practice, exclusively doing criminal defense. (ERT 454.) Mr. Selvin and Mr. Strellis hired a penalty-phase investigation specialist, Jackie Lesmeister, who was a former probation officer. She reviewed all the probation reports and tried to make contacts. (ERT 460.) She has since passed away. In his review of his trial files, Mr. Selvin did not recall seeing any work product from Ms. Lesmeister. (ERT 461.) Mr. Selvin also testified that they hired Brian Oliver, an investigator, who was tasked with working on the guilt phase and maybe some penalty phase. (ERT 460.)

The attorneys' penalty phase strategy was to urge the jury not to execute a mentally ill person. (ERT 520-521.) This proved difficult, because, as Mr. Selvin testified, petitioner was impossible to work with. Mr. Selvin believed this was because, in Selvin's opinion, petitioner was mentally ill. (ERT 463.) Petitioner, his parents and some other relatives were totally uncooperative. The attorneys explained to family members that the legal team needed social history and background information from them, and set up at least four or five appointments for the family to come in. They never came. It became obvious to the attorneys after the family members failed to show up for the first two or three times that they would not cooperate. The attorneys even went to Petitioner's mother's home, to no avail. (ERT 464-466.) When the attorneys saw Mrs. Welch in court, they told her they'd like to speak to her; there was always some excuse why she couldn't show up. The attorneys felt that she clearly did not want to talk to them. Indeed, the attorneys felt petitioner was in control of his family and that he did not want them to cooperate with the attorneys. The attorneys felt that the family was uncooperative, either because they were trying to be helpful to petitioner or were afraid of him. (ERT 488-489.) Whatever the reason, the attorneys were unable to get any information from petitioner, his family or anyone else. Mr. Selvin believed the same was true for Dr. Pierce, Dr. Benson and even Jackie Lesmeister. The attorneys tried to analyze petitioner, to see what was going on. They knew petitioner was familiar with the system and that he knew how to try to work the system, to work the lawyers and the court. He also prepared some of his own motions. (ERT 490.) The attorneys believed the reason petitioner did not want to be interviewed regarding a mental defense was his fear that people would think he's mentally ill. (ERT 469.)

The petitioner's failure to cooperate frustrated the attorneys and thwarted their efforts to develop a mitigation case. Nonetheless, as Mr. Selvin acknowledged, an attorney should always conduct a mitigation investigation even if the client is paranoid or uncooperative, if the attorney can go somewhere with it. (ERT 480.) So the attorneys looked

to other sources than petitioner and his family. They received petitioner's juvenile records, juvenile probation reports and adult probation reports from the District Attorney's Office. (ERT 469-470.) A request for school records was made on June 26, 1989. Mr. Selvin does not recall if they received school records prior to June 26, but hadn't yet received certified copies of those records. (ERT 474.) Mr. Selvin reviewed every single record and looked at all the names. (ERT 484.)

In addition, Mr. Selvin reviewed all of petitioner's probation reports. He testified that petitioner grew up with the probation department. There were countless probation reports, tracking petitioner from his first experience as a juvenile. (ERT 478.) Mr. Selvin was asked by petitioner's counsel to review a probation report that included a discussion involving Glenn Riley, one of petitioner's witnesses in this hearing. Mr. Selvin gave the opinion that he would not have pursued further investigation regarding Mr. Riley or called him as a witness because of the facts involved in the probation report. (ERT 519.)

The attorneys felt they had enough information from the reports to support their mental illness mitigation defense. (ERT 518.) Dr. Pierce, the mental health expert, was satisfied that they had enough to support that penalty phase argument. (ERT 484-485.)

The Referee finds Mr. Selvin to be credible. He readily acknowledged trial counsel's duty to gather background information even with an uncooperative client. He testified that he and Mr. Strellis tried as hard as they could to obtain this information from the petitioner and petitioner's family, but were unsuccessful. His testimony appeared neither coached nor defensive: he testified as best as he could remember and admitted when he could not. Based upon his testimony and his demeanor, the Referee finds him to be a very credible witness.

Spencer Strellis:

Spencer Strellis, an attorney who represented petitioner in this case, testified that he had no independent recollection of this case. (ERT 538.) He testified that he has been practicing criminal law since 1959. (ERT 535.) At one point, he was a partner with Stanley Golde, the judge that presided over petitioner's trial. (ERT 536.) Mr. Strellis believed that petitioner was mentally ill and he didn't see any other viable defense for petitioner. (ERT 537, 541.)

Thomas Broome:

Thomas Broome, an attorney, testified that he represented petitioner prior to Mr. Selvin and Mr. Strellis. He has practiced for 36 years, focusing on criminal law. (ERT 195-196.) Prior to becoming an attorney he was a probation officer for Alameda County. He had previous contacts with petitioner while he was the court probation officer in juvenile court. (ERT 197.) Mr. Broome worked with Mr. Cross on petitioner's case. (ERT 198.)

To prepare for the penalty phase of petitioner's trial, Mr. Broome retained Dr. Pierce to study and render opinions on petitioner's mental health background and Mr. Harold Adams to help with the investigation of the case. (ER 203.)

Mr. Broome also testified that petitioner thwarted the defense team by refusing to cooperate. Petitioner talked to Dr. Pierce, but would not let Dr. Pierce to take notes during the interview. (ERT 222.) Petitioner also did not tell Mr. Broome that petitioner's father was violent toward him and his mother (ERT 205); petitioner's mother, Minnie Welch, however, told Mr. Broome that petitioner's father was very abusive towards her and petitioner. (ERT 204.) Mr. Broome did not communicate this to Mr. Selvin or Mr. Strellis, or to Dr. Pierce. There also was no information regarding this fact in his file. (ERT 234.)

The relationship that petitioner had with Mr. Broome and Mr. Cross was inconsistent. (ERT 206.) Petitioner accused his attorneys of doctoring the discovery and colluding with the District Attorney. (ERT 211.) Eventually Mr. Broome was relieved as counsel when a Marsden Motion filed by petitioner was granted. (ERT 222.) The next time Dr. Pierce attempted to visit petitioner, petitioner refused to see him. (ERT 234.) Mr. Broome did not know if Dr. Pierce generated a report; in any event Mr. Broome did not disclose any doctor's report to Mr. Selvin or Mr. Strellis. (ERT 234-235.)

Mr. Broome and Mr. Cross were not able to prepare anything for the penalty phase because petitioner simply did not cooperate with his attorneys, Dr. Pierce or the investigator, Mr. Adams. When they spoke to petitioner about his background they got less than a page of notes. (ERT 237-238.) Mr. Broome was not able to get anything out of petitioner to help put together a penalty phase. (ERT 240.) This was demonstrated during a Marsden motion when Mr. Broome told the court that the defense team had done nothing regarding the penalty phase because petitioner refused to allow anybody to do anything. (ERT 247-248, TRT 104.)

Robert Cross:

Robert Cross, an attorney, assisted Mr. Broome in representing petitioner for a few months. (ERT 273, 284.) Mr. Cross and Mr. Broome retained Dr. Pierce to evaluate petitioner. When they discussed mental health issues with the petitioner, he did not want anything to do with it. (ERT 289.) They tried to talk with petitioner and get background information and petitioner would ask why they needed that, which made it difficult to get that information. (ERT 290-291.)

Harold Adams:

Harold Adams, a private investigator, was retained by Mr. Broome. Prior to working with Mr. Broome, he worked for the Alameda County Sheriff's Department and then the Public Defender's Office. He retired as Assistant Chief Investigator for the Public Defender's Office in 1982. (ERT 678-679.)

Mr. Adams interviewed petitioner's father, wrote a report and gave it to Mr. Broome. (ERT 680.) He also took photographs of petitioner after petitioner was allegedly beaten while in custody. (ERT 681.) He also received, from petitioner, two names of relatives and four names of other individuals who were involved in a trailing assault case. Mr. Adams retired shortly after he took the photographs. (ERT 681-684.)

Minnie Welch:

Minnie Welch is petitioner's mother. She also has a daughter, Cathie Diane, born on October 1, 1956. (ER 1522.) Minnie Welch said her sister Sarah Perine (petitioner's aunt) gave petitioner his nickname -- Moochie. (ERT 1521.) Minnie was born in 1934 and at the time of the hearing was 76 years old. (ERT 1540.)

She testified that David Sr., her husband, never drank at home. He would go out of the house to do his drinking, usually every other weekend. (ERT 1544-1545.) When he came home he was intoxicated and would want to fight. He would sometimes slap and punch Minnie. (ERT 1549.) He also hit petitioner and his brother when he came home after drinking. When he wasn't drinking he would not hit them as much. (ERT 1554-1555.) He would hit the boys across their back with a belt or an extension cord. (ERT 1556-1577.)

Minnie Welch contradicted herself about when the abuse began. At one point she said she believed petitioner was 8 or 9 when David Sr. began to hit him. She said David Sr. did not hit petitioner when they lived on Fremont Street. They lived at two residences on Fremont Street from 1959 to 1961. Petitioner was three years old when they moved from Fremont Street to La Prenda. Later in her testimony, however, she stated that David Sr. used his hand to spank petitioner when he was two or three. (ERT 1585, 1587.)

Minnie Welch attended petitioner's trial. She was working at the time at Piedmont Garden, a retirement home, as a dietitian. (ERT 1574.) She took the bus to work from her home, which usually took an hour. After she got off work at 1:30 p.m., she would take the bus to court. Trial lasted several months and she attended nearly every day. During the trial she would bring clothes and run errands for petitioner. (ERT 1575-1576.) During the trial she saw Mr. Strellis and Mr. Selvin in court. (ERT 1578.) She also remembers Mr. Broom and Mr. Cross. (ERT 1579.)

Minnie Welch's testimony was in some ways consistent with the testimony of petitioner's lawyers. She testified that on one occasion two men came to her home from the defense team. She believed they were police officers, but doesn't really remember who it was that came to her house. (ERT 1579-1581.) She also testified that she was asked to come to the lawyer's office and have a meeting, but did not go. (ERT 1591-1592.) She was aware there would be a penalty phase and that mental health issues would be raised for that part of the case. Mrs. Welch testified that petitioner did not want mental health issues brought up in this case. He was upset about it and made that clear to her. Mrs. Welch denied that petitioner asked her not to talk to his lawyers or anyone connected with his defense. (ERT 1582.)

Minnnie Welch now says, however, that she would have cooperated if asked. She testified that even if petitioner had asked her not to testify about mental health issues, she would not have respected his wishes. (ERT 1592-1593.) The Referee does not find credible Mrs. Welch's testimony that she was available to testify or that she would have provided information to the attorneys. Both her actions at the time and her testimony belied that claim: at the time she didn't go to meet with the lawyers when asked, and admitted as much in her testimony. Her testimony was also in stark contrast to that of Mr. Selvin as well as Dr. Pierce and Dr. Benson. The Referee finds that Minnie Welch's selective help – making the effort to go to court everyday and running errands for petitioner, yet never managing to meet with counsel for any of the scheduled meetings – shows that she chose not to

cooperate with counsel. Therefore, the Referee finds that she would not have been available as a witness in petitioner's case.

Sarah Perine:

Sarah Perine, petitioner's aunt, is the younger sister of Minnie Welch. (ERT 1256-1257.) Ms. Perrine came to California from Alabama on June 29, 1957. (ERT 1263.) At the time Minnie Welch was living with David Sr., and her daughter, Cathie. Ms. Perrine also had three aunties and some cousins living in California. (ERT 1265.) She testified that David Sr. was violent to Minnie. He would slap, beat and push her around. (ERT 1271.) On one occasion when Minnie was pregnant with petitioner, Ms. Perrine saw David Sr. slapping and beating her. She also saw him kicking her on the couch. (ERT 1273.)

Ms. Perrine testified that she saw David Sr. drinking and saw the bottles and cans sitting around in the house or in the garbage can. She saw him drink beer and whiskey. This is in stark contrast to the testimony of Minnie Welch and Cathie Thomas, who both testified that David Sr. never or rarely drank at home. Ms. Perrine also testified that she saw David Sr. drink at bars in the neighborhood. Then later clarified that if she would ride the bus by where the bars are, she would see his car outside as she was passing by. (ERT 1271-1273.)

Ms. Perrine saw David Sr. spank petitioner about once a week when petitioner would spill something, or drop something on the floor. David Sr. would hit him with a belt or extension cord or with his shoe. He would also flick his finger on petitioner's head. (ERT 1281-1282.)

Ms. Perrine moved to Los Angeles in 1961 and back to Oakland in November 1963. Once she moved back she did not see David Sr., Minnie or petitioner very often, maybe once or twice a month. (ERT 1284.)

Ms. Perrine attended petitioner's trial once. No one from the defense team contacted her. (ERT 1287-1288.)

Ms. Perine's testimony was confusing at times. The Referee finds that, in certain aspects of her testimony, Ms. Perine was easily led by counsel. However, the Referee finds credible Ms. Perine's testimony that David Sr. hit Minnie and petitioner.

Cathie Thomas:

Cathie Tingle Thomas, petitioner's sister, testified that she has always referred to petitioner as Moochie. (ERT 1603-1604.) Her father, David Sr., was a merchant marine from 1965 to 1972. He was gone more than he was home; he would be gone for six months and home for four to six weeks. (ERT 1620.) She saw her father drink at family gatherings but rarely at home. He'd leave on Friday night and show up drunk on Sunday night. When he was drunk he became angry, violent and abusive. He was abusive to her mother. (ERT 1621-1622.) Her bedroom was across the hall from her parents' room and she could hear her father punching her mother with his fists. At times she would enter the room, turn the light on and see her father hitting her mother. (ERT 1625.)

Ms. Thomas also heard her father hit petitioner with a belt or an extension cord in the boy's room. (ERT 1627.) The first time she heard this petitioner would have been six or seven years old. (ERT 1630.) Her father would hold the socket portion in his hand and wrap it around his wrist to make a loop and use it like a whip. (ERT 1628.) These beatings would last about five minutes. (ERT 1629.) She noticed marks on both her brother's arms. (ERT 1630.) Her father usually was drunk when he hit petitioner but sometimes, even when sober, her father would hit petitioner. Sometimes it was because petitioner did something wrong and sometimes it was for no reason at all. (ERT 1630-1631.) Ms. Thomas' parents divorced in the early 70's. Even after the divorce her father would come back to the house off and on, sometimes staying for a month at a time. When he was at the house he would continue to hit petitioner. (ERT 1634-1635.) She recalled that the last time her father tried to hit petitioner, petitioner fought back. Petitioner then left the house with a shotgun and shot out the windows of their car. Immediately after that incident, petitioner shot the windows out of the McPherson's house down the street. (ERT 1635-1637.) Petitioner was 17 at the time. (ERT 1636.)

Ms. Thomas remembered some of the trial. She attended some days and would see her mother there. (ERT 1639.) Someone came to their house to talk to her mother about the case but they did not speak to her. It was a Caucasian man. (ERT 1640.) Ms. Thomas was living with her mother and at home when counsel visited their house for the sole purpose of discussing social history and obtaining background information. Ms. Thomas would have been 33 years old at the time. Counsel received no information from anyone during that visit, including Ms. Thomas.

Ms. Thomas testified that if counsel had asked, she would have testified. That contradicts Mr. Selvin's testimony: although counsel did not testify that he had talked specifically to Mrs. Welch or Cathie Thomas during that visit, he was clear that no one from the family was cooperative. The Referee is not convinced Ms. Thomas would have cooperated any more than her mother did. The Referee finds credible, however, Ms. Thomas's testimony regarding the abuse petitioner suffered at the hand of his father.

Konolus Smith:

Konolus Smith testified that he grew up with petitioner and knows him as Moochie. (ERT 584.) They attended Sobrante Park Elementary School together and later Madison Junior High. He first met petitioner in the cafeteria at school when petitioner and Mr. Smith got into a fight. (ERT 585-587.) On one occasion, Mr. Smith saw petitioner's dad slap him on the head at school. On another occasion, he saw David Sr. throw a soda bottle at petitioner as he was walking down the street. On the last occasion Mr. Smith mentioned, he was in a restaurant with petitioner when David Sr. approached and hit petitioner, causing him to fall. Petitioner stayed down for a couple of seconds and appeared stunned, but never lost consciousness. (ERT 595-598.) Mr. Smith saw petitioner at school with marks on him, black eyes and scratches. Mr. Smith testified that petitioner's father inflicted these, but on cross-examination admitted he never actually saw David Sr. hit petitioner other than the two times he testified to. (ERT 610.) Mr. Smith also testified that petitioner was always fighting everybody, and was known for fighting. (ERT 618.) During those fights petitioner would receive bruises, scrapes and black eyes. (ERT 621.)

For fun, while living in Sobrante Park, Mr. Smith, along with other friends including petitioner, would hang out at the factories, the train tracks, the creek, and sometimes San Leandro. San Leandro had a swimming pool, movies, Boys Club and good parks to play in. (ERT 600, 608.) Petitioner stayed overnight at Mr. Smith's house twice. Petitioner slept in Mr. Smith's bed and Mr. Smith did not know on those two occasions whether petitioner had some problem at home. (ERT 605.)

At the time of petitioner's trial Mr. Smith was working at Atascadero State Hospital as a technician. His license as a psychiatric technician was later revoked due to a conviction for domestic violence. (ERT 616.) That was just his most recent conviction, for which he is currently serving a sentence in Solano State Prison. In 1973 he was

convicted of homicide and robbery and served his sentence at DVI and then the California Men's Colony in San Luis Obispo. He was released in 1981. (ERT 575-577.)

Although Mr. Smith is a convicted felon, with convictions of homicide and robbery and more recently of domestic violence, the Referee finds credible his testimony regarding his experiences with petitioner while growing up.

Roy Milender:

Roy Millender, petitioner's uncle, testified that he is Mrs. Welch's brother. He is retired from working in the paint industry. (ERT 553.) He knows petitioner as Moochie. (ERT 554.) Petitioner's father, David Sr., would make petitioner go in the closet as punishment when petitioner and his brother would fight. David would say "go to jail." Roy saw David discipline petitioner by hitting him and making him go in the closet. (ERT 562.)

When petitioner was a teenager and having problems at home, he would stay with Mr. Millender in Berkeley. Petitioner stayed there off and on through the age of 16. (ERT 566-567.) Sometimes he would stay for only a weekend, but when school was out he would stay for as long as six weeks. Mr. Millender visited petitioner while he was in the California Youth Authority. Mr. Millender was never contacted by petitioner's defense team. (ERT 568-569.) The Referee finds his testimony to be credible.

Glen Riley:

Glen Riley, a childhood friend of petitioner, testified that he knows petitioner as Moochie and that they grew up on the same street in Sobrante Park. Mr. Riley left Sobrante Park from 1973 to 1977 when he went into the military. (ERT 1476-1477.) He is two to three years older than petitioner and they attended the same elementary school. (ERT 1478.) Mr. Riley recalls petitioner getting into fistfights in the neighborhood. (ERT 1480.) Mr. Riley would play at petitioner's house almost every day. (ERT 1489.) Petitioner was like a younger brother to Mr. Riley. (ERT 1484.)

Mr. Riley knew petitioner's dad, David Sr., who was a merchant seaman. David Sr. would be home for a couple of months then out for a few months. Mr. Riley saw David Sr. drink, but not sure if he was

intoxicated. He saw David Sr. backhand his children. He never saw him beat them but he saw evidence of a beating. He saw welts on petitioner's legs and back, similar to welts Mr. Riley would get after a "whipping." (ERT 1491.) The welts were in the shape of small loops, like from an extension cord. (ERT 1492.)

When Mr. Riley returned to Sobrante Park after his stint in the Navy, he visited petitioner's family at their home. Petitioner was 17 at the time. Mr. Riley arrived at their house to find petitioner standing outside without a shirt on. It was December and chilly out. David Sr. invited Mr. Riley in but would not allow petitioner inside. After 5–10 minutes Minnie told petitioner to come inside. Petitioner went into his bedroom and David Sr. followed and threw a cup of coffee on him. Petitioner came out of his bedroom with a sawed off shotgun and said "you're not gonna let me drive this car?" He then proceeded to shoot the car. The neighbors were looking out their window and petitioner said "what they looking at?" and fired a shot at their house. (ERT 1499-1502.)

Mr. Riley attended the trial one day. He recognized the bailiff, Fred Hives. No one from the defense team contacted him. (ERT 1504.) The Referee finds Mr. Riley's testimony to be credible. The testimony is of little value, however, because the Referee credits Mr. Selvin's testimony and judgment that he would not have conducted further investigation or called Mr. Riley as a witness in the penalty phase.

Therese Scarlet Nerad:

Scarlett Nerad, a licensed investigator and mitigation specialist, testified that she was contacted by petitioner's attorney in the summer of 2001. Ms. Nerad first met petitioner in the fall of 2001. (ERT 978-979.) When she first broached the subject of petitioner speaking with a mental health professional, petitioner was not interested and refused to continue the discussion. At the urging of Dr. Froming (the post-judgment consulting neuropsychologist), for a period of six months, different members of the four-member team, met with petitioner at least weekly, and corresponded with him as well. Each time they would bring up the subject of a mental health evaluation while talking about other areas of the investigation. After six months of laying the ground work, they finally convinced petitioner to see Dr. Froming. They also convinced petitioner to see Dr. Stewart, but petitioner would only see him on one occasion. Dr. Stewart was not able to conduct a comprehensive evaluation of petitioner at that time. When they learned that the court ordered petitioner to see respondent's expert, Dr. Martell,

the team started to talk to petitioner about him. They told petitioner Dr. Martell would give petitioner the same sort of tests Dr. Froming gave him. (ERT 979-981.) However, the team could not convince petitioner to cooperate with Dr. Martell. (ERT 982.) On cross-examination, Ms. Nerad acknowledged that petitioner associated Dr. Martell with Ms. Rivlin of the Attorney General's Office and that Dr. Martell was working with her, not petitioner. (ERT 988.)

Dr. William Pierce:

Dr. William D. Pierce, a clinical psychologist, testified that he had performed work on twelve death penalty cases prior to petitioner's trial. (ERT 304, 307.) Dr. Pierce's approach in a capital case was to evaluate the defendant clinically and give a confidential opinion to the attorney as to any psychological/psychiatric factors that might be involved in a defense. After that he would help develop the penalty phase of the case. (ERT 307-308.)

Dr. Pierce was retained by Mr. Broome to evaluate petitioner and give his opinion as to any psychiatric or psychological issues that could be important to the defense. He also was asked to address petitioner's competence to stand trial and, if needed, to help develop the penalty phase of the trial. (ERT 312.)

Dr. Pierce saw petitioner for an hour on his first visit. They generally discussed Dr. Pierce's role, some of petitioner's background, including his history of incarceration, how he was living, and his drug abuse history. Petitioner was concerned that Dr. Pierce would testify at his preliminary hearing and petitioner ended the session because he felt Dr. Pierce wasn't on his side. (ERT 313.)

Dr. Pierce attempted to visit petitioner a second time but petitioner refused to be seen. Dr. Pierce learned that petitioner was concerned that their discussions were being overheard or taped. (ERT 315.) Dr. Pierce attempted to see petitioner a third time, but again petitioner refused. Shortly after that, Mr. Broome was removed from the case. In May of 1988, petitioner's new attorney, Mr. Strellis, brought Dr. Pierce back into the case. (ERT 316.) By then, Dr. Benson was working with Mr. Strellis on petitioner's case and knew that Dr. Pierce had previously worked on the case with Mr. Broome. Dr. Benson and Dr. Pierce had previously worked on several capital cases together. (ERT 317.)

In May of 1988, Dr. Pierce and Dr. Benson attempted to interview petitioner's mother, Mrs. Welch. They made several appointments to meet with her and an investigator at Mr. Strellis' Office, but each time she did not show up. (ERT 318-319.) In September of 1988, Dr. Pierce again tried to meet with petitioner, but again petitioner refused. Dr. Pierce was contacted next by Mr. Strellis in June of 1989. By then the penalty phase was imminent. (ERT 319-320.) Up until that time, Dr. Pierce had not reviewed any social history documents, including school or employment records. He had also not conducted any interviews of friends, family, teachers or counselors. (ERT 321-322.)

During the preparation of the penalty phase, the doctors did review school records from 1963 to 1970, juvenile records from 1971, adult criminal history records, California Department of Corrections records, transcripts of the preliminary hearing, selected transcripts of the guilt phase of the trial, a factual summary of events, a summary of factors in aggravation supplied by counsel, police and sheriff reports and selected records from Highland Hospital. (ERT 324.) Dr. Pierce diagnosed petitioner as having delusional paranoid disorder, persecutory type, with a rule-out of paranoid schizophrenia. His diagnosis also included psychoactive substance use disorder with dependence on cocaine, alcohol, heroin and morphine. Both diagnoses are Axis I. Dr. Pierce also found petitioner to have impulsive personality disorder but ruled out organic personality syndrome, explosive type, which is Axis II. (ERT 326.) Dr. Pierce testified that organic personality syndrome refers to people with minimal brain damage. People with this disorder tend to be irritable, moody, have difficulty controlling impulses. They may have a speech impediment or motor difficulties. They tend to overreact to slight provocation. Impulsive personality disorder is similar. People with this disorder do things impulsively, act out of slight provocation, not able to put the brakes on or put the inhibitors on. (ERT 331.) Dr. Pierce referred to petitioner's juvenile records and criminal history as well as his behavior in the courtroom throughout the case to support his diagnosis. (ERT 333-335.) When asked at this hearing what additional evidence he would look for to be able to diagnose petitioner with schizophrenia, Dr. Pierce testified that social history information would not be that helpful to him but that he would want to do some psychological testing on petitioner. (ERT 337.)

In 2002, in connection with post-judgment proceedings, Ms. Nerad, a member of petitioner's team, contacted Dr. Pierce. She provided Dr. Pierce with additional materials, including declarations of family members, friends, at least one teacher, a school nurse and people in the neighborhood. Dr. Pierce considered the declarations of

petitioner's mother and aunt documenting child abuse (ERT 337-339), as well as records about toxicity in the neighborhood petitioner grew up in. He also learned that petitioner was a sickly child and had problems breathing as an infant. (ERT 340.)

Dr. Pierce testified that physical abuse of petitioner's mother could be an important factor suggesting that petitioner may have suffered brain damage in utero. Dr. Pierce also learned that an uncle of petitioner's believed aliens were coming. Dr. Pierce would not have put a lot of weight on that fact, however, because an uncle who hallucinates does not mean that his nephew is schizophrenic, and petitioner denied he has any mental illness. (ERT 346-347.) Had Dr. Pierce known the new facts in 1989, he would have wanted to conduct a full neurological evaluation on petitioner. This would include an EEG and/or a CT scan. He did mention these additional tests in his testimony to the jury during the penalty phase of petitioner's trial. (ERT 342-343.)

Dr. Pierce was not provided in 2002 or subsequently with any genetic tests to review in determining whether there was a genetic basis for a diagnosis of schizophrenia. He also was not provided with any CT scans to review in determining whether there was any structural damage to the brain. (ERT 365.) In cross-examination during the trial, the prosecutor asked Dr. Pierce if he had given petitioner those additional tests would he have changed his diagnosis; Dr. Pierce answered with a qualified no. (ERT 367.) Dr. Pierce went on to explain that it was a working diagnosis, based upon the data that he had. Petitioner had refused to cooperate, so Dr. Pierce had no test data. Dr. Pierce was not able to interview family members, so the records and the transcripts, as well as petitioner's behavior, were the only data upon which he based his clinical opinion. If he had been able to give petitioner the tests, he would have been more certain of his diagnosis. Dr. Pierce noted that he was fairly confident in his working diagnosis based on the data that he had. (ERT 368.) Also on cross-examination, in the penalty phase, Dr. Pierce was asked to review a probation report, which included a psychodiagnostic evaluation of petitioner conducted in 1976 by a psychologist named Mr. Dunbar. Dr. Pierce agreed with the description of petitioner's behaviors but felt the report was incomplete because it never listed the specific tests that were given to petitioner. Because of that, Dr. Pierce couldn't assess Mr. Dunbar's opinion that there was no showing of any neurological difficulties. (ERT 368-369.) However, Dr. Pierce noted that neurological tests give a picture of where a person is at, at that point in time. (ERT 381.)

The Referee finds Dr. Pierce's testimony to be credible in every respect. His demeanor while testifying showed a genuine concern regarding all aspects of the case.

Dr. Samuel Benson:

Dr. Samuel Benson, a neuropsychiatrist, testified that he was retained by Mr. Strellis as a forensic psychiatrist for petitioner's case. (ERT 386, 396.) Dr. Benson had been involved in eight to ten capital cases prior to petitioner's case and had worked with Dr. Pierce on four to five of those cases. Mr. Strellis asked Dr. Benson to do a complete psychiatric evaluation of petitioner. Dr. Benson was given police reports and told by both his current attorney, Mr. Strellis, and his former attorney, Mr. Broome, that the petitioner may present some difficulties. (ERT 397-398.) Dr. Benson visited petitioner in January 1989, and learned that it bothered petitioner if Dr. Benson took notes of his interview, so Dr. Benson tried to gather as much information as he could from petitioner without the use of notes. Dr. Benson met with petitioner four other times during a six-month period. There were two to three other visits scheduled but petitioner did not show. (ERT 399.) Dr. Benson did discuss with petitioner conducting further testing such as a CT scan, however he didn't get very far because petitioner did not want to be tested, period; he did not want to be evaluated psychologically, neurologically, or to submit to any kind of brain scanning. (ERT 434-435.)

Dr. Benson tried to gather further information from family members. He tried to meet with Mrs. Welch, with no success. (ERT 401.) He knew from records at Highland Hospital that petitioner had cocaine, a metabolite of heroin, and alcohol in system when he was brought to the hospital after the crime. At some point, Dr. Benson learned that petitioner's maternal uncle had schizophrenia; Dr. Benson couldn't rule out schizophrenia. (ERT 404-405.) He had school records, social service records including petitioner's juvenile justice records, the jailhouse records and his prison records. From these records and his limited discussions with petitioner, the doctor had some information on what had happened to petitioner during his lifetime – where he was at various times and what was going on with his life at various times. (ERT 406-408.) Dr. Benson did not, however, have any interviews of social history witnesses. (ERT 401-402.) Dr. Benson felt that petitioner suffered from traumatic brain disease or organic brain disease, which would explain all of petitioner's behaviors. Dr. Benson wished he could have done testing to prove that. With the information he had, he came up with a differential diagnosis: intermittent explosive personality

disorder, persecutory delusional disorder, organic brain disease or organic personality disorder. Dr. Benson testified at the penalty phase that petitioner had one of those disorders

In 2002, Dr. Benson was contacted by petitioner's team and was provided with a lot of additional information. (ERT 408.) The declarations of Randy Street, Sarah Perine, Konolus Smith and Phebia Richardson revealed the following: (ERT 425-426.)

- Petitioner lived in a poverty-stricken neighborhood;
- Petitioner's father was a severe alcoholic.;
- Petitioner's father did not supply sufficient clothing or food for his family;
- Petitioner's father beat petitioner and petitioner's mother, including when she was pregnant with petitioner;
- Mrs. Welch was malnourished when she was pregnant with petitioner;
- Life was extremely difficult for petitioner;
- During childhood petitioner tended to become isolated and withdraw;
- Petitioner had difficulty in school;
- Petitioner was thin and pale and malnourished as a child;
- Petitioner's social life was reasonable but friends had to be careful how they said things because petitioner wouldn't quite understand what was being said and would get fighting mad (ERT 409-410); and
- Petitioner received more punishment, from his father, than his siblings (ERT 417).

Dr. Benson also reviewed the neuropsychological examination that was done in 2002. (ERT 411-412.) Dr. Benson testified that this additional information, which suggested evidence of early brain trauma, would explain petitioner's lack of impulse control, his misperception of realty, and his loss of bladder control. (ERT 419, 421-422.)

Dr. Benson testified that had he known this information at the time of trial, it would have solidified his diagnosis. In his penalty phase testimony, Dr. Benson did cite examples of intermittent explosive personality disorder from petitioner's school records to support his diagnoses. These included problems at school, like difficulties concentrating, in getting along with others, in getting counseling and with studies. Dr. Benson also citied examples from petitioner's juvenile and prison records to support the diagnosis of organic personality disorder. (ERT 428-429.) Thus, at trial Dr. Benson testified about organic personality disorder. When asked in the reference hearing if this diagnosis would be the same knowing what he knows now, Dr. Benson answered "yes, but the names have kind of changed." Dr. Benson testified that the diagnosis is more or less traumatic brain disease and that his diagnosis is basically the same only the terminology would have changed. (ERT 429-430.) This terminology change is based on the information that petitioner's appearance was sickly, he had trouble keeping up in school, he had difficulties controlling his bladder, he was living in poverty and malnourished and he was punished more than his siblings.

The Referee finds Dr. Benson to be a credible witness, but does not afford his testimony much weight. Dr. Benson relied on information from the declarations of petitioner's friends and family, who testified very differently in court. Dr. Benson also relied on examinations done years after the crimes of which petitioner was convicted. Even then, after conviction when petitioner's incentives might be different, it took at least six months for petitioner's team working with petitioner on a weekly basis to persuade him to submit to the additional neurological and psychological examinations. Therefore, the Referee finds that, because despite the best efforts of his attorneys petitioner could not be convinced submit to testing in 1989 with Dr. Pierce and Dr. Benson, no test results would have been available at the time of the penalty phase.

Dr. Pablo Stewart:

Dr. Pablo Stewart, a forensic psychiatrist, testified that he specializes in defense work for capital cases. (ERT 628-629.) He explained the components of a mental health evaluation: spending time with and evaluating the client, reviewing as many records as possible, and speaking to people who know the individual. Records would include school, juvenile and psychiatric records. After that, further testing may be warranted such as neuropsychological, neuroimaging and medical tests. (ERT 636-637.)

Petitioner's team retained Dr. Stewart in 2002. (ERT 639.) He reviewed declarations of Sarah Perine, Konolus Smith, Phebia Richardson, Glen Riley and Minnie Welch. He also reviewed juvenile records and the declaration of Dr. Karen Froming. In addition, he reviewed trial testimony of Dr. Benson and Dr. Pierce as well as their testimony in this hearing. He also met with petitioner in June of 2002. (ERT 640-641.) Dr. Stewart's impression of petitioner, at the time of his interview, was that he was significantly mentally ill and very likely suffering from significant brain damage. (ERT 642.) Dr. Stewart testified that he was not able to do a more comprehensive evaluation of petitioner because of petitioner's psychotic symptoms. (ERT 643.)

Dr. Stewart testified that he could understand how Dr. Benson and Dr. Pierce arrived at their diagnoses. As to their diagnosis of impulsive personality disorder with a rule out of organic personality syndrome explosive type, Dr. Stewart saw the same things they saw. However because petitioner had a close family relative with schizophrenia Dr. Stewart felt more confident that schizophrenia was the prominent diagnosis. (ERT 648-649.) On cross-examination, however, Dr. Stewart conceded his diagnosis would also have to be rule out schizophrenia. (ERT 657.)

Dr. Stewart had the benefit of more information than the trial doctors had: the neuropsychological testing, the possible toxic exposure petitioner experienced as a child and the fact that petitioner was severely abused. Dr. Stewart believed that all this additional information would have made the trial doctors' diagnoses a little more accurate. (ERT 650.) It's not that he would arrive at different diagnoses, but he would have added more, such as PTSD, even though he was unable to do a trauma evaluation. (ERT 657-658.) Dr. Stewart acknowledged that a diagnosis could be made without family member interviews but it would have to be a rule out type of diagnosis. (ERT 659.)

Dr. Stewart's opinion that petitioner suffered severe child abuse was based on an account of petitioner's father hitting petitioner's head causing open wounds. Dr. Stewart could not recall whose declaration mentioned that. (ERT 663.) Dr. Stewart's 2002 declaration stated that petitioner had numerous scars on his face, forehead, head and arms from injuries inflicted as a result of severe child abuse. At the hearing, Dr. Stewart testified that he examined the injuries himself. As to their cause, he attributed them to child abuse because petitioner told him they were. Petitioner did not mention, however, that he frequently participated in fights as a child and as an adult. Dr. Stewart also

admitted the wounds were old and could have been inflicted at any age. (ERT 665-666.)

The Referee finds Dr. Stewart's testimony to have questionable credibility. Dr. Stewart declares that Dr. Benson's and Dr. Peirce's diagnoses are inaccurate and/or incomplete, but even after considering all the additional information given to him, he does not really differ in his own diagnosis. Moreover, his opinion is based on facts that were not proved at the hearing, such as the allegation that petitioner suffered open wounds after being hit in the head by his father, and unfounded facts and an exaggeration of statements made in the declarations by friends and family. Therefore the Referee gives his testimony very little weight.

Dr. Karen Froming:

Dr. Karen Froming, a clinical neuropsychologist, testified that in August of 2001 she was contacted by petitioner's team in 2002 to conduct a neuropsychological evaluation on petitioner. (ERT 700.) Prior to conducting the testing, Dr. Froming reviewed declarations from individuals involved in petitioner's life, his birth certificate, an environmental impact map, an E.P.A. finding on San Leandro Creek and a family history. (ERT 716.) Dr. Froming also relied upon a statement she read in Sarah Perine's declaration that David Sr. had kicked Mrs. Welch in the abdomen while she was pregnant with petitioner. (ERT 718.)

To persuade petitioner to do the tests, Dr. Froming encouraged petitioner's counsel to meet with petitioner almost weekly or biweekly, building the relationship between counsel and petitioner and building the relationship in abstentia with Dr. Froming. (ERT 1067.) It took six months, from August to March, before petitioner agreed to be tested by Dr. Froming. Dr. Froming conducted tests over six days in the year 2002: March 11, 12, 13; April 6; and June 4 and 10. (ERT 1064-1065.)

Dr. Froming discussed the gestational development of the nervous system and how a developing fetus can be affected in utero by stressors introduced through the mother. Physical abuse is one stressor. It raises the levels of cortisol, a stress hormone, which circulates in the mother's blood stream. These hormones then can be transferred to the baby and alter the cortisol level in the baby as well. (ERT 719.) Toxins in the physical environment can be another stressor, damaging the developing nervous system. Dr. Froming referred to a map of San Leandro Creek, which showed the amount of toxic chemicals present.

She found that petitioner's chronic health problems such as skin rashes, breathing problems and eye irritation were connected to the toxic chemicals in the creek. (ERT 722-723.) Dr. Froming also noted David Sr.'s alcohol abuse and how it related to the stressor of physical abuse. (ERT 724-725.) Dr. Froming testified that David Sr. was a very serious alcoholic. His drinking continued throughout the time he and Minnie were married. It exacerbated his violence, in that he became more violent when he drank.

Where most evaluations take two, possibly three, days, Dr. Froming needed to meet with petitioner for six days to conduct the evaluation. At the beginning of the interview process, petitioner wanted to discuss issues regarding his trial: complaints about how trial counsel presented the case; complaints that Dr. Pierce did not agree with petitioner's view that he should only have been convicted of manslaughter; and complaints that petitioner didn't want mitigation evidence presented, but the judge allowed it over petitioner's objections. (ERT 726-728.) Dr. Froming let petitioner vent because she needed his support to do the testing. (ERT 729.) During the testing, petitioner would digress and Dr. Froming would have to stop and start again. (ERT 730.) Petitioner asked Dr. Froming whether she was married and whether she had children, and he attempted to kiss her at the end of the testing. (ERT 733.)

Dr. Froming then described the various tests she gave to petitioner and his performance on each. (ERT 735-824.) Based upon the results of the tests, Dr. Froming opined that petitioner has problems with attention, memory and working memory, tracking and manipulating information, and suppressing an over-learned response. He also cannot figure out what the rules are in the environment he is in. He will either perseverate on a response based on a misperception of the situation, or he can't fathom the situation at all, or he comes up with something idiosyncratic in response. (ERT 816-817.) Dr. Froming believes these results are consistent with impairments in the frontal and temporal regions of the brain. (ERT 823.)

In response to a 2010 inquiry by Dr. Kreigler about additional things that could be done to corroborate the existence of trauma to certain regions of the brain, Dr. Froming also administered additional tests in September of 2010. Dr. Froming decided to conduct an emotion-processing task and structured interview. This was comprised of thirteen subtests. (ERT 824-825.) From these tests, Dr. Froming found evidence of frontal-subcortical impairments. (ERT 829.) She also administered the dissociative disorder interview scale, which goes

through all of the types of anxiety disorder components that are found. Dr. Froming found that petitioner has some elements of major depression with sleep disturbance. He has paranoid ideation and features of dissociative disorder. (ERT 831-832.) Dr. Froming found there was clear evidence of childhood abuse as well as violence in the neighborhood and toxic exposure, based on the report of trauma to petitioner's mother prior to petitioner being born, toxin exposure when petitioner would swim in the industrial area, and head injuries and being hit in the head and knocked unconscious by his father. (ERT 832-833.) Dr. Froming acknowledged that if there were inaccuracies in the declarations it would affect her interpretation of those records. It would not, however, alter her conclusions regarding her data; he performed the way he performed. But it would potentially alter her conclusions about how those records contribute to the overall picture. (ERT 858.)

During cross-examination, Dr. Froming was asked a series of questions regarding petitioner's conduct during and subsequent to the crime and whether these facts were inconsistent with her diagnoses. (ERT 845, 850-858.) Dr. Froming acknowledged there are other possible interpretations of the facts. (ERT 852.) For example:

- When petitioner shot Dellane and said, "This one's for you, Dellane," it showed petitioner knew he had a gun in his hand and recognized Dellane.

- After petitioner shot Darnell and Dellane his next words were, "Where's Chuck?," it showed he was focused on his destructive mission.

- When petitioner waited until nighttime when the family was asleep before he broke in and shot them, it showed a rational approach to the shooting.

- When he fled, concealed the weapon and burned his clothes, it showed his consciousness of having done something wrong. (ERT 854, 856, 858.)

The Referee finds Dr. Froming's opinions of limited value. None of the witnesses to petitioner's childhood (Cathie Thomas, Konolus Smith and Sarah Perine) said that petitioner's father kicked or struck Mrs. Welch in the abdomen while she was pregnant with petitioner. There was also very little evidence presented that petitioner was exposed to toxins and no direct evidence that he was affected by any toxins. Also, there was no evidence that petitioner suffered any head injuries and was knocked unconscious by his father. Therefore, the Referee

discounts as unfounded Dr. Froming's conclusions that "direct child abuse to [petitioner] in terms of head injuries" resulted in "an on-going and consistent impact on [petitioner's] brain over time" that was "consistent with serious child abuse."

The Referee also finds that because petitioner did not agree to submit to testing in 1989 with Dr. Pierce and Dr. Benson and would not cooperate, any additional diagnoses from Dr. Froming's testing would not have been available at the time of the penalty phase. Accordingly, the Referee must discount the neurological data, the psychological testing and the opinions of Dr. Froming based on those results in assessing the adequacy of the investigation and presentation of the penalty phase.

Finally, the Referee finds that there was no foundation to support Dr. Froming's opinion that petitioner was at risk because he was exposed in utero to high levels of stress hormones from his mother. While there was evidence petitioner's mother suffered from a pattern of spousal abuse when she was pregnant with petitioner, there was no evidence this raised the cortisol levels in her bloodstream or that this was neuropsychologically toxic when and if it was transferred to petitioner as a developing fetus.

Dr. Julie Kriegler:

Dr. Julie Kriegler, a clinical psychologist, testified that she was retained on petitioner's case to evaluate his history and his record regarding trauma. (ERT 1664, 1676.) Dr. Kriegler reviewed records from various sources and numerous declarations, and conducted interviews with petitioner, his mother, his aunt Sarah, Konolus Smith and Glen Riley. She also reviewed the testimony from this hearing of doctors Froming and Stewart, Mrs. Welch, Aunt Sarah Perrine, Uncle Roy Millender, Konolus Smith, Glen Riley, and petitioner's sister Cathie Thomas. (ERT 1678.)

Dr. Kriegler found that petitioner has a genetic risk for schizophrenia and substance dependency. She opined that petitioner's father was dependent on multiple substances and his father's mother was also known to be an alcoholic. Dr. Kriegler also found there to be intrauterine stress. She based this on reports that Mrs. Welch was severely abused by petitioner's father, including being hit in the abdomen during the time she was pregnant with petitioner. Dr. Kriegler concluded this also meant Mrs. Welch was highly stressed, which produced high levels of stress hormones which are neurologically toxic

to a developing fetus. Dr. Kriegler noted that petitioner's parents had little education, came from poverty, deprivation and racism. (ERT 1708-1709.) Petitioner's paternal grandfather was so abusive that his wife (petitioner's paternal grandmother) abandoned the children and left them with their father. (ERT 1710.) Dr. Kriegler also found that petitioner's mother suffered from depression. (ERT 1711.) In addition petitioner himself had struggles in school and a speech impediment, which could be markers of neurological impairment. (ERT 1714.)

Dr. Kriegler also testified that she found evidence that petitioner was subjected to severe, ongoing, unrelenting abuse from his father. Dr. Kriegler cited examples of this, such as petitioner sleeping by the creek and under friends' beds, getting assaulted by his father to the point of unconsciousness in public, and seeing his mother assaulted by his father. (ERT 1715-1718.) Dr. Kriegler went on to describe some of the symptoms petitioner exhibited, which she believed were the result of serious child abuse: Petitioner was paranoid and perceived people were out to get him. He had a history of substance abuse starting as early as age 10-12. In addition to symptoms of child abuse, Dr. Kriegler in her interviews saw signs of thought disorder or schizophrenia as well as attention difficulties. (ERT 1719-1721.)

Based upon all these factors Dr. Kriegler opined that petitioner is severely neuropsychiatrically impaired. His function, his thought process and his perceptions are also impaired. This is a result of a confluence of multiple factors: all the risks, the mental illnesses, the neuro-cognitive dysfunctions, protracted trauma and a lack of safety. (ERT 1722-1723.) When asked if she would have been able to come to these conclusions even without the benefit of her three interviews with petitioner, she stated she would because of the consistent reporting from all the other historians regarding early protracted trauma. When asked if she was left with only the social history interviews, excluding petitioner, Dr. Stewart and Dr. Froming's testimony, would her ultimate conclusion have been altered significantly, she stated no. (ERT 1723-1724.)

The Referee does not give much weight to the opinions of Dr. Kriegler because – like Dr. Stewart and Dr. Froming – many of the facts upon which Dr. Kreigler relied were exaggerated, misstated or not shown at the hearing. For example, she assumed petitioner suffered in utero injury from an assault on Mrs. Welch's abdomen, but there was no evidence of such an assault. Dr. Kriegler also assumed that petitioner was beaten by his father with his fist into a state of unconsciousness in public, when the evidence really showed petitioner's father slapped him on the back of the head causing petitioner to fall down for a couple of

seconds at which point petitioner appeared stunned. (ERT 598, 1716-1717.) Other instances Dr. Kriegler assumed included that petitioner's father was dependent on multiple substances, that petitioner's father jumped out of a car and threw a bottle at petitioner's head, (ERT 597) that petitioner's father threw a cup of hot coffee in petitioner's face (ERT 510) and that he punched petitioner at school. (ERT 595.) All these instances were not proved at the hearing or greatly exaggerated compared to the actual testimony. Finally, Dr. Kriegler testified that petitioner was deprived of a home and ended up sleeping in cars, at the creek, or under friends' beds. (ERT 1716.) In fact, Mr. Smith testified that petitioner stayed with him for two nights and slept in a bed, not under one. And on those two occasions Mr. Smith did not know if petitioner was having a problem at home. (ERT 605.) Although the Referee finds that these discrepancies undermine many of Dr. Kriegler's assumptions, there was some credible evidence to support Dr. Kriegler's opinion that petitioner was the victim of serious child abuse based on the testimony provided by Sarah Perine, Cathie Thomas and Roy Milender.

Dr. Daniel Martell:

Dr. Daniel Martell, a forensic neuropsychologist, testified on behalf of respondent. (ERT 1828.) In preparation for his testimony he reviewed the direct appeal opinion of this case, the statement of facts from respondent's brief on direct appeal, a disk with the clerk's and reporter's transcript of the trial, declarations and exhibits provided by petitioner's counsel in support of his petition, and the work of the doctors that consulted and evaluated petitioner. Dr. Martell also reviewed the notes made by Dr. Kriegler and Dr. Froming in their interviews with petitioner as well as their declarations and testimony in this hearing. Dr. Martell also reviewed the declaration of Mr. Thomson and received copies of petitioner's prison chronos. (ERT 1835-1836.)

The Referee granted a motion to allow respondent's expert to evaluate petitioner, so Dr. Martel traveled to San Quentin to interview and test petitioner. Once he arrived, he was told that petitioner refused to see him. After that, Dr. Martell spoke with petitioner's counsel and suggested ways counsel might help facilitate petitioner's cooperation – having petitioner's attorneys or doctors in the room during the interview. Counsel proposed these alternatives to petitioner but he still refused to see Dr. Martell. (ERT 1837-1838.)

In reviewing the doctors' test results, Dr. Martell identified neuropsychological deficits that included borderline intellectual

functioning. Petitioner's I.Q. was above mental retardation but below "low average." Petitioner's memory functioning was commensurate with his level of I.Q. In addition, there was evidence of deficits in executive functioning, otherwise known as frontal lobe functioning, which was demonstrated by petitioner's impulsivity and distractibility. There was mixed evidence regarding perseveration (pathologically repeating behavior in speech and language or physical actions). Perseveration was observed in some tests and not in others. Petitioner's scores regarding intact abstract problem solving were better than Dr. Martell expected for petitioner's I.Q. (ERT 1839-1840.) The testing of petitioner's frontal lobe functioning yielded mixed results, and Dr. Martell was concerned about the validity of the data. Dr. Martell felt that petitioner's low scores were in significant part a function of his psychiatric disorder, his paranoid delusions, his easy distractibility and the difficulty keeping him focused, all of which interfered with timely testing. Dr. Martell opined that if petitioner's mental disorder were more affectively treated, some of his apparent deficits might be resolved. (ERT 1841-1842.) All disorders go through periods of exacerbation and remission.

Dr. Martell noted that even without testing, Dr. Pierce and Dr. Benson observed the same symptoms early in the case. Dr. Martell observed two kinds or problems: psychiatric disorders and organic brain dysfunction. Some of the observed deficits in testing (low I.Q. and problems in executive functioning) are symptoms of organic brain dysfunction; paranoid ideation and delusions are symptoms of psychiatric disorders. Indeed, Dr. Martell was struck by the consistency of the description from the doctors over time: Everyone seemed to be describing the same person, the same constellation of problems all the way back to the penalty phase of the trial. (ERT 1845.) Thus, Dr. Martel concluded, even though Dr. Pierce and Dr. Benson did not have the benefit of the neuropsychological testing, they got the fundamental diagnoses right and were validated by the subsequent doctors that examined petitioner. (ERT 1844-1845.)

Dr. Martell had questions regarding the extent of the influence of neuropsychological factors on petitioner's behavior. He was hampered in resolving these questions by petitioner's refusal to talk about his life. However, Dr. Martel found that petitioner's behavior at the time of the crime contradicted his doctors' testimony that his frontal lobe damage affected his ability to control his behavior. For example, petitioner was able to lay in wait, sit in his car and wait for the police to leave. That behavior – choosing to move in a way that maximized his opportunity to do what he had said he wanted to do and minimized his risk of getting

caught – is inconsistent with frontal lobe damage. Also, he brought a fully loaded UZI machine gun to the crime scene – evidence of planning and organization. Petitioner thought about what he wanted to do, brought a weapon appropriate to the task, made sure it was loaded, and waited until the police left the area. (ERT 1845-1848.)

In addition Dr. Martell found there was a certain systematic approach to his behavior during the crime. Petitioner went through the house stating, "Where is Chuck at?" indicating Petitioner knew Chuck was not where he was supposed to be. Petitioner said "This one's for you" before shooting the victims, which showed a systematic pursuit to eliminate witnesses from both his trial and from what he was doing that night. Dr. Martell opined that both of those things showed intact planning, organization, and lack of impulsivity. Dr. Martell found that petitioner's prior threats to do exactly what he did is relevant too: it demonstrated that he had a plan, he told people of his plan, developed it for a reason, and carried it out. Dr. Martell noted that those are all frontal lobe executive control functions that, at that time, were intact and operating effectively. Petitioner's choice of the time to commit the crime – the middle of the night when the victims would be asleep and were easier targets – again showed thinking and planning on how to murder a large number of people. It was the best way to control the victims and to prevent them from interfering with what petitioner was trying to do. This was goal-directed behavior. Finally, petitioner's behavior after the crime – burning the clothing he was wearing, putting the weapon in a pillowcase and leaving it in a cousin's yard – showed that petitioner was cognitively intact enough to understand that he needed to get rid of evidence that might later connect him to the crime. This was organization, planning and goal-directed behavior which showed petitioner was functioning at a much higher level than the doctor's testified he would have been able to. (ERT 1848-1850.)

The Referee finds Dr. Martell to be a very credible witness. Dr. Martell did not overstate or misstate facts upon which he based his opinions. He did not stretch his opinion, but appropriately narrowed it to reflect the limits on his information because petitioner refused to see him. Based upon Dr. Martell's demeanor and candor on the witness stand, the Referee finds his testimony very credible.

The petitioner offered into evidence the declarations of social history witnesses. The Referee granted that request and admitted them into evidence, not for the truth of their contents, but for the purpose of establishing the basis for the experts' opinions.

B. Findings of Fact and Conclusions On Question 2

Question 2 to the Referee Consists of two parts:

1. **Did trial counsel adequately investigate potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse?**

2. **If trial counsel's investigation was inadequate, what additional information would an adequate investigation have disclosed?**

The Referee answers those two questions as follows:

1. **Part 1: Trial counsel Did Not Adequately Investigate Potential Mitigation Evidence During the Penalty Phase that Petitioner Had Been the Victim of Serious Child Abuse.**

The Referee finds that trial counsel did not adequately investigate potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse. Some investigation was done: the attorneys tried to get information from an uncooperative client and from the client's uncooperative mother. Counsel failed, however, to go beyond those efforts to undertake their own investigation, or instruct the penalty phase investigator to obtain social history information, from other sources: petitioner's extended family or from petitioner's community, co-workers, teachers, classmates, neighbors or other professionals who had encounters with petitioner in his developmental years.

a. The Efforts To Get Information From Petitioner and His Parents Were Adequate.

Petitioner's lead trial counsel, Spencer Strellis, was the third in a series of attorneys. He took over petitioner's case in January 1988 from former counsel Thomas Broome, who (with his co-counsel Robert Cross) in turn had replaced still-earlier counsel James Giller, in May 1987. (ERT 198.) Alexander Selvin became involved in petitioner's case in late 1988 or early 1989 as Mr. Strellis' co-counsel. (ERT 457-458.) By then, Mr. Strellis had retained a guilt phase investigator (Brian Olivier) and a penalty phase investigator (Jackie Lesmeister). (ERT 459-460, Exhibit N-3, Tab 100, 468.)

Mr. Strellis and Mr. Selvin also retained mental-health professionals within the year before the penalty phase to diagnose petitioner and explain the

significance of the diagnosis to the jury. In May 1988, Mr. Strellis brought Dr. William Pierce, a clinical psychologist first retained by former counsel, Mr. Broome, back into the case. (ERT 311, 316-317.) Dr. Samuel Benson, the neuropsychiatrist, was also retained sometime in late 1988 or early 1989. Dr. Benson met with petitioner five times between January and July 1989. (ERT 399.) Dr. Pierce had succeeded in meeting with petitioner on only one occasion. (ERT 312-313.) Dr. Pierce made a second attempt to meet with petitioner in September 1988 but petitioner would not see him. (ERT 316.) Prior to the penalty phase in July 1989, Dr. Pierce had made two unsuccessful attempts to meet with petitioner's mother, Minnie Welch and then ceased to work on the case any further until Mr. Strellis contacted him again in June 1989, two weeks before the penalty phase. (ERT 318-319, 320.)

Up until January 1988 when Mr. Strellis took over, little had been done by the former attorneys on the penalty phase. Broome had met with petitioner's mother (ERT 174, 224) and had retained Harold Adams, an investigator. Mr. Adams had interviewed petitioner's father once in 1987 focusing only on guilt phase issues. (ERT 203, 220; Exhibit N-1, Tab 63; Exhibit N-3, Tab 100.) Mr. Broome had not been able to do any other penalty phase investigation before his representation was terminated in January 1988 because, as he informed the court, petitioner refused to allow anybody to do anything. (ERT 248.)

By May 1988, Mr. Strellis had obtained documents from the District Attorney including petitioner's juvenile and adult probation reports as well as "penalty phase materials" involving reports of prior incidents and convictions, which the prosecution relied upon to establish the factors in aggravation. (ERT 469-470, Exhibit N-1, Tabs 55, 56; Exhibit N-3, Tab 100.) Certified copies of Petitioner's elementary, junior high school and high school records, however, were not obtained until after the end of the guilt phase (ERT 472-473) on or about June 26, 1989. (ERT 471-473; Exhibit N-1, Tab 49; Exhibit N-3, Tab 100.)

It was not until after the guilt phase ended in June 1989 that Dr. Benson and Dr. Pierce, both of whom had been asking for additional information, were provided with it: petitioner's juvenile records from 1971; California Department of Corrections records; selected hospital records from Highland Hospital; school records from 1963 to 1971; and selected transcripts of petitioner's trial; transcripts of preliminary hearing; factual summary of events; and a summary of factors in aggravation. (ERT 324, 403, 406-407.)

Two weeks before the penalty phase Dr. Pierce was contacted by Mr. Strellis to further consult on the penalty phase. By then Dr. Pierce had formulated his diagnosis of petitioner and was confident in his assessments.

(ERT 368.) There was also no evidence Dr. Benson's assessment was compromised by any time constraints

The Efforts to Interview Petitioner were Adequate. The Referee finds that trial counsel made adequate efforts to obtain social history information from petitioner. The trial attorneys tried to get petitioner to open up about social history information but petitioner was committed to protecting that information at all costs. (ERT 465.) Mr. Selvin and Mr. Strellis "just could not get any information from petitioner...." Both Mr. Selvin and Mr. Strellis were of the opinion petitioner did not want anyone to think he was mentally ill and, because he was mentally ill, they found him impossible to work with. (ERT 463, 469, 536.) This sentiment was echoed by petitioner's previous attorneys, Mr. Broome and Mr. Cross. (ERT 248, 289.)

The Referee finds there was no evidence petitioner disclosed to his trial counsel that David Sr. had abused petitioner or his mother. Petitioner had expressed resentment to Mr. Broome about his father's abuse of his mother. Mr. Broome should have passed this information on to Mr. Selvin or Mr. Strellis, but he did not; they cannot be faulted for not knowing. (ERT 205, 234-235.)

The Referee finds that petitioner never disclosed to Dr. Pierce or Dr. Benson that petitioner had been abused by his father as a child. Rather petitioner declined to provide social history information to Dr. Benson during five clinical interviews (ERT 413, 416, 465), just as he refused to provide Dr. Pierce with that information during his one clinical interview with petitioner. (ERT 313, 315, 316, 320, 436.) Accordingly, the Referee finds that trial counsel's failure to obtain social information from petitioner was not due to ineffective representation but to petitioner's own actions.

The Efforts to Interview Petitioner's Parents Were Adequate. The Referee finds that trial counsel made adequate efforts to contact and obtain social history information from petitioner's mother and father, who was deceased at the time of the hearing. (ERT 464-465; Exhibit N-1, Tab 64.) Petitioner's parents never told the trial attorneys that David Sr. abused petitioner as a child. The Referee credits the testimony of Mr. Selvin and Mr. Strellis that they did everything they could to contact petitioner's parents; that the parents did not show up to the meetings that were scheduled (ERT 464); and that petitioner's parents were uncooperative with petitioner's attorneys. (ERT 464, 466, 489.) The Referee also credits the testimony of Dr. Benson that he tried to meet with Minnie Welch but was unsuccessful (ERT 401), and the testimony of Dr. Pierce that petitioner's mother failed to show up at the appointed time for two scheduled interviews with him. (ERT 318.)

The Referee does not credit the testimony of Minnie that she was available to provide information to the trial attorneys and to testify on behalf of petitioner at the time of his trial. (ERT 1581, 1592-1593.) Her testimony about going to the lawyer's office was not credible: She testified that during the time of petitioner's trial she had been to counsels' office more than once (ERT 1599); then she contradicted herself asserting that the lawyers never asked her to come to their office; then she further contradicted herself by admitting that she did not go to their office but gave the excuse that it was because she was not able to get there. (ERT 1591-1592.) Minnie Welch's excuse for not going to scheduled meetings was particularly incredible, given that she said she attended petitioner's trial on a daily basis over a year, while maintaining a rigorous work schedule. (ERT 1575-1578.) There is no evidence Minnie Welch asked petitioner trial attorneys' to accommodate her schedule. Nor did she give trial counsel any reason to believe she would assist them had they made a sixth or seventh attempt to enlist her help.

The Referee finds based on the testimony of Mr. Strellis and Mr. Selvin that petitioner had tacitly disapproved of his parents cooperating with members of the defense team because he did not want anybody to know he was mentally ill. (ERT 465, 489.) Mr. Cross, petitioner's former counsel, noted that petitioner did not want to have anything to do with a classification that he was "crazy." (ERT 289.) Minnie Welch even acknowledged that at the time of his trial her son did not feel good about the mental health issues being raised in the case (ERT 1592); did not want mental health issues to be brought up in the case; and she recalled that he was a "pretty upset about it". (ERT 1593.) In fact trial counsel introduced at the penalty phase the testimony of Dr. Pierce and Dr. Benson over petitioner's objection. (TRT 5916-5919, 6017.)

The Referee finds that however much Minnie Welch may now wish, and even believe, that she would have cooperated with petitioner's attorneys, at the time she bowed to petitioner's wishes and did not cooperate with petitioner's trial counsel or the mental health experts. Accordingly the Referee concludes that trial counsel undertook an adequate investigation, on their own and through their mental health experts, to obtain social information from petitioner's mother and father.

b. The Efforts To Interview Petitioner's Extended Family Were Inadequate.

The Referee finds that the trial attorneys, in ending their efforts when stonewalled by petitioner and his parents, conducted an inadequate penalty phase investigation. Competent counsel would have sought (either themselves or through an investigator) to obtain social history information from other

sources about petitioner's mental health, child abuse and social history. (ERT 464-465.)

The Referee specifically finds that the trial attorneys did not meet prevailing professional norms at the time of trial when they failed to contact and obtain social history information from Cathy Thomas (petitioner's sister), Sarah Perine (petitioner's maternal aunt) and Roy Millender (petitioner's maternal uncle) – all of whom were available to testify at the time of petitioner's trial.[3]

The Referee finds that the penalty phase investigator, Ms. Lesmeister failed to contact petitioner's sibling, aunts and uncles. Petitioner's attorney, Mr. Selvin knew or should have known about this hole in the investigation: He testified he was not aware of any work product produced by Ms. Lesmeister, and did not see any in the file. (ERT 461, 468.) Nor was there evidence the trial attorneys themselves ever undertook to contact other family members. (ERT 461, 468.) There were no interview reports with social history or mitigation witnesses contained in the trial attorneys' files. (ERT 461, 468.) Trial counsel did not specify which "family" members they attempted to contact other than that Mr. Selvin recalled setting up at appointment for "someone else" possibly petitioner's brother or uncle. (ERT 465.) Mr. Selvin could not recall, however, anyone on the team performing or obtaining any social history interviews, any statements, affidavits, declarations, or witness statements. (ERT 460, 468.)

Mr. Selvin conceded that even if petitioner was difficult, paranoid or uncooperative it was still the attorneys' duty to conduct a mitigation investigation. (ERT 480.) Yet petitioner's trial counsel decided that since they were not getting cooperation from petitioner and his parents, to go with what they had, which was, essentially, the records. (ERT 483-485.) They thought they had enough there and if the jury did not believe Petitioner was mentally ill, nothing they could do would make a difference at the penalty phase once he had been convicted at the guilt phase. (ERT 530, 532-533.) The Referee finds trial counsels' reasoning did not absolve them of their duty to adequately

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[3] Petitioner suggested Dwight Welch (petitioner's brother) and Terry Yvonne West (petitioner's former wife) also would have provided useful information. They were deceased at the time of the hearing, and the Referee finds there was no evidence from which to infer that, had they been contacted by defense counsel at the time of petitioner's trial, either of them would have been available to testify or provide further information. Indeed, Dwight Welch had been convicted and sentenced on July 11, 1989, to five years State Prison for auto theft. His trial took place at the same time and across the hall from petitioner's trial. Dwight told petitioner's probation officer that he and petitioner have had serious conflicts over the past years resulting in injuries to Dwight. (Exhibit 55.)

investigate evidence in mitigation at the penalty phase especially in light of the evidence that the trial attorneys were aware that they needed to talk to other family members.

c. The Defense Team's Efforts To Interview Community Members Were Inadequate.

The Referee finds petitioner's attorneys, in failing to seek social history information from members of petitioner's community, did not conduct an adequate penalty phase investigation. Coworkers, teachers, classmates, neighbors or other professionals (such as probation officers) had encounters with petitioner in his developmental years and were available. The attorneys should have directed their investigator to pursue these potential witnesses.

Counsel also did not investigate sources of the information contained in petitioner's school records. Prevailing professional norms at the time of the trial required trial counsel to contact, and/or direct their investigator to contact petitioner's school personnel including teachers and principals. (ERT 467.) The Referee finds there was no evidence any school personnel were contacted. However the Referee notes that no witnesses relating to petitioner's school records testified at the hearing. (ERT 467.)

2. Part 2: The Additional information That An Adequate Investigation Would Have Disclosed.

a. Evidence of Child Abuse

The Referee finds that had there been an adequate investigation, information about severe child abuse would have been disclosed at the time of the penalty phase from social history witnesses Sarah Perine (petitioner's maternal aunt), Cathy Thomas (petitioner's sister), Konolus Smith (petitioner's childhood friend) and Roy Milender (petitioner's maternal uncle). Based on Mr. Selvin's testimony, the Referee finds that the report involving Glen Riley did not reveal facts that warranted further investigation, so the information from Mr. Riley would not have been disclosed at the time of the penalty phase. Again, because the Referee discredits Minnie Welch's claim that she was cooperative and available to testify, the Referee finds that none of the facts she related in her testimony would have been available social history information at the time of petitioner's trial. (ERT 1521-1600.)

The Referee finds that additional information from these witnesses would have disclosed that petitioner's father inflicted serious physical abuse upon the petitioner as a child to the time he was 17 years of age. The Referee

finds that the following facts would have been discovered and could have been introduced at the penalty phase at trial:

- Petitioner was born on March 21, 1958 (ERT 1265), a year before his younger brother, Dwight, who was born on March 1, 1959 (ERT 1266) and 1½ years after his sister, Cathie, who was born on October 1, 1956. (ERT 1265.) Petitioner was known as "Moochie." (ERT 1254.)

- Sarah Perine (ERT 1256) saw petitioner's father spanking him with a belt, extension cord or shoe, or flicking his finger on petitioner's head about once a week until she moved to Los Angeles in 1961. (ERT 1281-1282.) Sarah also saw petitioner shake and tremble around his father. (ERT 1269, 1283.)

- According to Cathie Thomas their father, David Sr., when he was drunk became angry, violent and abusive to her mother and petitioner. He would leave on Friday night and show up drunk on Sunday night. From her bedroom she could hear her father punch her mother with his fists. When she would enter the room she saw her father hitting her mother. (ERT 1625.)

- Cathie Thomas also heard her father hit petitioner with a belt or extension cord in the boy's room. This continued from the time petition was six or seven to age 17. These beatings would last about five minutes, and she saw marks on her brothers' arms from being hit. Her father hit petitioner more often when he was drunk, but also when he was sober; sometimes he would hit petitioner for a reason, sometimes for no reason at all. (ERT 1629-1631.)

- The frequency of the physical abuse diminished when petitioner was 12 or 13, once David Sr. began working in the merchant marines, and was home for only four to six weeks at six-month intervals. (ERT 1620.) When David Sr. was home, he would drink on the weekend and beat petitioner. (ERT 1621-1622, 1631.)

- Petitioner's contact with his father further diminished after the age 12 or 13 when his parents divorced between 1970 and 1971. Petitioner's father would still come back to their home on La Prenda, in Sobrante Park, off and on after the divorce. He continued to hit petitioner during this time. (ERT 1634-35.)

- The last time David Sr. tried to hit petitioner, petitioner was 17. For the first time, petitioner fought back. The confrontation spilled into the hallway and petitioner and his father started to fight. Immediately after the fight, petitioner left the house with a shotgun and shot out the

window of their car and the windows of the McPhersan's house down the street. (ERT 1635-1637.)

- Konolus Smith, petition's childhood friend, saw petitioner's father hit petitioner in public twice: once when petitioner was under the age of 10 and David Sr. arrived at school and gave petitioner "kind of a slap upside the head" (ERT 595); and once when petitioner was a teenager hanging out with his friends, and David Sr. came in and "slapped him on the back of the head," causing petitioner to fell down "for a couple of seconds" and appear "stunned." (ERT 598.) However, there was no evidence of any head injuries suffered as a result or that petitioner was knocked unconscious. David Sr. also threw a bottle from a car while petitioner was walking down the street. (ERT 596-597.)

- Roy Millender, petitioner's maternal uncle, had seen petitioner's father discipline petitioner by hitting him and making him "go to jail" in the closet. Petitioner also stayed with his uncle, on weekends and for as long as six weeks when school was out. Petitioner stayed with his uncle off and on until he was 16 years of age. (ERT 562, 567-568.)

b. The Effect of an Adequate Investigation On the Opinions of Mental Health Experts.

The Referee finds that had there been an adequate investigation, additional information would have been available to petitioner's mental health experts, who in turn would have been able to support their opinions with the additional evidence. Mental health experts Dr. Kreigler, Dr. Stewart and Dr. Froming explained the full diagnoses that would have been available had all the information they had been available at trial. Their opinions, however, were grounded on a mix of information: social history information, neurological and psychological testing of petitioner and clinical interviews with petitioner. Only some of that information would have been discovered by adequate investigation at the time of trial. The Referee accordingly parses their opinions, crediting them only to the extent they are based on information that would have been available to counsel had adequate investigation been conducted.

i. Supplemental Expert Opinion Would Have Been Available Based on Information from Social History Witnesses.

Declarations, statements and evidence of various social history witnesses were provided to Dr. Kriegler, Dr. Froming, Dr. Stewart, Dr. Benson and Dr. Pierce in formulating their opinions for the purpose of the reference hearing. The declarations of social history witnesses were admitted into

evidence not for the truth of their contents, but for the limited purpose of establishing the basis for the experts' opinions. (ERT 340, 349, 1886; Exhibit N-1, Tabs 8-14.)

The social history witnesses who would have been available at the time of trial and who also testified at the evidentiary hearing provided a factual foundation to further support an expert's opinion. In particular, the expert's opinions were based on the following information:

- Dr. Pierce reviewed the additional information set forth in the declarations of petitioner's mother, Minnie Welch (ERT 338); Sarah Perine (ERT 338); and the school nurse, Phebia Richardson. (ERT 338.) Dr. Benson reviewed "additional information" (ERT 408) set forth in declarations of Minnie Welch (ERT 426), Sarah Perine (ERT 426), Konolus Smith (ERT 426), Randy Street (ERT 426) and Phebia Richardson. (ERT 426.)

- Dr. Kriegler's opinions were based in part on a review of the testimony from the evidentiary hearing of Minnie Welch (ERT 1678), Cathie Thomas (ERT 1678), Sarah Perine (ERT 1678), Konolus Smith (ERT 1678), Roy Millender (ERT 1678) and Glen Riley. (ERT 1678.) Dr. Kriegler also reviewed the testimony of Dr. Froming and Dr. Stewart. (ERT 1678.) Dr. Kriegler conducted two interviews with Minnie Welch (ERT 1678) and single interviews with Sarah Perine (ERT 1679), Konolus Smith, (1679) Glenn Riley (ERT 1679) and the petitioner. (ERT 1679.)

- Dr. Stewart's opinions were based in part on a review of the declaration of Sarah Perine (ERT 640), Konolus Smith (ERT 640), Phebia Richardson (640), Glen Riley (ERT 640), and Minnie Welch. (ERT 640.) Dr. Stewart also reviewed "juvenile records and other records." (ERT 640.) He also reviewed the reference hearing testimony of Dr. Pierce and Dr. Benson. (ERT 641.)

- Dr. Froming reviewed declarations of "individuals involved in" petitioner's life (ERT 716) but only specifically mentioned Sarah Perine's declaration (ERT 717-718) and the declaration of petitioner's son. (ERT 846; Exhibit N-1, Tab 32.)

The Referee finds, however that the experts relied in part on social history witnesses who were not available at the time of the trial. To that extent, the experts' opinions are not supported by the record, undermining the weight the Referee accords to their testimony. For example, information provided to the experts by Minnie Welch and Glen Riley would not have been available at the time of trial because, as the Referee found above, Minnie

Welch was uncooperative and Mr. Selvin reasonably would not have pursued further investigation involving Glen Riley. (Exhibit N-1, Tab 8, 12)

The Referee also finds there was no evidence from any of the following social history witnesses at the evidentiary hearing indicating that they would have been available to the experts at the penalty phase and therefore the reference court has not otherwise considered their declarations in Exhibit N-1: Phebia Richardson (Tab 13), David Esco Welch IV (Tab 32); Treslyn Block (Tab 33); Randy Street (Tab 34); Billy Williams (Tab 35); Marco Franco (Tab 36); Jackie Jackson (Tab 37); David Irving (Tab 38); Dwight Jackson (Tab 39); Roy Turk (Tab 40); Marie Lewis (Tab 41); Beatrice Lewis (Tab 42); John Quatman (Tab 43); William Welch (Tab 45); Daniel Abrahamson (Tab 46); or the statement of Stella Jackson. (Tab 47.)

ii. Supplemental Expert Opinion Would Have Been Available Based On Clinical Interviews of Petitioner After Discovery of Social History Information.

The Referee finds that because petitioner made himself available in 1989 for clinical interviews with Dr. Pierce and Dr. Benson, additional diagnoses from mental health experts, now proffered by Dr. Stewart, Dr. Kriegler and Dr. Froming, would also have been available had there been an adequate investigation.

The Referee finds that in 1989 even though petitioner did not disclose details of his social history and refused to take any type of tests, petitioner had agreed to the brief clinical interviews conducted by Dr. Pierce and the five conducted by Dr. Benson. These interviews provided the mental health experts at the time of petitioner's trial an opportunity to formulate clinical diagnoses and opinions of petitioner's psychological condition.

Accordingly, the Referee finds that had Dr. Pierce and Dr. Benson had available to them the social history information adduced later, which an adequate penalty phase investigation would have disclosed in 1989, they would have been able to observe what was seen during the later clinical interviews with petitioner in 2002. Thus, to the extent opinions formulated by Dr. Kriegler, Dr. Stewart and Dr. Froming were based on clinical interviews conducted with knowledge of the social history information, those opinions would also have been available at the time of the penalty phase.

iii. Supplemental Expert Opinion Based On Neurological And Psychological Testing of Petitioner Would Not Have Been Available.

The Referee finds that because petitioner refused to submit to testing in 1989 with Dr. Pierce and Dr. Benson (ERT 435-437), the additional diagnoses of Dr. Froming based on neurological and psychological testing would not have been available at the time of the penalty phase.

Petitioner adamantly refused to submit to neurological testing in 1989. The attorneys and the doctors did everything they could to convince him to cooperate. He would hear none of it. At a meeting between Dr. Benson, Dr. Pierce and petitioner's trial counsel, which occurred after the guilt phase (ERT 404), Dr. Benson urged petitioner's counsel to get physical studies of petitioner's brain including CT and PET scan. (ERT 404, 433, 434; TRT 6015-6017.) Dr. Benson's discussion with petitioner did not get very far as petitioner did not want to be tested "period... psychologically, neurologically, or by any kind of brain scanning." (ERT 435.) Dr. Pierce and Dr. Benson confirmed this at the penalty phase. (TRT 5934, 5986, 6013, 6015-6017, 6035-6036, 6047-6049, 6056-6062.) Petitioner also would not submit to psychological testing in 1989. (ERT 434-437.)

The fact that petitioner later acquiesced to testing – over a decade later, and after the trial's results were known – does not retroactively change his behavior in 1989. He would not do it. Period.

Indeed, The Referee finds that even when the new doctors entered the picture years later, and petitioner underwent neurological and psychological testing in 2010, petitioner was selective in which expert he spoke to, and when. He spoke to his own experts and cooperated; he willfully refused to cooperate with the respondent's expert, Dr. A. Martell. (ERT 1837.) Petitioner's conduct was calculated, not a function of delusional beliefs: He made a rational and willful decision to thwart Dr. Martell in 2010, just as he made a rational and willful decision to cooperate with three of his own experts in 2002.

The Referee recognizes that Petitioner had difficulty trusting mental health professionals. Petitioner refused to meet again with Dr. Froming, Dr. Kriegler or Dr. Stewart in 2010 (ERT 958, 967, 984, 987, 1097), which was consistent with petitioner's pattern of not trusting people (ERT 1079, 1080, 1088, 1089) and taking umbrage with those who expressed unflattering opinions about his mental health status – a pattern evident at the time of his trial in 1989. (ERT 265, 469, 489, 967, 1592, 1593; TRT 5916-5920.) One reason petitioner chose not to meet with Dr. Martell was that he was

respondent's expert and, in petitioner's mind, the respondent had been insulting and wrongfully put his mental state in issue at the evidentiary hearing. (ERT 970, 974, 975, 1894.) The Referee also recognizes that even when talking to his own experts, petitioner exhibited paranoid and/or delusional thinking. Nonetheless, the Referee finds that petitioner demonstrated that he was capable of making a rational choice to cooperate with each of his experts. The fact that petitioner had the presence of mind to agree to six days of neurological testing in 2002, and more testing in 2010, undermines the opinions of Dr. Froming, Dr. Pierce and Dr. Benson that petitioner's delusional beliefs prevented him from agreeing to undergo any testing. (ERT 315-316, 319, 320, 436, 700-701, 726, 959, 961, 983, 988, 1094, 1097, 1894-1895.)

Petitioner remained determined not to meet with Dr. Martell even when petitioner's concerns were addressed (ERT 976, 951-953, 981, 986 1081) and documented in a protective order indicating that the intended testing could not be used to prove petitioner was insane, incompetent, or otherwise mentally ill; or to provide justification for forcible medication. (ERT 726, 959, 961, 983, 988, 1894.) Other measures were proposed in an effort to facilitate his cooperation – including having an attorney present in the room or one of the defense team doctors present (ERT 1098, 1837-1838) – but petitioner would agree to none of them. (ERT 990, 1101, 1102.)

Even in the post-trial proceedings, petitioner was selective in his cooperation and wanted only his chosen experts, not others, to evaluate him. The Referee found petitioner in contempt for willfully refusing to cooperate with Dr. Martell on November 17, 2010, when petitioner refused to meet with him. (ERT 1837.) The Referee could, as a sanction for his contempt, strike all his experts' testimony. The Referee declines to do that. Instead, the Referee considers petitioner's lack of cooperation in assessing the weight to give the opinions of Dr. Kriegler, Dr. Stewart, and Dr. Froming.

The Referee accordingly finds that petitioner would not have cooperated in 1989 with any neurological or psychological testing. Therefore, the testing done by Dr. Froming, and any and all findings and opinions based on it, would not have been available to the trial team in 1989.

C. Findings of Fact and Conclusions On Question 3.

Question 3 to the Referee Consists of two parts:

1. **Would a reasonably competent attorney have introduced such evidence at the penalty phase of the trial?**

2. **What rebuttal evidence would reasonably have been available to the prosecution?**

The Referee answers those two questions as follows:

1. Part 1: A Reasonably Competent Attorney Would Have Introduced Some of the Social History Evidence At Trial.

The strategy for presentation of evidence in a mitigation case is inextricably entwined with the evidence in aggravation. At trial, the prosecution relied on the circumstances of the crime and numerous other aggravating factors to support the imposition of the death penalty. Accordingly, the answer to this question requires consideration of the evidence about the underlying crime. For that, the Referee considers the trial record and incorporates by reference the circumstances of the crime summarized in the decision of People v. Welch (1999) 20 Cal. 4th 701, 722-727.

Petitioner believed that two of his pit bulls were stolen by the people inside Barbara Mabrey's home in Oakland. On December 7, 1986 at about 8:00 pm, petitioner threatened the Mabrey family that if they did not find his dogs they were "all going to die." (TRT 4233, 4538, 4563.) When the police were called to investigate an earlier incident (TRT 4233, 4538, 4539, 4563) petitioner fled a short distance in his car (TRT 4359) to a vantage point where he could see the house. He watched the house with his headlights off (TRT 4560-4561), telling others that when the police left, he would be back to kill everybody in the house. (TRT 5460.) Petitioner learned police were still there at 10:00 pm, and decided to come back after they had left. (TRT 5285-5292.) In the wee hours of the morning on December 8, 1986, petitioner and his then-girlfriend broke down the front door of Mabrey's home. With an Uzi carbine, he went from room to room, killing six people by shooting them in the head, some as they slept. Among those killed were a 4-year-old boy and a 2-year-old girl. (ERT 507; TRT 3911-4021, 6115-6116.) Other people survived the attack, including a nine-month-old child who was grazed by one of the bullets that killed his mother and sister. (TRT 4026-4036.)

As circumstances in aggravation the prosecution also presented evidence of at least three prior felony convictions (TRT 5675-5676, 6117-6118) along with evidence of at least fourteen instances of uncharged violent conduct in aggravation. (TRT 5678-5908, 6117-6122.)

The Referee finds that, faced with the prosecution's case in aggravation, (TRT 6113-6122, 6153-6154), a competent defense attorney would have presented some of the evidence that would have been revealed after adequate investigation of child abuse. That evidence would help to mitigate the aggravating factors in the case as well as to engender sympathy for petitioner.

a. The Social History Evidence That Would Have Been Introduced About The Serious Child Abuse Suffered By Petitioner.

The Referee finds that a reasonably competent attorney would have introduced the testimony of lay witnesses Cathie Thomas, Sarah Perine, and Roy Millender about the serious child abuse petitioner suffered. In particular, competent defense counsel would have introduced the following evidence:

Cathie Thomas:

- She heard her father hit petitioner with an extension cord when petitioner was six or seven years old. (ERT 1629.)
- The beatings would last about five minutes. (ERT 1629.)
- She observed marks on petitioner's arms. (ERT 1630.)
- Her father hit petitioner more often when he was drunk but also when he was sober. (ERT 1630-1631.)
- Sometimes her father would hit petitioner for no reason at all. (ERT 1630.)
- The beatings lasted until petitioner was 17 years old, but with less frequency from age 12 through 17 when petitioner's father worked for the merchant marines. (ERT 1634-1636.)
- Petitioner did not do well in school. (ERT 1611.)
- As a small child petitioner had a speech impediment. (ERT 1611.)
- Petitioner was punished more severely than his younger brother Dwight. (ERT 1632.)

Sarah Perine:

- Petitioner's father was violent to petitioner's mother. (ERT 1271.)
- She saw petitioner's father slap and beat petitioner's mother when she was pregnant. On one occasion she saw petitioner's father kick petitioner's mother when she was on the couch. (ERT 1271-1273.)
- She saw petitioner's father spank petitioner with a belt, extension cord or shoe once a week. (ERT 1281.)

- As a little boy, Petitioner would nervously shake when he was around his father. (ERT 1283.)

- When he was a little boy petitioner lived in poverty and was malnourished. (ERT 1269-1270.)

Roy Milender:

- Petitioner's father would discipline petitioner by hitting him and making him "go to jail" (the closet). (ERT 562.)

- When petitioner was a teenager and having problems at home petitioner would stay with Mr. Milender for periods of up to six weeks; this occurred off and on until petitioner reached the age of 16. (ERT 566-567.)

The Referee finds it is unlikely that a competent defense attorney would have called Konolus Smith as a witness. The three incidents he testified to did not amount to serious child abuse and his previous convictions of robbery and homicide would outweigh any value of his testimony. In addition, his testimony may have been more hurtful than helpful in that he testified that petitioner picked fights all the time. If defense counsel called Mr. Smith, this adverse information would have to have been disclosed to the prosecution in discovery, and the prosecution would have used it against petitioner in rebuttal.

b. Additional Expert Testimony Would Have Been Introduced Based on the Social History Information.

The Referee finds that competent counsel would have tendered additional evidence from mental health experts in mitigation. At the penalty phase, the defense presented the opinions of Dr. Benson and Dr. Pierce to explain the nature of petitioner's mental illness (ERT 477, 481; TRT 6190-6196, 6200) to mitigate the aggravating circumstances of the crime and to present petitioner's prior aggravating violent acts as symptoms of a mental illness. (ERT 507, 513-514, 521, 523; TRT 6153-6177, 6180-6185, 6192-6196, 6200.) Dr. Pierce and Dr. Benson could not opine as to the origins of petitioner's inability to control his impulses, however, because they did not have the benefit of the additional social history information that would allow them to make the connection between the serious abuse that petitioner had suffered as a child and his inability to control his impulses. The evidence about serious child abuse would have been additional support for the mental health experts' opinions. The experts could have explained to the jury the significance of the

social history evidence to provide a better understanding of the petitioner at the time the crime was committed.

Introducing mitigating evidence, like that proffered at the hearing through Dr. Kriegler, Dr. Stewart, Dr. Froming, and Dr. Benson, that petitioner's psychological functioning was impaired as a result of the serious child abuse he had suffered, would have been in keeping with the strategy to urge the jury that it would be unjust and disproportionate to execute petitioner because he had problems as the result of factors over which he had no control and which shaped and twisted his development. (ERT 476, 477, 481, 521, 523, TRT 6153-6177.) Such evidence would also have been introduced to show that the factors in aggravation were symptomatic of a particular brain injury, disease or psychiatric condition. (ERT 527.)

The problem is that the new experts in the reference hearing (Dr. Kriegler, Dr. Stewart and Dr. Froming) reached opinions based on a mix of material: some material supported by the evidence and some not, and some material that would have been available at trial and some that would not. The Referee thus must parse their opinions to determine what opinions reasonably would have been offered at trial. Moreover, there is some discrepancy between what the new experts might have said, and the conclusions of the trial experts.

The Referee finds that the testimony of petitioner's sister, maternal aunt, maternal uncle, and childhood friends, provided the experts with information that would have permitted them to conclude that petitioner was abused as a child. Accordingly, the Referee finds that additional mitigating information from a clinical psychologist based on the history of serious child abuse would have been introduced. But much of the rest of the opinions must be discounted.

The Referee first addresses what must be discounted, then what is left that a reasonably competent defense attorney would have introduced in mitigation.

i. The Things That Must Be Discounted From the New Experts' Opinions.

The Referee finds that there was no support for opinions based on the following things:

Unproved Head Injury and Wounds. Although there was support for some expert opinion based on the abuse, the new experts assumed abuse more severe than what the evidence showed. Dr. Kriegler drew from Konolus Smith's account an inference that petitioner's father physically assaulted

petitioner to the "point of unconsciousness" in public. (ERT 598, 1716-1717.) In fact, Mr. Smith testified that petitioner's father "slapped him on the back of the head" causing petitioner to fall down for a couple of seconds and appear stunned. (ERT 598.) In addition, there were other instances in Dr. Kriegler's testimony that the Referee found to be greatly exaggerated from the facts admitted in the hearing. The Referee finds that notwithstanding these discrepancies there was some evidence to support Dr. Kriegler's opinion that petitioner suffered serious child abuse based on the information provided by Sarah Perine, Cathie Thomas, Roy Milender and Konolus Smith.

Dr. Stewart's opinion, which supported Dr. Kriegler's, also suffered from some of the same flawed premises. Dr. Stewart concluded that petitioner had suffered from "serious", "very severe" and "significant" child abuse. (ERT 644-646, 660-661.) Dr. Stewart's opinion, however, was based on unfounded facts. There was no evidence of some of the facts Dr. Stewart assumed – that petitioner's father hit him in the head causing an open wound or that petitioner's father started attacking petitioner and his cousin had to get him off of petitioner; or that the numerous scars on petitioner's face, forehead, head and arms were caused by child abuse. The Referee therefore finds that testimony akin to Dr. Stewart's would not have been introduced at trial.

Dr. Froming also assumed that "direct child abuse to (petitioner) in terms of head injuries" resulted in "an on-going and consistent impact on (petitioner's) brain over time" (ERT 833) that was "consistent with serious child abuse." (ERT 863.) The Referee finds, however, that nothing in the testimony of Cathie Thomas, Konolus Smith, and Sarah Perine supported Dr. Froming's assumption of head injuries inflicted on petitioner by his father. Therefore, such an opinion would not have been reached or introduced at trial.

Unproved Environmental Damage. The new experts attributed some of petitioner's problems to his physical environment. Dr. Kriegler, for example, opined that the child abuse of petitioner was compounded by risk factors he was exposed to in his social and physical environment. Dr. Kriegler's opinion did not depend on the neurological data or opinions of Dr. Froming but rather was based on a constellation of symptoms exhibited by petitioner as a child: his trouble breathing as infant; behavioral and academic difficulties in school; lack of psychomotor coordination; his smaller size; and his speech impediment. Dr. Froming opined that there were toxins in petitioner's environment that presented a risk factor to petitioner's developing nervous system. (ERT 718, 722-723.)

The Referee finds that there was evidence that petitioner had suffered health problems – asthma, rashes and little nosebleeds – as a child and that he resided in undesirable living conditions. (ERT 558-559.) But there is no

evidence that any toxins in fact affected petitioner's nervous system or caused any of the symptoms. (ERT 718.) Therefore, no expert would have testified based on this assumption in 1989.

The experts also proposed that petitioner may have been adversely affected by lack of attachment, to stress hormones released by Minnie Welch when she was pregnant, or in utero injury from blows to her abdomen. Much of the support for these opinions, however, comes from testimony of petitioner's mother, Minnie Welch. But as the Referee found above, she would not have cooperated in 1989. Accordingly, there would have been no evidence to support any opinion that Minnie Welch experienced post-partum depression, much less that this interfered with the attachment necessary for petitioner's healthy development. Moreover, even if Minnie Welch would have been available in 1989, and the experts could have considered her account of a pattern of spousal abuse when she was pregnant with petitioner, there was no evidence this in fact raised the cortisol levels in her bloodstream (ERT 718) or that this was "neuropsychologically toxic" when and if it was transferred to petitioner in utero. (ERT 718-721.) Therefore, no expert would have testified to this in 1989.

Dr. Kriegler and Dr. Froming also assumed that petitioner's mother was assaulted in the abdomen by her husband during the time she was pregnant with petitioner. (ERT 718.) The Referee further finds there was no evidence petitioner suffered in utero injury. Sarah Perine saw petitioner's father slap and hit his mother, and once saw him kick her when she was on the couch. But there was no evidence that Minnie Welch was hit in the abdomen, much less in a way that would have injured petitioner. Accordingly the Referee finds that no expert in 1989 would have opined (as Dr. Benson did in the reference hearing) that abuse to petitioner's mother in the abdominal area was "one of the principal causes of infantile brain disease." (ERT 411.)

ii. What The Experts Would Have Been Able to Say.

The experts all agreed that the serious child abuse affected petitioner. The Referee credits those opinions to the extent they have support in the underlying evidence, and finds that the opinions, to the extent they were legitimately grounded in facts, would have been introduced by competent counsel in 1989.

Dr. Benson's Revised Opinion. The Referee finds that had Dr. Benson reviewed the additional social history information at the time of trial, he would have changed his diagnosis of organic personality disorder to traumatic brain disorder.

The Referee finds that even without Dr. Froming's neurological data, had Dr. Benson been provided additional information about petitioner's early childhood, Dr. Benson would have changed his diagnosis from organic brain disease (which at the time he vainly wished he could have tested to confirm) to traumatic brain disease. (ERT 405, 411-412.) Dr. Benson at trial had already identified petitioner's poor attention span, his poor judgment, his exaggerated response to confrontation and lack of control as evidence to support his diagnosis of traumatic brain disease. (ERT 419, 428, 429, 430, 441-446, TRT 6053, 6054.) Many new facts would have solidified Dr. Benson's diagnosis: information that as a child petitioner's appearance was sickly, he had trouble breathing, he had trouble keeping up in school, he had difficulties controlling his urine output, he lived a life of poverty, he was malnourished, and he was singled out for physical abuse by his father. (ERT 411, 412, 419, 421, 425, 441-444.)

The Referee further finds that Dr. Benson would also have provided additional expert opinion that petitioner's sickliness and trouble breathing was consistent with brain damage and petitioner's malnutrition could have lead to a slower rate of development and growth. (ERT 442-444.) The Referee finds that this new information would have also provided a factual basis for Dr. Benson's opinion that petitioner's brain impairment was traceable to the abuse petitioner suffered at the hand of his father. (ERT 425.)

Dr. Benson testified at the reference hearing that only the terminology of his diagnosis would have changed had he known in 1989 what he now knows about petitioner's social history. Nonetheless, his testimony would have been somewhat different. Dr. Benson's diagnosis would have been more certain and more grounded in fact. An expert's opinion is only as good as the facts upon which his or her opinion is based. More basis in fact may lend more credibility to an expert's opinion. Here, the opinion Dr. Benson offered the jury would have been supported by additional facts testified to by the social history witnesses.

Dr. Pierce's Unchanged Opinion. The Referee finds that Dr. Pierce's opinion would not have been substantially different. The Referee finds there is no evidence that had Dr. Pierce been able to review the additional social history information at the time of trial, he would have reversed his diagnosis of delusional paranoid disorder, persecutory type. (ERT 326, 357-358, 362.) The additional information would only have made Dr. Pierce that much more insistent that a full neurological evaluation be performed on petitioner. (ERT 343-344.) And that evaluation, as explained above, would not have happened.

The Referee further finds that Dr. Pierce would not have changed his opinion about rule-out-schizophrenia. (ERT 326, 357-358, 362; TRT 5937.) To determine whether petitioner was schizophrenic, Dr. Pierce still would have wanted to do the psychological and neurological testing, which still would not have happened. (ERT 329, 337, 345, 364-365.) Dr. Pierce also would not have altered his diagnosis of petitioner as having a psychoactive substance disorder with dependence on cocaine, alcohol, heroin and morphine. (ERT 341, 357-358, 362.)

The Referee further finds that Dr. Pierce would not have changed his diagnosis of impulsive personality disorder, explosive type. (ERT 325-326, 329-331.) Dr. Pierce's clinical diagnosis at the time was based upon the behavior petitioner exhibited in the courtroom during his trial – acting out impulsively, interrupting the court, having to be taken out of the courtroom, claiming conspiracy of judge, the court, the Alameda Bar Association – all of which supported a diagnosis of impulsive personality disorder. (ERT 334, 335, 352.) Those facts were still facts. Dr. Pierce testified at the reference hearing that had he had the additional social history information, he would have recommended that a full neurological evaluation on petitioner be conducted at the time of trial to see if there was something organic, which might be a central nervous system or neurological cause to his behavior. (ERT 343, 368.) But again, that testing would not have occurred and so would provide no basis for Dr. Pierce to have changed his diagnosis.

The Referee further finds that the additional social history information would not have changed Dr. Pierce's diagnosis of rule-out-organic personality syndrome (ERT 326, 328, 331, 361), also referred to as minimal brain damage. (ERT 331, 360, 361.) Dr. Pierce believed petitioner's out of control behavior, delusional thinking, aggressiveness and impulsivity might have been neurologically based. (ERT 329, 331-335.) The social history would not have changed that.

In the end, rather than renounce his 1989 diagnosis, Dr. Pierce in 2010 testified that the new information reconfirmed it. Had he had the additional social history information – physical abuse of petitioner's mother when she was pregnant, petitioner's sickliness as a child, his emotional disturbance at school, and the physical abuse by his father – Dr. Pierce would have been more insistent that a full neurological evaluation on petitioner be conducted at the time of trial to rule out brain damage. This, of course, was not new. In 1989, Dr. Pierce believed petitioner's demonstrated hyperactivity and explosive, out of control violent behavior required full neurological testing including EEG and CT scan. (343, 344, 365.) But the new information would not have changed the petitioner's refusal to be tested. (ERT 367-368.) Accordingly, in the

absence of neurological testing, the additional information from social history witnesses and documentation would not have impacted Dr. Pierce's diagnosis.

New Experts. In addition to the experts who testified, competent counsel would have called a clinical psychologist like Dr. Kreigler to testify, based on the additional information from social history witnesses and clinical interview with the defendant, to the following:

- Petitioner has a genetic risk for schizophrenia and substance dependency. (ERT 1708.)
- Petitioner's father was dependent on alcohol and his father's mother was also known to be an alcoholic. (ERT 1708.)
- Petitioner struggled in school and had a speech impediment which could be markers of neurological impairment. (ERT 1709-1714.)
- Petitioner had a history of substance abuse starting as early as age 10-12. (ERT 1720.)
- Petitioner was psychologically impaired as a result of serious child abuse. He exhibited symptoms such as paranoia and a perception that people were out to get him. (ERT 1812, 1817, 1719-1721.)
- Petitioner is neurologically compromised. This is based on a constellation of symptoms exhibited by petitioner as a child – his trouble breathing as an infant, behavioral and academic difficulties in school, lack of psychomotor coordination, his smaller size, and his speech impediment. (ERT 1712-1713.)
- As a result of protracted early trauma, petitioner is severely neuropsychiatrically impaired. His function, his thought process, and his perceptions are also impaired. This is a result of a confluence of risk factors, the mental illness, the neuro-cognitive dysfunctions and protracted trauma. The risk factors include: his genetic risk for psychosis, mental illness and dysfunction, his substance dependence, the fact that his parents are of low educational status and came from poverty and that his father was raised in a severely abusive household and his father was abandoned by his mother. (ERT 1707-1710, 1722-1723.)
- As a result of witnessing the abuse of his mother and being raised by compromised and dysfunctional parents, petitioner suffered from dysregulation of his nervous system resulting in petitioner's

inability to control his impulses, to tolerate stress, delay gratification, make choices, self-soothe and stay calm. (ERT 1687-1689, 1694, 1698, 1715, 1719.)

- Petitioner exhibited symptoms of dysregulation such as lack of impulse control, reactivity, dissociative states, anxiety, paranoia, and obsessive compulsive behavior. (ERT 1718.)

2. Part 2: What Rebuttal Evidence Would Reasonably Have Been Available to the Prosecution?

The Referee finds that the prosecution would reasonably have had available to them, and would have offered in rebuttal, the evidence of Dr. Martell that was proffered at the reference hearing. The Referee finds that the prosecution would have requested an opportunity to have its mental health expert conduct a clinical interview with petitioner to develop evidence to rebut the opinion of defense experts that petitioner was psychologically impaired as a result of serious child abuse. (ERT 1812, 1817.)

The clinical interview was an essential component of a competent mental health evaluation. It was the basis for Dr. Pierce's and Dr. Benson's expert opinions in 1989 and for that of Dr. Kriegler in 2010. Dr. Martell also emphasized the value of the clinical interview. (ERT 1838, 1939.) In fact, Dr. Froming opined, that while she was not confident Dr. Martell would succeed in administering lengthy neurological testing, (ERT 1072, 1101) she "felt that a clinical interview, if that was all we could get from Martell, would be telling in and of itself" (ERT 1073) as to petitioner's psychiatric state. (ERT 1072.) Accordingly, the Referee finds that the prosecution would have requested and the court would have granted a clinical interview between petitioner and its expert to develop evidence to rebut any opinions petitioner suffered psychologically from serious child abuse.

The Referee further finds that the prosecution would reasonably have had available rebuttal evidence that petitioner was in control of his behavior at the time of the murders and that petitioner's violent acts were not symptoms of any mental disturbance or illness. As Dr. Martell explained at the reference hearing, the circumstances of the crime showed petitioner had planned and methodically carried out the murders of four adults and two children. The Referee thus finds the circumstances of the crime detailed at the penalty phase relevant to the determination of what rebuttal evidence would have been available to the prosecution and a brief review of the trial record is therefore necessary.

At the penalty phase, the prosecution asserted the circumstances of the murders demonstrated that petitioner was in control of his impulses. (TRT 6113-6114, 6117, 6127, 6128, 6137, 6153, 6209-6210.) There was evidence petitioner had previously threatened to kill Barbara Mabrey and people in her home. (TRT 4203-4204, 4216-4217, 4314-4316, 4327-4330.) On one of these occasions petitioner threatened that if she went to court and testified against him he would kill her slowly, shooting off her limbs one by one. (TRT 4217, 4329-4330.) Petitioner then accused the Mabrey family of stealing his dog and threatened to kill them if they did not find it. (TRT 4226, 4451-4453.)

On the night of the murders, petitioner again threatened the Mabrey family that if they did not find his dogs they were "all going to die." (TRT 4233, 4538, 4563.) When the police were called (TRT 4233, 4538, 4539, 4563) petitioner drove off a short distance and watched the house with his headlights off (TRT 4560-4561), telling others that when the police left, he would be back to kill everybody in the house. (TRT 5460.) Petitioner learned police were still there at 10:00 pm, and decided to come back after they had left. (TRT 5285-5292.) At approximately 3:00 am he came back with an Uzi and shot six people at close range in the head – including two children, age 4 and 3, and an infant who survived his gun shot wounds. (ERT 507; TRT 3911-4021, 4026-4030, 6113-6117, 6143.)

The trial counsel's mitigation case sought to explain, through the testimony of Dr. Benson and Dr. Pierce, the nature of petitioner's mental illness (ERT 476-478, 481, 521; TRT 6155-6156, 6190-6196; 6200) and to present petitioner's prior violent acts as symptoms of a mental illness. (ERT 507, 513, 514, 521, 523; TRT 6153-6180.) Through the testimony of Dr. Pierce (TRT 5921-6004) and Dr. Benson (TRT 6005-6102) the defense contended that petitioner committed the murders while he was under the influence of extreme mental or emotional disturbance or that he was prevented from conforming his conduct to the requirements of the law because of mental disease or defect. (TRT 5969-5971, 6153-6173.)

If counsel introduced additional evidence about serious child abuse, and expert testimony akin to Dr. Kreigler's that the abuse impaired petitioner's psychological function, rebuttal evidence would include cross-examination testimony like that adduced at the reference hearing. On direct examination Dr. Kriegler testified petitioner suffered from dysregulation of his nervous system (ERT 1694, 1698, 1715, 1719), resulting in petitioner's inability to his control impulses (ERT 1687-1688), to tolerate stress, delay gratification, make choices, self-soothe and stay calm. (ERT 1687-1689, 1719.) On cross-examination respondent put a set of hypothetical facts to Dr. Kriegler based on the circumstances of the murders to demonstrate that petitioner was in control of his behavior. This approach on cross-examination resembled that taken by the Deputy District Attorney at trial, who challenged Dr. Pierce's and Dr.

Benson's opinions that petitioner was mentally impaired and he had no impulse control when he committed the murders. (TRT 6113-6122, 6127-6132, 6136-6137, 6143.)

Accordingly, the Referee finds that had additional evidence about child abuse and its effects on petitioner been introduced at the penalty phase, the prosecution would have introduced evidence to impeach and therefore rebut that evidence like that offered by Dr. Martell. Dr. Martell contradicted Dr. Kriegler's assertion that petitioner was not in control of his actions because his psychiatric impairments were affecting his behavior at the time of the crime in significant ways. (ERT 1847, 1854, 1855.) In particular, the prosecution's rebuttal expert opinion would provide evidence that:

- Petitioner demonstrated his ability to lay in wait by sitting in his car, and waiting for the police to leave, which was inconsistent with a person who could not to control violent impulses, paranoid ideas or threat-control-override symptoms. (ERT 1847.)

- Petitioner demonstrated he could choose his moment in a way that would reduce his risk of getting caught and at the same time maximize his opportunity to do what he told others he wanted to do, which was not consistent with an inoperative frontal lobe that caused petitioner to be impulsive and unable to control what he was doing. (ERT 1847.)

- Petitioner showed a systematic approach during the crime that involved planning and organization: he brought a loaded UZI to the crime scene; he waited until the police had left; he told people he had a plan; he did this in the middle of the night; and he shot the victims at close range. (ERT 1848-1849.)

- After the crime, petitioner showed he was cognitively intact enough to understand that he needed to get rid of the evidence by burning clothing in the fireplace (ERT 1848-1849) and putting the weapon in a pillowcase and leaving it in a cousin's yard. (ERT 1849-1850.)

The prosecution would have offered expert opinion, like Dr. Martell's opinion, that petitioner's behavior on the night of the crime did not show impulsivity. (ERT 1848.) Being able to plan, be goal directed and organized showed frontal lobe executive control functions that were intact and operating effectively at that time. (ERT 1848, 1850.) The prosecution thus would have presented expert opinion that petitioner was functioning at a much higher level during this time span than what the defense theory posited he would have been able to.

Enclosures and Attachments

Forwarded with this Report are: (1) the proposed findings submitted by the parties; (2) all memoranda of points and authorities submitted by the parties, (3) exhibits received at the evidentiary hearing, and (4) transcripts of all proceedings before the Referee.

Dated: December 27, 2012

Judge Mary Ann O'Malley