SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	No. S107508
	)	
ALFREDO REYES VALDEZ,	)	Related Appeal No. S026872
	)	
Petitioner.	)	
	)	

PETITIONER'S BRIEF OF EXCEPTIONS TO THE REPORT OF THE REFEREE

Reference Hearing, Superior Court
Los Angeles County, State of California

THE HONORABLE CHARLES HORAN, REFEREE

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DEATH PENALTY

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INTRODUCTION

Petitioner, Alfredo Reyes Valdez, submits his exceptions to the Report of the Referee ("Report"), filed December 4, 2008 in Los Angeles County Superior Court, East, Department M and transmitted to this court . The Report was the result of habeas proceedings filed by petitioner in 2002 in this Court, in which he challenged his conviction and death judgment on numerous grounds including but not limited to ineffective assistance of trial counsel at both the guilt and penalty phase of his trial. On February 7, 2007, this Court ordered the referee to conduct a hearing on four of petitioner's ineffective assistance of counsel claims and to make findings with respect to the following four questions.

1. Why did petitioner's trial counsel not introduce evidence at the guilt phase of the trial that the blood on the pants seized from the Monte Carlo automobile had been tested by the prosecution and found not to have come from the victim and did this reason constitute a reasonable tactical choice by trial

counsel?

2. Why did petitioner's trial counsel not attempt to introduce at the guilt phase of the trial the proffered evidence regarding Liberato Gutierrez to show that Gutierrez may have murdered and/or robbed the victim and did this reason constitute a reasonable tactical choice by trial counsel?

3. Did petitioner's trial counsel provide ineffective assistance of counsel by failing to adequately investigate and present evidence of mitigation during the penalty phase as alleged in subclaim H of the petition?

4. Why did petitioner's trial counsel not attempt to introduce at the penalty phase of the trial the proffered evidence regarding Liberato Gutierrez to show that Gutierrez may have murdered and/or robbed the victim and did this reason constitute a reasonable tactical choice by trial counsel?

The referee generally found against petitioner on Questions 1 through three. Specifically he found with respect to Question 1 that trial counsel's decision not to introduce the blood on the pants constitutes a reasonable tactical choice. (Report, p. 60.) On Question 2, the referee noted that while one of trial counsel's reasons was faulty, his decision not to offer third party culpability evidence was a reasonable tactical choice. (Report, p. 70.) In *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052.], the United States Supreme Court set forth the seminal two part showing required to measure

ineffective assistance of counsel. First, it must be demonstrated that counsel's performance was deficient and "fell below an objective standard of reasonableness." (*Id.* at 688.) Second, it must be shown that the defense was prejudiced by counsel's deficiency and "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Id.* at 687.) The referee interpreted Questions, 1, 2 and 4 as calling for findings only as to the first prong of *Strickland* but, interpreted Question 3, given the wording of the question, as calling for him to address the second prong of *Strickland* as well. (13 R.H.T. 1370.) With respect to Question 3, the referee concludes that petitioner had failed to demonstrate constitutionally ineffective assistance of counsel. "Petitioner has failed to prove by preponderance of the evidence the existence of significant mitigating evidence that was not discovered by counsel and that there is no reasonable likelihood that the introduction of the scant arguably mitigating evidence that petitioner has shown to have existed would have influenced the verdict." (Report, p. 103.) On question four the referee found that trial counsel did not consider the third party culpability matter anew in the context of the penalty phase and thus there was no reasonable tactical choice not to present such evidence. (Report, p. 103.)

SUMMARY OF EXCEPTIONS

Petitioner was convicted and sentenced to death for the April 30, 1989,

murder of Ernesto Macias. Macias's body was found on the street, about fifty feet from the front door of his residence; one of the pockets of his jeans was turned out. Macias had $80 in his other pocket. He was wearing rings and other jewelry. Physical evidence indicated that he had been shot inside his residence. Petitioner had been at the residence that evening and was said to have been the last one to leave. He was arrested in a car the following day. A gun in the car which could have been the murder weapon had blood on it which blood, according to serology testing, could have belonged to Macias. Petitioner's prints were in the blood and the prints would have had to be made when the blood was wet. Additional blood, which is the subject of this Court's first question, was found on pants in the car, subjected to DNA testing and found not to belong to Macias. No property belonging to Macias was found in appellant's possession or in his residence. A robbery based felony murder was the only theory of liability submitted to the jury.

As specifically detailed *post*, petitioner excepts to the referee's findings that any of trial counsel's stated reasons for his actions or inaction were reasonable tactical decisions. Initially, petitioner excepts to the referee's refusal to admit the Pomona Contract, which detailed the terms of trial counsel's appointment. The financial constraints, evident in the Pomona Contact, under which trial counsel was laboring, created a conflict of interest and were relevant to petitioner's claims of ineffective assistance of counsel, and also relevant to trial counsel's credibility

as a witness, as he stated he did not recall how much he was paid for the case and that he did not consider requesting second counsel because it was not a complex case. In fact, he was paid less than $1,000 for the case and second counsel was precluded by the Pomona Contract. The preclusion of second counsel was, as set forth herein, in and of itself violative of petitioner's constitutional rights.

Trial counsel testified that all of his decisions were influenced by the fact that his client told him he "was good for it" [i.e, the homicide] yet, counsel asked petitioner no questions as to how "it" happened and in fact stated he did not want to know. Even assuming, without conceding, that petitioner made the admission attributed to him by counsel, and it meant what counsel claims to have believed it did, petitioner excepts to the referee's findings that counsel made any reasonable tactical decisions, as his lack of investigation and knowledge concerning the circumstances in which the homicide occurred precluded any such decisions. Petitioner excepts to the referee's findings that counsel's decision, assuming arguendo that he actually made any such decision, not to introduce the blood on the pants was a reasonable tactical decision. Petitioner excepts to the referee's finding that trial counsel's decision, assuming without conceding that he made any such decision, not to argue a theory of third party culpability to the court with respect to the introduction of the Liberato Gutierrez evidence was a reasonable tactical decision. With respect to Question 3, petitioner excepts to the referee's

decision to reach the second prong of *Strickland* and excepts to the court's ruling not permitting the introduction of articles, which counsel discussed or attempted to discuss with Dr. Hinkin concerning Complex Post Traumatic Stress Disorder. Petitioner excepts to the referee's findings that "petitioner has failed to show by a preponderance of the evidence the existence of significant mitigating evidence and that there is no reasonable likelihood that the introduction of the scant arguably mitigating evidence that petitioner has shown to have existed would have influenced the verdict."

EVIDENCE PRESENTED AT THE HEARING [1]

INTRODUCTION

Trial counsel, Anthony Robusto was admitted to the California Bar in 1977 and has been in private practice since that time. Since 1987 he has practiced only criminal defense. (Exhibit F 7.) [2] Prior to the Valdez case he had been second

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For the readers convenience, petitioner has adopted the format of the referee in that R H.T. stands for Reporter's Transcript of Reference Hearing.
R.T. stands for Reporter's Transcript of Petitioner's Trial.
Exhibit, unless otherwise specified, refers to exhibits at the evidentiary hearing.
Exhibit F is the November 20, 2007, interview of Anthony Robusto.

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Mr. Robusto was interviewed by Deputy District Attorney Brian Kelberg and the interview was recorded. It was later agreed between counsel and approved by the court that Mr. Robusto when he took the stand would swear to the truth of the statements he made in the interview [Exhibit F] and that both parties would ask follow up questions. Exhibit F is, therefore, referenced interchangeably with his

chair counsel in *People v. Stansbury*, a capital case out of Pomona, but was relieved prior to jury selection. (Exhibit F 8, 9.) He was also second-chair counsel on a federal capital case which ended up settling before trial. (Exhibit F 21.) On March, 18, 1991, Robusto was appointed to represent Chauncey Veasley, another capital case out of Pomona. (Exhibit R.) On April 19, 1991, he was appointed to represent Alfredo Valdez. (10 R.H.T. 747, Exhibit F 7, Bates No. 1689) Robusto was working on the Veasely case and the Valdez case at the same time and the cases were tried in very close proximity. (10 R.H.T. 754, 757, Exhibit R) The bill for counsel's hours submitted for the Valdez preliminary hearing, which included the hearing, itself and preparation totaled 20.5 hours. (10 R.H.T. 750-752.) Robusto does not remember whether after the preliminary hearing he was on an hourly or a flat fee. If it was a flat fee case, that would explain the absence of any further billing. During the period of the Valdez case, there was a contract in Pomona with a group of lawyers to take every case that came through the Pomona Superior Court where there was a conflict or when the Public Defender was not available. The group would pick up all those cases and get paid a certain number of dollars per year. (10 R.H.T. 733, 734.) He has no idea how much he was paid on this case. (10 R.H.T. 780.)[3]

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testimony at the hearing. (10 R.H.T. 726.)

[3] Mr. Robusto later confirmed with Mr. Kelberg who subsequently advised counsel

Robusto began attending the annual capital defense seminars in Monterey, California, commencing in the 1980's. He attended some of the presentations on mitigation evidence but does not specifically remember suggestions on how to overcome obstacles in gathering mitigation evidence. He was, however, aware of the necessity for gathering mitigation evidence when he represented Valdez. (Exhibit F 13.) Robusto did not use psychological testing at the time he represented Valdez, because at that point it was not "really in vogue." (Exhibit F 16.) He now knows what neuro-psychological testing is but was not aware at the time of the Valdez trial that brain damage could be a possible mitigating circumstance. (Exhibit F 18.) His understanding has evolved over time and he is an entirely different lawyer now than when he tried the Valdez case. He has more experience and knowledge, has been testing more and has gone to more seminars. (Exhibit F 19) Robusto never considered seeking second counsel because he did not think the case was complex enough to justify second counsel. (Exhibit F 32)

A note in Robusto's file indicates that he interviewed Valdez at the jail on April 22, 1991. (10 R.H.T. 747, Bates No. 1822.) The only other entry in his file that relates to a conversation with Valdez refers to a May 1, 1991, interview. (Interview, 33, Bates No. 1820.) The rather vague note indicates Valdez said he

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and the court that this case was under the flat fee contract but Robusto still said that he did not recall how much he was paid. (11 R. T. 859.)

lied about the gun because he was on parole and did not want to get in trouble for having the gun. (10 R.H.T. 753-754, Bates No. 1820) Robusto, however, claims there was another conversation. After Valdez was charged with the Macias murder he was charged with the murder of Aguirre at Ralph Welch Park. Robusto represented Valdez at the preliminary hearing on the Aguirre case and Valdez was not held to answer. (1 R.H.T. 12.) Robusto went to lock up and said something like, "I'm done worrying about this case. Now, I need to worry about Macias." Valdez indicated, "Don't worry about it. I'm good for it. I did this." (Exhibit F 35, 36, 72) Robusto said. "You're kidding," and Valdez said "No." Robusto terminated the conversation saying, "I don't want to know any more." Since Valdez had already been arraigned on the Macias murder, Robusto assumed Valdez was aware the charge was not just murder, but robbery and robbery-murder. (Exhibit F 72) Robusto never discussed the palm print on the gun with Valdez because he did not want to have any further discussions about the crime with him. Valdez had, in Robusto's opinion, "confessed" and Robusto did not need to know any more. (Exhibit F 39, 40, 72) Valdez never told Robusto the circumstances of the crime and Robusto never asked him. (Exhibit F 35.)

Attorney Jack Earley, a certified criminal law specialist, testified as a *Strickland* expert. (11 R.H.T. 863, 866.) Earley began his career in the Riverside Public Defender's office where he worked from 1973-1978. He was a Public

Defender in 1978-1981 in Orange County and then in 1981 he went into private practice with offices in Orange County and San Diego County. In 1990 he closed the San Diego office. He now tries cases in various counties in California and in other states. (11 R.H.T. 864.) He has done over 400 jury trials with approximately 100 being homicide cases in various counties in California. He has done seven death penalty cases with one being tried twice. (11 R.H.T. 865.) He has been teaching at the death penalty conference in Monterey on an annual basis since 1981 or 1982. He normally lectures at California Public Defenders Association Homicide Seminars and was one of the lawyers who initiated the Death Penalty College, a week long course for attorneys in Santa Clara. (11 R.H.T. 866, Exhibit L-1.) At habeas counsel's request, Earley prepared a report dated April 14, 2008, addressing this Court's four questions. In preparation for his report and for his testimony, he reviewed the clerk's transcripts, reporter's transcripts, the habeas petition and attached exhibits, the appellate briefs, Mr. Kelberg's interview with Robusto, Robusto's file, Valdez's prison records, and various police reports. (11 R.H.T. 867, 868, Exhibit L.)

Based on his review of the materials, as it relates to the four questions for this question, Early believes that petitioner's case was not adequately prepared. (11 R.H.T. 912.) A reasonably competent lawyer would not walk away and fail to ask further questions when his client says something ambiguous or vague like,

"I'm good for it." (11 R.H.T. 886.) Rather, a reasonably competent lawyer would know that since this is a death penalty case, the surrounding circumstances were very important. (11 R.H.T. 886.) Even when a person admits liability for a crime, there will often be defenses including self defense, heat of passion, the absence of a robbery and/or a theft which was an afterthought. (11 R.H.T. 887.) There would also be other Factor K evidence to explore such as mental health issues and drug and alcohol use. (11 R.H.T. 887.) There would be concerns about whether the client is actually being accurate or truthful about whether he is "good for it." A reasonably competent attorney would not conclude from that remark that his client was an actual killer and would not know whether he was possibly an aider and abettor. Since there is no evidence available about what happened after the people left the [Macias] house, there would be many questions a reasonably competent attorney would ask. (11 R.H.T. 887.) Any reasonably competent lawyer would want to explore all those issues to determine what kind of investigation and what kind of mitigation to present. (11 R.H.T. 888.) Based on the prosecution's evidence offered at the trial, there were many possible and plausible scenarios other than the prosecution's theory [of robbery/murder.] (11 R.H.T. 890.)

MITIGATION EVIDENCE (QUESTION 3)

Petitioner's Family

Rosa Valdez is 69 years old and the mother of Alfredo Valdez, whom she calls Freddie. (9 R.H.T. 640, 724.) She remembers meeting Arturo [Art Corona] from Ms. Marshall's office. Arturo ate at her house, spoke to her in Spanish approximately six times and helped her write a declaration. (9 R.H.T. 641.) Since she does not read English, he read the declaration to her and she signed it. (9 R.H.T. 642, Exhibit 11.) Rosa is married to Antonio Valdez Sr.; they had five children together. (9 R.H.T. 642.) Antonio, Sr. is now in prison for raping one of his granddaughters. [Cindy Davila] (9 R.H.T. 646.)

Rosa's oldest boy Antonio, Jr. [Tony] passed away in a car accident in 1981. Freddie is the second oldest followed by Victoria, Ricardo and Graciela; Ricardo was killed three years ago. (9 R.H.T. 644.) When Tony, Jr. died, Freddie cried a lot because they were very close and only eleven months apart. (9 R.H.T. 671) Rosa was born in Ciudad Juarez, Chihuahua, but grew up in El Paso, Texas, where she legally immigrated when she was 11 years old. When she was 18 years old she attended a party in Juarez where she met her husband. (9 R.H.T. 644, 648.) She foolishly fell in love with him and started to live with him in Juarez. Her first son Tony was born in 1961, but she did not marry Antonio, Sr.

until Ricardo was born. (9 R.H.T. 648.) Rosa worked at a car wash in El Paso, Texas, when they first got married and Antonio, Sr. did nothing. He had a drinking problem and when he was drunk he beat her up and took her money; the beatings continued through their days together. All the children except Graciela were born in Mexico. Graciela was born in El Paso. (9 R.H.T. 647.)

Antonio, Sr. hit Freddie all the time starting in Juarez when he was two or three years old. She was working all day in Texas and would come home at 7:00 p.m. (9 R.H.T. 655.) She would see bruises on the boys' arms, legs and faces and Antonio, Sr. admitted hitting them. (9 R.T 658.) Later the boys told her that he would make them kneel in the sun with stones in their hands. Antonio, Sr. used to say, "that's why I don't work because in Mexico nothing pays, you know you make the money." (9 R.H.T. 655.)

In 1971, they moved to San Bernardino, California, and she worked in a factory as a seamstress. Antonio promised to change his ways, but only worked for six months. Antonio, Sr. did not physically abuse her during this period as they were staying with her family (9 R.H.T. 647.) After a year they moved to Pomona and rented a house on Mission Street where the abuse began again. (9 R.H.T. 648.) Antonio, Sr. would hit her in front of the children. Freddie, who was small, would cry and hug her. Victoria never said anything and Graciela was too little. Antonio, Sr did not work while they lived on Mission. He did whatever

he wanted but he said he worked in house painting. She worked all the time at cleaning jobs and was out of the house a lot. Sometimes she had two jobs. (9 R.H.T. 649.) A neighbor got Antonio, Jr. a job cleaning the phone company building at night. Antonio, Sr. worked on that job for about two months then he put her and the boys to work there. The children were school aged and she would drive them there at night. (9 R.H.T. 650.) They got home at 3:00 to 4:00 a.m. and then they had to get up again at 7:00 a.m. The children did poorly in school and Freddie particularly had problems. (9 R. T .651.)

Rosa met Caroline Reyna when the family lived on Mission in Pomona and continued their friendship when they later bought a house on Marquete in Pomona (9 R.H.T. 651.) At some point when Freddie was about 17, Reyna lived next door to them but before that she was close by and the children could either walk or ride the one bicycle they owned between them to her house. (9 R.H.T. 652.)

Antonio, Sr. did not hit the girls but he used to hit Freddie and Antonio, Jr. with a utility cable when Freddie was 10 or 11. (9 R.H.T. 658.) One day the school called to say that the boys were not in school. Freddie told his dad that they had gotten home from work so late that they had to go sleep in the cemetery. When she came back from work he was beating them with a pool stick over their whole bodies. (9 R.H.T. 659.) She said to leave them alone and he said "I'm

going to beat you too." She was afraid of him because when she told him she did not want to live with him any longer he would put a knife to her neck and say if you leave me I'll kill you or I'll kill your kids. (9 R. T. 660.) She does not remember if Reyna was there when Freddie was hit with a pool cue but she thinks Reyna saw the aftermath of the beating. (9 R.H.T. 667.) She recalls that Reyna did see Antonio, Sr. hitting Freddie with a bat when Freddie was about 12 or 13. While they lived in Pomona, Freddie ran away about six times. She and Reyna would look for him all the time at night. The last time he ran away he left for one year and went to Texas. (9 R.H.T. 668.)

In addition to beatings, Antonio, Sr. did not let Freddie watch television. (9 R.H.T. 671.) Freddie did not go to school when he had bruises that were showing. (10 R.H.T. 713.) Rosa did not take him to the hospital because she was afraid of Antonio, Sr. and he would tell her not to take him. He would say, "He's going to get better. That's what he needs because he's always on the streets." (10 R.H.T. 714.) She also thought that a person had to be in the United States legally to not be turned away for medical care from hospitals. Freddie was illegal because he was not born here and Antonio, Sr. never let her get the paperwork. (10 R.H.T. 716.) She has since learned differently because she has seen friends go to the hospital who do not have their papers. (10 R.H.T. 716.)

When Freddie was 16, the family bought a restaurant named La Placita.

Rosa and the boys worked there. Freddie washed dishes and mopped. (9 R.H.T. 653.) Antonio, Sr, came to the restaurant at night to take the money they earned. He never paid the boys for working. (9 R.H.T. 654.) One time, Antonio, Sr. sent Freddie out to clean a movie theater and when Freddie came back he told Rosa he was hungry because he had not eaten all day. Rosa gave him a burrito, but Antonio, Sr. took it away, beat Freddie with a frying pan and made him leave the restaurant. (9 R.H.T. 660.)

Rosa remembers going to talk to a probation officer named Topete, without Antonio, Sr. and telling him that Freddie was being beaten by his father. (9 R.H.T. 663.) Alfredo was 16 or 17 when she had this conversation with him. Officer Topete started to come over to buy lunch at the restaurant. (9 R.H.T. 664, 665.) Rosa thought he was a good person who tried to help her and Freddie. (9 R.H.T. 665.) Topete was Freddie's probation officer when Freddie ran away from home after being beaten. Before running away, Freddie was in bed for three days without being able to move at all. (9 R.H.T. 666.)

After Antonio, Jr. died in 1981, Rosa was unable to work for eight months and as a result the family lost their house. Antonio sold the restaurant and spent the money gambling on horses. Reyna read Rosa the letter about losing the house and went with her to talk to an attorney in Riverside. (9 R.H.T. 669.)

Rosa first talked to Robusto in the hallway of the courthouse. (9 R.H.T.

671, 676.) He did not speak to her directly but spoke to Freddie's friend Delores. Rosa understood some English at that time and understood that they were going to give Freddie 25 years. She never had a conversation with Robusto herself. She does not remember him coming to her house. (10 R.H.T. 676.) Rosa was in the courthouse hallway everyday during Freddie's trial along with Caroline Reyna, Graciela, Victoria and Delores. Antonio Sr. was not with them. (10 R.H.T. 677.) She testified during Freddie's penalty phase and understood that they wanted her to tell how Freddie behaved during his life. She does not think her husband testified; he was not living at the house when Freddie was on trial. (10 R.H.T. 678.) She told Freddie's friend, Delores, to tell Robusto that Freddie had been very mistreated by his father and Freddie had suffered a lot since he was a child. She told the jurors and Robusto that Freddie suffered a lot because she did not have time to be with him because she worked day and night all her life. (10 R.H.T. 679-80.) She did not tell the jury that Freddie suffered at the hands of his father. (10 R.H.T. 692.) Nobody told her to say that here in front of the jury. She would have told the jury if someone asked her. (10 R.H.T. 693.)

If Robusto had asked her when she was testifying about Freddie being mistreated by his father she would have answered his questions. (10 R.H.T. 680.) She only remembers talking to Robusto in the hallway of the courthouse. (10 R.H.T. 701.) She told Robusto about the skipping school incident and that

Freddie ran away and the family went to Arizona to pick him up. She believes she told him this when she saw him outside in the hallway with Freddie's friend Delores interpreting. (10 R.H.T. 706, 722.) He never asked her if Freddie had been beaten at other times, or whether Antonio, Sr. beat any other children in the family. (10 R.H.T. 707.) Other that one time in the hallway she never told Robusto about Antonio, Sr.'s relationship with Freddie. (10 R.H.T. 708.)

Antonio, Sr. had always told them never to say anything but if Robusto had told her it would help her son she would have told everything even if her husband would have killed her. (10 R.H.T. 710.)

According to Caroline Reyna, who has known the Valdez family since 1973, Antonio Valdez Sr. was a violent alcoholic (9 R.H.T. 569-570, 573.) At dinner with the family he would came home drunk and tell the kids "to do this and do that." He would take Freddie into the room and right there they would have it out (9 R.H.T. 573.) A lot of times the kids would run away from the house to run away from those problems. Eventually the Valdez family lost the house because of Antonio, Sr.'s ways. (9 R.H.T. 575.) (9 R.H.T. 576.)

Reyna never observed Antonio, Sr. hitting Rosa but saw him yell at her and saw him push her on one occasion when she was trying to stop him from hitting Freddie with a bat. (9 R.H.T. 577, 578.) Freddie was 14 or 15 when she observed Antonio, Sr. hit him with the bat on his back and arm. She did not see

the bruises because he left that night and ran away. She saw bruising on Freddie's body under his shirt on other occasions and on his legs, arms and back. (9 R.H.T. 627.)

Reyna has one daughter, named Sabrina Zueck who was born in 1977. (9 R.H.T. 572.) When Sabrina was six years old she told her that Antonio, Sr. was molesting her. Sabrina told her that Antonio, Sr. forced her into the bathroom a few times, where he took out his penis and wanted her to play with it, and that he touched her when he was taking her to school. Reyna took her to the doctor and the doctor found no evidence of vaginal or anal penetration (9 R.H.T. 581, 583.) Sabrina was afraid of Antonio which is why she did not tell her mother sooner. She said Antonio, Sr. threatened her that if she told that she would get hurt more. Reyna did not call the police because she was not sure what to do. Rosa was supposed to be Sabrina's baby-sitter, and she told Reyna that nothing was happening. (9 R.H.T. 582.) After finding out about the molestation, Reyna and her daughter moved but after two years moved back next door at the time Antonio, Sr. was in jail for driving under the influence. (9 R.H.T. 626.)

Sabrina went through a lot and at age 12 ended up in the hospital in Pomona where they take children who have been traumatized. She is in the Army now and still goes to counseling (9 R.H.T. 584.) Reyna does not know if is because of the molestation, but Sabrina will not let men get near her and has

become a lesbian. (9 R.H.T. 585.)

Reyna remembers Freddie's trial and recalls talking to his attorney before the trial at the family home. (9 R.H.T. 585.) She thinks Rosa, Victoria, Sabrina and herself were there. She never talked to Mr. Robusto alone. It never occurred to her to tell Robusto that Freddie's father had molested her daughter. He never asked her. If he had asked she would have told him. (9 R.H.T. 586.) She does not recall Antonio, Sr. being present at the meeting. (9 R.H.T. 603-604.) All the people were together at the meeting and the questions were put to one person at a time. (9 R.H.T. 597.) He only asked how she felt about and what she knew about Freddie. (9 R.H.T. 597.)

She did not go into specifics with Robusto because he did not ask her specific questions. It was something that went so fast, maybe five minutes. Everyone was in the same room. He never talked to her in the hallway of the courthouse. When she testified the only way she knew to be there was that they called her name. He did not talk to her that day or the day before. (9 R.H.T. 590.)

She recalled Arturo from Marilee Marshall's office as being a nice person and she did talk with him a lot about what happened. She told Arturo that Antonio, Sr. was a very violent man. (9 R.H.T. 592, 629.) She does not remember how many times she met with Arturo. (9 R.H.T. 619.) She never talked with Rosa or the family about what to say in the declarations. (9 R.H.T.

624.) Arturo typed the declaration and she signed it. She does not remember how many times she saw him. If Arturo had asked about her daughter being molested in the bathroom she would have told him, but he did not specifically ask. (9 R.H.T. 631. Exhibit 12.)

If Robusto would have specifically asked her, during the her trial testimony, about the abuse Freddie had suffered she would have answered the questions. She stopped after mentioning the yelling because it was her first experience in court and she was nervous. She just answered the questions asked. (9 R.H.T. 602.)

At the time she testified at Freddie's trial, she knew that Antonio, Sr. had been sexually abusing her daughter, she hated him and had no reason to protect him. (9 R.H.T. 604, 605)

Sabrina Zueck, Reina's daughter, testified that she signed her declaration at Marilee Marshall's office, after having once met with Arthur Corona. (Exhibit 13, 12 R.H.T. 1081-1082.) Sabrina calls Rosa her grandmother since she has no other grandparents, but there is no blood relationship. (12 R.H.T. 1084.) She has pictures of Freddie holding her when she was a baby. He used to sing and play with the kids. When she was living next door she saw Antonio, Sr. screaming and yelling all the time. (12 R.H.T. 1085.)

She remembers when she was four or five seeing Freddie trying to run to

his room and Antonio, Sr. running after him and hitting him in the back of the head. Antonio, Sr. would go in the room with Freddie and close the door and then her mom would take her away. (12 R.H.T. 1086.) She remembers more incidents where she personally saw the father physically abusing Freddie. (12 R.H.T. 1093.) Freddie always had bruises on him (12 R.H.T. 1100.) She remembers often waking up in the morning and seeing the boys at her house. (12 R.H.T. 1099.) She remembers Ricky showing her mom some bruises and her mom getting upset. Her recollections are based on observations from when she was a small child. (12 R.H.T. 1101)

Sabrina recalls that Antonio, Sr. began molesting her when she was really little. He touched her on a weight bench in the boys' room and in the car on the way to elementary school. She remembers things happening in the living room and in her grandmother's room. (12 R.H.T. 1087.) As she got older she remembers him forcing her head in certain areas and forcing her to be in certain positions. (12 R.H.T. 1088.) She told her mother and in response her mother pulled her away from the Valdez family when she was about six. Her mother went to talk to Rosa and when she came home she said Sabrina could never see them again. (12 R.H.T. 1088.) She did see them again a few years later when they moved back and resumed a relationship with the family but did not associate with Antonio, Sr. (12 R.H.T. 1089.)

Sabrina still actively participates in the Valdez family functions and considers them to be her only true family. At the time of her declaration she was not close with her mother because she had told her mother she was a lesbian and her mother would not speak to her for two years. (12 R.H.T. 1094.)

Rosemary S. (Jane Doe), who gave a declaration when she was 17, recalled that growing up she was her grandfather's favorite. He did have a nice side, but it was generally to get what he wanted. (12 R.H.T. 1071, 1073, Exhibit 15.) The rest of the time he was abusive, not physically, that she saw, but verbally, emotionally and mentally abusive to the whole family. He used to drink a lot. (12 R.H.T. 1072.) He was always yelling and everyone was afraid of him. He began molesting here when she was five, thus roughly around 1987, but she did not realize it until she was seven. (12 R.H.T. 1076, 1072.) Once she realized he was molesting her it broke her heart but she did not know how to deal with it so she never said anything. (12 R.H.T. 1072.) As she got older it got more uncomfortable because he was eventually asking for sex and tried to attack her. She put her foot down and told him if he ever touched her cousins or sister that she would kill him. (12 R.H.T. 1073.)

She wrote in her declaration that she told her grandmother about the abuse and nothing was ever done, but after dealing with the abuse for years, she is now not sure whether she actually said anything to her grandmother or not. She is not

sure if it is a real memory. (12 R.H.T. 1078-1079.) She did tell the family about all that occurred with her grandfather when he was arrested. (12 R.H.T. 1080.)

Freddie's sister, Graciela, is seven years younger than Freddie. She is presently a correctional officer at California Institution for Men. (12 R.H.T. 1105.) Graciela is also the mother of Cindy Davila . [4] (12 R.H.T. 1136.) As a child, her father never hit her but abused her verbally. She was always a chunky child and he called her spoiled, fat and stupid and would tell her to stop eating. He treated her sister differently. (12 R.H.T. 1107.)

Graciela saw her father physically abuse her mother many times. When he was drunk he would come home and wake up the whole family and bring Rosa and the children out into the living room. Graciela would sit next to her mother and he would start yelling at Rosa about whatever happened that day or the day before. He would tell Rosa , "You're stupid, you're raising your kids wrong," and he would slap her in front of all of the children. (12 R.H.T. 1108.)

There were numerous times that she saw her father hit Freddie with a pool stick, his hand, or his fist. (12 R.H.T. 1109-1110.) Freddie was about twelve when she first saw him being hit by her father. [Graciela would have been five.] Her father treated Freddie differently than the other children; he was the "bad

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[4] Exhibit 7 reflects that Antonio, Sr. was convicted in 1999 of continual sexual abuse of a child which ultimately resulted in his impregnating Cindy Davila, his granddaughter.

one" and was always in trouble. Freddie was not allowed to watch television with the other kids or to eat desserts. He spent most of his time in the room he shared his brothers. She was eleven when her older brother Tony died. (12 R.H.T. 1110.) Tony Jr. and Freddie were pretty close since they were only eleven months apart but she never witnessed Tony intercede on Freddie's behalf with their father. Tony would get upset, but was too scared of Antonio, Sr. to do anything. She was scared of her father as well because although he did not do anything to her physically she could see what type of a person he was. (12 R.H.T. 1111.)

Graciela recalls Freddie sniffing paint from a sock and acting strange afterward . (12 R.H.T. 1111.) He would act funny and dance around in the garage where they had a pool table. (12 R.H.T. 1112.)

One incident of abuse sticks in her mind because she helped Freddie afterwards. Freddie was 15 or 16. [Graciela would have been eight or nine.] She does not know what Freddie did, but he was behind a closed door and she could hear him screaming and her father was in there with him. Graciela opened the door because Freddie was screaming and her mother was not doing anything about it because they were all terrified. She opened the door and saw her father with a two-by-four in his hand, running around the room. Her father pulled the bunk beds away from the wall so he could have access to Freddie. When Antonio, Sr. noticed that the door was open he screamed at Graciela; she does not know

how many times he hit Freddie. (12 R.H.T. 1109.) Graciela saw her father hitting Freddie in the back, but Freddie must have suffered more blows than she observed because it was apparent afterward that he had been hit in the face with either the two by four or her father's hands. She recalls that when her father was finished, Freddie could not get up. She fed Freddie cereal through a straw the next day because he could not eat solid food. After that beating, Freddie ran away. (12 R.H.T. 1109, 1131,1132.)

In her house they were not allowed to say what went on because her father told them that if anybody ever found out what he was doing, he would kill all of them. (12 R.H.T. 1117.) She believed what he said because he was a very violent man. He would get out a really long knife and the kids would flee for their lives. They would leave in the middle of the night and go to Caroline Reyna's house. They kept clothes outside in case they had to leave in the night when her father came home. She has never been afraid of anyone in her life except her father. (12 R.H.T. 1118.)

When Freddie was on trial, Graciela was 22, working and living at home. (12 R. T. 1116.) She only recalls speaking with Robusto in the hallway, while the trial was going on. He would basically just inform the family of what was going on that day. (12 R.H.T. 1113, 114.) Robusto would speak to her in English in the hallway, her mom would ask her what was said and she would tell her. (12

R.H.T. 1115.) Robusto never sat down anywhere with her and her parents and had her translate an interview. She does not remember Robusto coming to their home. (12 R.H.T. 1116.) Reviewing Robusto's notes of the family meeting at 7:30 p.m. where it says "Gracy" translated does not change her recollection. (12 R.H.T. 1121.) She would have recalled acting as a translator for Robusto at the house if it had been a substantial amount of time. (12 R.H.T. 1139.) If it were only for ten minutes, she may not remember, she just does not remember him being there. (12 R.H.T. 1140, 1120.)

When she signed her declaration she knew that her father was in jail and he was not a threat to her anymore. In 1992, fear would have caused her not to be willing to disclose the abuse. (12 R.H.T. 1119.) She also drew the conclusion that the information was not relevant. (12 R.H.T. 1120.) If she had been given the opportunity of somebody sitting down with her, away from her parents and others in the family, and asking about what her brother's childhood was like, specifically whether or not her father had hit him a lot, she would have told the truth. (12 R.H.T. 1118.) If Robusto would have asked her mother to describe Freddie's relationship with his father, and if her mother had known that it was going to help Freddie in any way, she thinks her mother would have told Robusto about the abuse. If Rosa only told Robusto about one incident it was not accurate. (12 R.H.T. 1134.)

Freddie's sister, Victoria Perez, remembers giving a declaration in July of 2000. (12 R.H.T. 1217, Exhibit 14.) She does not read or write very well, although she went through the ninth grade, she believes she reads at about the third or fourth grade level. She recalls meeting with Art [Art Corona] at her house on 9th street. (12 R.H.T. 1218.)

Art talked to her at the house on 9th street on two occasions; she talked to him alone first and the second time her mother and sister were present. (12 R.H.T. 1261, 1262.) They talked about her story and then he came back and read her the declaration. She agreed with what he read to her and signed it. (12 R.H.T. 1219.)

Freddie is one year and a couple months older than Victoria and they were very close as children. Her father treated Victoria well while she was growing up and babied her a lot (12 R.T 1221.) The reason she does not know how to read and write properly is because he used to tell her that she did not need to learn because he was going to take care of her. (12 R.H.T. 1221.)

Victoria saw her father hit their mother all the time. He would hit Rosa with his hands, and sometimes with a belt. He used to drink on Friday, Saturday and Sunday and on those days he hit her more. (12 R.H.T. 1222.) She saw bruises on her mother, black eyes and marks on her cheeks. (12 R.H.T. 1228.)

When Freddie was about seven he stole some money, a jar of pennies from

a neighbor. In front of Victoria and Ricky, Antonio, Sr. burned Freddie's hands on the stove to show all them not to steal. (12 R.H.T. 1225.) Her father hit Freddie almost every day; he was the target. Her father hated Freddie. He beat the other boys as well but not as much as he abused Freddie. (12 R. T. 1223.) Freddie was the type of kid, even though he got hit, he still jumped around and played and was funny and her dad did not like that. He wanted him to be quiet and do the things he said. Her older brother, Tony Jr., was more mellow and he would not get hit as much. (12 R.H.T. 1223.) Her dad used to hit Freddie with wires and sticks and Freddie would have big bruises and marks. He hung Freddie up in the garage and beat him with a cord. He used to hit him a lot in the back, in the legs "or wherever." (12 R.H.T. 1226.) A lot of times Freddie wore sweats or a shirt so one could not see the marks and welts but he would show them to Victoria. He would have bruising on his face, arms, and hands. (12 R.H.T. 1250.) Freddie did not go to school when he was bruised up that way. (12 R.H.T. 1251.) She thinks he stayed home because he was hurt and because he did not want people to see the bruises. (12 R.H.T. 1251.) Freddie was around eleven or twelve when her father hung him from the garage rafters and beat him with a belt buckle. She does not know what he had done to get her father to hang him by his feet and beat him. (12 R.H.T. 1253.) Freddie screamed all the time when he was beaten. Sometimes Victoria watched through the window in the garage. (12

R.H.T. 1226.)

When Freddie was around 11 he ran away to Arizona after being beaten with a stick by his father. She remembers going to Arizona with her father to pick him up and sitting in the police station. Her mom told her the police had let Freddie go because he told them about the abuse. (12 R.H.T. 166.) Things were worse when Freddie got back home. (12 R. T 1265-1266.) Once she saw Freddie being hit with a two by four; her brother Ricky was also present but her mother and Graciela were not present. (12 R.H.T. 1263.) Freddie was 16 years old when he was beaten so badly he had to eat through a straw. (12 R.H.T. 1264, 1294.)

Her father worked in the janitorial company and he would take the kids to work with him, but he really did not work himself. (12 R.H.T. 1286.) Freddie ditched school a lot, especially on Mondays because he could not get any sleep. She and Freddie ditched school a lot together. They would go back home and sleep under the pool table because they were really tired. The table had a cover on it and their father could not see that they were there. He would catch them once in a while. She was not afraid of him because he only hit her once when she was ten for ditching school and she probably deserved it (12 R.H.T. 1229, 1232.) She was afraid because she did not like him hitting her brother. She was afraid for Freddie. (12 R.H.T. 1230.)

The statement in the declaration about Freddie holding bricks in the sun is based on something "they" talked about when they talked about the abuse. (Exhibit 14.) Her mother used to talk to her aunt, Leticia Belmar, who was also in an abusive relationship and they used to cry. (12 R.H.T. 1247.) She has a clear memory of seeing her brother forced to hold bricks over his head for an hour from when she was four years old. When Freddie was a little older and they were living in California, her father made him hold as many as three bricks. She was about eight years old at that time. (12 R.H.T. 1248.) She knows what bricks are and that they weigh maybe a pound. (12 R.H.T. 1249.)

Antonio, Sr. had a large knife from the family restaurant that he used to chase the family around the house with. (12 R.H.T. 1232.) Her father mostly chased Freddie and her mother. Freddie was cut on the back and bled on two occasions (12 R.H.T. 1254.) The cuts were not that deep, just long slices that did not require stitches. Her mom used warm rags to stop the bleeding. Caroline Reyna was also aware of the cuttings on Freddie. (12 R.H.T. 1255, 1256.) Her father did not cut anyone other that Freddie. Victoria agrees with the court that she may have exaggerated when she said in her declaration about the knife that, "whoever he caught he would cut." (12 R.T 1257, Exhibit 14.)

The kids used to jump out of the window when they knew that their father was drinking and go over to Caroline Reyna's house,, or sometimes her mom had

the keys ready for their other car. Sometimes they would call Reyna from a public telephone and she would come and pick the kids up. Reyna moved a couple of times; once she lived about 15 minutes away by car and at an other time she lived maybe ten minutes away by foot and they used to run to her house barefoot. (12 R.H.T. 1224.)

Around the same time as the principals stopped paddling the kids in public schools, Victoria went to voluntary group counseling in school, where teachers talked to the kids and said that they should not let their parents abuse them. Victoria never told any teachers that she and her brothers were being abused at home. (12 R.H.T. 1237, 1240.) At the time she was confused and she did not know what to say, but she went to the counseling because she believed she and her brothers and sister were being abused. (12 R.H.T. 1241.)

She and Freddie started sniffing gasoline when they were ten or eleven. She did not like the feeling so she stopped but Freddie continued using drugs. Around the same time, Freddie used to put paint in a sock and sniff it. (12 R.H.T. 1226-1227.) Freddie would act crazy when he was high. He would jump around and play and sing. (12 R.H.T. 1227.) Victoria never saw him use other drugs, but he told her he was using them. (12 R.H.T. 1227.)

Victoria remembers an incident in 1985 or 1986, when she was about 21 and she tried to kill her father. She had just come home from being at a friend's

house where she spent the night. Her father, who had just gotten out of county jail, came in drunk and started asking where her mother was. (12 R.H.T. 1230.) Victoria kept saying "I don't know," and then he slapped her really hard and threw her against a couch, causing her to fall over the couch. (12 R.H.T. 1230-1231.) Victoria was really upset because her father started telling her he was going to beat up and kill her mom. She got a knife, the same knife her father had used on her brother and started hitting him with it. He threw a chair at her. Victoria's sister "Gracie", who was 15 or 16 at the time, came out and called the cops. The officer came in and talked to Victoria. She remembered telling him that her father better not come back or she was going to kill him because she was tired of him abusing her mother. She was in shock that he hit her that day. It was the first time he ever hit her like that and she could not believe it. (12 R.H.T. 1231.)

At the time of Freddie's murder trial she had two kids and was divorced. (12 R.H.T. 1244.) She came to the trial but was only present in the courtroom when she testified at the penalty phase. (12 R.H.T. 1233.) Freddie used to have a girlfriend who translated for her mother when Robusto would tell them how things were going. Sometimes Victoria would stand next to Robusto and her mom and listen and sometimes not. These conversations were fifteen minutes at most. She does not recall Robusto ever coming to the family house. During that

period she lived at home with her mother on 9th street and was working in Pomona on the morning shift from 7:00 a.m. to 3:30 p.m. (12 R.H.T. 1234.)

Robusto never talked to her about Freddie's life and Victoria did not discuss with him what her testimony was going to be at trial. No one explained to her why she was going to be on the witness stand. If Robusto had asked her questions about her father beating Freddie Victoria would have told him. (12 R.H.T. 1234, 1235.) She was not afraid of her father, so fear of her father would not have kept her from saying anything. Because of love for her father she might not have said anything bad because she was younger and did not know any better. Despite Victoria's love for her father, however, she would have told about the abuse if asked, but she did not volunteer any information. (12 R.H.T. 1236.) She did have a fear that if she told something to Robusto about the abuse, something bad might happen to her mother if her father learned that Victoria had told. (12 R.H.T. 1244.) The only reason Victoria never said anything is Robusto never asked them questions about the abuse. (12 R.H.T. 1245.) There is no other reason. (12 R.H.T. 1246.) When Victoria said something about a fear for her mom's safety, that was not one of the reasons that she did not tell Mr. Robusto about the bad things that happened to her brother. (12 R.H.T. 1246.) It is the truth that if Robusto had asked she would have told about the abuse. (13 R.H.T. 1290.) No fear of her father would have kept her from telling. (13 R.H.T. 1290.)

Victoria is 100% certain that she was never present in her mother's house or anywhere else where Robusto asked Victoria to talk about Freddie or asked her to describe Freddie's relationship with his father and mother. He never asked questions like that. (13 R.H.T. 1291.) It would not change her memory to know that Robusto has notes of a family meeting in 1992. (13 R.H.T. 1293.)

Both Graciela and Victoria stated that Freddie was using hard drugs after he got out of prison. (12 R.H.T. 1268.) Graciela did not see the drugs but she saw the paraphernalia. (12 R. T. 1125-1126.) According to Victoria, when Freddie was using drugs, they had to lock their rooms so Freddie would not steal their stuff. When Freddie was high he would argue with his girlfriend Tina a lot. There was too much yelling and screaming for Victoria to live with them. She did not want her kids brought up around that life. She never saw Freddie hit Tina, but she heard banging on the walls and yelling. When Freddie drank alcohol or got high he would get violent. (12 R.H.T. 1272.)

The Psychological Evaluation :

Nancy Kaser-Boyd, Ph.D

Dr. Nancy Kaser-Boyd earned a doctorate in clinical psychology from the University of Montana in 1980. She did postdoctoral training in Psychology in the Law at USC's Institute of Psychiatry of the Law in 1979-1980. She is board certified in assessment. Her specialty area is child abuse, neglect and trauma. (8

R.H.T. 238, 239-240.) She has been qualified as an expert in Posttraumatic Stress Disorder ("PTSD") due to various causes such as battered women's syndrome and child abuse, physical abuse, and sexual abuse; she has also been qualified as an expert in malingering. (8 R.H.T. 239, Exhibit A.)

In 2002, she was asked by Marilee Marshall to render an opinion as to whether there was credible evidence that Valdez was battered as a child and to discuss factors in his social history, including an antisocial father and other conditions, that should have been discussed as mitigation factors at the penalty trial. (9 R.H.T. 492.) Dr. Kaser-Boyd reviewed declarations by Valdez's family members. (8 R.H.T. 255, Exhibits 11-16.) In Kaser-Boyd's opinion, these declarations were credible. They were very detailed, internally consistent and very much like what is known about the behavior of child abusers. (8 R.H.T. 315.) Kaser-Boyd reviewed the reports of Valdez's father [Antonio, Sr.] impregnating his 13-year-old [granddaughter Cindy Davila] and his subsequently being arrested and convicted in 1999 for a violation of Penal Code section 288.5. (8 R.H.T. 347, Exhibit 7.) The occurrence of sex crimes six years after Valdez went to death row reveals the underlying psycho-pathology of Antonio, Sr. The psychological literature shows a correlation between physical and sexual abuse in people, such as Antonio, Sr., who are very self-centered. It does not in and of itself prove that Valdez was abused but lends credibility to the suggestion. (8 R.H.T. 348.) A

person who would hit his children may also sexually abuse his children or other children. (8 R.H.T. 349.)

When Kaser Boyd was retained, Marshall indicated that before an Order to Show Cause issues there are very limited funds for experts.[5] (9 R.H.T. 521.) Kaser Boyd obtained a chronology of Valdez' life from Marshall which contained a summary of the juvenile records and probation records; she also reviewed school records. (8 R.H.T. 345, 385-386,469, Exhibit 21.) Kaser Boyd used the chronology prepared by Marshall for an overview of Valdez's life. Kaser Boyd thought it was a more important use of funds to visit Valdez rather than reading more documents and did not, therefore, ask Marshall to send everything potentially relevant to the issue. (9 R.H.T. 460,461, 522.)

Kaser Boyd assumed that if there had been any contemporaneous references to childhood abuse it would have been provided in the summary. (9 R.H.T. 523.) She felt it was professionally and ethically necessary to meet Valdez before forming an opinion about him. (8 R.H.T. 286, 287.) In drafting her declaration, Kaser-Boyd reviewed reports of child abuse and gave her professional opinion about whether such abuse would impact behavior and personality so as to be considered a mitigating factor. (8 R.H.T. 460-461, Exhibit D.) She has

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5 Kaser-Boyd was paid $3700 for professional fees and travel expenses. (9 R.H.T. 565.)

reviewed probation reports and juvenile records, as well as additional school records in anticipation of her testimony. (8 R.H.T. 389.)

Kaser-Boyd's ability to assess credibility is based on clinical observations after interviewing perhaps 6000 people over the course of 30 years. She views herself as an objective clinical psychologist, not an advocate. (8 R.H.T. 322.)

At UCLA, Kaser Boyd teaches a seminar that includes report writing and instructions on administration of certain tests to assess personality and malingering. She also teaches specialty topics such as the evaluation of risk for violence, posttraumatic stress disorder, malingering, factitious disorder, affective disorders and schizophrenia. She is on the Criminal Panel for Los Angeles County, and is appointed by both the prosecution and defense. She has testified for the prosecution on a death penalty case in San Diego where Dan Goldstein was the prosecutor. (9 R.H.T. 524.)

In the San Diego case, she was retained to evaluate the defendant who claimed she suffered from battered womens' syndrome and was forced to do the crime. Kaser-Boyd had to determine whether the claim was true or whether the defendant was malingering. She administered the MMPI, the MCMI and the Rorschach tests. Kaser-Boyd gave the defendant the MMPI because she had a higher reading level than Valdez. (9 R.H.T. 525, 554.) The defendant's presentation on the testing indicated that was she malingering and Kaser-Boyd

testified accordingly at the penalty phase of her trial. (9 R.H.T. 525.) Kaser-Boyd is not opposed to the death penalty. (8 R.H.T. 306.)

Kaser-Boyd evaluated Alfredo Valdez at San Quentin prison over a period of two days and made notes during her visit. (8 R.H.T. 242, 243.) She evaluated Valdez for both credibility and malingering. (9 R.H.T. 528.) Kaser-Boyd would not have written a declaration regarding his psychological problems if she thought he was malingering. (8 R.H.T. 370.) To evaluate malingering, she looked at whether Valdez exaggerated things or tended to minimize things. She considered his emotional tone and his affect when he was talking, because it is hard for people to fake the emotions that go with painful memories. (8 R.H.T. 369.)

As part of her evaluation, Kaser-Boyd reviewed some of Valdez's drawings with him (8 R.H.T. 244, 245, Exhibit C 1-4.) A person's artwork reflects his pre-occupations. (8 R. T. 245.) Valdez told her the drawing, Exhibit C-1, represented danger on the streets. The dead person in the picture was the victim in his case dying alone on a lonely street. (8 R.H.T. 246, Exhibit C-1.) Another drawing, "Smiling Faces" (Exhibit C-2) is also about a pre-occupation with dramatic, violent themes, including gang life, as well as warfare and salvation. The drawing is about "chasing the dragon," which signifies addiction to drugs. (8 R.H.T. 247.) In Kaser-Boyd's opinion the drawing reflects Valdez's opinion of his life and his image of the world as a dangerous place, negative place, but there is hope of

salvation through Jesus. (8 R.H.T. 248, Exhibit C-2.) Another drawing is about a man addicted to drugs with tattoos that relate to his mother. (8 R.H.T. 248, Exhibit C-3.) These drawings reflects the themes of Valdez's life - - - crime, drug addiction, conviction and his sorrow for the kind of life he has experienced. (8 R.H.T. 249, Exhibit C-2.) The drawing, *La Loquita*, translated as Little Clowns, represents a happy face and a sad face, illustrating that life can turn sad quickly. The letters R.I.P. note that many people in his life have died. There is a picture of the grim reaper and a cross representing redemption. (8 R.H.T. 250, Exhibit C-3.)

Kaser-Boyd interviewed Valdez regarding his childhood. He told her that when he was five, his father burned his hands on top of the stove as punishment for stealing. (8 R.H.T. 252, 254.) Valdez said he was often targeted for the most abuse among the siblings, for reasons he did not understand. (8 R.H.T. 254-255.) He was often hit with whatever object was around, including a baseball bat and a two-by-four. Valdez talked about being hit in the head with a belt so hard that he lost consciousness. He remembered being hung upside down in the garage and hit with a belt. He was often subjected to verbal abuse as well. (8 R.H.T. 255.)

Valdez told her that after his brother Tony was killed in a car accident everything in the family became chaotic. Tony had protected Valdez from his father and had also taught him things. When Tony was gone there was no one else to do that. (8 R.H.T. 2457.) Valdez told her after his brother died, he started using

marijuana and drinking; later he started using hard drugs, including heroine and cocaine. (8 R.H.T. 392.) Kaser Boyd considered that the person she met in 2002 was the product of having injected cocaine over a lengthy period of time. (8 R.H.T. 395.)

Kaser- Boyd asked Valdez about repressed memories, although she did not use that term. (8 R.H.T. 318.) Kaser-Boyd concluded that Valdez used drugs and ran away from home which are avoidant behaviors because of the child abuse. (8 R.H.T. 319.) Kaser-Boyd concluded that Valdez's statements during their interview were reliable and valid. He seemed very consistent and the affect he displayed was consistent with that of a person who has been abused. Valdez expressed beliefs about the world and about himself of a person who has been abused. Valdez has the criminal history of someone who has been abused. (8 R.H.T. 409.)

Valdez also told her that he was not involved with a gang. Valdez felt the Mexican Mafia was after him and he was in Administrative-Segregation. (8 R.H.T. 303.) Kaser-Boyd has since seen San Quentin records that say he had gambling debts and was using drugs in prison; those reports do not change her opinion as to what caused his psychological problems. (8 R.H.T. 418, 419.)

It is not enough to just be in a dangerous place to get PTSD. One has to have experienced an event that directly threatens one's life or the lives of loved

ones. The experiences Valdez has had in San Quentin do not establish that criterion feature for development of PTSD. (8 R.H.T. 420.) Valdez was not having flashbacks or nightmares of anything that happened with the Mexican Mafia. (8 R.H.T. 421.) Getting in a fight with another man is not necessarily a traumatic trigger. People with PTSD are easily provoked. (8 R.H.T. 424.) She does not think that the prison life, however violent, caused Valdez' PTSD. He also does not have the major criteria for PTSD, rather he has chronic or complex PTSD. (9 R.H.T. 518.)

The criteria for PTSD are appropriate for a single life threatening or horrifying event. On the opposite page of the DSM there is a description of how PTSD differs when it is repeated and chronic, listing symptoms of the Associated Features. Much of the literature now talks about complex PTSD. (8 R.H.T. 267.) Chronic PTSD has been renamed complex PTSD. Traditional PTSD, as it appears in the diagnostic manual DSM-IV [6] typically refers to a one-time life event which causes a sense of horror and extreme helplessness. (8 R.H.T. 240.) People suffering from chronic, or complex PTSD as it is now called, have changes in personality due to developmental periods where they experienced incredible anxiety and fear. (8 R.H.T. 240.) Chronic or complex PTSD was recognized prior to 1990-1991. (8 R.H.T. 240, 241.) Psychologists have published works

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[6]In 1992, the DSM III was in use. (8 R.H.T. 320.)

which argue there are separate criteria for diagnosing the type of PTSD from which Valdez suffers. (8 R.H.T. 354.) Judith Herman from Boston and John Briere, at USC, have published articles on Complex PTSD. There have been entire conferences with multiple speakers on the topic of Complex PTSD. (8 R.H.T. 354.) Valdez also meets the criteria for several personality disorders but all of the disorders he suffers from could be caused by the same underlying pattern of severe child abuse. (9 R.H.T. 531-533). She does not see it as her task to make a diagnosis. Her task was to discuss child abuse and how it affects a person. (9 R.H.T. 535, 536.)

Kaser-Boyd considers the acts described by Valdez and his family to be very high-level child abuse. It is unlikely that a child could live through that much trauma without its having an impact on his development and personality. (8 R.H.T. 257.) [7] Children experiencing that much trauma are unable to focus on school; such children tend to be hyperactive and not able to concentrate well. They tend to have behavior disturbances, become angry and get in fights at school; they have problems with authority figures and they will be difficult to manage. They may experience the effects of complex PTSD which results in disturbances in their

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[7] Kaser-Boyd has consulted on cases in which people from Mexico "punished" their children by having them hold bricks in their hands while standing in the sun. She has never seen it personally, but she has heard of it prior to this case. (8 R.H.T. 410.) She did consider it a possible exaggeration for him to have been holding three bricks. (8 R.H.T. 412.)

sense of self; they feel damaged, worthless and cannot trust others. They have disturbances in their relationships with others and problems with emotional control. Such persons have serious problems with judgment, which cause them to either be victimized or become victimizers. (8 R.H.T. 258.) They hyper-vigilant to danger so they are quickly angered and easily provoked. Substance abuse would only make these features worse. Substance abuse tends to make interactions with other people worse and, more impulsive, depending on the substance. (8 R.H.T. 263.)

Before forming her professional opinion, Dr. Kaser-Boyd considered the fact that Valdez's family members and friends did not mention family abuse when they testified at his trial in 1992. It would not surprise her to hear that Robusto, the defense counsel at trial, said he interviewed the family, but was not told about the child abuse. (8 R.H.T. 270.) In most of the abuse cases she has worked on the families are very protective and do not readily admit negative things unless there is rapport with the attorney or mitigation specialist. (8 R.H.T. 270.) Kaser-Boyd stated, "You can not just sit down with people and say tell me the ugly. You have to form a relationship with them and interview them more than once." (8 R.H.T. 271, 9 R.H.T. 556.) Perhaps the family members felt more free to talk after Antonio, Sr. got arrested, or was in prison. (8 R.H.T. 378.) However, building trust over time and helping witnesses see how they can be kept safe can get them to

talk. (9 R.H.T. 556.) Confidential interviews are also helpful. (9 R.H.T. 557.)

Valdez's display of bravado and self-confidence, as reported by Robusto, would not be inconsistent with someone suffering from childhood trauma. Victims of abuse tend to develop defense mechanisms to their vulnerability and often it's in that hyper-masculine "I'm a tough guy" kind of way if they are male. (8 R.H.T. 274.)

The Neuro- Psychological Evaluation

Kyle Boone, Ph.D

Dr. Kyle Boone has a doctorate in Clinical Psychology, received in 1984 from the California School of Professional Psychology. She did a two year full-time postdoctoral fellowship at UCLA in the Department of Neuropsychology. She is a full professor in the Department of Psychiatry at UCLA. She teaches at Harbor-UCLA. (14 R.H.T. 1390.) She trains master's level and postdoctoral students in neuropsychological assessment; she also does her own clinical assessments. (14 R.H.T. 1391.) The primary focus of her research is on developing and validating tests to detect malingering. (14 R.H.T. 1391, Exhibit O.)

Boone evaluated Alfredo Valdez in San Quentin on July 2, 2007. She does not recall if she was asked to review any documents with respect to the case prior to the evaluation. She usually asks for school records or medical records that relate

to neurological conditions or psychiatric conditions, but she does not have an independent recollection in this case of whether she did so. She prepared a report for counsel on her findings. (14 R.H.T. 1392, Exhibit P.) Since preparing the report, she has reviewed additional documents provided by defense counsel, including juvenile records, school records, declarations of family members and the report of Dr. Hinkin. None of the material she has reviewed changed her original professional opinion. (14 R.H.T. 1393.) Records help determine the cause of any cognitive abnormalities, but do not change the fact of their presence. (14 R.H.T. 1394.) Boone generally conducts interviews first and then reads records; it is not her practice to confront individuals she is evaluating in the testing session with their records. (14 R. T. 1458.)

Boone administered various tests to Valdez: The Wechsler Adult Intelligence Scale, version III, which is the gold standard IQ test. She also used the Trailmaking test, which measures thinking speed; the second part of that test measures the ability to multi-task. The Stroop Test measures thinking speed and the ability to inhibit behavior not appropriate to the situation. (14 R.H.T. 1394.) The Verbal Fluency test requires the examinee to rapidly think of words and generate information. (14 R.H.T. 1394-1395.) The Wisconsin Card sorting test measures problem solving; it also tests the ability to respond to external feedback, and to change behavior in response. The Rey Auditory Verbal Learning Test,

measures the ability to learn by rote novel information, and to retain it over time. The Rey-Osterrieth Complex Figure test requires the examinee to construct a design with paper and then to draw it from memory. The Boston Naming Test measures word retrieval and the ability to think of precise names of things. The Wide Range Achievement Test, version IV, the reading subtest, provides a grade equivalent in terms of sight reading skills. The Rey Word Recognition Test is a freestanding metric designed to detect malingering. And the Rey 15-Item Test plus Recognition Trial also designed to detect malingering. (14 R.H.T. 139.)

Rather than administering the Weschler Memory Scale WMS-III, Boone used the WMS-R, the second version. Boone prefers this version because there is a problem with the normative data on the WMS-III; people with dementia were not excluded from the WMS-III sample, thus skewing the norms. (14 R.H.T. 1396.) Boone has examined the limitations and problems with the normative data on the WMS-III in her publications; thus she prefers the WMS-R. (14 R.H.T. 1396.)

The first category of Boone's evaluation report concerns Motivation and Cooperation. (14 R.H.T. 1396-1397.) The evidence indicates Valdez was expending his best effort on the tests. (14 R.H.T. 139.) Overall he passed seven of eight effort indicators, which is performance well within normal limits. (14 R.H.T. 1397.) The second report category was Intellectual Functioning. Boone

administered the WAIS III and generated an age corrected scaled score in the low average range. On some tests he was in the fifth percentile while in others he was in the 75th percentile. (14 R.H.T. 1398.) The scatter in Valdez' scoring pattern indicates that some of his innate capabilities are above average but then in some areas he is clearly way below average. The wider the scatter, the more concern that something during his life happened to impact those particular low areas. (14 R.H.T. 1399.) The general rule of thumb is that you expect someone to perform fairly evenly across the sub-tests. (14 R.H.T. 1399.) When patients with frontal lobe dementia were tested their lowest scores were on the verbal subtest. Valdez scored in the 9th percentile on the verbal subtest. (14 R.H.T. 1400.) In contrast, he was in the 75th percentile in the Similarity subtest. (13 R.H.T. 1401.)

Valdez was in the average range in tests on basic brief attention span. (14 R.H.T. 1402.) Valdez scored within the impaired to borderline range in the tests of executive/problem solving skills. She gave him a test in which he had to very rapidly stop himself from doing a behavior that was not appropriate to the situation. On this test he scored particularly badly, below the first percentile for his age and more than four standard deviations below the average. (14 R.H.T. 1405.) The Stroop test measures the ability to inhibit actions, to stop doing something that's not appropriate to the situation. (14 R.H.T. 1407.) It absolutely carries over into one's ability to control one's self to keep from committing crimes. Patients

with frontal lobe damage struggle on the Stroop test. It is a very quick way of measuring the ability to inhibit behavior. (14 R.H.T. 1407.)

Boone also administered the Wisconsin Card Sorting Test which measures problem solving. (14 R.H.T. 1408.) Valdez's performance was at the 6th to 10th percentile on this test as he made a lot of perseverative errors. Even though she was giving Valdez feedback that his response was "incorrect," he kept using exactly the same incorrect strategy, as opposed to altering his behavior. (14 R.H.T. 1408.) Valdez made a large number of false positive errors, indicating that he had heard a word read from a list when it had not been read. (14 R.H.T. 1408-1409.) In another test called FAS, he scored in the low average range. On the Similarities test he was at the bottom of the low average range. On Trails B, a measure of multitasking, he was in the average range. Some of his executive skills were very low and some were normal. (14 R.H.T. 1409.) As far as sight reading, his academic skills are consistent with his level of education. He functions within the low average range for general intellectual functions. (14 R.H.T. 1409.) However, the pattern of neuro-psychological scores suggest the presence of brain dysfunction in the frontal lobes. (14 R.H.T. 1409-1410.)

The frontal lobes enable humans to think through the consequences of behavior. Frontal lobes enable people to be empathic, to understand the impact of their behavior on others, to do two things at once and to stop behaviors that are not

appropriate to the situation. (14 R. T. 1410.) Frontal lobe dysfunction can lead to criminal offenses because the individual with such dysfunction is unable to think through the consequences and allow environmental rules to shape their behavior. Such persons do not have the brain equipment to allow the environment to shape their behavior. (14 R.H.T. 1410.) Patients with frontal lobe damage can distinguish right from wrong; they know the information but have trouble using that information to guide their behavior. There is a disconnect between knowledge and control over behavior (14 R. T. 1411.)

Valdez's executive/problem solving skills are in the mentally retarded range. (14 R. T. 1411.) He lacks the brain equipment to exert reasoned control over his behavior (14 R. T. 1412.) He is unable to think through consequences and stop behavior that is not appropriate to the situation. He would be likely to overreact or to act rashly. (14 R. T. 1412.) Valdez also has difficulty recalling what others say to him. His ability to recall three sentences was lower than 97 out of 100 individuals. (14 R. T. 1412.) On the word list task, when asked to circle eight words he remembered hearing Boone say, Valdez circled eight words she never said, even though Boone had read the list five times. This error pattern shows that he does not recall what others say to him, and he distorts what he hears so as to think that he heard something that did not happen. (14 R. T. 1413.) It is reasonable to assume that Valdez's recall would be even worse a month later, had

he been retested; this lack of recall also may have interfered with his ability to assist in his own defense at trial. (14 R. T. 1412, 1413.)

For purposes of evaluating Valdez, it is irrelevant how he acquired the frontal lobe problems, but she attributes it mostly to substance abuse rather than head trauma because generally only trauma which results in loss of consciousness for more than 30 minutes results in brain damage. Valdez told Boone he sniffed gas, paint and glue from age 13-16 and the sniffing caused him to hallucinate. (14 R. 1434, 1454.)

Frontal lobe changes related to methamphetamine use is described in some psychological literature (14 R.H.T. 1443.) Valdez told her he used methamphetamine three time a year in San Quentin. She accepted his self reporting as true. (14 R.H.T. 1451.) Valdez also reported that in 1988-1989, he was injecting cocaine daily and then using heroin to sleep. (14 R. T. 1452, 1453.) While there are inconsistences in the various probation reports throughout the 80's and through 1992, when the report was prepared for this case, with respect to his substance abuse, the reports corroborate each other and based on this, Boone opined that there is no question that Valdez was abusing multiple significant substances during that period of time. (14 R. T. 1459-1462.)

In 1999, Boone, along with Mitrushina, and Delia published a book entitled "Handbook of Normative Data for Neuropsychological Assessment." The term

"norms" refers to data samples from people that have been collected in different places and they are in the handbook so that the doctor conducting an assessment can decide which set of norms is the best fit for the particular patient. (14 R.H.T. 1463.)

Boone did not do any formal tests to measure Valdez's degree of acculturation. (14 R.H.T. 1508.) Her practice it to ask the referral source whether the person is fluent in English, and if they are not she does not test them. (14 R.H.T. 1518.) She accepted Valdez's statement that 90 percent of the time he speaks English. (14 R.H.T. 1523.) He was completely fluent in English with her during the interview. (14 R.H.T. 1523.) She does not believe he would have scored better in Spanish. (14 R.H.T. 1557.) The performance tests are not based on language but rather are visual. (14 R.H.T. 1558.) The fact that Valdez had Hepititus C in the past would not explain the magnitude of the neurological findings she found in her evaluation.. (14 R.H.T. 1560.)

Boone is not opposed to the death penalty, as she is not sure she has the right to tell a victim's family that they cannot request the death penalty; moreover, she does believe it is a deterrent to crime. However, Boone knows it is cheaper to house someone indefinitely and she has concerns about asking government employees to carry out a murder.[8] (14 R.H.T. 1563.)

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[8] She was paid $4,800 to evaluate Valdez on this case, which included a trip to San

Charles Hinkin, Ph.D. Criticism of Petitioner's Evidence.

Respondent presented the testimony of Dr. Charles Hinkin who has a Ph.D in Clinical Psychology and specializes in Neuropsychology. (15 R.H.T. 1573.) He is the Director of Neuropsychological services at the West Los Angeles Veterans' Affairs Medical Center. (15 R.H.T. 1577, Exhibit 33.) Hinkin is responsible for the administration of neuropsychological tests such as those described by Boone. (15 R.H.T. 1578.) Hinkin is the principal investigator and director of a specific program training individuals in research and clinical practice on the neuropsychology of HIV infection. (15 R.H.T. 1583.) He keeps up with research in the field and the norms being used by working with students and reading journals. (15 R.H.T. 1585.)

Hinkin has worked on three capital habeas matters, including Valdez; in all of them he has worked with Deputy District Attorney Kelberg. (15 R.H.T. 1582.) Personally, Hinkin is opposed to the death penalty. (15 R.H.T. 1661.) The major reason that his is engaging in this kind of work is for the financial

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Quentin. (14 R.H.T. 1567.) The amount she was paid did not impact her choice of tests, interpretation of tests or willingness to review background material about Valdez. (14 R.H.T. 1568.)

compensation.[9] (15 R.H.T. 1661, 1662.)

Hinkin did not personally examine Valdez. He reviewed, Boone's test data, her notes and her report. (15 R.H.T. 1587, 1588, 1593, Exhibits 32, P, Q.) Hinkin was told that it was legally permissible for him to evaluate Valdez and while he certainly could have gone and tested him, he did not do so. (16 R. T 1813.) Hinkin is aware of the ethical guidelines of his profession and agrees that evaluating an individual personally can yield additional information, but he believes to formulate an opinion it is not essential to examine patients as long as the examiner makes clear the limitations of his opinion. (16 R. T 1813, 1814.) Hinkin's opinion does have limitations because he did not evaluate Valdez personally. (15 R.H.T. 1815.)

Hinkin reviewed Valdez' school records, juvenile records, the files on the burglaries and the probation reports. (15 R.H.T. 1590.) He also reviewed records from San Quentin and a bound volume of medical records from a 1988 incident where Valdez was hospitalized at county hospital and had surgery after he was stabbed. (15 R.H.T. 1591, 1592.) Hinkin was physically present to listen to the testimonies of Kaser-Boyd and Boone. (15 R.H.T. 1593.) He reviewed the penalty

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He has so far billed the District Attorney's Office for 85 hours of work on this case at a rate of $375 an hour which included the preparation of a report. (15 R.H.T. 1749, Exhibit E.) He will be paid about $34,000 and then $5000 for a full day of testimony and an additional sum for a second half-day of testimony. (15 R.H.T. 1750.)

phase testimony as well as the declarations of the family members and Caroline Reyna. (15 R.H.T. 1596, Exhibits 11-15.) He has not reviewed the family testimony from the reference hearing and was not in court when the family testified. (15 R.H.T. 1792, 1794.)

Hinkin's Criticism of Boone's Opinion

Hinkin puts great stock in information gathered before a crime rather than after, because after an offense when someone is preparing their defense there is a more apparent and obvious potential for bias. (15 R.H.T. 1595.) His understanding was that Valdez was the only source of information upon which Boone relied. One has to consider the degree to which the source is being straightforward. (15 R.H.T. 1597.) According to Boone's handwritten notes, Valdez reported daily injection of cocaine, and methamphetamine use beginning in 1988 and up until the time of the crime. (15 R.H.T. 1600, 1605.) However, the May 1988 records from county hospital, Exhibit 35, where Valdez was treated for 11 days for multiple stab wounds, do not mention any signs of drug withdrawals. (15 R .T. 1605.) Hinken admits, however, that given that he was in critical condition, that was probably the last thing for which doctors would be looking [10]. (15 R.H.T. 1605.)

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Medical records, however, from Valdez' hospitalization at U.S.C. after the stabbing incident do reflect he was prescribed the narcotic Demerol for pain which may explain the lack of withdrawal symptoms. (Exhibit 35, p. 88.)

According to Hinkin, Boone placed great emphasis on inhalation of solvents as a cause for Valdez' perceived brain dysfunction but the only independent report that corroborates her claim is Valdez's own self reporting. (15 R.H.T. 1603.) Hinkin admits he would not expect to find medical records about illegal drug use unless someone had sought treatment for it. (16 R.H.T. 1804.)

Hinken found contradictory information regarding Valdez's drug use history in the records, particularly the probations reports. At times Valdez denies hard drug use and in other reports states that he uses cocaine and heroin. (15 R.H.T. 1601.) He reported that he had used methamphetamine in San Quentin three times a year. (14 R.H.T. 1451.) However, in Exhibit 26 from San Quentin, there is an entry for August 8, 2006 at 10:00 a.m. where Valdez is being seen for a history of nose bleeds, but he says he has not used nasal drugs for seven years. (15 R.H.T. 1602, Bates No. 368.) Hinkin saw no independent evidence in the records that Valdez used methamphetamine before he went to San Quentin. (15 R.H.T. 1603-1604.)

Hinkin opined that individuals who abuse methamphetamine do not normally develop neurological problems, but a subset do. That is also true of other illicit drugs. (15 R. T. 1603-1604.) The majority of individuals who engage in inhalant use and abuse do not develop permanent neurological dysfunction but this certainly can result in some neurological disease and disorders. (15 R.H.T. 1604.) There is no reason to suspect that inhalant use or any kind of drug use is going to

result in asymmetric lateralized neurological problems. There is no reason to expect either side to be disproportionally affected. The distribution of the test results would tend to argue against a neurotoxin as the etiological agent. (15 R.H.T. 1695.)

A blow to the head might cause lateralized findings, but it also might cause unilateral effects. (15 R.H.T. 1695.) It is possible Valdez may have at some point had a cocaine-induced stroke on the left side of his brain which could cause asymmetric findings. (15 R.H.T. 1696.) However, in that scenario his right hand would be significantly slower and weaker than his left and Kaser-Boyd noted Valdez is right handed. His art does not demonstrate problems with hand coordination. (15 R.H.T. 1697-1698.)

Other post-1992 factors which could have caused cognitive slowing are Hepatitis C infection and hypothyroidism, both conditions for which Valdez has been treated. (15 R.H.T. 1699, 1700, 1703.) Hinkin acknowledges that Hepatitis C is commonly transmitted by intravenous drug use and has no idea how long Valdez has had Hepatis C. and, in fact he could have been born with hypothyroidism. (16 R.H.T. 1802, 1803.)

In one of the tests Boone indicated that a false positive indicated frontal lobe executive dysfunction, but in her imbedded indicator of malingering in the RAVLT test is based on false positives. (15 R.H.T. 1646.) High scores on that

false positive indicator are either suggestive of someone who is trying to fake or they are suggestive of someone who has real problems. She is trying to have it both ways. (15 R.H.T. 1647.) He thinks there is circularity or inconsistency in her logic when it comes to the false positive errors. (15 R.H.T. 1647.) Hinken thinks Boone would have been more credible in her assessment of Valdez' malingering if she had not used her "own homemade measures" (15 R.H.T. 1549.) However, Hinken agrees with Boone that Valdez was not malingering. (15 R.H.T. 1827.)

Boone relied primarily on the results of four tests to determine that Valdez suffered from brain dysfunction, the Wisconsin Card Sorting Test, the Stroop Color Test, the Rey Auditory Verbal Learning Test and the Wechsler Memory Scale Revised. Valdez only had two impaired scores reported on the Stroop Color Test and The Wisconsin Card Sorting Test. There were 12 scores available on the Wisconsin Card Sorting test. (15 R.H.T. 1607.) Valdez's scores ranged from a low of 7th percentile to a high of 58th percentile. Like Boone, Hinkin considers the impaired range to be two standard deviations below the mean. (15 R.H.T. 1608.)

According to Hinkin, it is incorrect to state Valdez was unable to inhibit on the Stroop Color Test. (15 R.H.T. 1641.) There are one hundred tests and based on what he can tell from Boone's testing, on three or four of the tests Valdez did not appropriately inhibit the word reading in favor of the color meaning. (15 R.H.T. 1642.) It is inaccurate to state that Valdez was unable to inhibit his

behavior. Valdez took a bit of time doing it, but, according to Hinkin, there is no executive component to the amount of time a task takes, and the time factor is simply a matter of cognitive speed and attentional abilities. (15 R.H.T. 1643.) The test results do not show an inability to inhibit one's behavior or show that he is at great propensity for engaging in violent acting out. (15 R.H.T. 1643-1644.)

One result in the impaired range on a specific test does not necessarily translate into brain dysfunction. The exact score does not mean anything in isolation. It takes on meaning when compared with a normative sample which means comparing the scores with normative data, or samples of individuals who are as similar as possible in age, education, gender, and ethnicity. When the person's score is compared to the similar cohort and the scores are radically dissimilar from the similar cohort, then "something is going on." One then has to go through a whole line of differential diagnoses to figure out what is causing the abnormality. There can be idiosyncratic things about the individual which would cause the abnormality. (15 R.H.T. 1611, 1612.)

Hinkin thinks an idiosyncratic factor in Valdez' case is the impact of having learned English as a Second Language ("ESL"). (15 R.H.T. 1612.) According to Hinkin, even if the person is "fluent" in English it has some effect on the testing. (15 R.H.T. 1612-1613.) It has an effect because it is testing someone in a language which is not their language of origin, the way they think in their brain, the way they

dream. It may have a very negligible effect in some individuals or it may have a pretty dramatic and profound effect in someone who can barely speak English. If you test a person in their best language you are going to get their optimal level of performance. (15 R.H.T. 1613.)

Hinkin does not know from personal knowledge in which language Valdez is more proficient. He does not know if he reads or writes Spanish at all or whether Valdez even went to school in Mexico. (15R.H.T. 1752.) When Hinkin is called by an attorney to evaluate a client he relies, as Boone did, on the lawyer's assessment of the client's language ability and relies on the lawyer's opinion in forming his initial impressions of the case. (15 R.H.T. 1754.) He personally would take it at face value if an attorney told him the client spoke fluent English and would have no reason to doubt the assessment. (15 R.H.T. 1754.) He does not like doing assessments with interpreters because a lot is lost in the translation both ways. (15 R.H.T. 1755.)

In Hinkin's opinion, however, Boone was too quickly dismissive of the potential impact of ESL, having an eighth grade education and socioeconomic impoverishment. (15 R.H.T. 1640.) According to Hinkin, a far more parsimonious explanation is that Valdez does not demonstrate signs of acquired neurocognitive dysfunction and the results show pretty much exactly what one would expect with someone of his background. (15 R.H.T. 1641.) The data does

not support Boone's conclusion that Valdez suffers from frontal lobe dysfunction. (15 R.H.T. 1645.) Only a small number of tests are abnormal and Boone herself points out even normal individuals have a handful of abnormal tests results. (15 R.H.T. 1645.) .

If Boone would have applied other normative data sources, as Hinkin does in his report, Valdez's low scores would have been normalized. (15 R.H.T. 1656.) The examiner should know which normative data will be applied before selecting the tests. After doing a battery of tests you have to consider the soundness of the underlying data in the norms, and the fit with the patient, depending on what type of behavior being measured, as to which demographic variables are most important, factoring in age, language skills, and gender. It's a patient specific process. (15 R.H.T. 1809-1810.) Hinkin, however, maintains that there was no need for him to actually meet Valdez in order to select the appropriate norms with which to evaluate his scores. (15 R.H.T. 1813.)

With respect to head injuries, Hinkin does not agree with Boone's logic in limiting the head injury inquiry to those that resulted in loss of consciousness for 30 minutes or more. He asks people he is assessing if they have ever been knocked out. (15 R.T, 1680.) In Hinkin's opinion, the declarations of the family members, if true, describe abuse which cannot be dismissed as a potential neurological risk factor. (15 R.H.T. 1682.) Stress can also be a potential cause of brain dysfunction.

(15 R.H.T. 1683.) If one accepts as true that he was in a constantly abusive environment as a youngster that, too, is a kind of sustained chronic stress that can give rise to brain dysfunction. (15 R.H.T. 1684.)

If one accepts as true that throughout his entire life Valdez has been under extreme stress, he would be at great risk for developing stress-related neurological dysfunction. (15 R.H.T. 1684-1685.) Threats from unpaid gambling debts and the Mexican Mafia would quality as chronic stressors that might cause brain dysfunction. (15 R.H.T. 1684.) The stress of being on death row is also a consideration. (15 R.H.T. 1685.)

Hinkin's Comments on Kaser Boyd's Opinion

Hinkin has never published anything himself on PTSD. (15 R.H.T. 1760.) According to Hinkin, research suggests that most people who are exposed to the series of events mentioned in the declarations of Valdez's family and in the prison records do not develop PTSD. However, being exposed to those types of things puts one at great risk for PTSD. Being a victim of a stabbing as in the 1988 incident would be a contributing factor to PTSD. (15 R.H.T. 1768.) The scenario in which Valdez was in essence tortured by his father for 16 years of his life and then was stabbed and then was fearful for his life in the mid 1980s when he was in state prison, are the kind of events that could give rise to PTSD. (15 R.H.T. 1770.) A healthy psychologically well- adjusted adult would have a better prognosis for

recovery than someone without this status. (15 R.H.T. 1771.)

Hinkin thinks it would be an error for someone to state that Valdez was or was not abused based on reading the declarations. (15 R.H.T. 1735.) Kaser-Boyd did not appear to weigh any other alternative scenarios. (15 R.H.T. 1736.)

Assuming the declarations are true, and if Valdez had been treated in that manner, Hinkin would not be surprised if Valdez he had lasting problems from the experience, including PTSD. (15 R.H.T. 1795.) Kaser-Boyd, however, failed to ask Valdez to discuss the effects of the trauma on his life and on his psychiatric status. She focused more on what was the alleged abuse and not what was the effect of the alleged abuse. (15 R.H.T. 1796.)

If someone does not meet the diagnostic criteria for a disorder then they cannot be diagnosed with that disorder, even if they have the Associated Features. (15 R.H.T. 1786-1787.) Kaser-Boyd did not set forth in her declaration the criteria necessary to make a diagnosis of PTSD under the DSM. (15 R.H.T. 1721.) Her declaration is missing Criteria B, C, and D. Criterion B is the re-experiencing of trauma through repeated dreams, flashbacks or symbolic events triggering recollections of trauma. There has to be an avoidance of anything that reminds one of the trauma and an increased autonomic arousal, demonstrated through hyper vigilance. (15 R.H.T. 1722.) Kaser-Boyd focused exclusively on Criterion A to the exclusion of B, C and D. (15 R.H.T. 1723.) Hinkin's impression from hearing

her testimony was that she substituted the Associated Features for the diagnostic criteria for Complex PTSD. (15 R.H.T. 1725.) It is not correct to use the Associated Features and make a Diagnosis of PTSD under the DSM. (15 R.H.T. 1726.) In his opinion, if the subject does not have the symptoms they do not have the disease. Her clinical interview did not support the necessary criteria for the PTSD diagnosis. (15 R.H.T. 1730.) He believes what in order to call something Complex PTSD you need to first have PTSD. (15 R.H.T. 1774.)

Hinkin is not suggesting that a person has to have classic a DSM-IV-TR diagnosis in order to present psychological mitigation evidence at a penalty phase. (15 R.H.T. 1791.)

Trial Counsel, Anthony Robusto on Question 3

Robusto does not recall whether he reviewed Valdez' juvenile file at the time of his representation but eventually says he must have. (Exhibit F 120, 121.) Robusto does not recall reviewing school records but his general impression was that Valdez was a troubled person from the standpoint of school and had been disruptive in school. (Exhibit F 127) Robusto knew Valdez had issues and did not do well in school but does not remember how he knew that. (Exhibit F 129, 130.) Robusto believes he did look at the probation reports from 1983. (Exhibit F 131) He can not recall whether he talked with Valdez about his history but assumes he did. (Exhibit F 132.) With respect to Valdez' conduct in prison, during trial he

stated on the record what Valdez had told him. (Exhibit F 133.) Robusto never considered having Valdez evaluated by a mental health professional to determine if there was some disorder which caused his violent behavior. (Exhibit F 143.) Robusto concedes there would have been no downside in having Valdez evaluated but he just did not do it. (Exhibit F 144.)

Valdez exhibited so much violence over the course of time, Robusto thought that in the context of Pomona, the best thing for the penalty phase was to argue lingering doubt. (Exhibit F 144.) Robusto acknowledged at the reference hearing that a defense attorney can argue both mitigation about childhood experiences and lingering doubt, as they are not necessarily inconsistent defense theories. (10 R.H.T. 776.)

Valdez was perceived by Robusto as an addict who used heroin, cocaine and basically anything he could get his hands on; Valdez had started sniffing paint when he was a young kid. (Exhibit F 145, 148.) Robusto did not consider having an expert evaluate Valdez's drug use and its impact on his mental function. (Exhibit F 146.) Today he would have because he has become a better lawyer but it was not something he would have done at that time in his career. (Exhibit F 146, 147)

Now, Robusto is aware that prolonged drug usage can lead to brain damage. (Exhibit F 147.) However, at the evidentiary hearing, Robusto offered the

explanation that he stayed away from offering evidence of long term hard drug use as a mitigating factor because it was the prosecution's theory that the robbery/murder was for drugs and money to buy drugs. Robusto averred that if he had offered a history of drug use as mitigation it would have undercut the lingering doubt argument at the penalty phase. (10 R.H.T. 808.)

Robusto thinks he was aware of the fact that Valdez's older brother died in an accident in 1981 but Robusto did not have any information concerning its effect on Valdez. (Exhibit F 150-151.) If he had had any such information, he would have used it. (Exhibit F 151.)

Robusto was told by Valdez's mother, as he indicated in a *Marsden* hearing, that Valdez was struck by his father when he was 16 or 17 and ran away to Mexico where he remained for a year. (Exhibit F 156.) If Robusto had the information that is in the declaration about the father's abusive behavior and his pedophilia he would have recognized it as mitigating evidence. (Exhibit F 172, 175.) Robusto did not consider hiring anyone to do the social history investigation because he was doing it himself. (Exhibit F 163.)

At the hearing, Robusto testified that he first talked to Valdez about his background after the preliminary hearing. Robusto talked with Valdez more than once about his relationship with his family, at school with the juvenile justice system and how he got along with his family members. (10 R.H.T. 810.)

Throughout his entire representation, Robusto had an ongoing conversation with Valdez about his background and upbringing. (10 R.H.T. 811.) However, he would not classify his relationship with Valdez as good. Valdez was the type of person that no matter what he did, Robusto could never really gain his trust and never really developed a rapport with him. Valdez indicated that his relationship with his mother, father and siblings was all good, that it was a nice household and he was happy there. (10 R.H.T. 812.) Valdez told Robusto his issues were all about narcotics. He never gave Robusto the impression that his drug problem resulted from problems with the family. Robusto specifically asked if he had ever been abused by his father and Valdez said no. He indicated he was never abused by anyone. (10 R.H.T. 813.) [11]

Robusto claimed he spoke to Rosa Valdez over the phone, at the courthouse and at her home; he recalled the children were there and Rosa's husband was there and one of the Valdez's sisters interpreting for Robusto. At the courthouse, one of the daughters or someone would interpret as both the mother and father required an interpreter. (10 R.H.T. 730.) Robusto does not speak Spanish, but never thought

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[11] It is not petitioner's obligation to give his counsel leads or to tell his counsel what investigation to conduct; rather it is counsel's undelegable duty to conduct a competent investigation in a capital case. This is true even if a defendant declines to cooperate, refuses to testify, states that he does not want an investigation conducted, or even lies to his counsel .(See e.g. *Blanco v. Singletary* (1991) 943 F. 3d 1477.)

about bringing a translator to the house and he did not bring an investigator. (10 R.H.T. 744, 731.) Bates No. 110-121 are notes of the interview that he had with the family on February 24, 1992. at their house. The notes do not mention who was present at the meeting. (10 R.H.T. 739.) It is mentioned that "Gracy" translated for him. (10 R.H.T. 739-740.) He would not be surprised to find out that there are no other notes of family conversations in his file. He either had other interviews in which he did not take notes or he took notes but they were not put in the file. (10 R.H.T. 740.) It was not his custom and practice to make notes of what each witness told him. (10 R.H.T. 740.)

When shown the transcript from a *Marsden* hearing on February 26, 1992, (Exhibit G) wherein Valdez characterizes the February 24, 1992, visit to his house as the first time Robusto has gone out to his mother's house, Robusto says that is not true, that he went to his house multiple times. (10 R.H.T. 743)

He asked Rosa Valdez to describe Valdez's relationship with the family and Robusto was told it was a good relationship and there were no problems; Valdez was a good boy. (10 R.H.T. 817.) Valdez's father also indicated he had a good relationship with his son. (10 R.H.T. 815.) Robusto told the mother and family members that he needed to hear a candid assessment. He did interviews in both group settings and individually. In both kinds of settings he repeated the need to give candid information, good, bad and ugly. (10 R.H.T. 818.)

During the family interview on February 24, 1992, Robusto remembers that the father and sisters were there at a big table. (10 R.H.T. 821.) Robusto spoke to people both individually and as a group. (10 R.H.T. 822.) Robusto believes Valdez's father was there when Rosa told Robusto about Valdez running away and the family driving to Arizona. This was the first time he had heard anybody claim that the father hit Valdez. (10 R.H.T. 824.) He was surprised to hear this story on February 24, 1992, from Valdez's mother and it prompted him to once again go over the necessity of him receiving unfavorable as well as favorable information. (10 R.H.T. 825.) It also prompted Robusto to send someone to Juarez to figure out why Valdez went there and start talking to people there. (10 R.H.T. 826.) As a result of hearing about the hitting, Robusto talked to Valdez's sisters, dad and mon about it and was told that this occasion was a one and only isolated event. (10 RT. 826, 827.)

Robusto was surprised when during the penalty phase Caroline Reyna said that Valdez had some problems with his father. (10 R.H.T. 830.) Robusto was not expecting that answer or the information that the father would always yell at him. Reyna had never mentioned anything about problems to Robusto when he had previously asked. (10 R.H.T. 831.) Robusto did not think it would be appropriate, in front of the jury, to ask any further questions of Reyna on this subject without knowing what she might add. (10 R.H.T. 832.)

Strickland Expert, Jack Earley on Question 3

According to Jack Earley, back in 1992, a reasonably competent attorney would start his or her penalty phase investigation at the beginning of the case because there are numerous questions that may arise as to drug abuse, third party culpability, or whether the victim participated in activities leading to his own death, such as a drug deal which he knew was dangerous. It becomes very important to start very early on developing those defense theories. (11 R.H.T. 899.) A reasonably competent attorney would know that clients are not always forthright about themselves. If there is a mental disease or family problems the clients will sometimes hide it. It is well known by defense attorneys, prosecutors and the court that there are certain techniques for doing interviewing. Certainly by 1992 there was all the rape trauma awareness of why people who are the subject of abuse will not talk, why they will not talk in front of family members, why they will try to hide those types of things and defend family members, especially the abusers, and minimize what is going on. All those things were well known, not just in capital cases, but in rape cases, and child abuse cases. (11 R.H.T. 900.) It is important to get other people involved if a lawyer does not have any expertise in psychological issues, neurological testing and child abuse. It is important to have an investigator on the case early so that the investigator and the client and his or her family can develop a rapport. (11 R.H.T. 900.) One increases the chances almost 100% if

one associates with professionals who know how to get information from family members in a way that is non-pejorative for the family. (11 R.H.T. 1043.)

In this case, the records Robusto had at the beginning of the case showed that Valdez was not candid with probation officers about his drug and alcohol abuse. There was a police report that showed heavy PCP use, heroin use, runaway problems, problems in school, noting that the Valdez kids all dropped out of school. There were problems with the parents. All of those factors were indicators that there was "something going on below the surface." A competent lawyer would have at least seen the signs. A competent lawyer would know this was a complicated case because there was family in Mexico, a client "raised " in different prisons, and who had exhibited runaway behavior. The lawyer should have known it was important not to do interviews with other family members present. (11 R.H.T. 901.) It would be important to let the family know what kind of evidence in mitigation would be most helpful, because it is counterintuitive to witnesses. (11 R.H.T. 901.) A competent attorney would have looked into all these things before he was ready to pick a jury and before he announced ready six months before any work was done. (11 R.H.T. 902.)

By putting on a "good guy" penalty phase argument about the wonderful Valdez family which turned out such a bad kid, Robusto added fuel to the prosecutor's aggravation evidence. He chose to only focus on Valdez as a good

brother and son, rather than putting on what would be true mitigating evidence for a defendant who has prison records, violence, drug and alcohol abuse and all the factors that scream out PTSD, neurological issues and childhood issues. (11 R.H.T. 902.) A reasonably competent lawyer would have started getting help with those issues and started looking into them very early in his representation Earley did not see any of that done in this case. (11 R.H.T. 903.) A reasonably competent lawyer would know that it is important to use an interpreter, while not necessarily at all times, for any major interview with witnesses to obtain detailed information. (11 R.H.T. 904.)

Reasonably competent counsel in 1991-1992 on a capital case would have had their client evaluated by a psychologist. (11 R.H.T. 904-905.) It was fairly common knowledge how poverty affects mental health, how abuse affects mental health, how alcohol affects mental health, how drug use can be a sign of mental health issues, low grades, runaway situations, all of which say there's "something going on here." (11 R.H.T. 905.) There are very few lawyers who can make their own diagnosis. (1 R.H.T. 905.) It was not competent to say "I've already assumed there's nothing to even look for" given all of the signposts in the case. (11 R.H.T. 905.)

Basic concepts of the effects of child abuse on a person's development were a major issue discussed at the Death Penalty Seminars at the time of Robusto's

representation. (11 R.H.T. 905.) Neuro-psychological testing was "fairly big" at the time. Back in 1991-1992 the public was aware of Attention Deficit Disorder ("ADD") and Attention Deficit Hyperactivity Disorder ("ADHD") as it relates to how people do in school, and how they act out. It was common in the death penalty community to discuss what neurological deficits would explain a lot of behavior. (11 R.H.T. 907.) At that time it was fairly common to do neuropsychological logical exams and a wealth of testing was being done on clients. (11 R.H.T. 908.) No conceivable fear of what you might find would justify a reasonably competent counsel not having neuropsychological testing done. There can be a downside in a small number of cases to using it, but there is really no downside to gathering it to begin with. (11 R.H.T. 909.)

When a reasonably competent attorney is having problems communicating with a client or interpersonal problems and arguments with them, this could be another sign that the client has some underlying psychological and neurological problems. (11 R.H.T. 910.)

A reasonably competent attorney would know that there are a lot of reasons that clients manifest bravado. It may be a personality disorder or it may be that they are hiding problems. It may turn out to be nothing, but it may turn out to be a lot. (11 R.H.T. 911.) Valdez's history of school dropouts, bad grades, drug use, runaways, the prison records and violence "screamed" PTSD to Earley. (12 R.H.T.

1196.)

In Earley's opinion, the *Marsden* hearings are a fairly good "road map" that Robusto's work was not being done until he was already selecting a jury, and already in trial. (11 R.H.T. 896.) Without any investigation, without doing any work, there is no way that a competent lawyer could make an informed decision as to trial strategy. In this case, investigators were not hired until jury selection had started. (11 R.H.T. 895.) At any time the court could have asked Robusto, how he was interviewing witnesses without an investigator. There is an ethical obligation and state bar rule that lawyers should avoid becoming witnesses in a case and they should have an investigator present. (11 R.H.T. 897.)

THE BLOOD ON THE GRAY PANTS [QUESTION 1]

At the time of trial, Robusto had the Report from Cellmark, dated August 19, 1991, saying the bloodstains on the pants did not originate from Macias. (10 R.H.T. 759.) Robusto did not introduce the report because he did not want to go anywhere near the blood issues. (10 R.H.T. 759.) When shown the relevant portion of the trial transcript, (7 T.R.H.T. 1117), Robusto admitted that when examining Detective Terrio, it was Robusto that brought up the fact that there was blood on the pants found in the vehicle. (10 R.H.T. 760.) When refreshed with a portion of his closing argument, (9 T.R.T 1372-1374, Exhibit I), Robusto acknowledged that he argued, "Did you get an analysis done on the blood? Did

you get an analysis done on the grey pants, Did you get an analysis done on the vial?" (10 R.H.T. 763, 764.) Robusto's purpose for raising the issue was to point out to the jury the questions surrounding where the blood came from, and whether there was analysis done on it. The whole purpose was to try and raise a reasonable doubt about the quality and presentation of the prosecution's evidence. (10 R.H.T. 764.)

Robusto was concerned about the fact that the prosecution might come back and say, "if the blood was important on the pants why wouldn't the defense have tested it." Robusto did not remember what in fact happened. (10 T.R.H.T. 764.) Robusto's memory was refreshed when shown the prosecutor's closing argument which states:

> And what Mr. Robusto very cleverly did was save a lot of this stuff for argument and not ask the experts these questions. Let me mention that to you. Now he mentioned these pants that had possible blood in the car the defendant was arrested in. Now if the blood was consistent with that of the victim, don't you think he would have known that? He didn't ask Detective Terrio anything about testing. He didn't ask Detective Terrio what was done. He didn't ask Detective Terrio what he thought, how it was analyzed, if it was done, if it wasn't done. It's a little unfair then to get up in front of you and say where's the testing. Where's the blood, where's the beef. You know what I mean. You know what I mean, Ladies and Gentlemen, if in fact the blood was so relevant, defendant Valdez could have had it analyzed. He could have called his own experts. They could have taken the blood. They could have told you, yes it was, no it wasn't. (9 T.R.H.T. 1394-1395, 10 R.H.T. 766-767, Exhibit J.)

Robusto stated that it was a calculated risk that the prosecution would respond in the way the prosecutor did, but the burden of proof was still on the People. He knew at the time he made the argument and asked Terrio about the blood, that the DNA run had been done on the blood and Macias was excluded. (10 R.H.T. 767.)

The prosecutor left Robusto some arguments that included "sloppy police work" and "lingering doubt." (10 R.H.T. 807.) In deciding whether to introduce the evidence of the gray pants Robusto had to consider what the prosecution might do in response. (10 R.H.T. 804.) If the prosecution did more work, that would tend to cut against his argument that it was a sloppy police investigation (10 R.H.T. 805-806.) According to Robusto, if the prosecution started doing testing, their agents were going to use the best available methods, including DNA and he did not feel that would be beneficial to his client. (10 R.H.T. 807.) Robusto, however, acknowledged, upon being show the transcript that on February 10, 1992, during a *Marsden* hearing (Exhibit K) that he had learned from the discovery that while there was PGM testing, there was not enough blood on the gun to do a run. (10 R.H.T. 771.)

Strickland Expert, Jack Earley on Question 1

Mr. Earley does not believe that reasonably competent lawyers decide not do any work because they are afraid of the way that the district attorney may respond to it. (12 R.H.T. 1171.) In Earley's opinion, it was not reasonable for

Robusto to fail to introduce the report that showed that the pants had been sent out for DNA testing and came back showing that the victim was excluded as a donor of the blood. (11 R.H.T. 868-869.) There was no downside to introducing that report. It tended to exonerate or at least point to a reasonable doubt as to the other blood that was found in the on the gun in the car. There was at least one time in the trial where the prosecutor brought up why DNA testing would be more reliable than electrophoresis; and Robusto inexplicably objected to that testimony coming in from the prosecutor. (11 R.H.T. 869, 6 T. R.H.T. 933.) It was unreasonable for Robusto to object when the prosecutor was making the argument that DNA testing would have been more definitive. Once they brought in the pants it would have bolstered the argument that the blood on the gun would not necessarily have come from the victim. (11 R.H.T. 870.) Earley does not think that, "you can have it both ways and say your concern is if you bring up the pants and testing, the DA is going to do further testing on other things, then to bring it up yourself and say but that's the reason I didn't introduce the testing." (11 R.H.T. 873.) It's a circular argument. (11 R.H.T. 873.)

A reasonably competent defense attorney would not have brought up blood on the pants when examining a detective about what had been done and what had not been done. (11 R.H.T. 876.) A reasonably competent attorney would have known that the DNA testing in his file could only help him. Once Robusto made

an issue of the pants blood, the test results could only help not hurt the defense case; introducing the test results would have hurt the prosecution's case. (11 R.H.T. 877-878.)

THIRD PARTY CULPABILITY EVIDENCE [QUESTION 2 AND 4]

Before Valdez made his "statement," Robusto talked to Valdez about Gutierrez and the others in the alley. Valdez said he had no idea who they were. (Exhibit F 74) Valdez told Robusto he was at Macias' home that night. Valdez went there to buy cocaine then Valdez left with everybody else. (Exhibit F 74) Valdez never described Gutierrez as being one of the people at Macias' house. (Exhibit F 74) Valdez said he left with other people and he was not the last person there. (Exhibit F 75) Valdez gave Robusto some general area where he went to go buy drugs after leaving Macias' house, but it was not any place that Robusto could pinpoint. Robusto tried on more than one occasion to get an alibi from him but Valdez never provided any leads up until the time of his statement that Robusto could use as a foundation to look for anyone. (Exhibit F, p. 76, 77)

Robusto was aware of *People v. Hall* (1986) 41 Cal.3d 826 and *People v. Kaurish* (1990) 52 Cal.3d 648 when he prepared this case. (10 R.H.T. 771.) He does not see any difference between raising a reasonable doubt and laying it off [on someone else.] (10 R.H. T. . 772.) He had an Evidence Code section 402 hearing on the fact of other people in the area and he tried to get that evidence in, but he

did not characterize it as third party culpability. (10 R.H.T. 772.) Robusto does not currently recall the requirement for the admissibility of third party culpability evidence. (10 R.H.T. 772.) He believes that one has to have a good faith belief in the evidence before you can put the evidence on as third party culpability evidence. (10 R.H.T. 773.) Robusto thinks he tried to get in the fact that there was blood, or what appeared to be blood, on Gutierrez's shirt and boots. Robusto also had as part of the puzzle that his client had "confessed." (10 R.H.T. 774.) In the interview, Robusto indicated that in his mind the evidence to support Gutierrez as a third party suspect was insufficient to meet the admissibility standard set forth in *Hall* and *Kaurish*. (10 R.H.T. 781.)

After reading from the *Hall* case, Robusto's memory was refreshed as to the standard and what he had reviewed as part of his trial assessment. (10 R.H.T. 781, 782.) Robusto never had any evidence that the shirt or boot of Gutierrez that had what looked like blood was actually ever tested to see if it was in fact blood. Robusto had no evidence that the blood on the boots and shirt were consistent with the victim Macias. Robusto had no evidence at trial as to whether the blood was animal blood or human blood. (10 R.H.T. 783.) Robusto's focus at the guilt phase was to demonstrate that the police failed to do an adequate investigation, as a result of which the prosecution had failed in its burden beyond a reasonable doubt. (10 R.H.T. 783.)

He knew that after Gutierrez was arrested, the three people he was with were interviewed and they corroborated Gutierrez's story about why he was in the alleyway. He also knew that at the time of his arrest Gutierrez's blood alcohol was .30. (10 R.H.T. 784.) Gutierrez said the blood stains on his shirt and boot were from a nose bleed. (10 R.H.T. 785.) Robusto reviewed the police reports of witnesses' statements to the police. (10 R.H.T. 786.) He reviewed the police report that implied that latent fingerprints from the crime scene did not match those of Gutierrez. (10 R.H.T. 787.) Robusto also reviewed police reports of interviews with people who had been in the victim's home earlier that day, identifying Valdez as one of the people present. (10 R.H.T. 787.)

Robusto reviewed the reports of Valdez' interview in state prison where Valdez admitted being present at the Macias residence during the late evening/early morning hours before the killing. Valdez did not indicate that Liberato Gutierrez was present. (10 R.H.T. 788.) Robusto knew that Gutierrez had been booked with a wallet that contained $13.04. (10 R.H.T. 789.) Robusto understood that was evidence that Gutierrez was not connected to the murder and robbery of Macias. (10 R.H.T. 790.) It was also his understanding the shoe print on the porch of the Macias residence was not a match for the boots Gutierrez was found wearing. (10 R.H.T. 791.) There was testimony at trial about a dirt path to the west of the house where there were some shoe impressions. Gutierrez and his

friends were found three houses to the east of the Macias residence. (10 R.H.T. 792.) All of these factors were eliminating Gutierrez's connection to the scene. (10 R.H.T. 792.)

If he tried to put on evidence of Gutierrez's involvement, the prosecution would have just told the jury all the things the police did to rule him out as a suspect. (10 R.H.T. 793.) The more evidence the jury heard about what the police actually did in assessing Gutierrez as a suspect, it would tend to cut against the theme of police failure to properly investigate. (10 R.H.T. 793.) Everything discussed about Gutierrez would be admissible at the penalty phase. (10 R.H.T. 793.) Robusto believes he reviewed Detective Guenther's notes. (10 R.H.T. 776.) Robusto had no way of knowing at the time of the trial how the blood testing would turn out. (10 R.H.T. 797.) According to Robusto, Valdez was aware when he "confessed" to Robusto that he was also charged with the robbery as well as the murder. (10 R.H.T. 797.) Given that Valdez "confessed" and after reviewing all the evidence in the police reports indicating Gutierrez was not involved, it would have been his educated guess that any blood testing by the prosecution of the boot and the shirt would have shown a result inconsistent with Macias. (10 R.H.T. 798.) If he had attempted to do testing and offered no evidence of the results, the prosecutor would have "rammed that down" his throat. (10 R.H.T. 798.)

Finally, Robusto claimed that he really had no intention of introducing the

proffered evidence even if the prosecution's objection had been overruled. He was doing his job to raise issues for purposes of appeal. When asked why, if that were the case, he did not argue third party culpability Robusto stated that he did not think he was going to get it in and that was why he did not argue it. (10 R. T. 850.)

Robusto had to worry about credibility with the jury in a penalty phase. He did not want to lose all credibility when he had to argue penalty. "If they find out that I've tested the blood and they find out that I don't present the tests I'm now the slimy lawyer as opposed to someone who is trying to provide them with sufficient information to make an informed decision." (10 R.H.T. 799-800.)

***Strickland* Expert, Jack Earley On Questions 2 and 4**

According to Mr. Earley, reasonably competent counsel would have decided there was enough evidence in this case to support a third party culpability defense. (11 R.H.T. 880.) People were present who had the opportunity and a connection; They were investigated immediately by the police and arrested for involvement in this case. (11 R.H.T. 880.) There is no question at all that under third party culpability, there is enough of a connection that you would need to make a good-faith effort to get the evidence admitted. (11 R.H.T. 881.) How a court may rule depends on how the court views the evidence, but this would not even be a close case of realizing there is a connection to people who are at the scene. (11 R.H.T. 881.)

Circumstantially, what happened was that the victim left the house running after somebody, or being chased by someone. There was no eyewitness as to how the crime happened or even the time it happened[12]. There was evidence of the pulled out pocket, things that were not taken, and things that may have been taken . (11 R.H.T. 881.) Opportunity is very important. The robbery, which is what

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Detective Gregg Guenther, the detective assigned to the case in 1989 that investigated the case and testified at the original trial, testified at the Reference Hearing on May 22, 2008, that no one interviewed said they heard shots and it was never established exactly what time the murder occurred. (13 R.H.T. 1344.)

makes the crime death-eligible makes other people's access to the crime scene an issue. This is especially true, given that in the area there are street people, drug addicts, alcoholics, who are other suspects. (11 R.H.T. 82.) The third party culpability evidence would be admissible at least with respect to whether or not there was a robbery committed by Valdez. (11 R.H.T. 883.) Evidence that would have been excluded under the theory that Robusto offered would have been included under a third party liability argument. (11 R.H.T. 883.) A reasonably competent lawyer would know that the real battle they have is to ask whether or not this evidence raises a reasonable doubt with the jury. There is really no downside to the evidence or any downside is so minimal that this is one of those pieces of evidence that a reasonably competent attorney would have a duty to present because *it raises a reasonable doubt in the guilt phase* . (11 R.H.T. 884.) A lawyer's personal good faith belief about whether or not Liberato Gutierrez was guilty would not make a difference to a reasonably competent counsel. (11 R.H.T. 884-885.) The system is not about a lawyer deciding what he or she believes or not and only introducing that. (11 R.H.T. 885.)

Earley knew that the victim was found on a parkway south of the house, on the opposite side from the alley. (11 R.H.T. 972.) He understands Liberato Gutierrez was found three of four houses east of the Macias residence in an alley north of the Macias residence with the victim Macias's body found on the parkway

south of the residence. (11 R.H.T. 972.) He also considered that Gutierrez and his associates were found in a state of intoxication which would lead most jurors to potentially consider him as a suspect in a third-party culpability analysis. (11 R.H.T. 984.) Gutierrez also had an opportunity to have done the murder/robbery, or even just the robbery, since he was in the vicinity. (11 R.H.T. 985-986.)

No competent counsel would fail to do the hearing with regard to the admissibility of third party culpability evidence. No competent counsel would look at that and say, "I can't even make the motion to do that." In fact, Robusto did make the motion, but not under a third-party culpability theory. He wanted to get it in for another reason. No competent lawyer would just say, "I"m going to give up. I'm just not even going to try." (11 R.H.T. 994.)

Whether the defense takes the risk on getting the evidence in on the theory of "sloppy police work" or as evidence of "third party culpability" the defense attorney is taking the same risk. (11 R.H.T. 1003.) "Sloppy police work" is a viable defense. A defense attorney can also put on a defense of third party culpability, both together or separately. (11 R.H.T. 1005.) Earley observed that Robusto knows that "his good faith belief is not the standard because Robusto claimed he believed his client is guilty but he went ahead and argued that he's innocent of the crime. A reasonably competent lawyer would know he cannot put on necessarily manufactured testimony, but this is not manufactured. Obviously,

Robusto does not know what's going on, he did not even ask his client about whether he robbed anyone or whether there was maybe a theft by someone else." (11 R.H.T. 885.) It would be impossible for a reasonably competent lawyer to believe that if his client is guilty he cannot put on evidence that raises a reasonable doubt. (11 R.H.T. 885.)

Earley reviewed the *Marsden* hearings, with respect to Valdez's "confession" and he noted that Robusto did not tell the court that he chose not to investigate for strategic reasons because there had been a confession. However, when discussing his strategy about his investigation into the aggravation evidence during one of the *Marsden* hearings, Robusto then told the court that Valdez had confessed to some of those incidents. (11 R. T. 893, 894, Exhibits G, and K.) It was apparent to Earley that Robusto did not do any work, and did not hire investigators, until there were complaints from the client. Robusto told the court he was ready for trial in February, in July of the preceding year and then again in November when Robusto had not gotten any information, done any interviews nor had he hired any experts. (11 R.H.T. 895.)

ARGUMENT RE: EXCEPTIONS

ARGUMENT I

THIS COURT SHOULD NOT AFFORD DEFERENCE TO THE FINDINGS OF THE REFEREE TO WHICH PETITIONER EXCEPTS

Because petitioner seeks to overturn a final judgment in a collateral attack, he bears the burden of proof. [Citation.] "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands...'[Citations.]" (*In re Avena* (1996)12 Cal. 4th 694, 710.) A referee's findings on factual questions are not binding on the Court, but are entitled to great weight when supported by substantial evidence. (*In re Malone* (1996) 12 Cal. 4th 935, 945.) Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, as the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. (*Ibid*;) see also *In re Avena, supra,* 12 Cal. 4th at p. 710.) If, however, the referee's factual findings are not supported by ample credible evidence, they may be disregarded (*In re Hitchings* (1993) 6 Cal. 4th 97, 122.) The referee's resolution of any legal

issues or of mixed questions of law and fact is subject to this Court's independent review. (*In re Corder* 1988) 46 Cal. 3d 161, 180-181.) For example, *In re Roberts* (2003) 29 Cal. 4th 726, petitioner alleged that the prosecutor had knowingly presented false testimony at trial. Two witnesses recanted. The referee made findings favorable to petitioner. However, this Court determined that the two trial witnesses' reference hearing testimony was not credible and gave more weight to their trial testimony. (*Id.* at pp. 742-744.) This Court need not accept a referee's assessment of credibility where that assessment is not supported by substantial evidence.

ARGUMENT II

THE REFEREE SHOULD NOT HAVE REACHED THE ISSUE OF PREJUDICE ON QUESTION III

In a discussion of the Supreme Court's order, petitioner's counsel suggested that the Supreme Court order did not actually ask for the referee to decide the issue of prejudice. (13 R.H.T. 1369.) After re-reading the questions, the referee said, "arguably as to 1, 2, and 4, there is no requirement that the court go beyond the call of the question. Only number 3 calls for an additional conclusion as to whether that particular matter involved 'ineffective assistance.'" (13 R.H.T. 1370.) The referee continued, saying that it was "clear" that only question 3 required him to resolve "prong 2" of the *Strickland* test, the "prejudice portion."

(13 R.H.T. 1371.) Petitioner's counsel urged that determination of whether counsel was ineffective was the first prong of *Strickland* and did not involve a finding on whether the deficient performance affected the outcome of the trial. (13 R.H.T. 1369-1374 .)

Respondent then wondered aloud whether this Court had "changed its view from that expressed in *In re Ross* (1995) 10 Cal. 4th 184, where the court specifically said they don't ask referees to decide prejudice issues" (13 R.H.T. 1372.) Respondent opined that the only reasonable interpretation of Question 3 was that this Court wanted the referee to look at the record and determine whether counsel's performance was deficient and then go on to determine whether or not counsel's deficient performance was prejudicial to petitioner (13 R.H.T. 1373.)

In *Ross*, the court observed, "The referee responded to the six specific factual questions we posed in the reference order, but also answered some questions we did not ask, including the ultimate one: whether petitioner was prejudiced by counsel's performance. Our failure to ask that question was deliberate, for it is of mixed law and fact for our resolution." (*Id.* at 205.) In *Ross*, the referee did not review the trial record and the court found the referee's opinion on prejudice unpersuasive. (*Ibid.*) Although, here, the referee did have access to the full trial record, he also went beyond the scope of Question 3 in offering an opinion as to the second prong of *Strickland*; thus, as in *Ross*, this Court should not find the

referee's recommendations persuasive as to prejudice.

As explained in *In re Cordero* (1988) 46 Cal. 3d 161, 171, fn 1, the Supreme Court's reference orders formerly asked the referee to answer ultimate legal questions, and not merely find the facts. "We have now determined, however, that a referee should be asked only to make findings on disputed factual issues, and not to resolve legal issues arising from those facts." (*Ibid.*)

The recent case *In re Hardy* (2007) 41 Cal. 4th 977 restated the manner in which the Supreme Court reviews the referee's findings:

> Though we defer to the referee on factual and credibility matters, in other areas we give no deference to the referee's findings. We independently review prior testimony (*In re Cox* (2003) 30 Cal.4th 974, 998, fn. 2), as well as all mixed questions of fact and law (*In re Ross, supra*, 10 Cal.4th at p. 201). Whether counsel's performance was deficient, and whether any deficiency prejudiced the petitioner, are both mixed questions subject to independent review. (*Ibid.*) Ultimately, the referee's findings are not binding on us. (*In re Malone* (1996) 12 Cal.4th 935, 946; *In re Ross*, at p. 201; *In re Marquez* (1992) 1 Cal.4th 584, 603); it is for this court to make the findings on which the resolution of [petitioner's] habeas corpus claim will turn (*In re Visciotti* (1996) 14 Cal.4th 325, 349; see *In re Scott* (2003) 29 Cal.4th 783, 824)." (*In re Thomas* (2006) 37 Cal.4th 1249, 1256–1257.)

Consistent with this Court's jurisprudence, it should not defer to the finding the referee was not requested to make on Question 3, concerning the second prong of *Strickland.*

ARGUMENT III

THE REFEREE ERRED IN EXCLUDING THE POMONA CONTRACT WHICH WAS RELEVANT TO THE QUESTIONS BEFORE THE COURT, AS APPOINTMENT OF TRIAL COUNSEL PURSUANT TO THE TERMS AND CONDITIONS OF THE POMONA CONTRACT VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction:

The month before Anthony Robusto was appointed to represent petitioner he was appointed to represent Chauncey Veasley, another Pomona defendant facing death. (Exhibit R, 10 R.H.T. 747, Exhibit R, Bates No. 1689) Robusto was the only attorney appointed on the Veasley case and was working on both cases simultaneously; thus, he was sole counsel for clients in two capital murder trials in the span of seven months. (10 R.H.T. 754, 757, Exhibit R)

On September 26, 1992, Jury selection commenced in Veasley 's three defendant capital case . (Exhibit R.) On November 8, 1992, the jury found Veasley guilty and found the special circumstances allegation true. The penalty phase testimony was taken on November 12, and November 13, 1991, and on November 14, 1991, the jury returned a verdict which was sealed until verdicts

were reached on the other defendants . (Exhibit R.)

On November 25, 1991, on the heels of the verdict in Veasley, Robusto appeared at a status conference on petitioner's case and prior to the appointment of any experts, said, "Judge, I'm basically ready. I mean obviously I just got done with a capital murder case, but I'm ready to proceed. What I suggest we do is we set a trial date for either the last week in January or the first week in February. I would prefer February 3." (1 R.T. 23.)

Two days later, November 27, 1991, Robusto was back in court with Veasley when his death verdict was announced. (Exhibit R.) On January, 24, 1991, Robusto was in court with Veasley at his sentencing where Robusto's motion for modification of the sentence was argued and denied. (Exhibit R.)

At the reference hearing, Robusto testified that during the period of time he was working on petitioner's case [and Veasley's case] the court had entered into a contract in Pomona with a group of lawyers to take every case that came through the Pomona criminal court where there was a conflict or when the Public Defender was not available. The group would serve as defense counsel on all those cases and get paid a certain number of dollars per year. (10 R. H. T. 733, 734.) Robusto claimed he has no idea how much he was paid on petitioner's case and that he never considered seeking second counsel because he did not think the case was complex enough to justify it. (Exhibit F 32, 10 R.T. 780.)

In fact, as developed below, he was paid only $989.47 per case and the contract under which he was appointed precluded second counsel from being appointed. Later in the reference hearing, counsel offered Exhibits N1 and N2, a contract and contract extension to provide a context for the professional arrangement under which Robusto was appointed and paid for his work on petitioner's case. The referee sustained respondent's relevance objection to the exhibits finding that there was no showing whatsoever that the evidence was relevant to the nature or quality of the representation afforded petitioner." (Report, 43, 16 R. T. 1848-11851.) The referee equated Robusto's situation, under the contract, to being on a salary much like the public defenders who make a yearly salary, or the referee, himself, who makes the same salary whether he does one case or many. (16. R. T. 1849.) However, as counsel pointed out at the reference hearing, the Pomona contract did not provide Robusto with a salary, it provided him with legal fees; counsel was engaged in the private practice of law and had a business to run. While Robusto was allowed to take private cases on his own in addition to the contract cases, he was required to take all the cases that came out of the contract. Robusto had no choice, even if he felt he could not handle two capital trials in seven months time for less than $1,000 each, the contract did not allow him to refuse either of the cases. (16 R. T. 1850.)

Contrary to the referee's ruling, the conditions under which petitioner's

counsel was appointed were relevant evidence as the terms of the contract directly impacted counsel's ability to provide effective representation and resulted in a violation of petitioner's state and federal constitutional rights. As a result of the contract under which petitioner's attorney was appointed, Robusto labored under severe actual and potential conflicts of interest when he represented petitioner at trial. Unlike a public defender, Robusto was not paid a salary and his livelihood depended on handling a sufficiently large caseload to cover his overhead expenditures and provide an adequate income. The contract created a tremendous disincentive for representing petitioner effectively. Any time spent on defending petitioner prevented Robusto from earning money by handling other appointed or private cases. Additionally, the penalty provision of the contract effectively precluded Robusto from declining the appointment to represent petitioner due to the inadequate funding for the case or inadequate time Robusto had to spend on the case.

With respect to the representation, Robusto and petitioner had adverse interests. Robusto's personal and economic interest compelled him to accept the appointment, commence petitioner's trial as quickly as possible, minimize investigation and trial preparation, and try the capital case perfunctorily. It was in petitioner's interest for Robusto to investigate the case thoroughly, prepare for trial satisfactorily, and advocate petitioner's cause zealously at trial. Indeed, petitioner

was constitutionally entitled to that quality of representation under the Sixth, Eighth and Fourteenth Amendments. The conflict of interest severely impacted Robusto's representation of petitioner. As alleged in the instant Petition for Writ of Habeas Corpus, Robusto's representation was woefully and inexcusably inadequate.

B. The Pomona Contract Lawyers Association ("PCLA") Agreement

On November 1, 1990, the Los Angeles County Board of Supervisors entered into an "Agreement For Defense Services" ("Agreement") whereby nine lawyers contracted to provide representation in the Eastern District of the Los Angeles County Superior Court (Pomona) for all criminal defendants for whom the public defender was for any reason lawfully unavailable (Agreement, Exhibit N1.) The contracting attorneys had formed the PCLA for purpose of a defense services agreement with the County, the first such arrangement for conflicts representation in the Pomona Superior Court. Under the terms of the contract, the law practices of PCLA members were not restricted to representation in cases appointed under the contract. They were free to handle other legal matters and undoubtedly did so in order to supplement the income they received under the defense services contract.

Among the PCLA members was petitioner's attorney, Anthony Robusto. Robusto was initially appointed to represent petitioner on April 19, 1991. (10 R.T. 747, Exhibit F, p. 7 Bates No. 1689 .) Following the Preliminary Hearing, He was subsequently re-appointed on the Agreement on June 12, 1991, following the

preliminary hearing. (1 R.T. 55.)

The contract term for the Agreement was for twelve months (November 1, 1990 through October 31, 1991) and it called for the payment to the PCLA of a flat fee of $495,833 for all cases. (Exh. N1.) This figure was based on an anticipated 500 cases during the year (averaging $991.67 per case), and, accordingly, the contract provided that should the caseload exceed 500 cases, the PCLA would be paid an additional $991.67 per case.

Significantly, the Agreement did not distinguish between capital and non-capital cases. Consequently, the cost to the County of furnishing attorney representation in a death penalty case in Pomona during this period was the total sum of $991.67, the same as for a misdemeanor. This amount is grossly below compensation received at that time for representation in capital cases in courts other than the Pomona Superior Court, although additional discovery will be necessary to obtain further details. By contrast, the PCLA contract in effect in 1992, although by then amended to furnish separate compensation in death penalty cases, nonetheless provided only $35,000 for representation in any capital case. (Exh. N2). Pursuant to the 1992 extension of the Agreement, capital cases were compensated at a flat fee of $35,000 per case–rather than $991.67– with an advance of $20,000 upon appointment (Exh. N2.). Unfortunately, even this woefully inadequate correction to the obvious deficiencies in capital case compensation in

the first contract year came too late to benefit petitioner or his attorney.

In addition to the inadequacy of the compensation for representation in capital cases under the Agreement, other specific provisions of the contract joined together to deprive petitioner of his constitutional rights to due process, equal protection, and conflict-free representation.

PCLA members were required under the Agreement to accept appointment in all cases unless the court made a written finding that a conflict of interest or other legal disability precluded a member from being appointed. To ensure compliance, under the Agreement if PCLA refused to accept an appointment, its members were personally liable to the County for any fees required to be paid to a non-PCLA attorney (Agreement ¶5 "Penalty," Exh. N1.)

The Agreement expressly limited compensation under the agreement to one attorney for a single defendant in any given case:

> Manner of Counting Defendants. As used herein a defendant shall be counted as one defendant for all counts and cases consolidated together; and as more than one defendant for cases not consolidated together. Once a defendant has been counted for a particular case or cases under this contract that defendant will not be counted again for that case or cases in this contract or any extensions thereof (Agreement ¶3bii, Exh. N1.)

When the Agreement was extended for another year in October, 1991, this paragraph was modified to add as a last sentence: "Capital cases shall not be counted and shall be compensated separately as provided herein" (Exh.37, Vol.12,

p. 2421). The plain meaning and effect of this "one defendant-one case" language was to limit defense representation in any case, including capital cases, to one single lawyer.

The Agreement augmented the one lawyer per case limitation with the proviso that should for any reason a second attorney be required, that counsel would either have to be furnished by the PCLA on a pro bono basis, or the PCLA would be required to reimburse the County for any fees it paid for another lawyer:

> Pro Bono Publico Services. To the extent that CONTRACTOR'S members are required to provide services for a defendant under this contract for which the limitations in this contract precludes them from being compensated, CONTRACTOR'S members shall provide those services Pro Bono Publico without cost (Agreement ¶3c, Exh. N1..) . . .
> Penalty. In the event that a court covered by this Agreement is required to appoint an attorney other than a deputy Public Defender or one of CONTRACTOR'S members whose services are compensated pursuant to this Agreement to represent a defendant due to any reason other than in conjunction with a written finding of a conflict of interest or legal disability that precludes CONTRACTOR from being appointed to represent such defendant, then CONTRACTOR and its members shall be liable for any attorney's fees that COUNTY is required to pay the attorney appointed to represent such defendant (Agreement ¶5, Exh. N1.)

The combined effect of these terms was to insure that the County would pay for only one lawyer per case, including capital cases, and that should a second attorney be appointed, the PCLA would be required to either offer representation at no cost to the County, or reimburse the County for any costs the County incurred in

furnishing outside counsel.

C. Representation by an attorney bound by the PCLA violated Petittioner's State and Federal Due Process Right by Denying Petitioner the Option of Second Counsel.

Petitioner contends that the PCLA Agreement unreasonably and arbitrarily preempted his presumptive right to seek second counsel under California law, in violation of his Fifth and Fourteenth Amendment right to due process of law. Although the Sixth Amendment right to counsel has not been held to require appointment of two lawyers to represent a defendant in a capital case, the State of California has by case law and statutory authority created a presumptive entitlement to second counsel in death penalty cases within its jurisdiction. (*Keenan v. Superior Court* (1983) 31 Cal.3d 424; California Penal Code section 987(d).)

Pursuant to the California Supreme Court's decision in *Keenan, supra*, in a capital case where the death penalty is being sought the defendant is entitled to seek the appointment of a second counsel at public expense to assist in his defense. Emphasizing the "constitutionally mandated distinction between death and other penalties," (*Keenan*, 31 Cal.3d at 434), the court held that, although appointment of second counsel is not an "absolute right," the trial court must exercise its discretion guided by legal principles and policies that recognize that "death is a different kind of punishment from any other, both in terms of severity and finality" and that

"[b]ecause life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed." (*Keenan*, 31 Cal.3d at 430.) As expressed by the court, "[I]n striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime," citing *United States v. See* (9th Cir. 1974) 505 F.2d 845, 853, fn. 13and *Powell v. Alabama* (1932) 287 U.S. 45, 71, [53 S.Ct. 55, 84, 77 L.Ed. 158]. Indeed, under *Keenan*, upon "a showing of genuine need a *presumption* arises that a second attorney is required." (*Keenan*, 31 Cal.3d at 434 (emphasis added).) The court's elaboration in *Keenan* of the challenges facing capital defense is itself persuasive of the fact that in most death penalty cases there will be a "genuine need" for second counsel. Among the elements recognized by the court as peculiar to the need for a "complete and full defense" is that the possibility of a death penalty raises unique issues requiring special attention to pretrial preparation, during which "counsel must become thoroughly familiar with the factual and legal circumstances of the case." (*Keenan*, 31 Cal.3d at 431-432.) Importantly, *Keenan* recognizes the inherent problem present in "any capital case" of simultaneous preparation for a guilt and penalty phase of the trial, and that "the issues and evidence to be developed in order to support mitigation of the possible death sentence [are] substantially different from those likely to be considered during the guilt phase."

(*Keenan,* 31 Cal.3d at 432.)

In 1984, California Penal Code section 987 was amended to codify the *Keenan* requirement of second counsel in capital cases:

> In a capital case, the court may appoint an additional attorney as a counsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any such affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request. (Penal Code section 987(d).)

Notwithstanding these requirements of *Keenan* and Penal Code section 987(d), the PCLA Agreement gave no recognition to and made no provision for the appointment of second counsel in capital cases. To the contrary, the Agreement limited indigent representation of capital cases in Pomona to one lawyer. This denial of petitioner's presumptive entitlement to second counsel violated not only his rights under state law but also his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and his Eighth Amendment right to be free from the arbitrary and unreliable imposition of the death penalty.

As with any other defendant facing the death penalty in the State of California, petitioner had a "substantial and legitimate expectation" that state created procedural rights in which he had a "liberty interest," such as entitlement to

second counsel, would be fully and fairly employed. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].) Deprivation of this state law entitlement by virtue of appointment of counsel under the PCLA agreement accordingly violated his due process rights guaranteed under the federal constitution. (*Hicks v. Oklahoma*, 447 U.S. at 346; *LaBoa v. Calderon* (9th Cir.2000) 224 F.3d 972; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state".] California state law recognizes that the arbitrary withholding of a non-constitutional right provided by its laws implicates federal due process rights. *People v. Webster* (1991) 54 Cal.3d 411; *People v. Marshall* (1996) 13 Cal.4th 799; *People v. Moreno* (1991) 228 Cal.App.3d 564, 573; *People v. Gastile* (1988) 205 Cal.App.3d 1376, 1382.)

Here, the conduct of the Los Angeles County Board of Supervisors, acting through the PCLA Agreement, effectively denied petitioner a state law entitlement to second counsel, thereby violating his federal due process rights.

D. Representation under the PCLA Violated Appellant's State and Federal Rights to Equal Protection of the Laws.

Petitioner's Fourteenth Amendment right to equal protection was violated in two respects by appointment of counsel under the PCLA Agreement — first through the arbitrary denial of the presumptive right to second counsel enjoyed by

other capital defendants, and secondly by limiting compensation in a manner wholly disparate from that paid for representation of indigent capital defendants in courts other than the Pomona Superior Court.

Petitioner, as well as all other capital defendants in the Pomona Superior Court, should have enjoyed the same presumptive right to second counsel under the statutory and case authority of the State of California as did all other capital defendants in the state. He did not, however, because the PCLA contract arbitrarily, irrationally, and unreasonably abrogated that entitlement.

Distinguishing between due process and equal protection guarantees, Chief Justice Taft, writing for the court in *Truax v. Corrigan* (1921) 257 U.S. 312, 332, [42 S.Ct. 124, 66 L.Ed. 254], observed that while due process " tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold," the framers of the Fourteenth Amendment "were not content to depend on a mere minimum secured by the due process clause," and adopted a "specific guarantee" that seeks "an equality of treatment of all persons, even though all enjoy the protection of due process." As expressed by the California Supreme Court in *People v. Romo* (1975)14 Cal.3d. 189, "The constitutional guaranty of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by

other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness" (citations omitted). The clause is "essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne v. Cleburne Living Ctr., Inc.* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 87 L.Ed.2d 313]; *Green v. City of Tucson* (9th Cir. 2003) 340 F.3d 891, 896.) "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." (*Hayes v. Missouri*, (1887) 120 U. S. 68, 72 [7 S.Ct. 350, 30 L. Ed. 578].)

The constitutional guarantee of equal protection is designed to protect every person within a state's jurisdiction against intentional and arbitrary discrimination "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (*Sunday Lake Iron Co. v. Wakefield Tp.* (1918) 247 U.S. 350, [38 S.Ct. 495, 62 L.Ed. 1154]; *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564, [120 S.Ct. 1073, 145 L.Ed.2d 1060].) The fact that a difference in treatment under the law of similarly situated persons is unintended and results from the application of a statute which is fair on its face does not preclude an attack on equal protection grounds. *(Griffin v. Illinois* (1956) 351 U.S. 12 [76

S.Ct. 585, 590 (fn 11), 100 L.Ed. 891].)

The numbers of individuals in a class alleging discrimination is of no consequence to equal protection analysis–a "class of one" is protected when he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Village of Willowbrook v. Olech, supra*, 528 U.S. at 564.) In the present case, petitioner and other capital case defendants brought to trial in the Pomona Superior Court, were, by virtue of the PCLA agreement that governed and controlled the appointment of conflicts counsel in that district, treated differently than defendants facing the death penalty in other courts in the State of California, and even in other district courts of the County of Los Angeles.

Unlike other capital defendants, petitioner's presumptive right to second counsel under the laws of the State of California was effectively abrogated by an arrangement between the County of Los Angeles and a few select lawyers whereby only one attorney could be compensated in any single case, even a death penalty case. There existed no reasonable, rational, or acceptable basis for this disparate treatment between capital defendants in Pomona and elsewhere in the state.

Apart from the arbitrary denial of second counsel, the PCLA agreement also denied petitioner's right to equal protection by affording his appointed counsel payment for services that was substantially below that paid to lawyers representing

indigent capital defendants throughout the rest of Los Angeles County and the State of California.

The essential impact of the terms and conditions of the PCLA contract was to compel contracting lawyers, such as petitioner's counsel, as a condition of receiving all other conflict appointments in Pomona, to accept representation in capital cases for a sum of money so inadequate that it was the functional equivalent of no compensation at all. It has been estimated that an adequate defense in a capital case requires an average of 1200 attorney hours, including pretrial preparation and time spent in court. (Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences* (1995) 43 Buff.L.Rev.329, 376.) Had Robusto expended the average 1200 hours work on this case, he would have earned under 83 cents an hour for his efforts.

In *Rompilla v. Beard* (2005) 545 U.S. 374 [162 L.Ed.2d 360, 125 S.Ct. 2456], the United States Supreme Court gave renewed emphasis to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as furnishing authority and guidance to determining what is reasonable with respect to trial defense attorney's performance. (*Rompilla*, 125 S.Ct. at 2466.) As the title of the guidelines reflects, these norms cover not only attorney "performance," but "appointment" as well, and the guidelines in effect at the time of the present case provided that "Capital

counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation." (*ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.1(A)(1989), p. 12.)

The ABA guidelines give clear recognition to the natural relationship that exists between an attorney's compensation and the quality of representation, and the special importance of that relationship in death penalty litigation. Just as clearly, this relationship was wholly ignored and violated by the PCLA contract which provided for attorney compensation far below "a reasonable rate of hourly compensation," not "commensurate with the provision of effective assistance of counsel," and which did not "reflect the extraordinary responsibilities inherent in death penalty litigation." California Penal Code section 987.2 provides that appointed counsel shall receive "a reasonable sum for compensation." Penal Code section 987.3 delineates the following factors to be considered in determining "reasonable compensation" for court-appointed counsel:

(a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
(b) The time and labor required to be spent by the attorney.
(c) The difficulty of the defense.

(d) The novelty or uncertainty of the law upon which the decision depended

(e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(f) The professional character, qualification, and standing of the attorney.

With regard to capital cases, the PCLA contract wholly disregarded these statutorily prescribed factors, and, in contrast to other county superior courts throughout the State of California outside of Pomona, and contrary to law, compensated the defense of capital cases on the same basis as the defense of misdemeanor cases. Because his counsel was appointed under the PCLA contract, which was unique to the East District of the Los Angeles Superior Court (Pomona), petitioner received representation inferior to that of capital defendants in other districts in Los Angeles County and the State of California where conflict counsel were compensated on a more adequate and equitable basis.

E. Petitioner's Representation Under the Terms of the PCLA Violated Petitioners Sixth Amendment Right to Counsel.

Petitioner alleges that the constitutional infirmities of appointment of counsel under the PCLA Agreement were not limited to his Fifth and Fourteenth Amendment rights to due process and equal protection, but also violated his Sixth Amendment right to counsel. Included in the right to the effective assistance of counsel is a correlative right to representation that is free from conflicts of interest.

(*Wood v. Georgia* (1981) 450 U.S.261 [101 S.Ct. 1097, 67 L.Ed.2d 220]; *Glasser v. United States* (1942) 315 U.S. 60, 70 [62 S.Ct. 457, 464, 86 L.Ed. 680].) The right includes pecuniary interests of counsel that conflict with his client's interests. *United States v. Gantt* (D.C. Cir. 1998) 140 F.3d 249, 255; *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1473.

The PCLA agreement under which petitioner's counsel was appointed created an inherent, unavoidable, and actual conflict of interest between the financial interests of counsel and the best interests of a client facing the penalty of death. As discussed *ante*, under *Keenan* and Penal Code section 987(d), petitioner was presumptively entitled to second counsel upon a showing of need. A request for additional counsel was required to be made by application of the first attorney appointed stating the reasons why second counsel was needed. Indeed, as detailed post, the decision to request second counsel exists solely with the first appointed attorney, and not with the trial court or the defendant himself. Under ordinary circumstances, there would be no reason why an attorney appointed in a capital case should not or would not seek assistance for the reasons detailed in *Keenan* and discussed, *ante*. This is recognized by Guideline 4.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases which provides that the defense team in a capital case should consist of no fewer than two attorneys. However, under the PCLA, the circumstances were anything but

ordinary, and it would have been greatly contrary to the first attorney's pecuniary interests, as well as the interests of the entire association of contracting lawyers, to actively seek second counsel no matter how compelling the need.

Under the Agreement, compensation was limited to one attorney for a defendant in any single case. Should a second attorney be appointed, the PCLA would be required to either furnish such services from its own ranks pro bono, or to reimburse the County for fees the County paid to an outside attorney. During the period that the first PCLA contract was in effect, no second counsel appointment was made in any death penalty case. Thus, petitioner's counsel could not assert his client's entitlement to second counsel without grave injury to his own pecuniary interests and those of his cohorts in the PCLA.

Here, the conflict of interest was aggravated by the statutory scheme pertaining to second counsel which, as interpreted by the California Supreme Court, essentially removed any "fail safe" element that oversight by the trial court may have provided. In *People v. Padilla* (1996) 12 Cal.4th 825, 928, partially reversed on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823 fn. 1, the California Supreme Court observed that Penal Code section 987 subdivision (d) left the question of whether to seek second counsel to rest exclusively with the first appointed attorney, to the exclusion of the defendant himself and even the trial court:

> It is evident from the text of Penal Code section 987, subdivision (d), that it is appointed trial counsel, rather than the capital defendant himself, who needs to know the circumstances under which a second attorney may be appointed and the mechanics of seeking the appointment. Indeed, under the statute, the trial court lacks any specific authority to appoint a second attorney in the absence of a request from the first attorney and the making of a factual record sufficient to support such an appointment. To the extent that defendant's argument is that the trial courts have inherent power to appoint a second attorney, no authority supporting that proposition is cited.

Accordingly, an actual conflict of interest existed that denied to petitioner material assistance in the preparation of his defense in both the guilt and penalty phase, in violation of his Sixth Amendment Right to Counsel.

Petitioner further contends that his Sixth Amendment rights were violated by a financial conflict of interest that existed separate and aside from the second counsel issue. This Court recently clarified in *People v. Doolin*, (2009) 45 Cal. 4th 390, that a Sixth Amendment claim of conflict of interest is deemed a class of ineffective assistance of counsel. The defendant must show (1) counsel's deficient performance, and (2) a reasonable probability that absent counsel's deficiencies, the result of the proceeding would have been different. Deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest "that affected counsel's performance –as opposed to a mere theoretical division of loyalties." (*Id.* at 418, citing *Mickens v. Taylor* (2002) 535 U. S. 162, 152, L. Ed. 2d 291, 122 S. T. 1237) Here, the extraordinarily inadequate

compensation petitioner's counsel received for representing him under the PCLA Agreement--a meager amount that Robusto was compelled by contract to accept provided a powerful disincentive for counsel to expend the kind of time and effort critically essential to the proper defense of a capital case, especially with respect to investigating mitigating evidence and preparing for the penalty phase.

The PCLA Agreement created an inherent and irreconcilable conflict of interest between capital case defendants and their counsel in Pomona that violated the Sixth Amendment right to conflicts-free representation. In this case, Mr. Robusto's pecuniary interests diverged from petitioner's interest with respect to second counsel, adequate mitigation investigation and adequate trial preparation. Mr. Robusto was not enduring a mere financial hardship, but was risking potential financial ruin, when as a solo practitioner he was forced to do two capital trials almost back to back for less than $1,000 each. When faced with choosing between his own economic survival and petitioner's interest in a vigorous defense, Robusto selected the former option.[13] Consequently, the conflict of interest adversely

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During the reference hearing, upon learning of the Pomona Contract, counsel served a subpena duces tecum on the Los Angeles County Executive Office asking for quarterly billing statements submitted by the PCLA for the period of March 1991-March 1992. As part of the PLCA contract, the member attorneys were asked to submit quarterly billing statements with a running total of how many defendants were represented by each member, including the case name, court, defendant's name, and case type (misdemeanor, felony, homicide, or death penalty case.) (Exhibit N1, ¶ 4c, i-iii.)

The Manager of the Chief Executive Office responded to the subpoena that

affected Robusto's representation of petitioner.

F. The Violation of Petitioner's Constitutional Rights Presents Structural Error Requiring Habeas Relief.

As alleged, *ante*, petitioner contends that his due process and equal protection rights were violated by denial of his entitlement to second counsel under California law. From a standpoint of remedy, petitioner alleges that denial of second counsel falls into that category of violation that constitutes per se or "structural error." With respect to a remedy analysis, under Supreme Court jurisprudence a distinction must be drawn between denial of second counsel and ineffective assistance of counsel caused by a conflict of interest created by the PCLA contract. Ineffective assistance of counsel claims under the Sixth Amendment require either a finding of prejudice under *Strickland v. Washington*, *supra*, or a presumption of prejudice under one of the recognized exceptions to *Strickland*, such as an actual conflict that affected counsel's performance. (*Mickens v. Taylor, supra,* 535 U.S. 162 ; *Cuyler v. Sullivan* (1980) 446 U.S. 335 [100 S.Ct. 1708, 64 L.Ed.2d 291].) On the other hand, denial of second counsel as a due

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the requested billing statements could not be located and were most likely destroyed pursuant to a County policy of record retention for five years. Counsel tried to introduce this evidence of due diligence in an attempt to flesh out exactly how many, and what type of cases Robusto was assigned from the panel during the same time period while he was simultaneously representing two death defendants facing death, however the referee would not allow the exhibit to be marked. (14 R.H.T. 1388.)

process and equal protection violation, is not focused on deficiencies in the performance of counsel. It is, rather, founded on the absence of performance altogether.

As a "structural error" automatic reversal is required. (See, e.g. *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630 [113 S.Ct. 1710, 123 L.Ed.2d 353]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 380 [113 S.Ct. 2078, 124 L.Ed. 182]; *Arizona v. Fulminante,* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Structural errors impact "the framework within which the trial proceeds," affect "the entire conduct of the trial, from beginning to end," and are "defects in the constitution of the trial mechanism which defy analysis by 'harmless error' standards." (*Arizona v. Fulminante, supra*, 499 U.S. at 309-310.) Structural error is distinguishable from "trial error" which "'occur[s] during the presentation of the case to the jury,' and is amenable to harmless error analysis because it 'may be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" (*Brecht v. Abrahamson, supra*, (quoting *Arizona v. Fulminante, supra*, at 307-308).)

A variety of errors implicating the right to counsel have been held to be structural, thus requiring automatic reversal. (See, e.g. *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (denial of right to counsel); *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, n.8 [104 S.Ct. 944, 79 L.Ed.2d

122] (denial of right to self-representation); *Bland v. California State Corrections* (9th Cir. 1994) 20 F.3d 1469,1479 (denial of right to substitute counsel of choice).) "Assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error'. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic" (citations omitted). (*Holloway v. Arkansas* (1978) 435 U.S. 475 [98 S.Ct. 1173, 55 L.Ed.2d 426] (quoting *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 827, 17 L.Ed.2d 705].)

The entitlement to *Keenan* second counsel violated in the instant case not only implicates the Sixth Amendment right to counsel, but is directly founded on it. *Keenan*, in recognition of the unique challenges facing a defense of both guilt and penalty phases in a death case, essentially extended the Sixth Amendment right to counsel to include, in the State of California, a presumption of entitlement to a second attorney. Accordingly, with regard to employment of the structural error doctrine, the unconstitutional denial of that right must be found to require automatic reversal as in other cases of deprivation of the Sixth Amendment right to counsel.

"Unlike errors the Supreme Court has subjected to harmless-error analysis, it would be virtually impossible to determine whether the denial of a peremptory challenge [by analogy second counsel in the present case] was harmless enough to

warrant affirming the conviction." (*United States v. Annigoni* (9th Cir. 1996) 96 F.3d 1132, 1144.) Second counsel's importance cannot be defined by reference to particular trial witnesses, exhibits, rulings, or argument, and its absence cannot be "quantified and assessed" in the context of events that occurred or tangible evidence that was presented at trial to determine its impact on the jury verdict. The benefit to the defense of a second lawyer is wide-ranging and clearly affects "the entire conduct of the trial, from beginning to end." (*Arizona v. Fulminante*, *supra*, 499 U.S. at 309-310.) Conversely, its absence seriously disadvantages the defense during the entirety of the case, from beginning to end. Valuable assistance is afforded by a second attorney at every stage of the proceeding, beginning with pretrial investigation and preparation, including interviewing witnesses, marshaling evidence for both guilt and potential penalty phases, drafting motions, and determining defense strategy for the upcoming trial. At trial, second counsel aids in the "trial mechanism" from jury selection to closing argument, including examination and cross-examination of witnesses, objections to evidence, and jury instructions. Especially relevant to petitioner's situation where there has been a claim of ineffective preparation for the guilty phase, *Keenan* emphasized the importance of second counsel to the simultaneous pretrial preparation for a guilt and penalty phase of trial, during which counsel must become thoroughly familiar with the factual and legal circumstances of the case. (*Keenan, supra*, at 431-32.)

All of these aspects of pretrial and trial proceedings are subject to the influence of a second attorney's effort, and any one, or all, would be subject to change and improvement as a result of that effort. Reviewing for harmless error under these circumstances would require pure speculation of a kind that would render the exercise an absurdity. The impossibility of determining whether the denial of second counsel "had substantial and injurious effect or influence in determining the verdict," *Brecht v. Abrahamson, supra*, thus requires automatic reversal of the judgment.

Petitioner contends here that the grossly inadequate compensation afforded in death penalty cases under the PCLA Agreement was such as to create a circumstance – tender of a paltry sum of money in the same amount as paid for representation of misdemeanors – in which no counsel, however competent, could have furnished effective assistance in any practical sense. In *United States v. Cronic* (1984) 466 U.S. 648, 659-660 [104 S.Ct. 2039, 80 L.Ed.2d 657] the Supreme Court described three scenarios in which prejudice from ineffective assistance of counsel may be presumed, including an entire failure to subject the prosecution's case to meaningful adversarial testing, and a circumstance in which even a fully competent attorney likely could not provide effective assistance. As has been alleged, an actual conflict of interest existed in this case pitting Robusto's personal financial interests, and those of his fellow PCLA members, against

petitioner's Sixth Amendment interest. This conflict adversely affected Robusto's performance because he was foreclosed from considering and seeking the important assistance of second counsel, and was otherwise unable to devote the time, energy, and effort essential to representation in this death penalty case. Accordingly, prejudice may be presumed without resort to the error-specific analysis ordinarily required under *Strickland.*

Even assuming the absence of a finding of structural error or a presumption of prejudice, petitioner contends that many of the errors and omissions occasioned by the ineffective assistance of his counsel would have been avoided had second counsel been available, and had his first counsel been compensated in the ordinary fashion prescribed by California law rather than under the unique terms of the PCLA Agreement. Thus, the constitutional violations resulting from appointment of counsel under the PCLA Agreement "had a substantial and injurious effect and influence on the trial and the jury's verdict." *Brecht v. Abrahamson*, *supra*, 507 U.S. 619. Counsel's performance prejudiced petitioner and undermined the confidence in the verdict. But for counsel's ineffective assistance, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington*, *supra*, 466 U.S. 668.

ARGUMENT IV

TRIAL COUNSEL'S STATED REASONS FOR NOT INTRODUCING THE RESULTS OF THE DNA TESTING ON THE PANTS DID NOT CONSTITUTE A REASONABLE TACTICAL CHOICE

A. Introduction

Mr. Robusto testified that at the time of the Valdez trial he had in his possession the report from Cellmark, dated August 19, 1991, indicating that the bloodstains on the pants found in the Monte Carlo did not originate from Macias. (10 R.T. 759, Murder Book, Bates No. 124, Trial Counsel's File, Bates No. 1621.) He claimed he did not introduce the report because he did not want to go anywhere "near the blood issues." (10 R.T. 759.) In making decisions for trial, Robusto claims that he factored in petitioner's "confession." Robusto in particular claims that he was doing everything to prevent the prosecution from testing the blood on the gun with DNA testing. "The reason I'm going back and forth in my own mind, is because I have a client that confessed to me to doing the killing. I have PGM testing[14] that is indicating that it's consistent with Macias. (Exhibit F, 50) Since Robusto had the "confession" from Petitioner, he felt that if he sent any

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An October 27, 1989, Los Angeles County Police Department Lab Report indicated the blood on the gun could belong to the victim and up to 15% of the population. Petitioner was ruled out as a donor of the blood on the gun. (Bates No. 1591.)

items of evidence for testing then additional prosecution testing was going to result in a positive DNA match for Macias on the gun, which was only going to hurt petitioner. (Exhibit F 51, 10 R.T. 807.) Robusto claimed that in deciding whether to introduce the evidence of the gray pants he had to consider what the prosecution might do in response. (10 R.T. 804.) If the prosecution did more work, that would tend to cut against his argument that it was a sloppy police investigation (10 R.T. 805. 806.)

B. Robusto's Stated Reasons Do Not Constitute a Reasonable Tactical Choice.

The referee states that it was reasonable for Robusto to fear that the prosecution could do DNA testing on the gun. The referee discounts the fact that on February 10, 1992, Robusto, himself, told the court during a *Marsden* hearing (Exhibit K) that PGM testing had been done on the gun but there was not enough blood on the gun to do a complete run. (10 R.T. 771.) The referee states that this statement is insufficient to show that Robusto believed there was not enough blood left on the gun to do a DNA analysis and maintains that no reference hearing testimony that such an analysis was not possible was presented at the reference hearing. (Report, page 58.) The referee is simply incorrect on this point. The declaration of Steven Renteria which was admitted and referenced by the referee in his report explains at length the testing done in 1991, the testing available at that time, and why there was not enough blood left on the gun, or in the samples which

had been extracted, to do further DNA testing under the then-existing technology. (Exhibit 31 f, Report, p. 55 .)

Also, the prosecution already knew that if the gun could be re-tested for DNA it would yield a more specific result. During the examination of the witness from the Serology Unit of the Crime Lab who presented the evidence of the PMG testing on the gun, the district attorney asked, "If we had sent this out for DNA, in your opinion would the percentage of the population [whose blood type matched the sample] have been lowered?" Robusto objected to the question before it could be answered. [15] (6 T.R.T. 934.) By even asking the question, however, the district attorney indicated an awareness of DNA testing and its capacity to produce more specific results. As Earley pointed out, Robusto's decision about whether to test evidence or present evidence had no impact on whether, when or how the district attorney tested the blood on the gun and it was unreasonable for him to believe otherwise. The prosecution already had the knowledge and certainly the incentive to obtain the most definitive tests available with respect to the blood on the gun, and would, no doubt, have done so if the technology had existed, without regard to what Robusto did or did not do or say. Also, there is no evidence to suggest that

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The prosecutor's question also shows that the expert from the crime laboratory could have been opined about the DNA testing that had already been done just as he was being asked to opine about the DNA testing that had not been done. (See Report, p. 55, f.n.13.)

the prosecutor in preparing her case did not anticipate that Robusto would use the favorable test results with respect to the blood on the pants, since the results were turned over to the defense in September of 1991. (1 R.T. 12.)

Finally, when examining Detective Frank Terrio, it was Robusto who brought up the fact that there was blood on the pants found in the vehicle. (10 R.T. 760, 7 T.R.T. 1117.) In closing argument, Robusto then argued, "Did you get an analysis done on the blood? Did you get an analysis done on the grey pants, Did you get an analysis done on the vial?" (9.T. R.T 1372-1374.) Robusto left it wide open for the prosecutor to argue that Robusto's argument was unfair since he had not asked Detective Terrio if the blood had been analyzed and that if the blood was important to the defense, they could have tested it. (9 T. R.T. 1394-1395, 10 R.T. 763, 764, 766-767, Exhibit J.) Thus, Robusto in raising the issue as he did without introducing the test results, made it possible, if not highly likely, that the jury thought that the pants found in the car were dripping with the victim's blood. In fact Robusto knew and could easily have proven that such was not the case. The referee rejects this analysis stating that the jury most likely inferred that either the prosecutor had not done testing or that the results showed the blood on the pants did not come from the victim. (Report, p. 57, fn. 16.) Petitioner disagrees. It would simply be in the human nature to assume that all of the blood in the car came from the bloody crime scene and since Macias was the only one they had

been told was bleeding, the jury in all likelihood would have assumed a single donor and they would have assumed that donor was Macias.

As *Strickland* expert Jack Earley opined, Robusto is making a circular argument and trying to have it both ways in that Robusto claims he did not introduce the blood DNA testing on the pants because he was concerned that if he brought up the issue, the DA would do further testing on other things. However, then Robusto, himself, brought up the blood on the pants. (11 R. H. T. 873.)

According to the referee, it was reasonable for Robusto to fear additional PGM testing because he knew two donors were involved and knew, that PGM testing had an 86% probability of ruling out a one donor theory, thus making the pants irrelevant and at the same time depriving Robusto of his argument that the prosecution had failed to put on relevant evidence and the police had done sloppy work by failing to do testing. (Report, page 56.) Petitioner, the referee, and Earley all agree that the stronger the evidence suggesting that there was a single donor who contributed the pants blood and the blood on the gun, the stronger the inference that the blood on the gun was not that of the victim. (Report page 52, R.H.T. 1142-1143.) However, fear that an inference intrinsically helpful to petitioner may be weakened on rebuttal did not excuse the failure to use evidence at counsel's disposal to make the inference possible.

According to Earley, Robusto had nothing to lose, would have taken no

risk in presenting this evidence and in fact had an ethical obligation to do so. (R.H.T. 1173, Exhibit L, page 1 Report p. 52.) However, the referee states that Earley overlooked the fact that when the prosecution rested the state of the evidence was such that the jury was free to conclude that while petitioner had obviously touched the gun at some point, he may have done so only while in the vehicle. (Report, p. 52.) According to the referee, Robusto, having more information, knew the gun belonged to petitioner and knew the pants had nothing to do with the homicide. He in fact had every reason to believe that the blood on the pants had nothing to do with the blood on the gun. (Report, p. 53.) Robusto also knew of other evidence which if produced would prove that petitioner had not simply come into "fortuitous" contact with the gun while in the Monte Carlo. For example, Velador and Eliseo Morales could have been called to testify that petitioner had the gun when he entered the car and did not obtain the gun from either of them. (Report, p. 54, Exhibit F, p. 65 R.H.T.) [16] The referee correctly notes that the report generated when Juan Velador picked up his car indicates he stated that there was no gun in the car when he loaned it to petitioner and Morales.

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The referee references a response given by Robusto to a series of leading questions during respondent's interview, as to whether he considered [that if he introduced the evidence of the blood on the pants not belong to Macias] that the prosecution may bring Morales to testify that the pants belonged to Morales or Velador. (Exhibit F, p. 65.) Robusto agreed and stated that there was no way he wanted Morales in the court. (Exhibit F, p, page 65.)

(Report, p. 54, Exhibit 21, p. Bates No. 000050-000052.) The report generated by Detective Guenther, following his prison interview with Morales on February 22, 1991 indicates Morales stated that while in the car, petitioner had the gun in his waistband, and showed it to Morales, saying that he obtained it from a guy. (Exhibit 21, Bates, No. p.p. 0000131-000133.) The referee fails to explain, however, how "fortuitous contact" in the car, would have yielded a print in wet blood *unless* petitioner took the gun away from another individual in the car right after the shooting. While this may have been a valid defense theory[17] there was no evidence to suggest it and Robusto never argued it was not petitioner's gun, nor did he ever attack the validity of the print or the fact that it had to have been made in wet blood. The only defense theory which counsel argued was the police work had been sloppy and it had not been proven beyond a reasonable doubt that it was Macias's blood on the gun, and it had not been proven beyond a reasonable doubt

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[17] Indeed, evidence was elicited at trial from which one could infer that petitioner handled the gun in a manner other than firing the gun. The partial print was on left grip and may have resulted from having picked up the gun, leaning on it on a table or putting it in a pocket (7 R. T. 1093, 1110) (The prints was also made by petitioner's left hand which is his non-dominant hand. (8 R. T. 1254.) A person normally shoots with his dominant hand. (6 R. T. 951.) If this were the theory of the defense or even one possible theory, the presence of Eliseo Morales or Juan Velador would have been helpful as it would have provided a live body who had access to the gun, connection with the car, connection with petitioner and who may have been the one who shot Macias. Even according to Robusto, petitioner never told him that he had personally shot Macias, only that he was "good for it."

that the gun was the murder weapon as there were 360 identical guns loose in Pomona at the time, four of which had been mentioned at the trial. (9 R. T. 1346, 1349-1350.1382-1383, 1387-1388.) The presence of blood not belonging to Macias on the pants could only have helped counsel's theory. This court cannot, therefore, impute to Robusto, the referee's "fortuitous contact" theory to explain in hindsight Robusto's failure to utilize evidence that would have advanced the only theory he presented.

Similarly the referee believes Robutso's alleged concern that these witnesses would be called was reasonable because their testimony would have shown that the association between the gun and the vehicle was merely fortuitous, weakening the inference that the gun and the vehicle were connected, and weakening any inference that the gun and pants were connected, or that that the placement of blood on the gun and the pants was contemporaneous, this dispelling the single donor theory and rendering the results of the blood on the pants of no use to petitioner. (Report, page 53.) The referee ignores that fact that the results of the blood on the pants were of no use to petitioner at all unless it was introduced. There was no single donor theory presented which was subject to being shot down by a swift footed move on the part of the prosecutor because Robusto never introduced the evidence that would have made such a theory possible.

The referee believes that Robusto was concerned about his credibility, but also fails to explain how anything the prosecutor could have done in response to Robusto introducing the simple fact that the blood on the pants did not belong to Macias would have caused Robusto to lose credibility with the jury. (Report, p. 59.) Credibility is subject to being lost during argument, not because one brings out a simple fact that is undeniably true. Had Robusto introduced the DNA exclusion, depending on what evidence, if any, the prosecutor introduced on rebuttal, Robusto was free to tailor his argument accordingly. He was free to argue a single donor theory, not to mention the pants blood at all, or simply allude to the fact that the presence of other unexplained blood in the car, weakened the inference that any of the blood in the car was derived from the crime scene.

Obviously, Morales was interviewed and not brought to court because the prosecutor did not think Morales would be helpful to her case. Morales had no credibility with respect to the ownership of the gun, and one would hardly expect that a prison inmate, being interviewed about a murder in which he was arguably involved, would heroically or foolishly claim that the alleged murder weapon belonged to him and not to petitioner. In addition, Morales' presence in court would provide another potential perpetrator of the homicide, who was closely connected to the gun, so that defense counsel could have argued that there was no

evidence that prints on the gun were ever compared with those of Morales and in fact Morales may have been the killer. Neither Velador [18]nor Morales had been asked about the pants and even assuming petitioner told Robusto "the pants had nothing to do with the case" [19] it would be unreasonable for counsel to consider that introducing the negative DNA testing on the pants would trigger Morales being brought down from state prison on short notice; it would be even more unreasonable to assume that Morales' testimony or presence, even if not helpful, would be of any significant detriment.

As set forth above, it was unreasonable for Robusto to fail to introduce evidence that showed that the pants had been sent out for DNA testing and came back showing that the victim was excluded as a donor of the blood. (11 R.T. 868-869.) It was even more unreasonable for him to have brought up the subject and

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The whereabouts of Velador at the time of the trial is unknown, although there is some indication in Robusto's file that he had asked his newly appointed investigator to interview him. (Exhibit F, page 64.)

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It seems highly unlikely that petitioner would say the pants have nothing to do with the case. If asked about them at all, which is in itself dubious since Robusto admits he never questioned petitioner about the crime, it is likely he would have said he did not know anything about the pants, or any pants in the car were not his. Whether an item has "anything to do with a case" calls for a legal conclusion which petitioner was not qualified to make. The pants were found in close proximity to him and close proximity to the gun. They necessarily, therefore, were part of a secondary crime scene and did have something to do with the case. In so far as Robusto based his strategy on petitioner's legal conclusion, his reasoning was not a reasonable tactical choice.

then failed to introduce the evidence of the negative test results. As Early said, the test results could only help the defense case and hurt the prosecution's case. Robusto's stated reasons, for not introducing the test results do not demonstrate a reasonable tactical decision.

ARGUMENT V

TRIAL COUNSEL'S STATED REASONS FOR NOT ATTEMPTING TO INTRODUCE THE PROFFERED EVIDENCE ABOUT LIBERATO GUTIERREZ AT THE GUILT PHASE AND PENALTY PHASE AS EVIDENCE OF THIRD PARTY CULPABILITY DID NOT CONSTITUTE REASONABLE TACTICAL CHOICES

A. Introduction.

At trial, Robusto made a motion pursuant to Evidence Code section 402 to admit evidence of the police investigation including the presence at the scene of Liberato Gutierrez who was observed by Officer Guenther to be extremely nervous, with shaking hands and drops of blood on his T-shirt and work boots. (8 T.R.T. 1165.) The prosecution responded that the evidence did not meet the admission requirements of *People v. Hall, supra,* 41 Cal.3d 826 and *People v. Kaurish*, *supra* 52 Cal.3d 648, two cases which establish the applicable standard for third-party culpability evidence. (8 .R.T. 1166.) When challenged, Robusto argued that he was not seeking to have the evidence admitted for "what the People are arguing in any shape, fashion or form." (8 .R.T. 1167.) Robusto wanted the evidence admitted to show, "whether or not these 12 people can believe and rely

upon the investigation that was performed by the Pomona Police Department as well as the Sheriff's Department." (8 .R.T. 1169.) The court would not allow discussion of the evidence of the blood on Gutierrez's shoes and clothes, or his nervousness. (8 R.T. 1171.)

In petitioner's direct appeal, this Court's majority opinion rejected his argument that the trial court had committed reversible error in not admitting evidence of third party culpability on the grounds that the issue had not been presented to the trial court. The third party theory was never properly proffered.

> "Defendant contends that had the jury heard evidence of Liberato Gutierrez's arrest in the alley, the blood on his shirt and shoe, his nervousness, and his "apparent lack of explanation" for his presence in the alley so late at night, [9] the jury could have found reasonable doubt existed that defendant was the murderer or robber. The jury, defendant theorizes, could have found that an inebriated Liberato Gutierrez entered the victim's home intending to burglarize it, and upon finding the victim may have shot and robbed him. Or, alternatively, the jury could have found that Liberato Gutierrez, at the very least, took the money from the victim's pocket. This latter point was not presented to the trial court in the offer of proof. "*(People v. Valdez* (2004)32 Cal. 4th. 73, 107.)

Because defendant's proffered testimony was not directed at eliciting testimony that Liberato Gutierrez was the person responsible for killing or robbing the victim, but rather was aimed at a general attack on the police investigation, the majority concluded the trial court did not abuse its discretion under *Evidence Code section 352* in limiting defendant's examination of Detective Guenther. The probative value of such an attack on the investigation was minimal and was properly excluded

under *Evidence Code section 352*. In any event, defendant does not challenge the trial court's ruling in this respect. "Defendant's present contention as to [third party culpability and Liberato Gutierrez] comes too late." *(Id.* at 108, citations omitted.)

B. Trial Counsel Stated Reasons

In his interview with Kelberg, Robusto said he felt that if he tried to pursue the third-party culpability defense that the prosecution would try to do DNA testing on other physical evidence. Robusto also feared that the prosecution would call Gutierrez and his associates to demonstrate they had no connection to the crime; the district attorney would put on further evidence that Gutierrez' prints did not match any latent print within the Macias residence and that Gutierrez' boots did not match shoe impressions left on the porch. (Exhibit F 87-88) In response to questioning at the hearing, Robusto also agreed that he had considered the fact that Gutierrez had only $13.04 in his wallet when arrested, and it was likely that if the blood was tested it would not be that of Macias. (10 R. H.T. 785, 789.)

Robusto also maintained he conducted legal research by reviewing the controlling cases *People v. Kaurish, supra,* and *People v. Hall, supra,* regarding the foundational requirements for third party culpability evidence and determined the Gutierrez evidence could not meet the foundational requirements for admission under the standards for third-party culpability. He believed that to meet the requirements he would have had to get the blood on Gutierrez' shirt tested and if

he did then the prosecution would become aware of the testing, which he wanted to avoid. (Exhibit F 98-99)

Robusto further indicated he was concerned about his credibility with the jury and from a tactical point of view he did not want to lose his credibility for purposes of the penalty phase. (Exhibit F 88, 89-90) "What I tried to do, is I tried– I push it to the limit. I wanted them to know that there were other people nearby. And then, hopefully, in their own minds, they may form the conclusion that the case wasn't proved beyond a reasonable doubt and that maybe somebody else four houses down could have possibly taken the money or been involved in the crime." (Exhibit F 89)

In Robusto's opinion, the Gutierrez third-party culpability argument would be too far outside the scope of reason for the jury to accept. (Exhibit F 90) As Robusto testified at the hearing, if he tried to put on evidence of Gutierrez' involvement, the prosecution could have just told the jury all the things the police did to rule him out as a suspect. (10 R.H. T. 793.) The more evidence the jury heard about what the police actually did in assessing Gutierrez as a suspect, those facts would tend to cut against the defense theme of police failure to properly investigate. (10 R. H. T. 793.)

In his interview with Kelberg, Robusto said he felt he had his hands behind his back because he had to have a "good faith belief about the third party person.

And I have a confession from my client," corroborated by the palm print on the gun. (Exhibit F, 97)

Robusto said that Petitioner "confessed" to the crime, "Gutierrez is just a guy that happens to be there, which was kind of verified by the cops already." (Exhibit F 78) "I tried, during the course and scope of the trial, in compliance with the law and compliance with good faith and in compliance with what I knew, to lay it off on Gutierrez and that group of guys, to the best of my ability, without, you know, violating, you know, my tenets of ethics." (Exhibit F 78) At the reference hearing, Robusto repeated his notion that a "good-faith belief" about the accuracy of the evidence was required before third party evidence can be introduced. (10 R. H. T. 773.) Robusto also acknowledged that he does not see any difference between raising a reasonable doubt and laying it off [on someone else.] (10 R. H. T. 772.)

Finally, Robusto stated that he really did not want to get the evidence in at all, would not have introduced it even if the court had granted his request and overruled the prosecution's objection, rather, he was just doing his job to preserve the record for appeal. When asked why if he was just preserving the record, [for purposes of appeal] he did not argue its admissibility as third party culpability evidence, Robusto circuitously claimed " because it would not have been admitted that way." (10 R. H. T. 850-851.)

C. Trial Counsel's Stated Reasons Do Not Constitute a Reasonable Tactical Choice And the Referee's Finding to the Contrary Is Incorrect.

According to Earley, reasonably competent counsel would have decided there was enough evidence in this case to support a third party culpability defense and made a good faith effort to get the evidence admitted. (11 R. H T. 880, 881.) As to credibility, he opined, there is really no downside to the evidence or any downside is so minimal that this is one of those pieces of evidence that a reasonably competent attorney would have a duty to present because it raises a reasonable doubt. (11 R. H. T. 884.)

According to Earley, no competent counsel would look at that evidence and say, "I can't even make the motion to do that." In fact, Robusto did make the motion, but not under a third-party culpability theory. He wanted to get it in for another reason. No competent lawyer would just say, "I'm going to give up. I'm just not even going to try." (11 R.T. 994.) Whether you take the risk on getting the evidence in on the theory of "sloppy police work" or as evidence of "third party culpability" the defense attorney is taking the same risk. (11 R.T. 1003.) "Sloppy police work" is a viable defense. You can also put on a defense of third party culpability, and sloppy police work both together or separately. (11 R.T. 1005.)

The referee disagrees with Earley and finds that Robusto's concerns were reasonable because the prosecutor's rebuttal evidence would destroy the third-

party culpability argument and significantly harm Robusto's credibility with the jury (Report, p. 68.) Petitioner disagrees. Obviously had some of the things Robusto claimed to be concerned about been introduced by the prosecution on rebuttal , the potential third party culpability argument would have been weakened, but there would still, as Earley said, have been no downside to putting on the evidence. As with the pant blood evidence, Robusto's closing argument would depend on the final state of the evidence and in this instance on whether or not it justified an instruction on third party culpability. In putting on evidence during trial, or eliciting evidence on cross examination, Robusto would simply have been building a potential argument. No credibility issue would arise unless and until Robusto argued something that was totally unsupported by the evidence presented. Robusto's potential argument would not have been destroyed if the blood on Gutierrez was shown not to be that of Macias, nor would he have lost credibility as he would not have made any argument yet that it was Macias's blood. Also, the mere fact that Gutierrez had blood him not belonging to Macias would not prove that he did not have contact with Macias; it would merely have weakened the inference. Similarly the fact that Gutierrez had a wallet containing only $13.04, does not prove that he did not take or attempt to take a wallet from Macias, which resulted in Macias's pocket being turned out. He could easily have tossed, stashed or handed off the wallet before being apprehended, there may have been nothing

in the wallet of value, or there may have been no wallet at all. The existence of a wallet in this case was always pure speculation. The turned out pocket and the fact that Macias may have had a wallet was the slim reed on which the whole capital murder theory was predicated. As for the boots not matching the prints on the porch apparently no one else's boots matched either, and Gutierrez did not need to have been in the house, much less left prints on the porch, to have had an encounter with Macias in the street either before or after his death. While Robusto did not seem to realize that he might have been able to dispel the evidence of a robbery and negate the special circumstance allegation by creating a reasonable doubt that Gutierrez or someone else was responsible for the turned out pocket, or for taking the alleged phantom wallet, he did try to create an inference that someone from the alley may have killed Macias.[20] This was no different than third party culpability evidence, except that more of the evidence would have been admissible and the jury would have been instructed how to consider it. There, thus

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The referee also states that Robusto did introduce evidence of third party culpability as to El Pato.(Report, p. 63, fn. 21.) According to the referee this further suggests that the choice not to argue third-party culpability as to Gutierrez was reasonable as it would have detracted from the impact of the "El Pato" evidence. Robusto, however, never stated this was a consideration and if it were a consideration it cuts against the credibility of his statement that he believed he had to have a good faith belief that the third party [Gutierrez or El Pato] was responsible before seeking to admit third party culpability evidence. In any event Robusto never requested an instruction on third party culpability as to "El Pato." This court should not credit theories imputed to Robusto in hindsight, when he was given ample opportunity to articulate his theories in an interview and at a hearing.

could be no tactical reason for not arguing for its admission as third party culpability evidence.

According to Earley, a lawyer's personal good faith belief about whether or not Liberato Gutierrez was guilty would not make a difference to a reasonably competent counsel. (11 R.T. 884-885.) The [adversarial] system is not about a lawyer deciding what the lawyer may believe or not and only introducing what he believes. (11 R.T. 885.) The referee at least agrees with Earley in that he acknowledges that in so far as Robutso's decision to forgo introducing evidence of third party culpability was influenced by the notion that he did not have a good faith belief that Gutierrez was involved, his decision was not reasonable. However, the referee incorrectly finds that since Robusto had a number of appropriate reasons, his decision was a reasonable tactical choice, not withstanding that one of his reasons was faulty.

The referee is incorrect, as none of Robusto's "decisions" were reasonable tactical choices; as Earley pointed out, Robusto did not know what was going on; he did not even ask his client about whether he robbed anyone or whether there was maybe a theft by someone else. (11 R.T. 885.) Even if this Court believes Robusto's testimony, as to what petitioner told him, and how it may have factored into his decisions, petitioner never confessed to the charged "crime," In fact at the *Marsden* Hearing on February 26, 1992, petitioner specifically stated that "there

ain't nothing indicating that ...this was a murder/robbery or anything like that, "that's what the she [the DA] thinks. (Exhibit G. p. 108.) Robusto, not knowing what transpired on the night Macias was killed, thus made all of his decisions in a vacuum, and such decisions, therefore, could not have been reasonable tactical ones.

ARGUMENT VI

PETITIONER'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY INVESTIGATE AND PRESENT EVIDENCE OF MITIGATION DURING THE PENALTY PHASE

A. Introduction:

Subclaim H of Petitioner's Petition for Writ of Habeas Corpus alleged that "Counsel Failed to Investigate, Consult with Competent Experts and Present Evidence in Mitigation Concerning the Severe and Unrelenting Emotional and Physical Abuse Petitioner Suffered Throughout His Childhood, His Resulting Mental State and Serious Resulting Substance Abuse Problem." (Petition for Writ of Habeas Corpus, 69.) This Court asked the referee to determine whether trial counsel provided ineffective assistance of counsel by failing to adequately investigate and present evidence of mitigation during the penalty phase as alleged in subclaim H of the petition.[21]

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As noted *ante*, petitioner excepts to the referee's conclusion that he was requested to address both prongs of Strickland.

In *Wiggins v. Smith* (2003) 539 U.S. 510, 533 [156 L.Ed.2d 471, 123 S.Ct. 2527.] the Supreme Court based their conclusion that counsel's performance fell below the *Strickland* standard on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." (*Id.* at 533.) Here, counsel's investigation into Petitioner's background did not reflect reasonable professional judgment. Robusto's apparent decision to perform such a limited personal and social history investigation was neither consistent with the professional standards that prevailed in 1991, nor reasonable by any standard. Counsel's failure to work with an investigator, mental health experts, mitigation specialists and even a professional interpreter on the penalty phase investigation, and his total failure to present an accurate picture of appellant's traumatic childhood and chronic drug abuse establishes that his incomplete investigation was the result of inattention, not reasoned strategic judgment.

B. Applicable Law Regarding Failure to Investigate and Present Evidence in Mitigation.

Preparing for the penalty phase of a capital trial is the equivalent of preparing for an entirely new trial, and trial counsel must treat it as such. (*Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 891.) An investigation that was sufficient

at the guilt phase may be deficient at the penalty phase because "mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." (*Williams v. Taylor* (2000) 529 U.S. 362, 398, [146 L. Ed. 2d 389, 120 S. Ct. 1495.]; see also *(Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043,) "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase.")

Because all relevant mitigating evidence must be considered during the penalty phase, *(Eddings v. Oklahoma* (1982) 455 U.S. 104, 117 [71 L. Ed. 2d 1, 102 S. Ct. 869],) the scope of trial counsel's penalty phase investigation must necessarily be broader than that conducted at the guilt phase. "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase," *(Smith v. Stewart*, (9th Cir. 2001) 241 F.3d 1191, 1198 (overruled on other grounds), even if trial counsel then decides against introducing it in accordance with his penalty phase trial strategy. See also *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868, 873-74 (holding defense counsel's penalty phase performance constitutionally deficient where counsel "failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether [the defendant] would live or die"); *(accord:*

Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223, 1227.) ("It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.") An attorney who conducts an inadequate investigation cannot hide behind the talismanic assertion that his decisions were justified by trial strategy because a decision made on the basis of an inadequate investigation is no strategy at all. (See, e.g., *William v. Taylor, supra* 529 U.S.. 363, 396.)

The ABA Guidelines, in effect during Petitioner's trial, provided that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989), *Wiggins v Smith, supra,* 538 U.S. at 524.) Despite these well-defined norms, however, counsel abandoned his investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

Decisions of the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit and this Court have signaled the emergence of a per se rule of ineffective assistance in cases, like this one, in which counsel failed both adequately to investigate and to present evidence in mitigation. (See e.g. *Williams v. Taylor, supra,* 529 U.S. 362, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073,

cert. Denied (1999) 528 U.S. 922; *Smith (Bernard) v. Stewart* (9th Cir. 1998) 140 F.3d 1263, cert. denied (1998) 525 U.S. 9929; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, cert. denied (1996) 517 U.S. 1111; *In re Gay* (1998) 19 Cal.4th 771.)

In *Williams, supra,* the United States Supreme Court affirmed the lower court's finding that, "even if counsel neglected to conduct such an investigation at the time as part of a tactical decision...tactics as a matter of reasonable performance could not justify the omissions." (*Williams, supra,* 529 U.S. at 373.) Or as the Ninth Circuit has explained:

> It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. As the Supreme Court recently made clear, "counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes a deficient performance." (*Smith (Robert Douglas) v. Stewart* (9th Cir. 2001) 241 F.3d 1191, 1198, quoting *Caro v. Calderon,supra,* 165 F.3d 1223, 1227, cert. denied (1999) 527 U.S. 1049.)

Thus, when counsel's failure to present evidence results from a failure to adequately investigate, the dual failure is deficient per se.

It is equally well established that no valid tactical decision can be made in the absence of adequate investigation:

> A defendant can reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a

> decision, his action - no matter how unobjectionable in the abstract - is professionally deficient. (*Gay, supra,* 19 Cal.4th at 807, quoting (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

In other words, "[u]nless a minimally adequate investigation is undertaken, it is impossible to make a tactical decision about whether to present or withold mitigating evidence at the penalty phase." (*Marquez* (1992) 1 Cal.4th 585, 606.)

The failure to adequately investigate strips the failure to present mitigating evidence of any possible tactical justification. In consequence, when counsel fails both adequately to investigate and to present such evidence, the failure satisfies the first prong of the *Strickland* test.

C. Trial Counsel's Stated Reasons For Not Having His Client Evaluated By Mental Health Professionals And for Not Investigating, Discovering and Presenting Mitigation Evidence.

Initially, Robusto admitted his performance was inadequate in some important respects. He did not have his client evaluated by a mental health professional because he did not use psychological testing at the time he represented Valdez. He commented that at the time of the trial, "it was not really in vogue." (Exhibit F p. 16.) He never considered having Valdez evaluated by a mental health professional to determine if there was some disorder which caused his violent behavior. (Exhibit F p. 143.) Valdez was perceived by Robusto as an addict who used heroin, cocaine and basically anything he could get his hands on

and had started sniffing paint when he was a young kid. (Exhibit F pp. 145, 148.) Robusto did not consider having an expert evaluate Valdez's drug use and its impact on his mental function. (Exhibit F p. 146.) Today he would have because he has become a better lawyer but it was not something he would have done at that time in his career. (Exhibit F pp. 146, 147.) Now, he is aware that prolonged drug usage can lead to brain damage. (Exhibit F p. 147.) He knows what neuro-psychological testing is now but was not aware at the time of the Valdez trial that brain damage could be a possible mitigating circumstance. (Exhibit F p. 18.) His understanding has evolved over time and he is an entirely different lawyer now than when he tried the Valdez case. He has more experience and knowledge, has been doing more testing and has gone to more seminars. (Exhibit F p. 19)

With respect to record gathering, Robusto does not recall whether or not he reviewed Valdez's juvenile file at the time of his representation, or his school records, but recalls that he knew Valdez did not do well in school, he was disruptive and he dropped out, as did his siblings. (Exhibit F pp. 120-121, 127, 129-130) Robusto could not recall at the time of interview whether he talked with Valdez about his history but assumed he did so . (Exhibit Fp. 132.)[22] If he did interview the client about his background it was not before February 26, 1992

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By the time of the hearing Robusto back tracked on this and said he had interviewed Valdez about his history and that Valdez never told him about any problems in the home. (10 R.T. 810-812.)

because Petitioner stated in the *Marsden* hearing that he had prepared a statement of his life that he wanted to share with his attorney but his attorney never came to see him. (Exhibit G, p. 115.) Kelberg pointed out that there were no signed release forms in Robusto's trial file, and Robusto did not remember what his practice was at the time about getting signed release forms to collect available records (Exhibit F pp.127-128, 131.) With respect to gathering mitigation evidence from family members and friends, Robusto states that he did the mitigation investigation himself, and that he made several trips to the family home, but that other than the one "isolated" incident about hitting related by Rosa Valdez, no one told him anything about the abuse Valdez suffered at the hands of his father. (Exhibit F pp.157-157. 175, 10 R.T. 817, 827, 831.) Robusto did review probation reports and those prison records which were provided to him in discovery. He noted that Valdez had a history of violence and decided that in Pomona lingering doubt would be the best theory for the penalty phase. (Exhibit F pp.144, 180.) Robusto acknowledged at the hearing that there is nothing inconsistent with presenting both lingering doubt and mitigation at the penalty phase. (10 R.T. 776.)

D. The Referee's Findings

Initially the referee concedes that there is little doubt that severe and unrelenting child abuse of the sort petitioner claims he suffered could be, in and of

itself strongly mitigating. (Report, p 72.) He also acknowledges that if, in addition, the abuse actually caused a significant and long term psycho-pathology, such evidence might be doubly effective. (Report, p. 72.) [23] With respect to petitioner's family members, the referee generally finds them not credible. He reasons that if the abuse occurred, Rosa Valdez would have revealed its details to trial counsel and would have testified to it at the penalty phase when given the opportunity. (Report, p.77.) The referee states that Carolina Reyna had no reason to hide the abuse, if it existed, and her failure to reveal it to Robusto or to testify to its existence at trial points strongly to the conclusion that it simply had not occurred. (Report, p. 78.) Graciela Gamp is not credible in so far as she stated she

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The fact there may have been other factors in petitioner's life which would have resulted in PTSD, or for that matter cognitive difficulties, was raised by respondent who attempted to establish risk factors after the crime and petitioner's placement on death row, such as methamphetamine use, gambling debts or threats from the Mexican Mafia. Petitioner in turn pointed to other incidents that happened to petitioner prior to the crime, which could give rise to or complicate existing PTSD, such as experiences during earlier prison terms, his worsening substance abuse, after his release and, of course, being the victim of a stabbing (Exhibit 35.) . Petitioner is not, as the referee suggests, attempting to raise a new claim with respect to the stabbing, but only to rebut respondent's allegations that petitioner's mental problems arose only after he went to death row. (Report, p. 72, fn.25.)

was reluctant to discuss abuse with Robusto, because she did so and very probably in the presence of petitioner's father and other family members. Her recitation of but one incident [at the time of the meeting with Robusto] strongly suggests that the later claims of additional abuse are not worthy of belief. (Report, p. 81.) The referee does not find Victoria Perez's claim that petitioner would have been able to conceal injuries of the type referred to herein for many years credible. Perez's concession that she gave untruthful testimony at the penalty phase, the contradictions in her current testimony and her admitted difficulty in recalling the events in question and her strong bias toward petitioner all combine to make her an unconvincing witness. (Report, p. 83.) The referee believed Sabrina Zueck with respect to the continuing sexual molestations by Antonio, Sr. but not with respect to her testimony about petitioner being abused. Given her age, which would have been between 3 and 5 years old, the referee has no confidence that she is in fact relating incidents she witnessed as opposed to those she heard about in the last few years. The referee found Jane Doe, Victoria's daughter, credible with respect to her being continuously molested by Antonio, Sr. but does not believe she notified anyone of the abuse until after Antonio was arrested for molesting her cousin, Cindy Davila. (Report, p. 83.)

The referee's wholesale rejection of all of petitioner's witnesses is unfounded. The extremely brief, perfunctory, testimony at the penalty phase, while

it contrasts with the testimony at the reference hearing, does not indicate that the witnesses testified falsely in any material fact on any question asked of them. Given the educational level and social and economic background of these witnesses they could hardly be expected to attempt to provide elaborate information that went beyond the call of the question. It would appear that they made an effort to say what they thought or had been told would be helpful....that petitioner was a good person and they loved him.

The referee almost totally discounts Dr. Kaser Boyd's expert opinion that petitioner was a severely abused child and suffers from complex PTSD. The referee found the testimony of Dr. Nancy Kaser-Boyd "generally unsupported by scientific methodology, logic or candor." (Report, 84. 96) [24] The referee proclaimed that Dr. Kaser-Boyd's opinion was "untethered to demonstrable reality and her diagnosis of PTSD was fatally flawed." (Report, 87.) The referee's findings with respect to Dr. Kaser-Boyd's opinion manifest an uninformed view on the nexus between the DSM and the emerging research in complex PTSD. During her testimony, Dr. Nancy Kaser-Boyd diagnosed petitioner as having

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With respect to the referee's complaint that Kaser Boyd had not read the penalty phase testimony of the witnesses whose declarations she considered, her own declaration indicates that she had read summaries generated prepared for the appellate briefing not just by defense counsel but by the Attorney General as well.(Exhibit D .) Thus, she had the same factual summaries of the penalty phase testimony which were presented to this Court on direct appeal.

"Complex Post Traumatic Stress Disorder." In her response to questions about why the Complex disorder was not in the DSM, she mentioned that there were published works which contend there is a separate criterion for diagnosing the type of PTSD from which she claims petitioner suffers. (8 R.H.T. 354.) She specifically mentioned literature by authors Dr. Judith Herman from Boston and Dr. John Briere, as having published informative research on Complex PTSD. She added that there have been entire conferences with multiple speakers on that topic. (8 R.H.T. 354.)

Nevertheless, the referee credited the testimony of Dr. Hinkin, who has never published on PTSD, and who did not examine petitioner. Hinkin did not, however, dispute that Complex PTSD exists, but merely asserted an undisputed fact that this is not currently a diagnosis in the DSM-IV. Hinken acknowledged, that there are researchers who use the term in reference to an individual who has been exposed to repeated traumatic events over a long period of time and in fact gave the example of a parent abusing a child. (15 R.H.T. 1765.)

Dr. Kaser Boyd stated that John Briere and Judith Herman are experts who had published articles about Complex PTSD. (88, R.T.T. 354.) When petitioner's counsel asked Hinkin whom he considered experts in the field of PTSD, he mentioned Dr. John Briere. (15 R.H.T. 1759.) He was not certain whether he had read Exhibit T but skimmed through it and discussed in on the witness stand. (15

R.H.T. 1781-1782.) Counsel also asked about his work with the Veterans Association. He suggested that only 5-10 percent of his veteran patients have PTSD, (15 R.H.T. 1758.) Exhibit U is a publication, or fact sheet, produced by the Department of Veterans Affairs . The fact sheet discusses Complex PTSD and cites to Dr. Herman to explain that because in the DSM-IV field trials 92% of people with Complex PTSD also met the criteria for PTSD, Complex PTSD was not added as a separate diagnosis. Complex PTSD, she goes on to state, may indicate a need for special treatment considerations. (Exhibit U.) The referee would not permit counsel to read a small portion of the fact sheet into the record and would not permit her to question Hinken about the article, maintaining, incorrectly, that the Department of Veterans Affairs, where Hinkin works, has nothing to do with Hinken's opinions. (16 R. T. 1787.-1789)

The referee refused to admit or even read the articles[25] about which counsel

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Roth, A. Susan, David Pelcovitz, Bessel van der Kolk, and Francine Mandel, (1997). "Complex PTSD in victims exposed to sexual and physical abuse: Results from the DSM-IV field trial for posttraumatic stress disorder." *Journal of Traumatic Stress,* 10, 539-555.

This study was done between 1991 and 1992, the era of petitioner's trial. Complex PTSD was being researched in correlation with long term impact of childhood physical abuse. (539-540.) The article mentions the fact that C PTSD (CP) was left out of DSM. "The CP symptoms are listed in the text describing the associated features of PTSD. Since CP co-occurs with PTSD, it is unclear whether CP may be a qualitatively distinct subtype of PTSD or whether it is a severity marker of PTSD symptoms. Therefore the more conservative decision not to incorporate the CP name into the diagnostic system was followed. (Last 2 pages of article.) There continues to be on-going professional debate about the

methodological and conceptual considerations of the CP construct."

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Herman, Judith Lewis. *Journal of Traumatic Stress,* (1992) 5, 377-391
1992, discussion of the fact that CP is "currently under consideration for inclusion in DSM-IV under the name DESNOS (Disorders of Extreme Stress Not Otherwise Specified.)

Herman's clinical observations identify three broad areas of disturbance which transcend simple PTSD. The first is symptomatic: the symptom picture in survivors of prolonged trauma often appears to be more complex, diffuse and tenacious than in simple PTSD. The second is characterological: survivors of prolonged abuse develop characteristic personality changes, including deformations of relatedness and identity. The third area involves the survivor's vulnerability to repeated harm, both self-inflicted and at the hands of others. (Pg. 379.)
While major depression is frequently diagnosed in survivors of prolonged abuse, the connection with the trauma is frequently lost. Patients are incompletely treated and the traumatic origins of the intractable depression are not recognized.

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Whealin, Julia M and Laurie Slone. "Complex PTSD" National Center for PostTraumatic Stress Disorder, United States Department of Veterans Affairs, http://www.ncotsd.va.gov/ncmain/ncdoecs/fact_shts_complex_ptsd.html 6/22/2008
This information from the federal Department of Veterans Affairs recognizes Complex PTSD , as a "new diagnosis" to describe the cluster of symptoms. (Citing to Dr. Herman's description as Disorders of Extreme Stress Not Otherwise Specified.) Dr. Herman notes that in the DSM-IV field_trials 92% of people with Complex PTSD also met the criteria for PTSD, Complex PTSD was not added as a separate diagnosis. Complex PTSD may indicate a need for special treatment considerations. The first criteria of Complex PTSD is a prolonged period of total control by another. The other criteria are symptoms that tend to result from chronic victimization including, alteration in emotional regulation, alterations in consciousness, changes in self-perception, alterations in the perception of the perpetrator, alterations in relations with others and changes in one's system of meanings.

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Wilson, John P. And Sheldon D. Zigelbaum. "Post-Traumatic Stress Disorder and the Disposition to Criminal Behavior" in Charles R. Figley *Trauma and Its Wake II j*(1985). New York: Brunner/Mazel. 305-321

had questioned or attempted to question Hinkin, although the articles would have better informed his own understanding of the difference and the relationship between PTSD, Chronic and Complex PTSD, as it related to Dr. Kaser-Boyd's' assessment of petitioner and better informed him with respect to evaluating her credibility as a witness.

In his evaluation of Dr. Boone's data, the referee credits Dr. Hinkin's suggestion that the use of other norms may have been more appropriate, even though Hinkin, himself, acknowledged that his opinion was limited by the fact that, unlike Boone, he chose not to interview petitioner. (Report, p. 92.)

The referee goes on to state that, even if Boone is correct that petitioner suffers from brain dysfunction, there is no direct or circumstantial evidence that the damage predated petitioner's trial. (Report, p. 93.) Specifically, the referee points to evidence that petitioner has used methamphetamine since his incarceration at San Quentin. Valdez's substance abuse prior to the crime is, however, well documented. When Boone interviewed Valdez he reported that in 1988-1989, he was injecting cocaine daily and then injecting heroin to sleep. (14 R. T. 1452, 1453.) There is evidence in the record on appeal, and in the exhibits introduced at the hearing corroborating that Valdez was using cocaine and heroin at the time that Macias

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Briere, J. (2004). Psychological assessment of child abuse effects in adults. In J.P. Wilson & T.M. Keane (Eds.), Assessing psychological trauma and PTSD, 2nd Edition. NY: Guilford. 43-68

was killed. The record in the instant case reveals that on April 4, 1991, when petitioner was in court for arraignment on the felony complaint, charging him with the April 30, 1989 murder of Ernesto Macias, he was also arraigned on a misdemeanor complaint No. 89M03423 charging him with being under the influence of a controlled substance on May 1, 1989, the day after the Macias murder. (CT 125, MRT 1-2). In fact, from all accounts, he was at the Macias' house trying to buy drugs on the night Macias was killed. According to Robusto, the prosecution's theory was that petitioner killed Macias over drugs and/or the money to buy drugs. (10 R.H.T. 808.) According to testimony at trial, Gerardo left the Macias house along with Arturo and Rigo to go to the house of a friend named "Pato" (RT 728, 729). Petitioner did not go with them and may have been told by Macias to wait outside. (RT 740.) Pato later told detectives that he and Macias had been selling heroin to petitioner for months.(Exhibit 21, Bates No. 181-182, , RT 729-730, 745-746.) See also trial counsel's file for remaining pages of same report, Bates No. 1577-1582 wherein Pato said that Gerardo, Arturo and Rigo came to his house the night of the murder to buy an "eight ball." Petitioner also testified positive for cocaine on May 8, 1989, Exhibit 21, Bates No. 276.

As Boone noted, while there are inconsistences in the various probation reports throughout the 1980's and through 1992, when the report was prepared for this case, with respect to [petitioner's reporting on] the extent of petitioner's

substance abuse, the reports do corroborate the fact of the abuse. There is no question, in her opinion, that Valdez was abusing multiple significant substances during that period of time. (14 R. H. T. 1459-1462.) [26]

With respect to the early use of inhalants, Hinkin faults Boone for placing great emphasis on Valdez's inhalation of solvents and asserts that the only independent report that corroborates her claim is Valdez's own self reporting. (15 R.H.T. 1603.) However, self-reporting becomes more credible when the same report was made years earlier and before any alleged motive to fabricate arose. Valdez apparently reported the use of solvents to Robusto at a time when not even Robusto, let alone Valdez, knew that the use of solvents could lead to brain dysfunction and such evidence could be a factor in mitigation. Robusto stated in his interview that he perceived Valdez as an addict who used heroin, cocaine and basically anything he could get his hands on; Valdez, according to Robusto, had started sniffing paint when he was a young kid. (Exhibit F 145, 148.) Valdez's statement to Robusto about sniffing paint was corroborated years later by Victoria Valdez when she testified at the reference hearing that she and Freddie started sniffing gasoline when they were ten or eleven and that around the same time, they

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Hinkin also notes that there is contradictory information regarding Valdez's drug use history in the probation reports. At times, when talking to probation officers, Valdez denied hard drug use and at other times admitted that he used cocaine and heroin. (15 R.H.T. 1601.)

used to put paint in a sock and sniff it. (12 R.H.T. 1226-1227.)

The referee agrees with Hinkin that head injuries short of causing unconsciousness for 30 minute are capable of causing brain damage, but again attempts to attribute resultant brain damage in Valdez solely to post trial events. The referee, thus, unreasonably dismisses, all the physical trauma testified to by family members, and the childhood head trauma reported by Valdez to Kaser Boyd and Boone; the referee focuses only on one incident in which Valdez self-reported that he was struck while at San Quentin by a rubber bullet, causing swelling. (Report, page 94.) Inexplicably, the referee seems to credit this one instance of Valdez's self reporting as beyond question. The referee notes a strong suggestion that Valdez often drank and got into fights but gives no time frame, thus,, refusing to acknowledge that these suggested fights would have all occurred prior to the crime.

In his evaluation of Anthony's Robusto's testimony, the referee's findings are mixed and logically inconsistent. He credits Robusto's testimony that he visited petitioner's home on numerous occasion and spoke to petitioner's mother on as many as six occasions and his sisters on perhaps three occasions but finds that Robusto conducted only one "in-depth interview." (Report, p. 100.) This in depth interview occurred on February 24, 1992. The referee is thus finding that this interview, conducted a week before trial, without an interpreter or an investigator, which generated only 12 pages of scribbled notes. (Bates No. 110 - 122) was the only in-depth interview of petitioner's family and friends done for

purposes of the penalty phase investigation (Report, p. 100.) The referee also believes that Robusto interviewed petitioner, asked him about abuse and petitioner denied it. The referee goes on to conclude that this is because none occurred (Report, p. 74-75.) Robusto's investigation, the referee concludes, while not exhaustive, was adequate; he followed up on the one lead he got from the mother by dispatching an investigator to Juarez. (Report, p. 101.)

The referee agrees with petitioner's witness, Earley, that Robusto was deficient for failing to conduct a thorough interview of petitioner with respect to the crime itself, as petitioner may have had information that could aid in his defense with respect to the substantive charge or the special circumstance allegation or that might serve as mitigating evidence. However, the referee finds that because petitioner has failed to offer evidence as to what he would have told Robusto he has failed to show prejudice. (Report, p. 100.) The referee further finds there is no credible evidence that an examination by an expert conducted at the time of trial would have turned up any mitigation of the sort suggested by Kaser-Boyd and Boone and the failure to consult an expert is not per se deficient. (Report, p. 100 The referee goes on to cite to the aggravating evidence admitted at the penalty phase to reach his conclusion that the introduction of the" scant arguably mitigating evidence petitioner has presented," would not have influenced the verdict of death. (Report, p. 101.)

F. Trial Counsel's Investigation Was Wholly Inadequate to Uncover the Mitigation Evidence Unearthed Post Trial and to Make Any Tactical Decision as To What to Present.

The American Bar Association Standards for Criminal Justice, in circulation at the time of Petitioner's trial describe the obligation in terms no one could misunderstand. In 1989, prior to Petitioner's trial, the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. Those Guidelines applied the clear requirements for investigation set forth in the earlier standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4. (*Rompilla v. Beard, supra,* 545 U.S. 374, 376, n. 7 [125 S. Ct. 2456, 162 L. Ed. 2d 360].)

The ABA Guidelines provide:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)

The United States Supreme Court, "long have referred [to these ABA

Standards] as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, *supra*, U.S., at 524, (quoting *Strickland v. Washington*, *supra*, 466 U.S., at 688. Counsel in the instant case adhered to none of the guidelines.

Investigator Edward Sanchez was appointed on March 9, 1992, to attempt to speak with petitioner's family in Texas and Mexico for purposes of mitigation. Sanchez was Spanish speaking, however, Robusto's declaration in support of his appointment reflects that he only worked on the case briefly in Texas and Mexico and did not have a role interacting with the Valdez family in California. (4 S.C.T. 12, 16)

Counsel's other investigator, Rick Beeson, was not appointed until March 13, 1992, after jury selection had commenced. (4 S.C.T. 45.) "On Beeson, I wanted someone just available for last minute stuff during the trial," Robusto told Kelberg. (Exhibit F p. 62, 187.) Beeson had no responsibilities for penalty phase interviews or investigation. (Exhibit F 178)

Robusto claimed he was doing his own mitigation investigation (Exhibit F p. 164); however no evidence, other than his vague recollections, suggests that Petitioner's family was ever interviewed outside of cursory conversations in the courthouse hallway conducted without professional interpreters. The one interview the referee credits, which took place on February, 24, 1992, was just one week before jury selection started. (Bates No. 110-122.) When this one documented

visit to the Valdez home was addressed in the *Marsden* hearing two days later, February, 26, 1992, petitioner told the court that he had just given Robusto his mother's address two or three days ago. (Exhibit G, p. 115.) Petitioner said that Robusto, in anticipation of the *Marsden* hearing, was "now doing things such as going to my house." (Exhibit G, p. 105.) Although Robusto had explanations for other things brought up at the *Marsden* hearing, he did not tell the court at the hearing that contrary to Petitioner's claims he had been to the house several times. (Exhibit G.) In fact, Robusto refers in the hearing to what he had just found out, after interviewing, petitioner's mother, and he refers to the hitting incident in his notes dated February 24, 1992. (Exhibit G, p. 116.)

Robusto testified that both the mother and father required an interpreter, yet even in that one documented interview, he did not have a qualified interpreter, or or have a Spanish speaking investigator to accompany him. (10 R.H.T. 730, 744.) While it seems true that Robusto went to the house as the notes exist and Petitioner apparently heard about the visit in time for the *Marsden* hearing, it is not clear from the notes of the interview, who was present. Caroline Reyna, the only person who recalls an interview, is not sure but, thinks it was just herself, Sabrina, Rosa, and Victoria. (9 R.H.T. 586.) Victoria and Rosa do not remember Robusto being at the house. Robusto's notes indicate that "Gracie translated," however, Graciela does not remember the interview and admits she may not have

if it had been very brief, (12 R.H. T. 1139-1140.) While it could be that she does not remember because it was brief, it is also unclear that Robusto knew who Graciela was, and it could have been Delores whom Robusto, frequently saw with Rosa at the courthouse. (10 R.T. 677, 706, 722.) Neither was an experienced or trained interpreter.

All of petitioner's immediate family members remember seeing Robusto in the hallway of the court house but none recall specific group or individual conversations with him about Petitioner's life history. (10 R. HT. 676, 12 R.H. T. 1116, 1234-1235.) There are no contemporaneous notes other than Bates No. 110-122, of the one interview at the house on February 22, 1992, that document any conversation with any penalty phase witness or potential penalty phase witness. (10 R.T. 843.) Robusto's lack of investigation and the fact that the referee finds his minimal effort adequate shocks the conscience.

E. Adequate Investigation Would Have Disclosed A Wealth Of Compelling Evidence In Mitigation Such As That Gathered By Post Conviction Counsel.

In *Smith (Bernard) v. Stewart, supra,* the Ninth Circuit rejected the attempt of counsel, as is the case here to blame his lack of information on the purported failure of petitioner and his family to supply it:

> In the case at hand, counsel did not perform any real investigation into mitigating circumstances even thought that

> evidence was rather near to the surface. No tactical reason is given for that failure. At the post-conviction hearing, counsel did testify that he had spoken with Smith, and Smith's mother, but that he had received no information. Counsel also spoke generally with Smith about his growing up years, but did not discover any difficulties worth mentioning, and does not recall having been made aware of any treatment Smith might have received at a medical facility. (*Smith (Bernard), supra,* 140 F.3d at 1269.)

In *Smith (Bernard), supra*, the Ninth Circuit found that trial counsel could have pointed to, "Smith's sociopathic personality, his bad drug history, his change in personality after a large drug overdose and his fine set of family relationships at the time." (*Id.* at 1269.) Similarly, in Petitioner's case, Robusto's failure to present evidence in mitigation cannot be excused after the fact by claims that he merely "received no information" from the family that indicated major problems.

According to Early, a reasonably competent attorney in 1991-1992 would have known that clients are not always forthright about themselves and that if there is a mental disease or family problems the clients will sometimes hide it. Reasonably competent attorneys were aware during that time that people who are the subject of abuse will not talk, especially in front of family members. (11 R. H. T. 900.) It is important to get other people involved if a lawyer does not have any expertise in psychological issues so that the investigator and the client and his or her family can develop a rapport. (11 R. H.T. 900.) A competent attorney would have looked into all these things and started getting help very early in his

representation. Earley did not see any of that done in this case. (11 R. H. T. 902, 903.) A reasonably competent lawyer would know that it is important to use an interpreter for any major interview (11 R.T. 904.) As Kaser-Boyd testified, it would not be surprising if Robusto interviewed the family and was not told about the child abuse. (8 R. H. T. 270.) In most of the cases she works on the families are very protective and do not readily admit negative things unless there is rapport with the attorney or mitigation specialist. (8 R. H. T. 270.) One has to form a relationship with the family and interview them more than once. (8 R. H. T. 271, 9 R.H. T. 556.) Confidential interviews and building trust over time and helping people see how they can be kept safe helps get people to talk. (8 R.H.T. 557 378, 556.)

Early stated that in the relevant time frame, reasonably competent counsel would have had the client evaluated by a psychologist. (11 R. H.T. 904-905.) It was common knowledge at that time that poverty had a detrimental effect on mental health and that alcohol and drug use could be signs of mental illness; similarly low grades, school dropouts and runaway situations would tend to show there is "something going on here." (11 R. H. T. 905.) At the time of Robusto's representation of Valdez, the basic concepts of the effects of child abuse on a person's development was a major issue being discussed at the Death Penalty Seminars. (11 R. H.T. 905.) Neuropsychological testing was also "fairly big" at

the time and it was common practice to do neuropsychological testing because neurological deficits can explain a lot of behavior. (11 R. H. T. 907, 988.) When a reasonably competent attorney is having problems communicating with a client or interpersonal problems and arguments with the client, it could be another sign alerting counsel that there may be some underlying psychological and neurological problems. (11 R. H. T. 910.)

F. Petitioner Was Prejudiced by Trial Counsel's Deficiency.

In a case with un-presented mitigation evidence similar to Petitioner's, the United States Supreme Court vacated a death penalty conviction. In *Rompilla v. Beard*, *supra*, after the defendant was found guilty of special circumstances murder, the prosecution, seeking the death penalty, presented evidence of aggravating factors that (1) the murder had been committed during a felony, (2) the murder had been committed by torture, and (3) the accused had a significant history of felony convictions indicating the use or threat of violence. In mitigation evidence presented by the two lawyers who served as the accused's defense counsel at trial, five members of the accused's family argued in effect for residual doubt and beseeched the jury for mercy. However, the jury, assigning greater weight to the aggravating factors, sentenced the accused to death. *(Rompilla v. Beard, supra.)*

In post-conviction research, evidence came to light that the defendant's

childhood was much more traumatic than the defendant led the defense team to believe. Evidence from prior conviction files included accumulated entries that "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts" (*Id.* at 391.) The court summarized:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags. (*Id.* at 392.)

The jury never heard any of this and neither did the mental health experts who examined Rompilla before trial. While the mental health experts found "nothing helpful to [Rompilla's] case," (citations omitted), their post conviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of "'red flags'" pointing up a need to test further. (citations omitted) When they tested, they found that Rompilla "suffers

from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *(Ibid.)* They also said that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Rompilla v. Beard*, *supra*, 545 U.S. at 379.)

The United States Supreme Court found the later discovered evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694.

Here, as Earley states, putting up a "good guy" penalty phase argument about the wonderful Valdez family which turned out such a bad kid added fuel to the prosecutor's aggravation evidence. Robusto chose to only focus on Valdez as a good brother and son, rather than putting on what would be a true mitigator for

someone who has prison records, violence, drug and alcohol abuse and all the factors that scream out psychological, neurological, and childhood issues. (11 R.T. 902.)

Petitioner's father, as the declarations and testimony at the hearing demonstrate, was not the hard working family man he portrayed himself to be at trial. Rather he was a vicious drunk, who made no effort to support his family, who beat his wife and children, especially petitioner for whom he had a special hatred, molested children and ultimately impregnated his own thirteen year old granddaughter. (Exhibit 7.) Even absent the testimony of Dr. Kaser Boyd and Dr. Boone, the family members made a compelling presentation of Petitioner's tortured childhood that would likely have mitigated in favor of life. The instant crime, unlike many capital cases was not so inflammatory that mitigation evidence would have fallen on deaf ears. When one considers the inclinations of a jury choosing between life or death for the petitioner, the post conviction mitigation evidence must be considered in the context of the crime which took place between two similarly situated men of about the same age, both of whom were immersed in a world of drugs and stolen guns.

At the penalty phase, the jury heard no explanation for petitioner's behavior, either with respect to the instant crime, or with respect to the violent incidents the prosecution had introduced as aggravation In fact they heard that petitioner came

from a poor but loving, happy home where good parents inexplicably turned out a violent young man. When one adds to the testimony of the family members the evidence adduced from the experts who evaluated Petitioner, the case for life instead of death becomes much stronger.

If before the penalty phase, efforts had been made to investigate and understand petitioner's life history, a psychologist or psychiatrist could have explained to the jury effectively the impact of petitioner's lifetime of trauma on his mental health, the impact of his father's severe alcoholism, of witnessing domestic violence between his parents, the family's poverty, his criminal history, his history of substance abuse and the extent to which these problems caused or contributed to any involvement in the Macias murder.

If the appropriate mitigation investigation had been done, a mental health professional would have evaluated petitioner and told the jury about the effects of the high-level of child abuse suffered by petitioner would likely lead to psychological disorders including complex or chronic PTSD. Kaser-Boyd believes petitioner suffers from Complex PTSD and even Hinkin, respondent's expert, stated that assuming the declarations are true, he would not be surprised if petitioner had lasting problems from the experience including possibly PTSD. (Exhibit D, 15 R. H.T. 1795.)

At a penalty phase presentation, a neuro-psychologist could have testified

about a diagnosis of frontal lobe dysfunction, which Dr. Boone attributes to substance abuse. (Exhibit P.) Testimony from a neuro-psychologist who performed testing like that done by Dr. Boone would have explained to the jury that petitioner's executive/problem solving skills and capacity to recall what others are saying are in the mentally retarded range and he lacks the brain equipment to control his behavior. (14 R.T. 1410-1413.)

In a recent Ninth Circuit case, the court noted that the, "failure to consult a psychologist or psychiatrist about the significance of the mitigation evidence would have been unreasonable in any case." (*Belmontes v. Ayers* (2008) 529 F.3d 834, 859.) In *Belmontes*, in preparing for a murder trial in 1982, trial counsel hired a mental health expert to evaluate the client for purposes of the guilt phase, but did not ask for comment on any issues relevant to the penalty phase. (*Ibid.*) The court found that trial counsel had a duty to discuss with witnesses the purpose of their testimony, reveal the type of questions he planned to ask them on the stand and instruct them as to what kind of information the jury would find helpful and what kind of testimony would not be relevant. (*Id.* at 861.)

At the penalty phase in *Belmontes*, like in petitioner's case, several family members testified, but much of the defendant's tragic life story went unmentioned in front of the jury. In *Belmontes*, the jury heard only that the defendant's father was a violent alcoholic, that the family was poor, that he had become a Born-Again

Christian and had been promoted in the Pine Grove fire brigade. The jury never heard, "testimony about the traumas that Belmontes faced as a youth....that he had struggled with substance abuse since his early teens." (*Id.* at 866.)

Trial counsel in *Belmontes*, like Robusto, failed to uncover evidence from the family, in spite of the fact that he had some communications with them and even called the mother to testify at the penalty phase. The mother never mentioned that Belmontes' father beat her, his 10-month old sister died of a brain tumor, he was depressed as a child, he suffered from his grandmother's prescription drug and alcohol addition and experienced constant strife with his immediate and extended family. Additionally, although some family members testified, the jury never heard that in his youth, Belmontes acquired rheumatic fever, was forced to live in a motel room where his mother brought back men and he started using drugs on a regular basis at the time of the murder. (Id. 851-852. In *Belmontes*, the court reversed the death verdict, finding that the defendant received deficient representation in the penalty phase. Ultimately, it was found to be the responsibility of trial counsel to follow up on clues suggesting trauma in the family, rather than complete reliance on lay witnesses to know what information will be helpful to the defendant at a penalty phase.

While it is always possible the jury may have disregarded all or some of the mitigation evidence in petitioner's case, this Court cannot say that had the jury

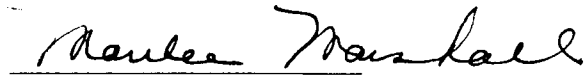
heard about the extreme unrelenting mental and physical abuse Petitioner suffered at the hands of this father, and the resultant post traumatic stress and neurological impairment he suffers to this day, they may well have decided that he did not deserve to die and voted for life instead of death. The likelihood of a different result if the evidence had been admitted is "sufficient to undermine confidence in the outcome" (*Strickland, supra,* 466 U.S., at 694.)

CONCLUSION

As set forth above, this court should reject the findings of the referee, grant the Petition for Writ of Habeas Corpus, and order a new trial for petitioner.

Dated: July 6, 2009

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief consists of 43071words, 13 point font as counted by the word processing program used to generate it.

Dated: July 6, 2009

Respectfully submitted,

MARILEE MARSHALL

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am over eighteen (18) years of age, and not a party to the within cause; my business address is 523 West Sixth Street, Suite 1109, Los Angeles, CA. 90014; that on July 7, 2009, I served a copy of the within:

BRIEF AND EXCEPTIONS TO REFEREE'S REPORT

on the interested parties by placing them in an envelope (or envelopes) addressed respectively as follows:

Mr. Carl N. Henry
Deputy Attorney General
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Each said envelope was then, on July 7, 2009, sealed and deposited in the United States mail at Los Angeles, California, the county in which I maintain my office, with postage fully prepaid.

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

Executed on July 7, 2009, at Los Angeles, California.

Michelle Rivero

MICHELLE RIVERO