SUPREME COURT COPY

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In the Supreme Court of the State of California

In re **DAVID ESCO WELCH,** **On Habeas Corpus.**	CAPITAL CASE Case No. S107782

Trial: Alameda County Superior Court, Case No. 90396
The Honorable Stanley P. Golde, Judge
Ref. Hearing: Contra Costa County Superior Court, Case No. 070855-2
The Honorable Mary Ann O'Malley, Judge

EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS

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DEATH PENALTY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

INTRODUCTION

For at least twenty-five years, it was the worst mass murder in Alameda County history. Kicking in doors in the middle of the night and searching room to room for anyone he had missed, petitioner David Esco Welch, then aged 37, killed four adults and two toddlers, execution style. He attempted the murder of another adult and a nine-month old baby who lay screaming in his dead mother's arms. He searched for, but did not find the woman he most wanted to kill, because she heard him killing her children and grandchildren with an Uzi and escaped to a neighbor's house to call police moments before appellant reached her bedroom. Appellant had been terrorizing the family for months, had threatened to kill them all, and was out on bail, scheduled for a preliminary hearing the next day in the felony charges arising out of his past actions at the same house. He had threatened the complaining witness, Barbara Mabrey, that morning that since she still planned to testify against him, he would shoot off her limbs, one by one. She obtained around the clock police protection, but Welch was watching those who were watching him. At change of shift, David Esco Welch killed the children and grandchildren of the primary witness to his earlier assaults and her houseguests, one by one.

A jury convicted petitioner of six first degree murders. His victims were Sean, Darnell, and Dellane Mabrey, Dellane's two-year-old daughter Valencia, Cathy Walker, and Cathy's four-year-old son, Dwayne. The jury found true the special circumstance of multiple murder and fixed petitioner's sentence at death. The jury also convicted petitioner of the attempted murders of Leslie Morgan and of Dellane's infant son Dexter and of concealing a firearm as a felon. The court sentenced petitioner to death. Petitioner's conviction and sentence were affirmed by this Court on direct appeal. (*People v. Welch* (1999) 20 Cal.4th 701.) The United States

Supreme Court denied certiorari. (*Welch v. California* (2000) 528 U.S. 1154.)

Petitioner filed the instant petition for writ of habeas corpus in this Court on June 24, 2002. On May 16, 2007, this Court ordered a reference hearing to be held in Contra Costa County and directed the referee to make findings on the following 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?

The hearing took place between September 13, 2010, and April 11, 2011. The parties filed simultaneous summaries of the evidence and proposed findings of fact. On January 2, 2013, the Honorable Mary Ann O'Malley issued and filed with this Court the Report and Recommendations of the Referee, addressing each of these questions.

SUMMARY OF THE EVIDENCE AND EXCEPTIONS

The following is a summary of the evidence adduced at the reference hearing through a combination of declarations, depositions, live testimony, trial transcripts, and documents:

A. The Guilt Phase Evidence at Trial

The reference questions concern the actions of trial counsel and the jury. We address the trial first, and then place in that context the evidence produced at the hearing concerning the allegations of juror misconduct and ineffective assistance of counsel.

1. Petitioner's Earlier Assaults on the Mabrey Family

In 1986, Barbara Mabrey lived at 10510 Pearmain Street in Oakland with her four sons, Darnell, Sean, Stacey and Charles, her daughter Dellane, and her daughter's two-year-old child, Valencia. Sixteen-year-old Dellane had an ongoing relationship with Valencia's father, Leslie Morgan. (RT 4195-4197.) In January, Dellane introduced Barbara to petitioner, David Esco "Moochie" Welch, describing him as her new boyfriend. (RT 4197, 4110-4113.) Soon Dellane told Barbara she was pregnant with Dexter, whom petitioner treated like a son from the time he was born on September 23, 1986.[1] (RT 4197-4198, 4200-4201.) Dellane continued to date both petitioner and Leslie Morgan. (RT 4483-4484.)

Barbara Mabrey did not approve of Dellane's relationship with petitioner. Barbara knew petitioner had a wife and children. She saw petitioner slapping Dellane around. (RT 4284-4288.) Starting in September, Barbara Mabrey tried, but failed, to discourage Dellane from seeing petitioner. She also told petitioner not to come around the house anymore, but petitioner ignored her request. (RT 4198-4199, 4294.)

In early October, when Dexter was two weeks old, petitioner broke into Barbara's bedroom and grabbed the baby away from her at gun point.

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[1] Blood tests conducted later in preparation for a civil determination of Dexter's custody established that Leslie Morgan, not petitioner, was Dexter's father. (RT 4831-4833, 4864-4865.)

Petitioner threatened to kill Barbara if she did not stop interfering in his relationship with Dellane and baby Dexter. To avoid an incident, Dellane, Valencia, and Dexter left with petitioner. (RT 4200-4201.) They remained with him in a motel room for several days, until found by some of the older male relatives and returned home on October 12. (RT 4202, 4304, 4537.)

Late on the night of October 12, 1986, petitioner drove up to where Barbara Mabrey was finishing her shopping, got out of his car and spit at her, saying "Bitch, you are dead." (RT 4203-4204.) He followed as a friend, Eddie Money, drove her home. (RT 4204.) Petitioner drove up fast as Mr. Money dropped Barbara Mabrey off in front of her home. The fender of petitioner's car clipped Ms. Mabrey's knee. As she stumbled and ran for the opposite sidewalk, Barbara saw petitioner laughing with a passenger and putting his car in reverse. Petitioner brought the car around and drove toward Barbara Mabrey again, missing her by three feet. (RT 4205-4207, 4309-4311.) Ms. Mabrey was frightened of what petitioner would do if she contacted the police. The next morning, however, she made a police report. (RT 4208; PEX 69, crime report dated October 13, 1986.)

A week later, Barbara Mabrey was walking from a store on 105th and Edes Streets when petitioner walked up to her and threw a liquid in her face. (RT 4209, 4314-4315.) She heard petitioner say, "Bitch, I told you not to come up here." Petitioner struck her on the side of her head with his fist. Barbara Mabrey fell to the ground. Petitioner kicked her in the back and the side as she lay in a totally defensive posture. (RT 4210-4211, 4316.)

A police car drove up, attracted by the gathering crowd. Petitioner jumped on his motorcycle and fled. When Barbara explained that "Moochie" had jumped her, the officers took her with them as they took off after the speeding motorcycle. Petitioner got away. (RT 4212, 4317-4318.)

Barbara Mabrey filed her second police report in as many weeks. (RT 4213; PEX 70, crime report dated October 20, 1986.)

Barbara Mabrey was awakened at three in the morning on October 29, 1986, by Dellane's scream, "David, stop." (RT 4215, 4326-4327.) Barbara went into the hall to find petitioner standing in the hall with a gun. Petitioner pointed the gun at Barbara's chest and told her not to come any closer. Then he slapped Dellane with his open hand. (RT 4216, 4327-4328.) He again leveled the gun at Barbara and threatened that if she went to court and testified against him, he would kill her slowly, shooting off her limbs one at a time. (RT 4217, 4329-4330.) Petitioner then turned the gun on Leslie Morgan, who was standing with Dellane in her bedroom doorway, and told him to stay out of his [petitioner's] bed, mind his own business, and "Get your motherfucking ass out of here." Morgan fled out of the house in his underwear. (RT 4218, 4329, 4443-4444, 4487.) Petitioner pointed the gun at Sean and Darnell, then left. (RT 4219.)

Barbara Mabrey filed her third police report of the month. (PEX 71, crime report dated October 29, 1986.)

Petitioner was arrested. He wrote Barbara Mabrey a letter from jail, saying he was being mistreated, expressing sorrow at what he had done, and asking her to drop the charges. She did not respond. Within a few days he was on bail and back on the streets. (RT 4221, 4337-4338.) He came to visit Dexter and Dellane, bringing with him a case of formula and a box of diapers. (RT 4222.) It was, he knew, a condition of his bail that he not go near the Mabreys. (RT 5103.)

The preliminary examination on the charges arising out of Barbara Mabrey's three police reports concerning petitioner's assaults on the Mabrey family was scheduled for December 9, 1986. (RT 4228-4229.)

2. Petitioner Threatens to Kill All the Mabreys, then Does So

On December 6, 1986, petitioner came to the house at 11:30 p.m. He had two pit bull puppies with him, which he showed around, then deposited in the fenced front yard while he went inside to visit with Dexter. (RT 4222-4223 4339-4340.) When petitioner came out only one of the puppies was in sight. Petitioner began making accusations that the absent puppy had been stolen. He shot out the windows of Steve Early's car, shouting, "You stole my dogs, you motherfucker." When Early drove off, petitioner turned on the Mabrey family and their neighbors, saying "You Niggers better find my dog or you are all going to die." (RT 4226, 4451-4453.)

Petitioner came over to the Mabrey home twice on Sunday, December 7, 1986. First he brought over a woman named Rita Lewis and introduced her to Barbara. Petitioner asked where his dog was and wanted help finding it. He asked Barbara whether she planned to go to court on Tuesday, December 9, and testify against him. When she said she was going to court, petitioner asked her to take a ride with him and Rita Lewis. Barbara refused, assuming petitioner was up to something. (RT 4227-4229, 4401.) Petitioner again warned Barbara Mabrey not to show up in court, then left with Rita Lewis. (RT 4228, 4230.)

At 8:00 p.m., petitioner returned in a car driven by Delores Walker.[2] Walker's daughter, Vanessa Towers was following, driving a station wagon belonging to Will Henderson. (RT 4231, 4538, 4540-4541, 5182-5183, 5322.) Petitioner was sitting in the back seat of his own car with Will Henderson and William Thomas, known as Billy the Kid. The station wagon hit Stacey Mabrey's Monte Carlo, sending it onto a neighbor's yard. The Mabreys heard the noise and came outside. Stacey told petitioner that somebody was going to have to pay to fix his car. (RT 4227, 4230-4231,

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[2] Delores Walker and Catherine Walker were not related. (RT 5192.)

4454, 4693, 5183-5184, 5188, 5323.) Stacey's cousin Perry also made a comment about paying for the car. (RT 4493-4495, 5458.)

When he heard the remarks about paying for the car, petitioner turned and pistol-whipped Perry on the head with his .45-caliber weapon, saying "Do you know, do you know who you messing with? Do you know who I am?" Perry fell to the ground bleeding. Petitioner then turned on Will Henderson, hitting him until he also fell to the ground. (RT 4232, 4355-4356, 4405, 4455-4456.) Barbara asked a neighbor to call police. (RT 4356.) Before he left, petitioner said "You Stone City Niggers [referring to the Stonehurst section of Oakland where the Mabreys resided] better get my dog" or you are all going to die. (RT 4233.) "Everybody in this fucking house is going to die." (RT 4538, 4563.) Petitioner also said the family would never be able to press charges against him again because they are all dead. (RT 5163.) Petitioner sped away in his car with Billy the Kid before the police arrived. (RT 4359.)

Petitioner was very angry. (RT 5328.) Petitioner left, but he only drove a little ways away. From a vantage point, unknown to the Mabreys, he watched the house for some time with his headlights off. (RT 4560-4561.) He told others that after the police left, he would be back to kill everybody in the house. (RT 5460.) About 10:00 p.m., petitioner asked a neighbor of the Mabreys whether the police had left the area yet. (RT 5285-5286, 5291-5292.) When told the police were still around, petitioner said he would be back. (RT 5286.)

Ultimately, the Mabrey family retired for the night. (RT 4234.) Barbara Mabrey was sleeping in the middle bedroom. Leslie Morgan and Dellane Mabrey, after watching television in the den for a while, joined the children, Valencia and Dexter, in the first bedroom, closest to the den. (RT 4234.) Sean, Stacey, and Darnell Mabrey and houseguests Cathy and Dwayne Walker also watched television in the den. Then Sean went to

sleep in the living room, Darnell, Cathy Walker and four-year-old Dwayne Walker went to sleep in the den, and Stacey went to sleep in the third bedroom, farthest from the den and the front door on Pearmain Street. (RT 4123-4124, 4270-4271.)

After midnight, petitioner went to a house down the street and told Dolores Walker that he was going to kill everybody at the Mabrey house. Dolores told her friends, in petitioner's presence, "it is going to be some bullshit tonight." (RT 4539.) Petitioner left.

At approximately 3:30 a.m. on the morning of December 8, 1986, Barbara Mabrey was awakened by two gunshots coming from the front of the house. She heard Dellane scream, "No, Moochie, Don't." Barbara could not see petitioner, but she saw Rita Lewis in the hall, pointing a gun and telling "Moochie" to get out of the way. (RT 4235.) She heard more gunfire coming from Dellane's room, but no more screams. Barbara Mabrey ran through the kitchen and out the back door to a neighbor's house. She called police to say petitioner was shooting her family. (RT 4235-4243.) Barbara's children, Sean, Darnell, and Dellane, were killed. Barbara's grandchild, Valencia, was killed. Barbara's friend and houseguest, Cathy Walker and her son, Dwayne, were also killed that morning, one day before Barbara was scheduled to testify at petitioner's preliminary hearing. (RT 4244.)

Stacey Mabrey was also awakened by gunshots in the house. (RT 4125.) Petitioner and Rita Lewis were entering the hallway from the first bedroom, looking toward the front of the house. (RT 4126.) Petitioner had a semi-automatic machine gun in his hand and was moving from Dellane's bedroom to the den. (RT 4127.) Rita Lewis held a short-barreled .38-caliber revolver. She said, "Come on, Mooch, let's go." (RT 4128.)

Stacey stepped back into his bedroom and into the closet to put on his shoes to leave out the back door. Suddenly petitioner came into the

bedroom, turned on the light and said, "Where's Chuck [another Mabrey son, who often slept in that room]?" Petitioner apparently did not see Stacey, frozen in the closet. Petitioner turned out the light and walked back toward the den. (RT 4131.) Stacey heard five more shots as he went out the back door and around the side of the house. From the side, he saw petitioner and Rita Lewis come out the front door and head down the stairs. (RT 4132-4133.) Petitioner was limping and fell once near the gate. Rita Lewis and a third person, who got out of the driver's seat of petitioner's car, helped petitioner into the car. Then they all drove away. (RT 4133-4134; see also 4387, 4390, 4394 [Barbara Mabrey's testimony to the same facts].)

Stacey looked back inside the house. His siblings, Sean, Darnell, and Dellane, his niece Valencia, Cathy Walker and Dwayne Walker all appeared to be dead. Baby Dexter seemed injured, but alive. Leslie Morgan was lying motionless on the floor. (RT 4134-4135.) The first officers on the scene found Sean dead on the couch in the living room; Catherine and Dwayne Walker dead on the floor of the den; Darnell dead on the couch in the den; Dellane and Valencia dead in the bed in the middle bedroom, with baby Dexter, shot in the face, but crying, quite alive, and clinging to his mother's body. (RT 4038-4034.) Seriously injured Leslie Morgan, Barbara Mabrey, and Stacey Mabrey lived to testify. (RT 4037.)

Leslie Morgan was awakened at 3:30 a.m. by shots coming from the living room. (RT 4459-4460.) Petitioner kicked in the heavily bolted door to the bedroom in which Morgan, Dellane, and the two babies slept. He stood at the foot of the bed with his finger on the trigger of a paratrooper-style Uzi and said, "This is for you, bitch." He shot Dellane, who fell silently back on the bed, next to Valencia, with Dexter still cradled in her left arm. Then petitioner pointed the Uzi at baby Valencia's head and pulled the trigger, killing her instantly. Morgan rolled under the covers

toward petitioner at the foot of the bed and grabbed his arms, causing the Uzi to fall into the bed sheets. (RT 4465-4466.) Rita Lewis then stepped into the room, holding a .38-caliber revolver, and said, "Watch it. Watch out, Moochie." (RT 4467-4469.) She fired her gun at Morgan, hitting him in the shoulder. (RT 4469.) Petitioner retrieved the Uzi and fired twice more at Morgan, hitting him in the arm. Morgan lay still, hoping petitioner would think he was already dead and not shoot him in the head as he had the others. (RT 4472.) Petitioner straddled Dellane's already lifeless body, fired once more at close range, then moved on down the hall. (RT 4474-4475.) Infant Dexter lay wounded in the head and crying, still cradled in his dead mother's arm. (RT 4482, 4632.)

Morgan heard petitioner roaming through the house, looking for Barbara Mabrey, and muttering "Where is the bitch at?" (RT 4475.) Petitioner also said he would take them all outside and blow their heads off. (RT 4476.) Eventually, Morgan heard Rita Lewis and petitioner leave. Morgan looked out the window in time to see a third person help the shooters into a 1986 Mercedes and drive away. Petitioner, who could not walk without help, still held the Uzi as he got in the car. (RT 4476-4477.)

Petitioner locked himself into the residence of his second cousin, Beverly Jermany, at 2116 103rd Avenue in Oakland at 5:00 a.m. (RT 4731-4732, 4765, 4782-4784.) He surrendered when the house was surrounded by police. Petitioner was arrested at 1:40 p.m. on December 8, 1986. (RT 4619-4620, 4624, 4641, 4656, 4668, 4734, 4745-4746.) He was wearing only his underwear. Inside, the fireplace was still warm. Ash in the shape of a pair of pants was visible on top of the fire. (RT 4746-4747.) Police recovered a pair of shoes, fitting petitioner, with a sole pattern generally matching a footprint on the kicked-in door to the murder scene, and with blood on them matching that of Leslie Morgan. (RT 4749-4752, 4756, 4828, 4833-4836, 4852-4857, 4038-4039, 4049; PEX 50, 110-B.)

Rita Lewis was also arrested at the Jermany residence. (RT 4623, 4663.) Petitioner later explained to medical personnel that his leg was injured when Rita Lewis shot him with a .38-caliber revolver. (RT 4737.) Rita explained to Beverly Jermany that she had accidentally shot petitioner. (RT 4771.)

The Uzi used to kill all of the victims (RT 4054-4077, 4081-4087 [bullets recovered]; 4890-4910, 4924 [bullets matched]) was recovered in the yard of Ms. Jermany's house, wrapped in a pillowcase. (RT 4579-4581, 4583; PEX 3.) Petitioner and Lewis had brought an object or objects to Jermany's house in a pillow case at 5:00 a.m. (RT 4771-4773, 4777-4778, 4801, 4803.) Capable of firing 25 rounds without reloading, the Uzi had one live round in the chamber and four live rounds in the magazine. (RT 4581.) The rounds were nine-millimeter hollow point ammunition. (RT 4585; PEX 103.)

Blood on the butt of the Uzi was consistent across several specific markers with that of Leslie Morgan, and could not have been the blood of petitioner or Rita Lewis. (RT 4827-4828.) Along with the Uzi, police recovered a Smith and Wesson .357 magnum with three live rounds and three expended rounds in the cylinder, as well as a .38-caliber Taurus revolver loaded with two live rounds and four expended casings. (RT 4587-4589; PEX 104, 105.) One slug recovered at the murder scene was fired from a Smith and Wesson. (RT 4927; PEX 32.) Other bullet fragments could have been fired by either a Smith and Wesson or a Taurus. (RT 4926-4927.)

The forensic evidence confirmed that petitioner had executed his victims by shooting them in the head at close range, generally as they slept. (RT 3911-3921 [Sean Mabrey died of multiple gunshot wounds, including a chest wound penetrating the heart, a gunshot wound to the jaw, and a gunshot wound to the head affecting the skull and brain]; RT 3922-3935

[Darnell Mabrey died of multiple gunshot wounds, including two gunshot wounds to the neck and one to the head through the nose, piercing the brain]; RT 3965-3976 [Catherine Walker died of two gunshot wounds to the head]; RT 3977-3992 [Dellane Mabrey died of bullet wounds to the head and neck, including a contact wound between the eyes, and one down through the chin into the torso]; RT 4006-4014 [Dwayne Walker, age four, died of a single contact wound to the right side of the brain]; RT 4014-4021 [Valencia Mabrey, age two, died of a single contact wound to the forehead].) Baby Dexter survived two, possibly three, bullet wounds to the head, one (possibly two) near his right eye and the other near the nose. If the trajectory of either of the bullets had varied by a degree the bullets would have entered the brain and caused massive damage. (RT 4026-4030.)

3. The "Other Moochie" Defense

Petitioner's personal theory of defense was mistaken identity. He testified that there are a lot of people in Oakland called "Moochie" and one of the other "Moochies" must have slaughtered the Mabreys and their houseguests. (RT 5111-5112.) He admitted he had some "problems" with the Mabrey family, but noted he had problems with just about everyone, and the problems he had with the Mabreys were not worth the trouble to kill them.[3] (RT 5106-5107.)

Petitioner testified that it was he who: shot at Steve Early's car, shattering the back window, because he thought Early might have his dog (RT 5012-5014, 5107); took Rita Lewis by the Mabrey house on the morning of December 7, asked about the dog, and tried to get Barbara to go

[3] By contrast, he admitted firing on Steve Early, blowing out the rear window of his car, because he thought Early might be driving off with petitioner's lost dog. "That was worth a shot," petitioner acknowledged. (RT 5107.)

for a ride with him (RT 5026-5030); was present on the evening of December 7 when the car driven by Vanessa Towers knocked Stacey Mabrey's car onto a neighboring lawn (RT 5044-5047); pistol-whipped Stacey's friend or cousin Perry following the car incident (RT 5047, 5116-5117); fought with Will Henderson moments later (RT 5048, 5088); and got shot on December 8, 1986. (RT 5052-5053.) However, he testified he and his girlfriend, Rita Lewis, spent the early morning hours of December 8, 1986, together at petitioner's wife's house, at Scotty's Liquors, and at his cousin Beverly Jermany's house. (RT 5051, 5053-5055.) Petitioner refused to explain how he got shot in the leg because he was under a "code of silence" and it was irrelevant to the case. (RT 5055-5056, 5099-5101.) He knew it was a condition of his bail that he was not supposed to have any contact with Barbara Mabrey in December, 1986. (RT 5103.)

Petitioner admitted 1981 prior convictions for assault with force likely to produce great bodily injury and possession of stolen property, and a 1983 prior conviction for assault on a prison guard. (RT 5057-5059.) Chillingly, he mentioned each judge by name who had ever "sent [him] to prison." (RT 5058-5059.)

Petitioner denied taking Dellane, Valencia, and Dexter to the Sixpence Motel or pulling a gun on Barbara Mabrey. (RT 5061.) Then he agreed he took Dellane, Valencia, and Dexter to the Sixpence Motel because there was no heat at the Mabrey house, but continued to deny he used any of his guns to get Dellane to come with him. (RT 5110.) He denied trying to run Barbara Mabrey down with his car. (RT 5062.) He admitted throwing a soda pop in Barbara Mabrey's face when she was at a liquor store and possibly telling her, "bitch, stay out of my affair." He warned her not to come into his neighborhood to tell lies to the police about him. (RT 5063.) After the warning and throwing the soda pop on Barbara

Mabrey, petitioner fled to avoid contact with the police, he said, because he had guns and drugs on his person. (RT 5064-5065.)

Petitioner admitted he sold drugs, but reasoned that because he never made a profit, he was not really a drug dealer. (RT 5065.) Petitioner sold guns, but only to "cool" people. (RT 5079.) He admitted going to the Mabrey house with a friend and a gun on October 29, 1986, to get his motorcycle jacket back from Dellane. He had to hit her hard with his fist to wake her up. (RT 5067.)

Petitioner kept an arsenal of guns and ammunition spread around all the places where he might spend some time. (RT 5064-5065, 5075.) This included a chrome .357 magnum, a silver-plated .45-caliber automatic, various other pistols and revolvers, a "few" Uzis, but not the gun that police say killed the Mabreys. (RT 5047-5048, 5064, 5069, 5075 [he kept a .357 nearby], 5077-5078 [denying he testified he used a .357 to shoot out Early's window], 5081-5083, 5086, 5111.) Petitioner admitted keeping guns nearby at all times, even though he knew it was a felony for him to possess a firearm. (RT 5079.) He boasted of being a good shot in a dangerous town. (RT 5079, 5081.) Even if guns were banned, he said, he would find a way to have access. (RT 5079.)

Petitioner specifically denied shooting Sean, Darnell, Dellane, Dexter, and Valencia Mabrey, Leslie Morgan, and Catherine and Dwayne Walker. (RT 5104-5111.) He had no idea what happened to his clothes. The police "speculated" he burned the clothes in Beverly Jermany's fireplace, but, he noted, they never put the ashes in evidence. (RT 5123-5124.) He denied stabbing Rita Lewis and again chastised the police for not bringing in the scissors he used if they existed, but he admitted he might have caused some of the injuries Ms. Lewis suffered, particularly the one to her chin. (RT 5121-5122, 5124.)

A urine screen and qualitative blood analysis were performed on blood drawn from petitioner on December 8, 1986. Petitioner had alcohol in his blood and cocaine and morphine, a metabolite of heroin, in his urine. (RT 5158-5159, 5342.) Since the requested quantitative analysis was never performed, exact amounts of alcohol, heroin, and cocaine consumed could not be estimated. (RT 5346, 5368-5369.) Dr. Herrmann was called by the defense to explain the effects generally these substances can have on the central nervous system. Alcohol and heroin, both depressants, and cocaine, a stimulant, whether consumed separately or in combination, can have a deleterious effect on motor skills and mental functioning, even at very low levels. (RT 5347-5355.) Testimony to the same effect was provided by Dr. Rosenthal, who also listed sleep deprivation as an additional factor affecting coherent thought processing. (RT 5389-5404.)

B. The Penalty Phase Evidence Includes Two Mental Health Professionals Who Have Interviewed Petitioner and Interpreted Many Specific Instances of His Behavior

The People proved three prior convictions.[4] (RT 5675-5676; PEX 123 [5/29/81 assault with deadly weapon], 124 [8/5/81 receiving stolen property], 125 [4/7/83 assault on a peace officer].) In addition, at the penalty phase, the People presented evidence of petitioner's further violent criminal conduct:

[4] A fourth conviction for a Vehicle Code section 10851 violation was excluded. (RT 5750.)

1. In 1973, while a juvenile detainee, petitioner committed a battery on Juvenile Hall counselor Mark Johnson (RT 5740-5743);

2. In 1975, petitioner fired one or more bullets at what he called a "nosey" neighbor, Faye McPherson, and her son, which entered a nearby bedroom and missed by inches her twin baby grandsons, sleeping in their cribs (RT 5731-5733);

3. In March of 1979, petitioner tried to run down a police officer with his motorcycle and committed separate batteries against two other officers while resisting arrest after a high speed chase (RT 5753-5759, 5761-5766, 5893-5896);

4. In December of 1979, petitioner severely beat and kicked Rosemary Dixon, an Oakland Police Officer working the warrant detail, causing injuries to her arms, neck and back that forced her disability retirement (RT 5685-5688);

5. At 3:30 on the morning of May 21, 1980, petitioner entered the home of his former girlfriend, Juanell Turner who was home alone with her three-year-old daughter, and choked, repeatedly raped and sodomized Juanell Turner, then called her later, demanding to know why the police were in front of her house (RT 5705-5719);

6. While at San Quentin serving time on the Rosemary Dixon assault, petitioner smashed his wife's face into the wall of the visiting room (RT 5838-5843);

7. Also, while in the maximum security adjustment center at San Quentin, in 1982, petitioner committed a battery on Correctional Sergeant Anthony Lee (RT 5807-5814);

8. While in the maximum security O-wing (Security Housing Unit or SHU) at the Correctional Training Facility at Soledad, on June 24, 1982, petitioner concluded a rules violation hearing (on the Lee battery), which he attended in waist chains, by spitting in the face of Correctional Lieutenant

Steve Lawrence, charging and attacking him, requiring restraint by several other officers, and promising to be "nothing but trouble" from that day out (RT 5856-5861);

9. Later on the same day of the Laurence assault, on June 24, 1982, in the SHU, petitioner "gassed" [threw feces in the face of] Correctional Officer Gowin, struck the officer in the face with his handcuffs, then bit him (RT 5873-5880);

10. Paroled from state prison, but soon jailed in the maximum security area at Santa Rita in September 1982, petitioner assaulted Deputy Sheriff Lord, injuring his face, requiring stitches, and cracking several of the Deputy's ribs (RT 5901-5908);

11. Petitioner assaulted other jail inmates in the maximum security area of Santa Rita in January, 1985 (RT 5772-5776), and on a jail transportation van in July of that year (RT 5780-5785); and

12. In custody awaiting trial on the present offenses, petitioner assaulted Deputy Sheriff Charles Utvick in the administrative segregation unit in December 1987, then threatened to kill all the deputies in the unit. (RT 5789-5795.)

Petitioner requested that no mitigating evidence be put on by his attorneys because he said he could not see how the mental health professionals could help. (RT 5916-5917.) The defense nevertheless presented two witnesses in mitigation. The theory was that Mr. Welch was suffering from a mental illness, that he was under the influence of that mental illness when he committed the offenses, and that the prior offenses, like the current crimes, should all be viewed as further symptoms or manifestations of that mental illness.

Dr. William Pierce, PhD., a psychologist, testified that he reviewed prison and juvenile court records, including probation reports, selected transcripts of judicial proceedings focused on petitioner's courtroom

behavior, and hospital records, interviewed petitioner in 1987, and consulted with counsel and other mental health professionals on the case. (RT 5930-5936, 5941-5943 [juvenile probation report read to jury], 5966-5967 [adult probation report read to jury, including the prediction "he will kill someone some day"], 5989.) He concluded petitioner had a differential diagnosis of delusional paranoid disorder combined with psychoactive substance disorder and possibly paranoid schizophrenia on axis one and an axis two diagnosis of impulsive personality disorder and/or organic personality disorder. (RT 5937.) In essence, in the opinion of Dr. Pierce, petitioner believes he is being persecuted, does not later take responsibility for his own explosive actions, and has abused cocaine to the point where he is paranoid, impulsive, aggressive, bizarre, provocative, and violently acting out. (RT 5938, 5944, 5949-5951.) It was Dr. Pierce's opinion that petitioner was acting on December 8, 1986, under the influence of an extreme mental or emotional disturbance. (RT 5970.) Further, the psychologist opined petitioner's ability to conform his conduct to law was impaired as a result of a mental disease or defect, possibly exacerbated by cocaine, heroin, and/or alcohol intoxication.[5] (RT 5971-5973.) On cross-examination, Dr. Pierce acknowledged that when petitioner armed himself with an Uzi, kicked in Dellane's door, said "this is for you, bitch," and pulled the trigger, there was nothing identifiably delusional about his thinking. He knew where he was and what he was doing. He knew right from wrong. (RT 5996-5999.) What was delusional, by implication, was his denial, later, that he killed Dellane.

Dr. Samuel Benson, Jr., M.D., a psychiatrist, interviewed petitioner on five occasions at the request of previous and then current defense counsel.

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[5] The psychologist specified later that appellant's capacity to appreciate the criminality of his conduct was not impaired. (RT 6002.)

(RT 6009.) He reviewed the same records provided to Dr. Pierce and reached a similar, but not identical conclusion, that petitioner's differential diagnosis is either intermittent explosive personality disorder, organic personality disorder, persecutory delusional disorder, or cocaine-induced delirium and that whichever disorder controls affected petitioner's ability to conform his conduct to law. (RT 6010-6015, 6043.) He would get angry and spin out of control, the doctor opined, in an escalation of paranoid emotion. (RT 6083.) As did Dr. Pierce, Dr. Benson agreed on cross-examination that petitioner was fully aware that he was killing the Mabreys, intended to do so, and knew all along that killing the Mabreys was against the law. (RT 6092, 6094-6099.) He was, in Dr. Benson's opinion, simply lacking in a control mechanism to stop himself from doing what he intended, planned, and announced he would do. (RT 6099.)

C. The Present Evidentiary Hearing

1. Juror Misconduct Issues

Petitioner's initial allegations in claim 6 posited an unnaturally close and improper relationship between the trial bailiff and the jury, such that the bailiff became a conduit for ex parte, extrajudicial information. (Pet. 132-141.) The reference question asked whether the bailiff engaged "in improper communications with any of the jurors that exposed them to information prejudicial to petitioner?" To determine the facts relevant to the juror misconduct allegation, the referee heard from four of the trial jurors, an alternate juror, the trial prosecutor, predecessor defense counsel, who had also been a bailiff in that building, and the trial bailiff. The referee found that there was no improper communication to the jury that petitioner was the source of the urine in the stairwell between the jury room and the courtroom, that there was no improper communication to the jurors that

witnesses had been threatened, and that the trial prosecutor did not improperly communicate with the jurors during trial. During the course of the hearing, the court also heard testimony that completely debunked the myth that there was any kind of improperly close relationship between the bailiff and the jurors.[6] Respondent accepts and adopts the credibility findings, findings of fact, and conclusions with regard to reference question one as set forth at pages 4-14 of the Report and Recommendations of the Referee. There is no credible evidence that there were any improper communications to the jury.

2. Ineffective Assistance of Counsel Issues

In claim 18, petitioner alleged a failure to conduct a competent investigation in preparation for the penalty phase and to present social history information. The Court's reference questions 2 and 3 focused on serious child abuse at several levels: whether counsel adequately investigated serious child abuse; if so, what additional information an adequate investigation would have disclosed; if an adequate investigation would have disclosed evidence of serious child abuse, whether a competent attorney would have introduced such evidence at the penalty phase; and what rebuttal would have been available to the prosecution?

To address these questions, the referee heard testimony from defense co-counsel Spencer Strellis and Alex Selvin; former defense counsel

[6] The baby shower for the bailiff and his pregnant wife alleged in the petition turned out to be a slightly misremembered jurors-only, lunch break pot-luck marking the engagement of one of the female jurors. Separately, the jurors did sign a card and enclose a modest gift for the baby when informed by the court that the bailiff had been absent to attend his daughter's birth. He had not discussed his impending fatherhood with the jury and the jury never met the bailiff's wife. The alleged meals at which bailiffs and jurors were said to eat and talk together turned out to be one jurors-only restaurant luncheon during deliberations when two bailiffs sat at a nearby table to be sure that nobody approached the jurors.

Thomas Broome and Robert Cross; defense private investigator Harold Adams; the two mental health experts who interviewed petitioner and testified at the penalty phase, neuropsychiatrist Dr. Samuel Benson and clinical psychologist Dr. William Pierce; petitioner (briefly) and four members of petitioner's family, his mother Minnie Welch, his sister Cathie Diane Thomas, an uncle Roy Millender and an aunt Sarah Perine; two childhood friends of petitioner's, Konolus Smith and Glen Riley; defense mitigation specialist Scarlet Nerad; defense forensic psychiatrist Pablo Stewart; clinical neuropsychologist Dr. Karen Froming; clinical psychologist Dr. Julie Kriegler; and a forensic neuropsychologist called by respondent, Dr. Daniel Martell.

Respondent accepts and adopts the credibility findings (RRR 14-39) and generally accepts and adopts the findings of fact and conclusions with regard to reference Question 2 (RRR 40-51) with two critical exceptions. Those exceptions are based on a logical extension of the referee's findings, which reveals a critical inconsistency. The referee finds, and respondent agrees, that petitioner, his mother, his father (who is now alleged to have been the source of the child abuse), and his sister either did not cooperate or would not have cooperated with counsels' efforts to conduct social history interviews. (RRR 19-22.) She also finds no evidence that petitioner's brother, Dwight Welch, who reported he had been repeatedly injured by petitioner, or petitioner's former wife, Terry Yvonne West, who had been violently assaulted by petitioner in the visitors' room at San Quentin in an event that was the subject of testimony at the penalty phase, would have provided useful information to the defense. (RRR 44 fn. 3; Pet. Exh. 55; Trial RT 5838-5843.) This is petitioner's entire immediate family. The referee concludes that counsel's efforts to obtain information from petitioner and his parents were adequate. (RRR 40-43.) However the referee finds that efforts to interview petitioner's "extended" family were

inadequate, including within the definition of "extended" family, petitioner's sister Cathie Diane Thomas, his maternal aunt Sarah Perine who had been living in Los Angeles since petitioner turned three-years-old, and his maternal uncle Roy Millender, who let teen-aged petitioner stay with him sometimes. Logic cannot explain how, having found Cathie Diane Thomas no more likely than her mother to show up for an appointment or cooperate with defense counsel against her brother's wishes (RRR 22), the referee can find it ineffective assistance of counsel not to have made further efforts to interview her. She was living with her mother, was present and recalls at least one of the incidents when counsel came to the house and were not admitted. (ERT 464-466, 1640.) It is illogical to find her flatly uncooperative and still find it ineffective not to have made further efforts to contact her.

In addition, and part of this first exception, in the 1980's context in which the penalty phase investigation necessarily was set, counsel could only have learned the names and whereabouts of extended family, like an aunt or an uncle, from sources within the immediate family, who were uniformly not cooperating. It took habeas counsel years to contact Sara Perine and Roy Millender, even with the belated cooperation of petitioner, his sister, and his mother. For that reason, respondent excepts to the finding that counsel were ineffective in determining that the knowable or available family members would not cooperate in the development of penalty phase evidence. They did not have the cooperation of those who knew about the aunt and uncle and did not have the luxury of years to wait out the death of petitioner's father or otherwise wear down the family's resistance to revealing anything about the family dynamic.

Respondent's second exception to the referee's report is that the referee faults counsel for inadequate efforts to contact community members. (RRR 45.) Counsel explained that they decided to focus on petitioner's

mental health, recasting each violent act as a manifestation of petitioner's mental illness. (ERT 520-521, 537, 541.) Having taken over the case after a series of counsel appointments and *Marsden* removals, attorneys Strellis and Selvin needed to focus their time, efforts and resources on the avenues that would prove helpful to the defense. They obtained and reviewed school records, juvenile probation reports, prison behavioral reports, and adult criminal history records and they observed their client's behavior in court and out. They were selective in which reports they followed up on, hoping to avoid developing witnesses and information that would bolster the prosecution theory of a life-long antisocial predator, and counting on the mental health professionals to discuss the more redeeming aspects of petitioner's life experiences along with the evidence of any mental health diagnosis. None of these reports even hint at serious child abuse. There are no hospital visits, no broken bones, no burns, no twisted limb injuries, nothing that would suggest serious child abuse. Indeed the sum value of the reports is that petitioner was a boy of average intelligence who sometimes turned violent to get what he wanted. The reports are in evidence and largely appear to support the antisocial personality theory of petitioner's behavior. To the extent they could be used to support the defense theory they were provided to Dr. Pierce and Dr. Benson, who made use of the reported incidents in their diagnoses and testimony, and interviewed petitioner about them. (ERT 312-313, 324, 397-398, 401, 406-408.)

We note, however, and the referee acknowledges, that no evidence was provided at the evidentiary hearing about the availability of such witnesses at the time of trial and no witnesses derived from these records testified at the evidentiary hearing. (RRR 45, citing ERT 467.) Community members Konolus Smith and Glen Riley testified at the hearing. Konolus Smith, himself a much-convicted felon, testified that he was

friends with petitioner from the beginning of elementary school through junior high school. Smith included petitioner in fun neighborhood activities. Smith testified to two minor altercations between petitioner and his father, a head slap at school and a restaurant incident where petitioner was hit by his father, neither of which resulted in any loss of consciousness or apparent injury to petitioner. (ERT 595-598.) Smith observed petitioner with scratches, bruises and black eyes as a child, but admitted petitioner was constantly picking fights resulting in these kinds of injuries. (ERT 610, 618, 621.) The referee ultimately concluded Konolus Smith was credible, but would not have been called as a witness by competent defense counsel because he established that petitioner's interest in provoking and starting fights traced back to early childhood, apparently, we add, before his father is alleged to have started abusing him. (RRR 23, 54; ERT 1585 [mother reports petitioner was eight or nine years old when first hit by his father] 1587 [although he may have received a spanking at a younger age], 585-587 [Konolus Smith (age six) first became aware of petitioner (age five) when, as a kindergartener, petitioner started a fight with first-grader Smith in the cafeteria].)

For similar reasons, Glen Riley, although credible, also established the persistent and early patterns of violence in elementary school-aged petitioner. Riley saw petitioner's father backhand slap his children, but never saw him beat them. (ERT 1491.) Defense counsel Selvin explained why he would not have conducted further investigation into what Glen Riley could have provided as testimony and would not have called him as a witness at the penalty phase. This explanation was credited by the referee, leading to the conclusion that Mr. Riley's testimony at the evidentiary hearing was of little value. (RRR 24.) Respondent notes that Mr. Riley was one of the witnesses to petitioner's first recorded use of a firearm against a family, including sleeping grandchildren, because one or more

family members had angered him by witnessing him committing an offense. Riley witnessed 17-year-old petitioner shoot out the windows of the McPherson home, with a sawed-off shotgun he kept handy in his bedroom, while the McPherson grandchildren slept inside. The incident occurred because petitioner was angry that Mrs. McPherson had witnessed him shooting out the windows of his father's car. The more one knows about this incident, where a bullet narrowly missed the napping twins, the more it foreshadowed the mass murder of the Mabreys, twenty years later. No competent defense counsel would have put Mr. Riley on the penalty phase witness stand.

This analysis leaves no usable witnesses developed on the basis of the community investigation, precisely as defense counsel predicted decades ago, and the chance of the Pandora's Box of further life-long anti-social personality evidence remaining largely unopened. Providing declarations from such witnesses to the mental health professionals to rely upon for their diagnoses would have made the witnesses and their most damning evidence available to the prosecution. Again, respondent whole-heartedly agrees that the evidence supports the referee's credibility and factual findings about the quality of the evidence produced at the evidentiary hearing. Those findings simply cannot be squared with a conclusion that counsel were ineffective under the circumstances in which they necessarily operated. Defense counsel stopped at just the right time, with incidents that could be spun toward a mental health diagnosis, without proving how obvious it was that, as one report noted, petitioner was "going to kill someone some day."

If counsel could not reasonably learn of, or earn the cooperation of, Cathie Diane Thomas, Aunt Sarah Perine, or Uncle Roy Millender, counsel could not have learned of serious child abuse. And if petitioner's schoolmates and childhood friends ultimately could provide no direct evidence of the allegedly serious child abuse first revealed more than 20

years after the trial, but could provide direct evidence establishing that petitioner's penchant for violence began in very early childhood, as defense counsel predicted, it cannot have been ineffective to decline to pursue the extended family and community investigations.

Except as inconsistent with the foregoing observations and evidence, respondent accepts and adopts the findings of fact and conclusions with regard to Question 2 (RRR 51-63). Thus respondent takes exception to the conclusion that an adequate investigation would, at the time, have disclosed evidence of serious child abuse. The investigation was adequate under the circumstances and counsel made an informed tactical choice not to keep making appointments with the family that would never be kept and not to pursue community leads that could only lead to damaging evidence. The remaining findings and conclusions assume the availability of evidence of serious child abuse. If that assumption is made despite the reasonableness of the investigation, then respondent concurs that the mental health diagnoses would have been slightly more complete, but not particularly different, that petitioner would never have submitted to neurological testing, but that clinical interviews would have been slightly more informed. (RRR 45-51.)

The referee's findings of fact and conclusions on Question 3, similarly assume the availability of some evidence of child abuse and address whether a reasonably competent defense attorney would have introduced the evidence and, if so, what evidence would have been available for rebuttal.

Fundamentally, the referee's conclusion is supported that if a reasonable investigation would have produced some evidence of child abuse, defense counsel in possession of that evidence would have produced some of it at trial. The referee noted that there was no proof of a head injury or of environmental damage. (RRR 55-57.) She noted that no

competent defense counsel would have put Dr. Stewart on the witness stand, and that the opinions of Drs. Stewart, Froming, and Kriegler based on the belief petitioner suffered a head injury or was exposed to toxins, stress hormones, or was kicked in utero, were not proved and would not have been admitted at the penalty phase. (RRR 56-57.)

The referee generally adopts Dr. Benson's testimony that, if he had possessed information that petitioner was subject to childhood abuse, he would have couched his diagnosis in slightly different terms. He would have been more certain, with additional examples, but his fundamental conclusions about petitioner's abilities and deficits would have been the same. (RRR 58.) Dr. Pierce testified that had he been privy to additional social history information, he would certainly have provided the same diagnoses: (1) delusional paranoid disorder, persecutory type, with a rule-out of schizophrenia; (2) psychoactive substance disorder, including polysubstance dependence on cocaine, alcohol, heroin, and morphine; (3) impulsive personality disorder, explosive type, with a rule-out of organic personality syndrome, that is impulsivity due to minimal brain damage. Dr. Pierce would still have wanted to perform neuropsychological tests and petitioner would still have been dead set against them. (RRR 58-59.) The referee found that, if a clinical interview with petitioner on the social history information had been an option in 1989, a clinical psychologist could have been called to present that information and relate it to petitioner's observed behaviors. While there would have been no neuropsychological testing, a picture could have been painted of a nervous, anxious, and distrusting individual, who abused drugs and alcohol beginning early in life, had behavioral problems and physical challenges as a child, was impulsive and never learned to calm himself down. (RRR 60-61.)

Finally, the referee addressed the nature of rebuttal evidence which would have been available to the prosecution had the defense presented that portion of the new evidence she found would have been available had a different kind of preparation been done for the penalty phase. Primarily, the referee found, and we agree, that the evidence developed by Dr. Martell would have been available to rebut the more certain and fact-based diagnoses of Drs. Benson and Pierce, and the testimony based on a clinical interview covering social history factors. (RRR 61-63.) The fundamental weaknesses in the defense approach, then and as hypothesized looking backward, are that it does not account for strong indicators of an antisocial personality disorder and is at odds with the facts of the case of which the jury was well aware.

The trial evidence shows petitioner approached the problem of Barbara Mabrey's imminent testimony strategically and patiently, trying several more acceptable tacks, before resorting to murder. He wrote her from jail, hoping to evoke sympathy with a report of mistreatment. He came to her home with gifts, formula and diapers for Dexter, to suggest he could help the family if he remained out of prison. As the preliminary hearing in the assault case drew closer and Mrs. Mabrey still planned to testify, petitioner tried more forceful approaches, but he did not leap impulsively directly to murder. Petitioner tried to get Mrs. Mabrey to take a ride with him (and the woman who later served as his murder accomplice), but she would not. He threatened to shoot off her limbs, one by one, if she insisted on going to court. Ultimately, after his dog went missing, he threatened to kill the entire family. Everyone in the family, in the neighborhood, and on the police force, believed he was capable of following through on his threat. That night, he planned. He did not act impulsively. He waited for a time (change of shift) when the police, whom he knew were watching for him because of his earlier threat to kill the

family, were briefly not present. When the time was right, he was prepared to act swiftly with a loaded gun, an armed accomplice, a getaway driver and a vehicle. He had time to kill and attempt to kill a lot of people because he attacked at night, when the family was asleep, indicating a rational solution to the problem of being outnumbered. He was focused, keeping track of the victims he had killed, and naming those for whom he was still hunting. He called Dellane by name, told her "this one's for you, Dellane," then shot her, making it clear he knew he had a gun in his hand, recognized Dellane, and had an articulable intent to kill her. "Where's Chuck?" he asked next, looking for Dellane's older brother. "Where's the bitch at?" he asked, as he approached Mrs. Mabrey's room toward the back of the home, knowing he had not yet killed the key witness against him in the following day's preliminary hearing. He was conscious of his own guilt in all the classic ways, fleeing the scene, destroying evidence, and lying to police.

Dr. Martell is a forensic neuropsychologist, who has considerable experience evaluating patients both for the defense and for the prosecution in criminal trials and post-conviction proceedings. Dr. Martell was turned away at the prison when petitioner refused to come out of his cell for a court-ordered clinical interview and testing, and his alternative suggestions for how to facilitate a meeting were rebuffed, but he did review the clinical notes made by Drs. Froming and Kriegler. He also reviewed trial transcripts, the petition and declarations in support of the petition, and the testimony of certain witnesses at the evidentiary hearing. Dr. Martell noted that the mental health professionals who have evaluated petitioner through the years all seem to be evaluating the same person. Dr. Benson and Dr. Pierce described the same symptoms and deficits, and arrived fundamentally at the same diagnoses that later testing validated. (ERT 1844-1845.) Psychologically, petitioner has his good days and his bad days

as his treatable mental health disorders wax and wane, despite the complete lack of treatment.

Petitioner's intellectual functioning is presently borderline, as his IQ measures above the mental retardation level, but below the "low average" range. His problem solving skills are noticeably higher than you would expect based on his IQ. Petitioner demonstrates memory function commensurate with his IQ. Some tests suggested perseveration, while others did not. Petitioner continues to manifest the impulsivity and distractibility noted by doctors and some lay acquaintances. Dr. Martell explained that the lower results on only some executive functioning measures were likely caused by his treatable but entirely untreated psychiatric disorders. That is, given the way his frontal lobe/executive functioning was tested, the data would not be valid if it took him a long time to complete the tests because he has paranoid delusions, is distractible, and has some trouble focusing, rather than because his brain has been injured. Effective treatment of his psychiatric disorders would allow for more valid testing of his executive functioning. It follows that a conclusion on the basis of these tests, that petitioner had suffered frontal lobe brain damage, would not be valid.

Petitioner's behavior at the time of the crimes contradicted much of the testimony presented at trial and most of that which the referee finds would have been available had the investigation been different. Dr. Martell went through the events on the night of the murder, showing petitioner could control himself; he could lie in wait in his car with the headlights off until the police left, for example. He brought a fully loaded Uzi to a house full of sleeping people, showing he obviously planned to have enough ammunition to kill everyone and achieved the strategic element of surprise, since most of his victims were asleep. His repeated actions that night directed toward optimizing his chances of achieving the stated goal (killing

all the Mabreys) and minimizing his chances of getting caught were completely inconsistent with frontal lobe damage or indeed any significant mental disturbance or illness. (ERT 1845-1848; RRR 61.)

The crimes were not impulsive, disorganized, or spontaneous. They were the very opposite, demonstrating that petitioner's executive functions were operating and in-tact. Petitioner's systematic search for the family members he most wanted to destroy and his checklist-like recognition that there were particular family members he had not yet killed showed his thinking was organized, he had planned, and was following his plan, he was not distracted from his plan. After the crimes, his flight, his destruction of the clothes he was wearing, and his efforts to hide the gun and avoid capture all showed he knew he needed to get rid of the evidence to avoid being connected to and punished for the crime. This was clear evidence that on the night of the crimes petitioner was operating at a much higher level of organization, planning, and goal-directed behavior than he would have been able to achieve if his doctors, old or new, were right about his mental state.

The referee found Dr. Martell to be a very credible witness and found he would have been granted a clinical interview with petitioner to rebut any opinions of defense experts that petitioner suffered psychologically from serious child abuse. (RRR 39, 61-63.)

It seems likely that the defense, like petitioner's habeas corpus team, would have promised the jury more than they actually delivered in terms of evidence of child abuse, leading to some discounting by the jury of any expert opinion based on more than could be proven. Ultimately, the evidence of "serious" child abuse was mostly indirect and inferential, and, given petitioner's penchant for peer on peer violence, a conclusion that any particular bruise was the result of child abuse could not be a firm one.

We note further that the sources of the social history information, had they testified for the defense and been subject to cross-examination, or had they been discovered to the prosecution and called as prosecution witnesses, had considerable damaging evidence about petitioner that confirmed his violent nature was of long-standing and that he was not so much a sympathetic victim of child abuse as a dangerous killing machine.

Petitioner's sister, Cathie Diane Thomas also testified about the last physical altercation between petitioner and their father which was in 1975, according to police reports, when petitioner was a teenager. Her father tried to whip him, but petitioner fought back and they wrestled right out the door, then petitioner got a gun and shot out the windows of his father's car. (23 RT 1635.) Then he shot out the windows of the McPhersons' house. (23 RT 1637-1638.) This was the "nosey neighbors" offense which was part of the penalty phase aggravating evidence and also witnessed by Glen Riley. According to Cathie Diane, the McPhersons were parents of the local bullies, whom the Welch children all believed had burglarized their house. The bigger McPherson boys had terrorized the Welch boys for years. Mrs. McPherson and one of her sons witnessed petitioner shooting out the windows of his father's car from the window of their house, so petitioner turned the gun on them and shot up their house, including firing through the windows of the room where Mrs. McPherson's twin baby grandsons were sleeping, missing them by inches. (23 RT 1641-1642; Trial RT 5731-5733.)

The connections between the McPherson offense for which petitioner's sister provided colorful detail and insight, and the murders on Pearmain Street, were inescapable. Petitioner had finally had enough of a family that he perceived had wronged him, and then members of that family had witnessed him doing something wrong. He took a gun to them and their house without a care for the sleeping babies. Guns. Anger.

Witnesses. Infant victims. It was all there. Petitioner's sister filled in the missing long-term grudge piece, also characteristic of the Mabrey murders, and forever tied petitioner's violence against the outside world to his anger at his father. Cathie Diane Thomas said that was the day the violence between petitioner and his father started in the house and spilled out into the street by the side door. (23 RT 1635-1636.) That it did, both literally and figuratively. Petitioner was 17 years old. From that moment on, petitioner used violence to even the score on the street. There is no question a jury hearing the whole story would have understood that petitioner fully became that day the monster who killed the Mabreys. Ultimately, the child abuse evidence was not sympathetic, it was chilling.

Taking it a level deeper, petitioner has shown that he has learned to use his explosive anger to control people and shows no interest in controlling it or seeking help. Clearly, judging from the manner in which he committed the offenses, he is neither neurologically nor psychologically impaired when he sets his mind on killing. There is no evidence of any effort to seek anger management or counseling or psychiatric services of any kind, just evidence collection for his writ. He wants to be how he is and has learned how to make it work for him. When he needed a new shirt in kindergarten, he attacked Konolus Smith and got one. When he wanted to avoid going back to custody, he assaulted the McPhersons with a firearm. That did not work. The McPherson's testified against him anyway. Learning from the experience, he became more violent, burnishing and brandishing his reputation as a "good shot in a dangerous town," as he testified at trial. When it appeared that threatening and intimidating the Mabreys with violence and shooting out the rear window of Steve Early's car in their presence was not going to keep Mrs. Mabrey away from petitioner's preliminary hearing or keep Dellane from choosing Leslie

Morgan over petitioner to parent her children, he decided to settle things, patiently, methodically, violently, permanently, with an Uzi.

ARGUMENT ON THE MERITS

I. THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED AS PETITIONER HAS SHOWN NEITHER JUROR MISCONDUCT NOR PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

The Petitioner in a habeas corpus proceeding bears the burden of proving that the judgment against him or her is invalid. Accordingly, the petitioner must prove, by a preponderance of the evidence, the facts necessary to establish a basis for habeas corpus relief. (*In re Lucas* (2004) 33 Cal.4th 682, 694.) Where the matter is returned to this Court by this Court's appointed referee, the referee's findings of fact are entitled to great weight when those findings are supported by substantial evidence. (*Ibid.*) This Court independently reviews the referee's legal conclusions and mixed questions of law and fact. (*Ibid.*)

B. Petitioner Has Not Produced Credible Evidence of Juror Misconduct

In his petition for writ of habeas corpus, petitioner contended, with cavalier inaccuracy, that:

> During the course of the trial, and prior to both the guilt and penalty phase verdicts, the bailiff communicated crucial, extrinsic information to the jurors. This information included statements regarding petitioner's alleged urination in the well of the courtroom and material communications that petitioner was violent and had threatened witnesses in this proceeding. None of this information had ever been proffered or admitted in open court. It was material both to petitioner's guilt and penalty, and thereby constituted error mandating reversal.

(Pet. at pp. 132-133.) The trial transcripts established at the time the petition was filed, that the jurors were made aware in open court, by

admissible evidence, both that petitioner urinated in the stairwell and that this entire tragedy occurred when petitioner's threats to kill Barbara Mabrey and her family one by one did not persuade her not to testify at petitioner's upcoming felony preliminary hearing. The evidentiary hearing did not produce any credible evidence of improper communications between the bailiff and the jury. This claim is completely without merit.

1. The Evidence Supports the Referee's Findings of Fact on Witness Credibility

All of the witnesses who testified on the juror misconduct issue appeared to be honest people trying their best to testify truthfully about events that took place over 20 years ago. The testimony of two witnesses deserves close attention, that of retired Deputy Dimsdale, who proved his meticulous concern for the truth, and that of Juror Cruz, who repeatedly established his difficulty in recalling the sequence of events.

In his written statements, Deputy Dimsdale denied ever receiving a gift from the jury. Had he been biased, close-minded, or afraid to admit a mistake, he would have left the issue as it was. Instead, on his own initiative, he looked through a box of keepsakes from his daughter's birth and found evidence he was wrong—a gift card, signed by members of the jury, enclosing a modest-denomination savings bond for his daughter—and brought that evidence to court.

The testimony of Mr. Cruz, by contrast, must be regarded with some caution. Though well-intentioned and anxious to please, Mr. Cruz had considerable difficulty recalling the sequence of events. He testified, for example, that the prosecutor came into the jury room alone during the course of the trial and spoke to the jurors about whether jurors should be concerned about their safety, given petitioner's background. While Juror Cruz recalled that this happened during or shortly after the testimony of a particular witness, prosecutor Anderson's testimony made it clear that the

prosecutor *never* spoke to the jury alone before the case was completed. Instead, Mr. Anderson spoke to the jurors about their verdicts only after the trial judge revoked the admonition not to discuss the case upon completion of the penalty phase. The referee found Mr. Anderson to be a credible witness. (RRR 10-11.) Mr. Cruz's testimony was tentative and confused, as the referee found. The combination of his demeanor and his clearly mistaken testimony about Mr. Anderson's conversation with jurors show that Mr. Cruz's testimony is inaccurate on many points and is not sufficiently reliable to establish any of petitioner's assertions. The referee's finding that the testimony of the uncertain and uncorroborated Mr. Cruz was not credible is well supported. (RRR 7-9.)

The referee found credible bailiff Dimsdale, prosecutor Anderson, former defense counsel Robert Cross, and jurors Carol Finley Hayward, Sally Ann Jessie, and Joanne Gonzales. The referee gave "very little weight" to the testimony of alternate juror Bernard Wells, who both showed bias toward petitioner and admitted his memory had been compromised by open-heart surgery. She found Mr. Cruz not to be credible. (RRR 4-12.)

2. Discounting the Uncorroborated Testimony of the Witnesses Found Not to be Credible, There is No Evidence of Juror Misconduct

The referee's principle finding on Question one is that "none of the bailiffs assigned to petitioner's trial engaged in any improper communications with any of the jurors that would have exposed [the jurors] to information prejudicial to petitioner." (RRR 12.) The referee addressed the two allegations in the petition, that a bailiff informed jurors that petitioner urinated in the stairwell and that a bailiff communicated to the jurors that petitioner or a supporter of petitioner's had threatened witnesses, and found them to be unfounded.

The law concerning receipt of extraneous information by jurors is generally stated as follows:

> A juror's receipt or discussion of evidence not submitted at trial constitutes misconduct. (Citation.) Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct. (Citation.)

Prejudice is assessed by reference to two tests, either of which will support a finding of prejudice requiring reversal:

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. (Citations.) Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. (Citations.) The judgment must be set aside if the court finds prejudice under either test.

(*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

Petitioner fails at the first step on the urine issue. He has not produced competent evidence of juror misconduct. No witness testified that a bailiff told the jury petitioner had urinated in the stairwell. Mr. Cruz thought there had been some mention about petitioner urinating and competency, but could not recall the source or the circumstances. Other jurors recalled that there was urine in the stairwell, but had no idea whose it was. Thus the only extraneous fact communicated to the jury was that they should take care in navigating a wet spot in the well-used stairwell that appeared to be urine. That is not competent evidence of juror misconduct.

Moreover, the jury heard from a defense mental health expert at the penalty phase that petitioner had urinated in a courtroom well during trial. This information was presented by the defense as an example of the bizarre behavior that characterized petitioner's mental health deficits. (Trial RT 5949, 5982-5983.) This testimony was recalled in closing argument. (Trial RT 6118.) As the referee found, "if any juror believed that the petitioner was the source of the urine, that belief likely came from the trial testimony" (RRR 13), not from the bailiff.

The effort to establish prejudicial juror misconduct in the form of a bailiff communicating to jurors about threats to witnesses similarly fails. It was a central fact in petitioner's trial that petitioner threatened and assaulted Barbara Mabrey before killing her family with an Uzi hours before she was to testify against him. (Trial RT 4201-4219.) After trial, prosecutor Anderson met with interested jurors and answered their questions about the trial, including any safety repercussions of their verdict. (ERT 1749.) Deputy Dimsdale and Juror Gonzales specifically denied that the bailiff spoke to jurors about any witnesses who were not going to testify or any threatened witnesses. (ERT 1305, 1348.) The referee found that any vague memories about threats to witnesses were attributable to Mrs. Mabrey's testimony about the facts of the case and/or Mr. Anderson's post-verdict, post-release question and answer session. (RRR 12.) Again, there is no competent evidence of juror misconduct in the form of receipt of extra-judicial communications from any bailiff about threats to witnesses.

Absent any competent evidence of misconduct, there is no need to assess prejudice. It would be pointless to assess the impact on juror impartiality of information that was either not received or received only as admissible evidence at trial. It follows that petitioner has utterly failed to bear his burden of showing prejudicial juror misconduct by a

preponderance of the evidence. Relief on habeas corpus cannot be based on juror misconduct.

II. TRIAL COUNSEL WERE NOT PREJUDICIALLY INEFFECTIVE FOR FAILING TO UNCOVER AND PRESENT THAT PORTION OF THE SERIOUS CHILD ABUSE EVIDENCE PRESENTED BY PETITIONER AT THE REFERENCE HEARING AND FOUND AVAILABLE BY THE REFEREE

A. Standard of Review Where Claim on Habeas Corpus is Failure to Investigate Additional Mitigating Evidence and Failure to Present the Results of a Hypothetical Contemporaneous Investigation

As the Supreme Court recently noted, habeas corpus involves "a collateral attack on a presumptively final judgment; therefore, 'the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them' (*People v. Duvall* (1995) 9 Cal.4th 464, 474). By a preponderance of the evidence, the petitioner must establish facts that constitute a basis for relief. (*In re Bolden* [(2009)] 46 Cal.4th [216,] 224.)" (*In re Crew* (2011) 52 Cal.4th 126, 149 [emphasis in original, parallel citations omitted].)

To prevail on a claim of ineffective assistance of counsel for failure to investigate and present particular mitigating evidence, petitioner must prove error, that counsel's "representation fell below an objective standard of reasonableness" under prevailing professional norms, and prejudice, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Waidla* (2000) 22 Cal.4th 690, 718; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

With regard to the investigation counsel is obligated to undertake, "'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*In*

re Cudjo (1999) 20 Cal.4th 673, 692 [citing *Strickland v. Washington* , *supra*, 466 U.S. at pp. 690-691].)

> Moreover, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." [Citations.]

(*In re Andrews* (2002) 28 Cal.4th 1234, 1255.) Thus, when deciding whether counsel was ineffective, "a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." (*In re Cudjo*, *supra*, 20 Cal.4th at p. 692.)

When, as here, the petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." (*Id.* at p. 695.) In making this decision, the court must consider the totality of the evidence before the jury, realizing that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (*Id.* at pp. 695-696.)

This Court does not need to determine whether counsel's performance was deficient before examining the prejudice petitioner suffered as a result of the alleged deficiencies. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be the case, that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; accord *In re Ross* (1995) 10 Cal.4th 184, 204; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

Even a complete failure to present mitigating evidence on behalf of a penalty phase defendant does not, in and of itself, establish ineffective assistance of counsel. (*People v. Snow* (2003) 30 Cal.4th 43, 112.) As this Court explained, just as petitioner's penalty phase was getting underway, "To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client." (*People v. Lang* (1989) 49 Cal.3d 991, 1031 [not ineffective to accede to defendant's wish not to present testimony of grandmother]; see also *People v. Bloom* (1989) 48 Cal.3d 1194, 1228 & fn. 9, disapproving *People v. Deere* (1985) 41 Cal.3d 353, 363-364 to the extent it suggests that a defendant's failure to present mitigating evidence, in and of itself, is sufficient to make a judgment of death constitutionally unreliable.) Constitutional reliability "is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigation evidence, if any, which the defendant has chosen to present." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.) "[A]n attorney's duty of loyalty to the client means the attorney 'should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client. . . .' (ABA Model Code Prof. Responsibility, EC 7-8.)" As this Court reasoned in *People v. Snow*, *supra*, 30 Cal.4th at p. 116, if counsel, "knowing their client had refused to permit them to conduct a meaningful investigation to build a case in mitigation of penalty, also knew, or reasonably believed, that defendant was likewise desirous that no argument be presented to the jury in his behalf, it might well be concluded

that counsel were simply following what they believed were their client's wishes in waiving penalty phase arguments and such omission would not constitute ineffective assistance of counsel. . . ."

B. A Substantial Penalty Phase Defense Was Presented to the Jury to Show Petitioner was Treatably Impaired, Rather than Irredeemably Antisocial

What may be petitioner's most favorable precedent, *In re Lucas*, involved a complete failure to present mitigating evidence, even though there existed readily available evidence of "extraordinary" child abuse that explained the defendant's behavior. In *In re Lucas* (2004) 33 Cal.4th 682, 690, this Court found prejudicial ineffective assistance of counsel, concluding that:

> Defense counsel did not present any evidence in mitigation at the penalty phase. The jury was not afforded any insight into what may have produced petitioner's capacity for violence or his drug dependency, nor any basis for exercising compassion. The jury found itself faced only with evidence of petitioner's ruthlessness and violence. Had defense counsel conducted an adequate investigation, readily available evidence might have been introduced that would have made the jury aware of petitioner's childhood experience of rejection and extraordinary abuse at the hands of his family.

The Court identified that readily available evidence as the consistent testimony of locatable family members concerning petitioner's brutal abuse at the hands of his mother, stepfather, and step grandmother, and treatment records from employees of the county child protective service agency confirming that "contemporaneous medical opinion was that petitioner had been the victim of cruel abuse." (*Id.* at p. 698.) Lucas showed up for first grade beaten black and blue and, as a seven-year-old, was placed at a facility for abused and neglected children. Relatives and friends of the family testified that:

> Between the ages of three and seven years, he was beaten regularly, given inadequate food, dressed in rags during Ohio winters, forced to sleep under the bed, disciplined by being burned with a cigarette and by the administration of chili peppers to his genitals, and excoriated because of the circumstances of his birth. His sister was not subject to abuse; petitioner often was fed solely on her leftovers.

(*Ibid.*)

Trial counsel in Lucas was aware that his client had been "in and out of juvenile institutions from the age of six years and had been a runaway," that he "did not have a normal childhood," and that he had been punished for bedwetting by being kept under the bed for up to three days. (*Id.* at p. 699-701.) Counsel did not discover the public records of whip marks and blisters on his client's back from beatings as a child, burns on his body from being pushed into a stove, and cigarette burns on his arms and hands. (*Id.* at pp. 716.) The Court determined that a causal connection could be established between the abuse and his development and conduct as an adult, and that the missing evidence was of such significance that it undermined confidence in the outcome. (*Id.* at pp. 716, 733.) The Court found counsel's investigation was inadequate in light of the evidence obtained and in light of the purported penalty phase strategy. (*Id.* at p. 725.) The Court found the trial attorney's view that evidence of childhood abuse and institutionalization would be unhelpful in light of the serious charges to reflect a misunderstanding of the purpose of a penalty phase and the vague fear that it would open the door to harmful rebuttal to be unfounded. (*Id.* at p. 728.) Lucas establishes that, if counsel is aware of potentially powerful child abuse information with a causal connection to the adult behavior, has ready access to those with further information, can substantiate it with contemporary public records, and nevertheless elects not to investigate it

because of a mistaken belief that it could not be helpful, then the complete failure to put on a mitigation case is ineffective assistance of counsel. (*Id.* at p. 731.) The Court found this failure prejudicial because the jury was provided with no explanation at all for the callous violence Lucas had perpetrated, even though there was readily available, pathos-producing testimony at hand to place on the otherwise empty mitigation side of the ledger. (*Id.* at p. 734-736.)

Such is certainly not the case here, where two mental health professionals diagnosed and explained what they identified as petitioner's treatable psychological impairments, including an inability to conform his conduct to law. The available public records were gathered by counsel and analyzed by the two mental health professionals. The available records hinted nothing about child abuse, but did provide information on intelligence, mental health, and a tendency toward violence which was thoroughly and consistently presented to the jury as mitigation. Counsel sought more information from petitioner and his family, but met a brick wall. Petitioner did not want his family involved in the penalty phase and refused to discuss his social history with counsel or the mental health team. The known family members broke appointment after appointment, refusing to discuss social history, or indeed any topic. Moreover, the decision to forego further social history investigation in this case, beyond the social history documents from schools, juvenile courts, and the criminal justice system, was reasonably based on the desire to use the inevitable penalty phase prosecution evidence to establish mental health issues, and not dredge up additional evidence that would cement an anti-social personality explanation for petitioner's shocking behavior. That approach was successful, in the sense that the prosecutor elected to rely on cross-

examination to test the diagnoses of Drs. Benson and Pierce. The prosecutor could have called an expert to clarify that petitioner's antisocial personality disorder better explains not only his lifelong commitment to choosing violence as a way of achieving his own ends but also why he would talk his way out of jail in order to shoot young adults, teenagers and babies in the head with an Uzi over some combination of grievances ranging from a determined witness to an untrue lover to a lost dog. The referee has found that, if the evidence of child abuse ruled available here had been presented, the prosecutor would have called a credible expert to counter the defense interpretation of the evidence. That the defense strategy to present a mental health defense based on the acts of violence that are a matter of public record, rather that delve more deeply into what they correctly predicted would be a childhood filled with additional acts of violence that would otherwise not come to light, did not achieve life without parole is a testament to the horrifying, motivated, deliberately unlawful, and well-planned acts of petitioner, not the ineffectiveness of counsel.

Where there has been a substantial mitigation case presented at the penalty phase, a habeas corpus petitioner is particularly hard pressed to show that counsel were constitutionally ineffective for failing to do more. In considering claims of ineffective assistance of counsel, the court addresses "not what is prudent or appropriate, but only what is constitutionally compelled." (*Burger v. Kemp* (1987) 483 U.S. 776, 794.) Effective assistance does not require exhaustive investigation of potential mitigating evidence. (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254.) "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty

to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland*, *supra*, 466 U.S. at pp. 690-691.) The question is whether, at the point a defense strategy was being adopted, counsel reasonably decided to forgo further investigation down the line of inquiry now being asserted. (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254.)

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." (*Strickland*, *supra*, 466 U.S. at p. 691; *Burger v. Kemp*, *supra*, 483 U.S. at p. 795.) In *Andrews*, for example, counsel were aware that petitioner had been incarcerated in the Alabama prison system, but Andrews never revealed the conditions of his incarceration, so counsel was never alerted to the need for further investigation into that prison stay as a source of mitigation evidence. (*In re Andrews*, *supra*, 28 Cal.4th at p. 1255.) Here too, defense counsel was never alerted to the possibility of serious child abuse, only to the mental health deficits presented to the jury in great detail by Drs. Benson and Pierce. If, as the referee has found, the newly revealed and available information would have made the doctors more sure, but would not have changed their diagnoses significantly, it follows that it was not error to present the penalty phase mitigation case that was presented. It was effective. Even with the benefits of hindsight, there were few ways in which the mitigation case could have been improved. The case that there is

something treatably wrong with this man's brain, and that is a reason to spare his life, was plainly and clearly made to the jury.

C. In the Absence of Prejudice, No Determination of Ineffectiveness Need Be Made

This Court has recognized that much mental health testimony lends itself to damaging rebuttal or alternative explanation. A psychiatrist or psychologist's expert testimony that family upbringing, deprivation, or prison experience can lead to enraged reactions to situations others would walk away from may help explain a murder, but may not make the murderer more sympathetic or the jury more inclined to house him in the prison system for the rest of his life. Mental health expert testimony is often described as a double-edged sword, since an expert's explanation of a defendant's lack of control mechanisms, for whatever reason, simply proves to a jury that the defendant cannot control his lethal impulses. (*In re Andrews*, *supra*, at pp. 1257-1258.) Thus a strategic decision not to investigate further into the defendant's upbringing, prison conditions, and mental health was further found to be non-prejudicial, even if assumed to be error, in light of the brutal circumstances of the crimes, the double-edged nature of much of the evidence, and the substantial potential for opening the door to damaging rebuttal. (*Id.* at p. 1259.)

This Court similarly determined in *In re Crew*, *supra*, 52 Cal.4th 126, that it need not make a determination on the error question of whether counsel's investigation and penalty phase performance fell below professional norms when he failed to discover and present mitigating evidence of defendant's childhood sexual abuse by his mother. Noting that, when "a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient," this Court determined there could be no prejudice because petitioner had not shown that trial counsel could

reasonably have discovered the alleged abuse. (*Id.* at p. 150.) There the defendant's first mention of sexual abuse by his mother was made to a mental health expert 17 years after he was charged with his wife's murder and 15 years after his mother, the alleged abuser, died. At the hearing, the defendant's former wife testified defendant had not told her anything about sexual abuse, a former girlfriend said he had told her his mother had been abusive, but did not elaborate on whether it was verbal, physical, or mental abuse, and the defendant's uncle testified that any such abuse would have been out of character for his sister. The defendant in *Crew* had been interviewed by his counsel and a psychiatrist concerning his social and family history and had reported he had a normal childhood, a characterization confirmed by his father. Thus there was no direct evidence of sexual abuse by the defendant's mother available to be found, and there could have been no prejudice arising from the failure to further investigate. (*Id.* at p. 152.)

Concerning additional potential mitigating evidence of a dysfunctional family situation, presented at the reference hearing, this Court found in *Crew* that there was no prejudice, because there was no reasonable probability that had the evidence been discovered and presented to the jury the result of the penalty phase would have been different. (*Id.* at p. 153.) Where petitioner showed no causal connection between the information concerning his upbringing and the brutal charged offense of murder to obtain his wife's money and possessions, the court found no prejudice, even though the family evidence might have elicited some jury sympathy. (*Ibid.*)

The key question is whether, even assuming (without finding) any ineffectiveness on the part of trial counsel, petitioner was prejudiced. The referee's factual findings, and the procedural developments at the evidentiary hearing, reviewed in the context of the trial record, demonstrate

that, even if there had been a failure to investigate the child abuse of which no one was made aware until recently, petitioner was not prejudiced by that failure. That is, it is not reasonably likely the result of the penalty phase would have been different had further investigation been undertaken prior to the penalty phase and the available results of that investigation presented to the jury.

That petitioner was not prejudiced by any failure to further investigate the possibility of serious child abuse is apparent on multiple levels. First, the evidence of child abuse was far less than compelling, compared to the mass murder and other crimes committed. The child abuse evidence, if found true by the jury, provides one possible source of petitioner's persistent anger. If linked to the psychological impairments, it provides one possible explanation for how much difficulty petitioner has controlling his behavior once he gets revved up, but it does not explain why he constantly seeks out opportunities to reach that exciting revved up place in his life where he feels he can harm others without being responsible. In context, the evidence of child abuse presented slightly more detailed explanations for the impairments his defense team described to the jury through the two mental health experts presented at the penalty phase, but it did not substantially change their diagnoses. Nor did it change the recognition of even the defense experts that petitioner actively and persistently provokes those around him, enjoys the thrill of causing fear in others, prides himself on being a dangerous person, and is very goal-oriented, lucid, and methodical when committing criminal offenses. In short, nothing about the new evidence developed at the evidentiary hearing could have the slightest impact on the obvious facts that petitioner was acting volitionally. Indeed he has never been demonstrably less impaired than the long weekend when he obtained bail prior to his preliminary hearing on the charges of assaulting Mrs. Mabrey on a promise made in

court that he would not go near her or her family, went directly to the Mabrey home and began cajoling, harassing and provoking the family, threatened to kill them all, waited for the perfect night-time moment between shifts of police guarding the home, armed himself with an Uzi and an armed accomplice, hunted methodically and deliberately for his targets, their children and grandchildren, fled the scene, destroyed evidence, and lied to police.

There was little sign of mental health impairment in the offenses, as even the new experts had to agree. Moreover, the connection, even now, between the reported spankings received as a child and the "whuppings" received as a tween or teen on those rare occasions when his father returned from his Merchant Marine tours to his ex-wife's home, and his present mental health impairments is a thin one. Mitigation of the offense requires extrapolating that thin connection back to a weekend 20 years after his last physical altercation with his father and 20 years ago. On that weekend, however, there was a deliberate and premeditated mass murder and available evidence that could be further developed that the operative mental health challenge petitioner faces is an anti-social personality disorder.

Second, because petitioner continues to manipulate, he only cooperates when it suits him. He absolutely refused to be tested or interviewed by respondent's expert. The end result of years of preparation and months of evidentiary hearing is that many of petitioner's claims cannot be tested by adversarial process. Certainly much of the mental health evidence offered at the present evidentiary hearing could never be presented at a retrial on the penalty phase because the People have a statutory right of verification once mental health status has been put at issue,

per Penal Code section 1054.3, subdivision (b)(1),[7] that petitioner has made it quite clear he will never permit. He was found in contempt at the evidentiary hearing for refusing to obey a court order for testing or an interview with Dr. Martel. By implication, although he cooperated with Drs. Benson and Pierce at the time, so long as they did not ask questions about his family, he would never have cooperated with a prosecution mental health expert asking about child abuse, even if the trial court had delayed the trial and penalty phase for the up to 20 years it took to convince petitioner to cooperate with his own experts on the topic of his family in preparation for the evidentiary hearing. Any lack of cooperation would leave the defense vulnerable to sanctions that would affect the evidence they could present.

Assuming there was evidence of serious child abuse to be found, that it was found, and that it was presented to the jury at the penalty phase, that evidence must still be compared to the solid evidence of a lifetime of deliberately unchecked violence that otherwise defined the penalty phase culminating in a crime that has defined "worst mass murder" in Alameda County for 25 years. This Court need not find ineffective assistance, because it is abundantly clear that even if further investigation had been done and evidence of paternal child abuse presented to the penalty phase jury, there is no reasonable likelihood of a different result.

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[7] That subsection provides: "Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action ... places in issue his or her mental state at any phase of the criminal action ... through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant ... submit to examination by a prosecution-retained mental health expert."

CONCLUSION

In light of the foregoing, respondent respectfully urges the Court to deny the petition for writ of habeas corpus. Respondent respectfully excepts to some portions of the referee's findings. Respondent further submits that whether respondent's exceptions are adopted or not, the referee's findings do not entitle petitioner to any relief on his claims of juror misconduct or ineffective assistance of counsel at the penalty phase.

Dated: September 3, 2013

Respectfully submitted,

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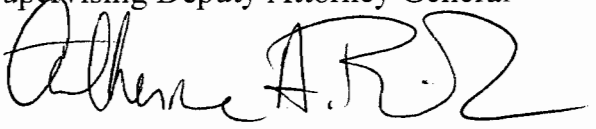

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CERTIFICATE OF COMPLIANCE

I certify that the attached **EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 15,911 words.

Dated: September 3, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re David Esco Welch***

No.: **S107782**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 3, 2013, I served the attached

EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 3, 2013, at San Francisco, California.

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Declarant

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Signature

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