SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID ESCO WELCH,
Petitioner,

On Habeas Corpus.

CAPITAL CASE
No. S107782

PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

DEATH PENALTY

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In re **DAVID ESCO WELCH,** **Petitioner,** **On Habeas Corpus.**	**CAPITAL CASE** **No. S107782** **PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT**

I.
INTRODUCTION

In 2005 this court granted an order to show cause on two claims raised in petitioner's habeas corpus petition. In 2007, this court ordered an evidentiary hearing to be conducted and directed the referee to take evidence and report to this court regarding the following referral questions:

> (1) During petitioner's trial, did the bailiff engage in improper communications with any of the jurors that exposed them to information prejudicial to petitioner? If so, what were those communications?
>
> (2) Did trial counsel adequately investigate potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse? If trial counsel's investigation was inadequate, what

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

(Order of 6/20/07)

The referee's report and recommendations were filed on January 2, 2013, and this court invited the parties to file briefs on the merits and exceptions regarding these findings, as well as replies within 30 days thereafter. Petitioner here submits his brief on the merits and exceptions to the findings, all of which are set forth in detail herein.

To briefly summarize petitioner's position, with respect to the first referral question, petitioner takes exception to the referee's findings and submits that improper communications took place which warrant relief in habeas corpus.

With respect to the second referral question, petitioner agrees in principle with the referee's findings that trial counsel's investigation was inadequate, and that an adequate investigation would have disclosed very substantial evidence of serious child abuse. Petitioner respectfully disagrees, however, with certain of the referee's findings excluding the testimony of some witnesses and limiting the scope of expert testimony presented at the hearing.

With respect to the third referral question, petitioner again agrees in principle with the referee's finding and a reasonably competent attorney would have introduced evidence of serious child abuse. However, petitioner again respectfully takes exception to certain findings petitioner

believes incorrectly limit the evidence that could have been presented at trial. Finally, petitioner strongly disagrees with the referee's finding that respondent would have been able to present an expert witness in rebuttal on the grounds that the proposed evidence is not competent rebuttal under California law because it rebuts only respondent's own cross-examination rather than petitioner's case in chief. (*In re Brown* (1997) 17 Cal.4th 873, 889; see also *People v. Carter* (1957) 48 Cal.2d 737.)

Before addressing the findings in detail, however, petitioner wishes to note that even if the referee's findings were to be adopted by this court without alteration, those findings compel the conclusion that petitioner is entitled to habeas corpus relief with respect to the penalty phase portion of the judgment. Accordingly, this court should issue the writ.

II.
SUMMARY OF PROCEEDINGS

A. Proceedings in the Trial Court

On December 16, 1987, the prosecution filed an information charging petitioner with nine felony counts based upon a single incident which occurred in the early morning hours of December 8, 1986. (TCT 1787-1797.)

Counts One through Six alleged violations of Penal Code section 187 and charged petitioner with the murders of Sean Orlando Mabrey (Count One), Dwayne Miller (Count Two), Kathy Walker (Count Three), Darnell Mabrey (Count Four), Dellane Mabrey (Count Five), and Valencia Morgan (Count Six). The special circumstance that each murder was committed to prevent the victim's testimony in a criminal proceeding was alleged as to each Count. (Penal Code section 190.2, subd. (a)(10).) Count

Six also alleged the special circumstance of multiple murder. (Penal Code section 190.2 (a)(3); TCT 1787-1797.)[1]

Prior to trial, defense counsel moved for competency proceedings pursuant to Penal Code section 1368 proceeding. Pursuant to *Faretta* v. *California* (1975) 422 U.S. 806, petitioner moved to represent himself. Both motions were denied. (TCT 778-783, 2117, 2120-2123, 2144.)

Petitioner's jury trial was held before the Honorable Stanley P. Golde. (TCT 2124.) The People were represented in the trial court by Deputy District Attorney James Anderson. Petitioner was represented by defense attorneys Spencer Strellis and Alexander Selvin. Pre-trial motions occurred over 31 court days from November 9, 1988 to January 19, 1989. (CT 2124-2266; RT 1-981.) Jury selection occurred over 50 court days beginning on January 19, 1989 (RT 1059,) and ending with the jury and alternates being sworn on May 16, 1989. (CT 2423; RT 3856-3857.)

The guilt and special circumstance phase took place on most court days in late May and early June, 1989. On June 19, 1989, the jury found petitioner guilty of all counts and found the multiple-murder special circumstance to be true. (CT 2473-2492; RT 5648-5656.)

The penalty phase began before the same jury on June 26, 1989. (CT 2493; RT 5668.) The defense evidence in mitigation, consisting only of the testimony of two mental health experts, Dr. William Pierce and Dr. Samuel

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[1]/ For the sake of brevity, petitioner has focused this procedural summary on matters relevant to these proceedings and has eliminated many details of the information, such as lesser offense and enhancement allegations, as well as details regarding the proceedings at trial and sentencing that might be included in an opening brief on appeal. If it would be helpful to the court, petitioner would be pleased to provide a more comprehensive procedural history on request.

Benson, was presented on July 5 and 6, 1989. (CT 2509-2510; RT 5915-6107.) On July 12, 1989, after slightly more than four hours of deliberation, the jury returned a verdict of death. (CT 2513-2514, 2523; RT 6227.)

On July 25, 1989, the trial court denied petitioner's motion for new trial and reduction of the verdict from death to life without possibility of parole. (CT 2524; RT 6255.) The trial court imposed the sentence of death as to Counts One through Six. (CT 2524; RT 6268.)

B. Post-Conviction Proceedings

An automatic appeal to this court followed pursuant to Penal Code § 1239(b). (California Supreme Court No. S011323.)

On May 1, 1992, this court appointed George C. Boisseau to represent petitioner on direct appeal and habeas corpus. The opening brief was filed on July 26, 1996. Respondent's brief was filed on July 10, 1997, and petitioner's reply was filed on May 18, 1998. This Court affirmed the judgment in an opinion issued on June 1, 1999. (*People v. Welch* (1999) 20 Cal.4th 701.) Petitioner's petition for writ of certiorari following direct appeal was denied by the United States Supreme Court on February 22, 2000. (*Welch v. California* (2000) 528 U.S. 1154, 145 L. Ed. 2d 1071, 120 S. Ct. 1160.)

Though dually appointed, Mr. Boisseau did not complete a habeas corpus investigation or file a habeas corpus petition in this Court.

Petitioner filed a request for the appointment of federal habeas counsel on February 28, 2000. (*Welch v. Woodford*, 5:00-cv-20242-RMW.) On April 16, 2001, the United States District Court for the Northern District of California appointed Stephanie Ross and Darlene Ricker as federal habeas counsel. On January 28, 2002, Ms. Ricker filed a motion to

withdraw, and on March 21, 2002, the federal court appointed Wesley A. Van Winkle as co-counsel to Ms. Ross.

On June 24, 2002, petitioner filed a petition for writ of habeas corpus in this Court alleging that numerous constitutional violations occurred during his trial and confinement.[2] The following day, June 25, 2002, respondent was directed to file an informal response to the petition. That informal response was filed on April 11, 2003. Petitioner filed a reply to the informal response on October 15, 2003.

On November 16, 2005, this Court issued an order to show cause directing respondent to show why petitioner should not be granted relief on two claims in his state habeas corpus petition. These claims were Claim 6, which concerned jury misconduct, and Claim 18, which concerned ineffective assistance of counsel during the penalty phase of petitioner's trial. (Order of 11/16/05.)

On June 20, 2007, after receiving briefing from the parties, this Court issued an order for a reference hearing in this matter. In pertinent part, that reference order directed the Superior Court in and for the County of Contra Costa[3] to take evidence and make findings of fact on the following questions:

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[2]/ A federal petition for writ of habeas corpus was received by the United States District Court for the Northern District of California on July 2, 2002. On July 30, 2002, the case was dismissed without prejudice pending the completion of state exhaustion proceedings. However, on February 26, 2004, the case was reopened to permit the petition to be lodged and deemed filed on the date state proceedings are concluded. (*Welch v. Woodford*, 5:00-cv-20242-RMW.)

[3]/ Because the case involved alleged misconduct by bailiffs and other court personnel, this court ordered the reference hearing held in Contra Costa County rather than Alameda County.

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

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

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

(Order of 6/20/07)

On July 18, 2007, this Court appointed Wesley A. Van Winkle as lead counsel for petitioner, with Stephanie Ross as associate counsel. On December 15, 2010, Ms. Ross's motion to withdraw as counsel was granted, and this Court appointed Karen Kelly as associate counsel to petitioner for all purposes.

C. Proceedings in the Reference Court

An evidentiary hearing in the Contra Costa Superior Court commenced on September 13, 2010. Testimony concluded on April 11, 2011.

The following 30 witnesses testified at the evidentiary hearing:

1. Alameda County Sheriff's Deputy John Dimsdale, bailiff for Judge Stanley Golde, retired (ERT 1336-1372) [4]

2. Alameda County Deputy District Attorney James Anderson, prosecuting attorney, retired (ERT 1746-1769.)

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[4] Petitioner designates the evidentiary hearing report's transcript as "ERT" and the evidentiary hearing clerk's transcript as "ETC." The trial transcripts are designated TRT and TCT.

3. Joanne Gonzales, juror (ERT 1299-1335.)

4. Carol Finley Hayward, juror (ERT 1374-1388.)

5. Sally Ann Jessie, juror (ERT 1389-1400.)

6. Bernard Wells, juror (ERT 1457-1473.)

7. Joseph Cruz, juror (ERT 1407-1456.)

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

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

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

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

12. Alexander Selvin, cocounsel for petitioner (ERT 453-534.)

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

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

15. Russell Stetler, expert in penalty phase investigation retained by petitioner for the reference hearing (ERT 1165-1248.)

16. James Thomson, *Strickland* expert retained by petitioner for the reference hearing (ERT 1007-1063, 1114-1161.)

17. Dr. Julie Kriegler, clinical psychologist retained by petitioner for the reference hearing (ERT 1663-1743,1769-1787.)

18. Dr. Pablo Stewart, psychiatrist retained by petitioner for the reference hearing (ERT 627-676.)

19. Dr. Karen Froming, neuropsychologist retained by petitioner for the reference hearing (ERT 693-865, 1063-1114.)

20. Dr. Daniel Martell, forensic neuropsychologist retained by respondent for the reference hearing (ERT 951-954, 1827-1855.)

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

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

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

24. Konolus Smith, petitioner's childhood friend (ERT 574-623.)

25. Roy Millender, petitioner's maternal uncle (ERT 552-571.)

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

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

28. Laura Rogers, associate counsel and investigator for petitioner for the reference hearing (ERT 968-977.)

29. Therese Scarlet Nerad, licensed investigator and mitigation specialist, for petitioner for the reference hearing (ERT 978-1002.)

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

The referee admitted the following exhibits submitted by petitioner: N1, Tabs 1-87, Tabs 88-99; and N-3, Tabs 100-117; M-1 and M-2 and the following exhibits submitted by respondent: 2, 2A; a hard copy of select portions of the trial record, which were referenced in respondent's briefs; the trial transcript in the form of PDF files, to which both petitioner and respondent made reference to in their briefs. (See Attached Index.)

Petitioner also offered into evidence the declarations of social history witnesses which the referee admitted for the purpose of establishing the basis for the experts' opinions. The declarations were not admitted not for the truth of their contents.

The referee's findings and the record of the reference hearing have been filed in this Court. This Court invited the parties to serve and file exceptions to the referee's report and simultaneous briefs on the merits, and invited the parties to file responses, if any, within 30 days of filing exceptions and briefs on the merits.

III.
PETITIONER'S BURDEN OF PRODUCTION, THE REFERENCE COURT'S TASK, AND THIS COURT'S STANDARD OF REVIEW FOLLOWING AN EVIDENTIARY HEARING.

For ease of reference and to frame this matter in its correct legal context, petitioner here briefly summarizes the law pertaining to the burdens of the parties and the roles of the respective courts following an order to show cause and an evidentiary hearing.

When a capital petitioner submits a habeas corpus petition to this court, he bears the burden of pleading factual and legal grounds for relief in the petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) This court then evaluates the petition by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. (*Id.*, at pp. 474-475.) "If, . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC [i.e., order to show cause]." (*Id.*, at p. 475, citing *In re Clark* (1993) 5 Cal.4th 750, 781; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.) "Issuance of an OSC, therefore, indicates the issuing court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*Ibid*, emphasis in original.)

Following the issuance of an order to show cause, respondent is required to file a return, in which respondent may or may not take issue with the facts or law as petitioner has alleged them, and the petitioner typically files a traverse, or reply to the return. (*People v. Duvall, supra*, 9 Cal.4th at pp. 475-478.) "Where there are no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing." (*Id.*, at p. 478.) Conversely, if there are disputed factual issues, the matter is referred for an evidentiary

hearing. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain factual findings and credibility determinations. (*In re Scott* (2003) 29 Cal.4th 783, 824.) If an evidentiary hearing is ordered, it is the petitioner who bears the burden of proof. (*People v. Duvall, supra*, 9 Cal.4th at p. 483.)

Thus, at this juncture in petitioner's case, this court has already determined that petitioner has made a prima facie case, i.e., that if his factual allegations are true, he is entitled to relief. The central purpose of the reference hearing was for the referee to hear the evidence and make factual and credibility determinations necessary to permit this court to decide whether petitioner's factual allegations are true and, therefore, whether petitioner is entitled to relief.

This court has frequently explained the distinctions between the role of the reference court and the substantive standard of review this court applies when reviewing the reference court's findings of fact. As previously noted, the primary reason for a reference hearing is to obtain credibility determinations.

> First,"this court gives great weight to those of the referee's findings that are supported by substantial evidence. [Citations.] 'This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations (*In re Scott* (2003) 29 Cal.4th 783, 824); consequently, we give special deference to the referee on factual questions "requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying" (*In re Malone* (1996) 12 Cal.4th 935, 946).'"

(*In re Bell* (2007) 42 Cal.4th 630, 640-641.)

This court has also frequently explained that although "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 supra*, 30 Cal.4th at p. 998, fn. 2), as well as all mixed questions of fact and law. (*In re Ross*, *supra*, 10 Cal.4th at p. 201.)" (*In re Hardy* (2007) 41 Cal.4th 977, 993.)

In the context of a claim of ineffective assistance of counsel, this court has explained that "[w]hether counsel's performance was deficient, and whether any deficiency prejudiced the petitioner, are both mixed questions subject to independent review." (*Ibid.*) An example of a mixed question of law and fact in the instant case is the question of whether "trial counsel adequately investigate[d] potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse?" (Referral Order (5/16/07).) In order to determine whether trial counsel's investigation was "adequate," it is necessary for this Court to refer to case law and other legal source materials, as well as expert testimony presented at the hearing regarding the standard of care applicable to capital trial counsel.

Even as to the specific referral questions it has directed the referee to resolve, this court retains the final decision-making responsibility.

> Ultimately, the referee's findings are not binding on us (*In re Malone*, *supra*, 12 Cal.4th at p. 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*, supra, 29 Cal.4th at p. 824)'" (*In re Hardy* (2007) 41 Cal.4th 977, 993-994, citing *In re Thomas* (2006) 37 Cal.4th 1249, 1256-1257.)

(*In re Hardy, supra*, 41 Cal.4th, at pp. 993-994.)

At the hearing itself, petitioner bore the burden of proof. (*People v. Duvall, supra*, 9 Cal.4th at p. 483.) "As provided by Evidence Code Section 500 'Except as otherwise provided by law, a party has the burden of

proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established." (*People v. Glasper* (2003) 113 Cal.App.4th 1104, 1116.) The burden of proving a fact is "satisfied when the requisite evidence has been introduced . . . ." (*People v. Belton* (1979) 23 Cal.3d 516, 524, internal citation omitted.)

Before the reference court, petitioner was required only to provide substantial evidence of the facts he asserted.

> Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. [Citation.]

(*In re Scott, supra,* 29 Cal.4th 783, 819, 888.)

Substantial evidence is defined as evidence that is reasonable, credible, and of solid value. (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

"Stated another way the trial court is charged with finding the historical facts. . . ." (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) "Deference is given to the factual findings of trial courts because those courts generally are in a better position to evaluate and weigh the evidence." (*People v. Louis* (1986) 42 Cal.3d 969, 986.) Appellate courts, on the other hand,

> are in a better position to resolve legal issues, because appellate judges are freer to concentrate on legal questions and the judgment of three or more judges is brought to bear in every case. Furthermore, factual determinations generally are of concern only to the litigants, whereas appellate decisions provide controlling precedent for future cases. From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law.

(*Haworth v. Superior Court* (*Ossakow*) (2010) 50 Cal.4th 372, 384-385, internal citation omitted.)

Thus, the reference court's obligation was to determine whether petitioner presented substantial evidence to support the factual findings he requested. Similarly, where a referral question placed the burden on respondent, such as in the area of rebuttal, respondent must have presented substantial evidence to support the requested finding of fact.

Generally speaking, the testimony of a single witness is sufficient to meet the test of substantial evidence. "Unless a statute requires additional evidence, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact." (Evidence Code section 411.) "In other words, the testimony of a witness normally cannot be disregarded. Unless impeached or contradicted by other testimony or by an inference deducible from the facts proved, or unless it is inherently improbable, the court must accept it as true." (Witkin, *California Evidence* (4th ed.) "Presentation At Trial," §89, pp. 123-124; see also *Sweeney v. Metropolitan Life Ins. Co.* (1937) 30 Cal.App.2d Supp. 767, 771 [where not contradicted or impeached, "neither the jury nor the court had the privilege of arbitrarily disregarding the positive evidence of actual occurrences"]; *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to sustain a criminal conviction'].) The same principle applies to the testimony of

expert witnesses. (*Wirz v. Wirz* (1950) 96 Cal.App.2d 171, 176; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 417; *People v. Smith* (1995) 31 Cal.App.4th 1185, 1190.)

A number of factors may be taken into consideration in assessing a witness's credibility. Among other sources, such factors are set forth in CALJIC 2.20 and include such matters as the existence or nonexistence of bias, the witness's demeanor while testifying, and other factors.

IV.
EXCEPTIONS AND ARGUMENT REGARDING QUESTION OF JUROR/BAILIFF MISCONDUCT

A. Applicable Law

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

As this court has repeatedly recognized, "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*People v. Nessler* (1997) 16 Cal.4th 561, 578 citing *People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.)

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental

> integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

(*People v. Nesler, supra*, 16 Cal.4th at p. 578, quoting *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, internal citations and fn. omitted.)

However, as this court has recognized, with narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [actual] effect of such statement, conduct, condition, or event upon a juror ... or concerning the mental processes by which [the verdict] was determined." (Evid. Code, § 1150, subd. (a); see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 .) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, "open to [corroboration by] sight, hearing, and the other senses" which suggests a likelihood that one or more members of the jury were influenced by improper bias. (*In re Hamilton* (1999) 20 Cal.4th 273, 295, citing *People v. Hutchinson, supra,* 71 Cal.2d 342 at p. 350.)

In *Hamilton*, this court explained that "[w]hen the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror

misconduct." (*In re Hamilton, supra*, 20 Cal.4th at p. 294, citations omitted.)

However, and of particular importance to the instant case, "[a] sitting juror's *involuntary* exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation." (*In re Hamilton, supra,* 20 Cal.4th at pp. 294-295, citations omitted, emphasis added.) Stated another way, the receipt of information about a party or the case that was not part of the evidence received at trial is misconduct "even if that receipt was passive or involuntary." (*People v. Cowen* (2010) 50 Cal.4th 401, 507.)

For at least 120 years, courts have viewed improper communications between the bailiff and the jurors as particularly improper and harmful. For example, in *Mattox v. United States* (1892) 146 U.S. 140, the jurors in a murder case received improper extrinsic evidence from the bailiff. The evidence showed that the bailiff had informed the jurors during their deliberation that the defendant in that case had previously killed two other men. Reversing the judgment, the court specifically stated that it could not "be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial." (*Id.,* at p. 151.) Noting the heightened scrutiny applied to capital cases, the court stated further that:

> It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

(*Mattox v. United States, supra*, 146 U.S. at p. 149.)

In *Turner v. Louisiana* (1965) 379 U.S. 466, misconduct was found where deputy sheriffs who were in close and continuous contact with the sequestered jury also were witnesses at the trial. (*Id.*, at p. 472.)

In *Parker v. Gladden* (1966) 385 U.S. 363, the United States Supreme Court underscored the danger of improper contact or communications between the bailiff and jurors once again. In that murder case, the bailiff stated to one of the jurors in the presence of others, "Oh that wicked fellow [the defendant], he is guilty," and on another occasion said to another juror under similar circumstances: "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it." Both statements were overheard by at least one regular juror or an alternate. (*Id.*, at pp. 363-364.) The Supreme Court reversed the judgment stating:

> We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the states through the due process clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a... trial, by an impartial jury . . . [and] be confronted with the witnesses against him"

(*Id.*, at p. 365.)

Once it has been determined that misconduct has occurred, a "rebuttable presumption" of prejudice is raised. (*In re Hamilton, supra*, 20 Cal.4th at p. 295.) And while there is universal agreement that misconduct results in a rebuttable presumption of prejudice, there has been some dispute among members of this Court with regard to how that prejudice is then evaluated.

In *People v. Nesler*, the majority of this Court relied upon language in *Carpenter* and described the analysis as follows:

> We assess the effect of out-of-court information upon the jury in the following manner. When juror misconduct involves the receipt of information about a party or the case from

> extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

(*People v. Nesler, supra,* 16 Cal.4th at p. 578-579, citing *Carpenter, supra,* at pp. 653-654.)

However, in his concurrence, Justice Mosk criticized the foregoing language for effectively reversing the presumption of prejudice:

> [T]he majority recognized, under *In re Hitchings* (1993) 6 Cal.4th 97 and *People v. Holloway* (1990) 50 Cal.3d 1098, that it is misconduct "for a juror to receive information outside of court about the pending case . . . ." The *Carpenter* majority also recognized, under decisions including *Holloway* and *People v. Marshall* (1990) 50 Cal.3d 907, that juror misconduct "gives rise to a presumption of prejudice . . . ." That means, of course, that "unless the prosecution rebuts that presumption . . . , the defendant is entitled to a new trial."
>
> But, without mentioning the presumption of prejudice, the *Carpenter* majority went on to "summarize" the law relating to the determination of prejudice, as follows: "[W]hen [juror] misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant."
>
> When it is read literally and in the abstract, the *Carpenter* majority's "summary" is problematical. The statement that "[t]he verdict will be set aside only if there appears a

> substantial likelihood of juror bias" seems to imply that the verdict will not be set aside if the reviewing court cannot determine whether or not there is, in fact, a substantial likelihood of such bias. An implication of this sort, which shifts the risk of nonpersuasion from the People to the defendant, amounts to a presumption of nonprejudice.

(*People v. Nesler, supra,* 16 Cal.4th 591, internal citations omitted.)

Justice Mosk argued that the *Carpenter* analysis departed from the test consistently applied by this court and needed to be read "reasonably and in context:"

> In his dissenting opinion in *People v. Von Villas* (1995) 36 Cal.App.4th 1425, 1455, Justice Woods wrote: "The summary is more than inaccurate, it is irreconcilable with *Marshall*, *Holloway*, and *Hitchings*. These three cases hold, as do a legion of earlier ones, that juror misconduct, such as the receipt of extraneous information, raises a presumption of prejudice. Quite apart from and prior to any 'review of the entire record' the misconduct itself raises a presumption of prejudice which requires a reversal unless rebutted. This fundamental principle is omitted from [the] summary."
>
> But when it is read reasonably and in context, the *Carpenter* majority's "summary" is sound. Considered together with the presumption of prejudice, it may be understood thus: "When juror misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record. The verdict will be set aside unless there appears no substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias unless the extraneous material, judged objectively, is not inherently and substantially likely to have influenced the juror. Second, looking to the nature of the misconduct and the surrounding circumstances, we will also find bias unless it is not substantially likely the juror was actually biased against the defendant."

(*People v. Nesler, supra,* 16 Cal.4th at pp. 591-592, parallel and internal citations omitted.)

As discussed at the conclusion of this argument, in the instant case misconduct occurred and unrebutted prejudice demands the reversal of petitioner's convictions.

B. Exceptions to the Referee's Findings on the Credibility of Witnesses

In her findings of fact on the juror misconduct question, the referee made "determinations regarding the credibility of the witnesses who testified at the hearing." (Findings at p. 4.) The referee concluded that the testimony of jurors Carole Hayward, Sally Ann Jessie, Joanne Gonzales, trial counsel Robert Cross, prosecutor James Anderson, and deputy John Dimsdale, was credible. (Findings at pp. 4-6, 9-12.) The referee gave "very little weight" to the testimony of juror Bernard Wells (Findings at p. 7), and found juror Joseph Cruz's testimony was not credible. (Findings at p. 9.)

Because the referee did not support these credibility findings with substantial evidence, petitioner takes exception to the referee's credibility findings.

It is well settled that:

> [T]his court gives great weight to those of the referee's findings that are supported by substantial evidence. This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations; consequently, we give special deference to the referee on factual questions "requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying."

(*In re Burton* (2006) 40 Cal.4th 205, 214, citations omitted.)

Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780. Among these considerations are (a) the witness's demeanor while testifying and the manner in which he testifies; (b) the character of his testimony; © the extent of his capacity to perceive, to recollect, or to communicate any matter about which he

testifies; (d) the extent of his opportunity to perceive any matter about which he testifies; (e) his character for honesty or veracity or their opposites; (f) the existence or nonexistence of a bias, interest, or other motive; (g) a statement previously made by him that is consistent with his testimony at the hearing; (h) a statement made by him that is inconsistent with any part of his testimony at the hearing; (I) the existence or nonexistence of any fact testified to by him; (j) his attitude toward the action in which he testifies or toward the giving of testimony; (k) his admission of untruthfulness and (l) any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing.

In *In re Burton*, this Court noted that the referee was faced with conflicts among the factual accounts of various witnesses. This Court credited the referee's findings of witness credibility because the referee had the opportunity to observe the testimony of the witnesses and relied on factors articulated in Evidence Code section 780. For example the *Burton* referee articulated that a particular witness "did not seem very persuasive" or had the demeanor "of an advocate for his client." The referee noted that certain testimony was corroborated in "the contemporaneous record." Thus, the *Burton* referee supported his credibility determinations with substantial evidence which comported with those factors specified in Evidence Code section 780, specifically: Evidence Code §780 (a), the witness's demeanor while testifying; Evidence Code §780 ©, the extent of his capacity to perceive, to recollect, or to communicate; Evidence Code §780 (j), his attitude toward the action; and Evidence Code §780 (l), any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony.

In the instant case, and unlike the findings of the *Burton* referee, after briefly summarizing the testimony of Carol Finlay Hayward, Sally Ann Jessie, and Joanne Gonzales, the referee merely concluded that their testimony was credible and did not support her findings with substantial evidence. (Findings at p. 4-5.) Moreover, while finding the testimony credible, the referee actually noted a number of factors which logically would have indicated a *lack* of credibility. For example, the referee noted that Sally Ann Jessie had only "vague" recollections and that Joanne Gonzales had "no independent recollection" of certain events and was "confused" about others. (Findings at pp. 5-6.) With respect to witness Robert Cross, the referee briefly summarized Mr. Cross's relevant testimony and concluded that he too was a credible witness, but gave no indication with regard to the basis for this conclusion. (Findings at p. 9.) Because these findings are either unsupported by substantial evidence or are actually contradicted by the presence of factors that undermine credibility, petitioner respectfully takes exception to the credibility findings regarding Carol Finley Hayward, Sally Ann Jessie, Joanne Gonzales, and Robert Cross.

As to prosecutor James Anderson, the referee concluded that "based on the observations of [his] demeanor and the content of his testimony" Anderson was a credible witness. (Findings at p. 10.) Petitioner also respectfully takes exception to this finding. Mr. Anderson was the prosecuting attorney in the case of *People v. Welch.* When testifying at the reference hearing, Mr. Anderson readily admitted that he would be upset if he were found to have committed misconduct in this case by engaging in improper communications with the jurors, as alleged by Juror Cruz. (ERT

1750-1751.) On the question of his bias against petitioner, Anderson admitted that he was a strong proponent of the death penalty. Mr. Anderson admitted he "felt good" that petitioner was on Death Row. (ERT 1753.) Mr. Anderson agreed that he had an interest in seeing petitioner executed. (ERT 1759.) Furthermore, Mr. Anderson admitted that in 1992, after petitioner had been convicted, he had posted on his office wall the photographs of six black men for whom he had secured death verdicts, and that petitioner was one of those men. (ERT 1750-1752.) He also admitted that quotations of statements made by him were accurately reported in an article in the *East Bay Express* Newspaper.[5] (ERT 1755-1758.) In view of the extensive and substantial evidence of Mr. Anderson's bias, all of which the referee inexplicably discounted, petitioner respectfully takes exception to the referee's finding.

Petitioner also takes strong exception to the referee's credibility findings regarding Deputy John Dimsdale, the principal bailiff during petitioner's trial. First of all, bailiff Dimsdale admitted his bias against petitioner– a fact never even alluded to in the referee's findings. Mr. Dimsdale acknowledged that when he was approached by an investigator from petitioner's defense team in 2006, he said to that investigator, "how does it feel to represent someone who's killed an infant?" and "what really gets me is how he's got you guys snowed. If someone deserves the death penalty, it's him." (ERT 1370-1371.) These strong, emotionally laden statements clearly indicate a bias against petitioner that must be viewed as

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[5]/ The referee's findings incorrectly identify the newspaper in question as the "East Bay Free Weekly." (Findings, at p. 10.)

undermining his credibility, but the findings never even mention these statements.

Furthermore, the findings grossly underestimate the impact on Deputy Dimsdale's credibility of the fact that he had previously made false statements under oath regarding this very issue. Although several jurors recalled having a baby shower and giving Dimsdale and/or his wife a gift upon the birth of their daughter in 1989, Dimsdale denied in a signed declaration under penalty of perjury that a shower had been held or that he and his wife had been given a gift. Then, on the morning of his testimony at the evidentiary hearing, Dimsdale produced a greeting card signed by all the jurors congratulating the couple on the birth of their new daughter, together with a $75 savings bond, claiming that he and his wife had discovered it only two days before. The referee found this revelation did not negatively affect Mr. Dimsdale's credibility. Petitioner respectfully submits that his previous false statement made under penalty of perjury, particularly when combined with his blatant emotional bias against petitioner, compel the conclusion that Dimsdale was not a credible witness.

To the contrary, this court would be fully warranted in concluding that Mr. Dimsdale initially suppressed this evidence and only later decided to produce it because he feared that his previous perjury would be found out when the jurors who gave him the gift actually appeared and testified, and that he would then be subject to prosecution for perjury. At a minimum, this court would be warranted in concluding that Mr. Dimsdale took his oath as a declarant so lightly that he was willing to swear he had not received a gift from the jurors without even investigating to refresh his memory about a matter to which he was aware the jurors had sworn under

oath. Of course, if he was willing to sign a declaration under penalty of perjury declaring facts that he later admitted were not true, his sworn oath as a witness and the testimony he gave at the hearing is also worth very little. However, in spite of his demonstrable bias and the fact that Deputy Dimsdale's testimony conflicted with his earlier sworn statement, the referee found him credible. In other words, although there is substantial evidence for concluding that Deputy Dimsdale was not a credible witness i.e., he had made inconsistent statements under Evidence Code section 780(e), the referee, based on no evidence whatsoever, concluded otherwise.

The referee gave very little weight to the testimony of Bernard Wells and found that Joseph Cruz's testimony was not credible. According to the referee, she gave very little weight to the testimony of Mr. Wells "due to the clear bias he showed toward Petitioner upon the conclusion of his testimony and his admission that his memory has been compromised by his open-heart surgery." (Findings at p. 7.) The referee considered too that "no witness at the hearing corroborated Mr. Wells' belief that he heard other jurors in the room say witnesses were threatened." (*Ibid.*) Petitioner takes exception to both of these findings.

Bernard Wells was a credible witness. As such, his testimony is entitled to be given great weight by this Court. Contrary to the referee's findings, nearly all of Mr. Wells' testimony is corroborated by the testimony of other witnesses who testified at the hearing; including his recollections that the bailiff's took the jurors to lunch, that the jurors gave a present to Deputy Dimsdale, and that escorted prisoners, one of whom was petitioner, urinated in the stairwell. Moreover, Mr. Wells' extraordinary testimony that he was an alternate juror who nevertheless sat in on the deliberations

with the deliberating jurors (ERT 1457-1458), was confirmed by other evidence, including the testimony of juror Carol Hayward, who recalled that an African- American who worked at Safeway participated in deliberations (ERT 1384-1385), and evidence that the alternate jurors were also present during the read back of testimony. (ERT 1468-1469.) Juror Joseph Cruz was also a credible witness, and petitioner respectfully takes exception to the referee's contrary finding. The referee complained that Cruz "appeared confused on the witness stand" and was "easily led." (Findings at p. 9.) However, while Mr. Cruz was deliberate in answering questions on the stand and appeared to be making extra effort to make sure he was testifying accurately, he did not appear to be "confused" or "easily led." Moreover, Mr. Cruz's recollections of the day-to-day activities of the jurors, the activities of the bailiffs, the jurors' gift to Deputy Dimsdale, and the presence of urine in the stairwell were corroborated by other evidence and therefore credible.

With regard to Mr. Cruz's testimony regarding the prosecutor's communications with the jurors in the jury deliberation room, virtually all of Mr. Cruz's testimony is supported by that of Mr. Anderson himself. Mr. Anderson did not deny that he went to the jury room and talked to the jurors about the repercussions of a guilty verdict. (ERT 1746-1748, 1762-1763.) The only discrepancy between Mr. Cruz's testimony and Mr. Anderson's testimony concerns the timing of this conversation, i.e., whether it occurred before or after the verdict. Circumstantially, the evidence supports a finding that it is more likely that Mr. Anderson's memory is faulty.

Unlike Mr. Anderson, who had some fourteen capital trials and numerous non-capital trials, petitioner's trial was the first time Mr. Cruz

had ever served as a juror. (ERT 1749, Exh. 20, Declaration of Joe Cruz, Jr., p. 1, lns. 5-6.) Mr. Anderson testified that in his career, juror safety issues came up quite a few times. (ERT 1749.) However, Mr. Cruz had only this single trial experience and for that reason his recollection is more likely to be accurate than that of Mr. Anderson, who may have conflated this trial with others where he indicated similar concerns were raised. Furthermore, unlike Mr. Anderson, Mr. Cruz did not have a vague memory of this occurrence. Instead, Mr. Cruz tied the conversation to a specific incident during the trial and recalled it was not only he but others who were concerned about their safety. (ERT 1427-1433, 1439, 1443-1444, 1453.) Mr. Cruz recalled Mr. Anderson's comments followed the loud bang in the courtroom which had startled and frightened some of the jurors. (ERT 1427-1428, 1431-1433.) In addition, more than one juror also expressed concern that petitioner could be a danger to them. (ERT 1395, 1421, 1429, 1442-1443, 1452-1453.)

The evidence also shows the jurors formed the opinion that petitioner had the ability to threaten them. This opinion was fortified by the improper communications the prosecutor, Mr. Anderson, had with the jurors during the trial. This communication was facilitated by the bailiff. (ERT 1478-1479.) The evidence shows that the communication occurred during the trial. Mr. Anderson's credibility is negatively impacted by both his bias against petitioner and his lack of specific recollection regarding the facts of this case. Mr. Cruz specifically resisted any attempt by respondent to have him agree with Mr. Anderson's recollection that the conversation took place after the jury had concluded their deliberations. (ERT 1425-1429, 1431-1436.) Accordingly, petitioner takes exception to the referee's finding that

Mr. Anderson and not Mr. Cruz was the more credibly. In fact, the reverse is true.

C. Exceptions to the Referee's Findings on the Reference Questions

In addition to petitioner's exceptions as to the referee's findings of credibility, petitioner offers the following exceptions to the referee's factual findings:

The referee found that "none of the bailiffs assigned to petitioner's trial engaged in any improper communications with any of the jurors that would have exposed them to information prejudicial to petitioner." (Findings at p. 12.) The referee discussed three categories of communications for which petitioner presented evidence at the reference hearing: (1) communications suggesting to the jurors that petitioner urinated in the stairwell; (2) communications suggesting jurors knew that witnesses had been threatened; and (3) improper communications between James Anderson and the jurors during the trial. Accordingly, petitioner will group his more specific exceptions under the foregoing headings.

1. Communications Suggesting Petitioner Urinated in the Stairwell

The referee concluded that "there was no credible evidence that any of the bailiffs communicated to the jurors that petitioner had urinated in the stairwell." (Findings at p. 13.)

Although the referee agreed with petitioner's proposed findings that jurors and prisoners, including petitioner, traveled to court through the same stairwell, that there was urine in the stairwell, and that Deputy Dimsdale knew that petitioner had urinated in the stairwell and brought that information to the attention of the trial court, the referee concluded that

jurors' recollections that it had been communicated to them that petitioner urinated in the stairwell and that he did so for the purpose of manufacturing a mental state defense, was either not credible or could be explained by trial testimony. (Findings at p. 13.) Petitioner takes exception with these findings.

Discussions regarding urine in the stairwell clearly took place in the escorting bailiff's presence. (ERT 1306, 1332.) According to Mr. Cruz, a bailiff told the jury that someone had urinated in the stairwell. Mr. Cruz could not remember whether the bailiff in question was Deputy Dimsdale. (ERT 1421-1422.) Someone mentioned that petitioner had urinated in the stairwell and that perhaps the reason was to "detract" from "his competency." It is important to note that Mr. Cruz was careful not to overstate his recollections. Rather, he recalled that it was "possible" that this comment came from the bailiff. Mr. Cruz did not think it was a juror who made the comment about petitioner urinating in the stairwell. Also, because Mr. Cruz did not personally see the urine, he must have gained this knowledge by discussion with someone who had seen it or who had been told about it. (ERT 1423-1424, 1436, 1439.)

Mr. Wells believed some of the jurors noticed the smell of urine in the stairwell. He recalled a bailiff commenting that the urine probably came from the prisoners who had been brought down to court before them. (ERT 1464-1466.) Mr. Wells and other jurors were aware that petitioner was one of those prisoners. (ERT 1351.)

Deputy Dimsdale acknowledged that he brought the matter of petitioner urinating in the stairwell to the attention of petitioner's trial judge. The record indicates that petitioner was reprimanded by the court to

"control your bladder." (TRT 3158.) Deputy Dimsdale also acknowledged that a juror mentioned urine in the stairwell to him. He may have brought the matter of urine in the stairwell to the jurors. (ERT 1361-1362, TRT 3157, 4978-4985.) As previously noted, while the findings do not mention Mr. Dimsdale's 2006 statements to petitioner's investigator, he acknowledged making these statements, reflecting a post conviction bias against petitioner. (ERT 1370-1371.)

Although the referee declined to admit post conviction declarations for the truth of the matter therein, the declaration of juror Gonzales both impeaches her own testimony and corroborates that of Mr. Cruz on this point. In her declaration, Ms. Gonzalez had stated under penalty of perjury that it was petitioner who urinated in the stairwell. (Exh. N-1, Tab 23.) Ms. Gonzalez also confirmed the information about petitioner urinating in the stairwell in her prehearing communications with the Alameda County District Attorney's Office. (ERT 1326-1328.)

Thus, there is substantial evidence to find that the matter of petitioner urinating in the stairwell was brought to the jurors' attention by a bailiff, and the trial record itself indicates that the bailiff in question was Deputy Dimsdale.

2. Communications Suggesting Witnesses were Threatened

The referee found that "none of the bailiffs communicated that petitioner and/or his supporters had threatened witnesses." (Findings at p. 14.) While the referee acknowledged that Jurors Sally Ann Jessie, Bernard Wells and Joseph Cruz each testified at the reference hearing that they were aware that witnesses at the trial felt threatened, the referee concluded that these recollections could be explained by the trial testimony of Barbara

Mabrey that petitioner had threatened and assaulted her and James Anderson's reference hearing testimony that he spoke to the jurors about possible repercussions after the trial was completed. (Findings at p. 14.) Petitioner takes exception with these findings.

First of all, as discussed below, there is substantial evidence that prosecutor James Anderson spoke to the jurors during the course of the trial, prior to deliberations. Mr. Cruz recalled that there had been talk among the jurors that witnesses could be harmed by someone associated with petitioner. The jurors wondered if petitioner had the capability of doing harm to a witness. At one point in the proceedings a loud noise in the courtroom startled the jurors, and it was at about this point in the trial that the jurors spoke about petitioner's ability to threaten witnesses. According to Mr. Cruz, all of the jurors participated in this conversation, which generally concerned whether or not petitioner was capable of threatening the jurors because evidence at trial indicated he had actually made threats against witnesses. Mr. Cruz could not recall where the information about petitioner having threatened witnesses came from. (ERT 1429-1430, 1439, 1443-1444, 1453.)

Mr. Cruz also explained that there was a time when the jurors "were a little bit shaky" or concerned about the issue of threats, and it was at this time that the prosecutor came into the jury deliberation room and "explained some things" to the jury. (ERT 1425.) James Anderson told the jurors "there's nothing to worry about. He's not on that kind of level." (ERT 1427.) These comments followed the loud bang in the courtroom which had scared some of the jurors. (ERT 1427-1428, 1431-1433.)

In addition, although as mentioned above the referee declined to admit post conviction declarations for the truth of the matter therein, the declaration of juror Gonzales both impeaches her own testimony and corroborates that of Mr. Cruz. In her declaration, Ms. Gonzalez had declared under penalty of perjury that many of the jurors were so fearful of petitioner that they had the bailiff walk the jurors to the parking lot. (Exh. N-1, Tab 23.)

Thus, there is substantial evidence for this Court to conclude that the jury was in receipt of improper communications that because petitioner and/or someone else had threatened witnesses these individuals had the ability to threaten the jurors too.

3. Communications Between Deputy District Attorney Anderson and the Jury

The referee found that "there were no improper communications between deputy district attorney, James Anderson, and the jurors during the course of the trial." (Findings at p. 14.) The referee noted that James Anderson denied any such communication and that Mr. Cruz "was confused and misrecalled the post-trial discussions with Mr. Anderson as having occurred during trial." (Findings at p. 14.) Petitioner takes exception to these findings.

As discussed above, there is substantial evidence that during the trial, after an incident in which the jury had been startled by a loud noise in the courtroom (ERT 1428), Alameda County prosecuting attorney Anderson came into the deliberation room because the jurors "were a little bit shaky" and "explained some things" to the jury. (ERT 1425-1429.) During his reference hearing testimony, Mr. Cruz described Mr. Anderson and testified that it was Anderson who spoke to the jurors in the jury room. Mr. Cruz

tied Mr. Anderson's talk to the jurors to the loud bang incident which occurred during the course of the trial. On cross examination, Mr. Cruz specifically disagreed with respondent's suggestion that the conversation took place after the jury had reached it verdict. (ERT 1425-1429, 1431-1436.)

Moreover, as noted above, Mr. Anderson testified to a bias against petitioner and an interest in seeing petitioner's death sentence carried out. (ERT 1750-1753, 1759.)

4. Other Findings Proposed by Petitioner but not Addressed by the Referee

Petitioner proposed a number of findings which were not addressed by the referee. These proposed findings and the support for those findings in the reference record included:

During deliberations, jurors were escorted to lunch by more than one bailiff. (ERT 1320-1321, 1340, 1441; TCT 2460, 2470, 2471, 2472, 2473, 2513, 2514.)

Jurors were driven to lunch in a van driven by a bailiff. (ERT 1414, 1470.)

Alternates ate lunch with deliberating jurors. (ERT 1467-1468.)

Bailiffs ate lunch with jurors. (ERT 1416, 1469-1470.)

Bailiffs sat with the jurors during lunch. (ERT 1416.)

Bailiffs often took jurors on shopping and other lunchtime expeditions. (ERT 1330, 1415-1416, 1469.)

Deputy Dimsdale's wife was pregnant and gave birth to a baby girl named Carmen. (ERT 1341.)

The jurors knew that Deputy Dimsdale's wife was pregnant and gave birth to a baby girl named Carmen. (ERT 1301, 1302, 1303, 1341, 1378, 1394, 1417-1418, 1420, 1472.)

The jurors purchased a $75 savings bond which was given to the Dimsdales as a gift for their baby. (ERT 1303, 1342-1343, 1419, Exhs. 2, 2A.)

All seated jurors and two alternates signed a card of congratulations and held a celebration of an unremembered nature (either a luncheon or a baby shower) for Dimsdale and his wife. (ERT 1301, 1302, 1303, 1341, 1378, 1394, 1417-1418, 1420, 1472.)

These findings are relevant to the reference questions posed by this Court, are supported by substantial evidence in the record, and accordingly should have been made by the referee. This is so because as discussed above, courts have long viewed improper communications between the bailiff and the jurors as particularly improper and harmful. In the instant case, the jurors had an unusually close relationship with the bailiffs, particularly Deputy Dimsdale, who was assigned to petitioner's trial court. This especially close relationship affects both the likelihood that the bailiffs would share improper information and that the jurors would view any such information imparted by the deputies with greater credibility.

The factual findings proposed by petitioner tend to corroborate petitioner's contention that bailiffs communicated the improper information that petitioner urinated in the stairwell and that witnesses had been threatened by petitioner and/or his supporters.

D. Conclusion

There is substantial evidence that, whether intentionally or by accident, jurors received evidence outside of that evidence received at trial. This evidence consisted of communications with bailiffs that petitioner had urinated in the stairwell and that petitioner and/or his supporters had threatened witnesses. Further, there is also substantial evidence that during the trial, the prosecuting attorney communicated with the jury about petitioner's potential to threaten or assault them. The evidence does not support the referee's findings, and those findings should therefore be rejected. Petitioner is entitled to relief on his Claim 6.

V.
EXCEPTIONS AND ARGUMENT REGARDING REFERRAL QUESTIONS ON INEFFECTIVE ASSISTANCE OF COUNSEL

The second and third referral questions posed by this court concerned petitioner's Claim 18, ineffective assistance of counsel during the penalty phase. Specifically, those questions were as follows:

> (2) Did trial counsel adequately investigate potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse? If trial counsel's investigation was inadequate, what additional information would an adequate investigation have disclosed?
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> (3) If an adequate investigation would have yielded evidence that petitioner suffered serious child abuse, would a reasonably competent attorney have introduced such evidence at the penalty phase of the trial? What rebuttal evidence reasonably would have been available to the prosecution?

(Order of 6/20/07)

The referee addressed both questions in section II of her findings, and petitioner will therefore also discuss these findings in a single section. Because the questions posed by this court concern the adequacy of trial counsel's mitigation investigation, petitioner will focus his discussion of the applicable law on the standard of care that applies to trial counsel in the penalty phase of capital trials.

A. Applicable Law

The basic federal constitutional framework for analyzing an ineffective assistance of counsel claim is now well known. To prevail, petitioner must show that: 1) counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness; and 2) the deficiency was prejudicial to the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; see also *In re Lucas*, *supra*, 33

Cal.4th at p. 721.) These two components are usually referred to, respectively, as the "performance" prong and the "prejudice" prong.

With respect to the "performance" prong of the *Strickland* analysis, counsel's performance is not "adequate" if it does not meet an "objective standard of reasonableness," i.e., if it is not reasonable under "prevailing professional norms." (*In re Lucas, supra,* 33 Cal.4th, at p. 721, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 521; *Bobby v. Van Hook* (2009) 558 U.S. ___, 130 S.Ct. 13, 16 [standard of attorney competence judged by "professional norms prevailing when the representation took place"].) The courts look to "prevailing norms of practice as reflected in American Bar Association standards and the like" as "guides to determining what is reasonable, . . ." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) The American Bar Association Guidelines for capital counsel are evidence of what reasonably diligent attorneys would do, but are not "inexorable commands" with which all capital defense counsel must fully comply. The standard of care remains the prevailing professional norms at the time of trial. (*Bobby v. Van Hook, supra*, 130 S.Ct., at p. 13.)

With respect to the "prejudice" prong of the *Strickland* analysis, as noted above petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome." (*Strickland,* 466 U.S. at 694.) However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.* at 693-694.) The standard is thus less than a preponderance of the evidence. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself

unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (*Id.* at 694.)

In the context of a claim of ineffective assistance of counsel at the penalty phase of a capital case, prejudice analysis involves a comparison of the evidence actually presented at the trial to "the totality of available mitigating evidence." (*Wiggins, supra,* 539 U.S. at 534.) "To determine whether counsel's errors prejudiced the outcome of the trial, we must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133.)[6] The fact that petitioner's counsel presented at least *some* semblance of a mitigation case does not alter the prejudice analysis. "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented.'" (*Sears v. Upton* (2010) ___ U.S., ___, 130 S.Ct. 3259, 177 L.Ed.2d , 1033.)

In the last thirteen years, the United States Supreme Court has decided five cases in which the court stated and interpreted the standards for assessing attorney performance in the penalty phase of a capital case and found trial counsel ineffective for failing to investigate and present potential mitigation evidence. Those five cases were, in chronological order: *Williams v. Taylor* (2000) 529 U.S. 362: *Wiggins v. Smith* (2003) 539 U.S.

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[6]/ Although cumulative prejudice analysis is applied, counsel still may be found ineffective for a particular error or omission even if he or she otherwise performed in a competent and professional manner. (*Frazier v. Huffman* (6th Cir. 2003) 343 F.3d 780, 796 [counsel ineffective in penalty phase for failing to investigate and present evidence on brain impairment in spite of "the thorough and professional manner in which counsel conducted appellant's defense during both the guilt and the penalty phase of trial"].)

510; *Rompilla v. Beard* (2005) 545 U.S. 374; *Porter v. McCollum* (2009) 130 S.Ct. 447, 175 L.Ed.2d 398; and *Sears v. Upton*, (2010) 130 S.Ct. 3259, 177 L.Ed.2d 1025. Every case but *Sears* was tried in the 1980s,[7] and the cases are thus highly relevant to the standard of performance applicable to trial counsel at the time of petitioner's trial in 1989. (RT 1121-1122.)

The first of these five cases was *Williams v. Taylor* (2000) 529 U.S. 362. In a trial held in September, 1986, trial counsel at the penalty phase offered the testimony of the defendant's mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. The three lay witnesses testified that the defendant was a "nice boy" and not a violent person. Through cross-examination of the prosecution's witnesses, defense counsel also emphasized the fact that the defendant had turned himself in on not one but four killings and also admitted a number of car thefts and other crimes, and also that he had expressed remorse for the killings. The defendant was convicted and sentenced to death after a jury found a "future dangerousness" aggravating circumstance to be true. (*Id.*, at pp. 369-370.) The United States Supreme Court held that although counsel had presented mitigating evidence at the penalty phase, he had been ineffective for failing to investigate, discover, and present: documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was "borderline mentally retarded," had suffered

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[7]/ The trials in these cases respectively date to 1986 (*Williams*), 1988 (*Rompilla* and *Porter*), and 1989 (*Wiggins*). The trial in *Sears* took place in 1993 (*Sears v. Upton, supra*, 130 S.Ct., at p. 3262), but there is no indication in the opinion that the performance or prejudice standards applied were different from those in the other four cases.

repeated head injuries, and might have mental impairments organic in origin. (*Williams v. Taylor, supra*, 529 U.S., at p. 371.)

In post-conviction proceedings, the state court held that counsel's failure to discover and present this and other significant mitigating evidence was "below the range expected of reasonable, professional competent assistance of counsel." (*Ibid.*) The state court held that counsel's performance thus "did not measure up to the standard required under the holding of *Strickland v. Washington* [citation omitted], and [if it had,] there is a reasonable probability that the result of the sentencing phase would have been different." (*Ibid.*)

Following subsequent appellate and federal habeas review, the United States Supreme Court agreed with the state post-conviction court and upheld its finding of ineffective assistance of counsel and its reversal of the defendant's death sentence. The United States Supreme Court particularly noted the following:

> The record establishes that counsel did not begin to prepare for [the penalty] phase of the proceeding until a week before the trial. [Citation omitted.] They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

(*Id.*, 529 U.S. at p. 395.)

The United States Supreme Court also noted that counsel's failure to uncover and present this mitigating evidence was prejudicial in spite of the

fact that a competent investigation also would have uncovered negative evidence.

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system -- for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. [Citation omitted.] But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.[8]

(*Id.*, 529 U.S. at p. 396.)

In *Wiggins v. Smith, supra*, counsel at a 1989 trial in Maryland presented a case in mitigation that focused on the report of a psychologist who tested the defendant, found he had an IQ of only 79, and concluded he also had features of a personality disorder. Counsel also presented a prison expert who testified that most prisoners serving life sentences adjust well and do not commit further violence in prison. (*Id.*, 539 U.S., at p. 526.) Counsel also obtained, but did not further investigate or present, a presentencing report from a prior case showing the defendant had experienced "misery as a youth" while in the Baltimore foster care system as well as additional records of his foster care history. However, counsel

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[8]/ It is also noteworthy that the Supreme Court found counsel's performance in failing to uncover and present this mitigating evidence to be prejudicial in spite of the fact that "Williams had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow inmate's jaw." (*Wiggins v. Smith, supra*, 539 U.S. at p. 537, citing *Williams v. Taylor, supra*, 529 U.S. at p. 418 (Rehnquist, C.J., dissenting.))

failed to retain a forensic social worker or have a social history report prepared and thus did not present evidence of the defendant's life history. (*Id.*, 539 U.S., at pp. 523-524.)

The United States Supreme Court held that counsel's failure to investigate the defendant's life history fell below reasonable professional standards. The court relied on the "well-defined norms" articulated by the American Bar Association to determine counsel's reasonableness: "ABA Guidelines provide that investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence . . . .'" (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524 [emphasis in original]; *see also ibid.*, citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 11.8.6 at p. 133 ["noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences"]; *see also In re Lucas*, *supra*, 33 Cal.4th at p. 723.)

The Supreme Court specifically rejected the prosecution argument that counsel had made a reasonable tactical decision not to further investigate or present life history evidence suggested by the presentencing and foster care reports, holding that in view of the contents of the reports "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." (*Id.*, at p. 527.) In view of post-conviction evidence that the defendant had experienced severe privation and abuse, physical torment, sexual molestation and "the kind of troubled history we have declared

relevant to assessing a defendant's moral culpability,"[9] the court found counsel had been ineffective and reversed. (*Id.*, at p. 538.) "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." (*Id.*, at p. 537.)

This court has endorsed the inquiry made by the United States Supreme Court in *Wiggins v. Smith*, for assessing counsel's performance at the penalty phase of a capital trial: "[O]ur primary focus is not on evaluating whether, in light of the evidence in their possession, counsel properly decided not to present evidence in mitigation. 'Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable*.'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 725, quoting *Wiggins v. Smith, supra*, 539 U.S. at p. 522 [emphasis in original].) As similarly put by the Ninth Circuit, "[a] decision not to . . . offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision." (*Lambright v. Schriro* (9th Cir. 2007) 485 F.3d 512, 525, citing *Wiggins v.*

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[9]/ In referencing cases it had "declared relevant to assessing a defendant's moral culpability," the Supreme Court cited language in its decision in *Penry v. Lynaugh* (1989) 492 U.S. 302, explaining that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (Id., at p. 319.) The Supreme Court had reversed the death sentence in *Penry* because the jury instructions in that case did not expressly permit the jury to consider in mitigation the defendant's history of mental retardation and child abuse. (*Id.* at p. 328.)

Smith, supra, 539 U.S. at p. 522-523; *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706, 719.)

In *Rompilla v. Beard, supra*, a 1988 Pennsylvania case, the defendant was found guilty of having repeatedly stabbed and murdered the owner of a bar and having set his body on fire. In the penalty phase, the defense presented the testimony of five of the defendant's family members who "argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14-year-old son testified that he loved his father and would visit him in prison." (*Id.*, at p. 378.)

The remaining three cases are also instructive here. Both *Rompilla* and *Porter* emphasize the point that counsel cannot blame their failure to conduct a competent investigation on an uncooperative client or his family members, any or all of whom may suffer from mental illnesses or have reasons for not wanting to reveal the client's childhood abuse or other evidence. For example, in *Rompilla*, tried in 1988, counsel were found deficient "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available." (*Rompilla v. Beard, supra*, 545 U.S. at p. 377.) Similarly, in *Porter*, counsel were found deficient despite a "fatalistic and uncooperative" client who instructed counsel "not to speak with Porter's ex-wife or son," because "that does not obviate the need for defense counsel" to conduct a mitigation investigation. (*Porter v. McCollum, supra*, 130 S.Ct., at p. 453. Quoting *Williams*, the Court reaffirmed this duty: "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's

background.'" (*Id.*, at p. 452.) As noted above, Porter's trial occurred in 1988, one year prior to petitioner's trial.

Sears stands for the proposition that the mere fact that counsel conducted some investigation or presented some penalty phase evidence does not shield counsel from a finding of ineffectiveness. In *Sears*, the Court found trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court noted, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented . . ." (*Sears v. Upton*, *supra*, 130 S. Ct., at p. 3266.) Postconviction evidence emphasized that the defendant had significant frontal lobe brain damage which caused deficiencies in cognitive functioning and reasoning. (*Id.*, at 3261.)

Thus, in determining the reasonableness of counsel's investigation, professional standards prevailing at the time of petitioner's trial required that counsel conduct a "reasonably thorough independent investigation of the defendant's social history - - as . . . reflected in the ABA standards relied on by the court in the *Wiggins* case." (*In re Lucas*, *supra*, 33 Cal.4th at p. 725; *see also id.* at p. 708 [prevailing professional norms for capital defense at the time of petitioner's trial were that "defense counsel should secure an independent, thorough social history of the accused well in advance of trial"][10]; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) This court also noted in *Lucas* that then-existing standards "emphasized the

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[10] The trial in *Lucas* also pre-dated the trial in petitioner's case. Indeed, the trial was completed before trial counsel were even appointed in petitioner's case. (*See* Docket in *People v. Lucas*, California Supreme Court No. S004788 [death judgment rendered November 4, 1987].)

importance of uncovering evidence of childhood trauma." (*In re Lucas*, *supra*, 33 Cal.4th at p. 725.)

In addition to merely conducting a social history investigation, counsel must consult with, adequately prepare, and present expert and other witnesses capable of explaining to the jury the meaning of the social history evidence. As consistently held by the Ninth Circuit, "[t]o perform effectively . . . counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" (*Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 1000, citing *Mayfield v. Woodford* (9th Cir. 2001)(en banc)) 270 F.3d 915, 927.) "To that end, the investigation should include inquiries into social background and evidence of family abuse." (*Summerlin v. Schriro* (9th Cir. 2005) 427 F.3d 623, 630, citing *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1176.) "The defendant's history of drug and alcohol abuse should also be investigated." (*Summerlin v. Schriro*, *supra*, 427 F.3d at p. 630, citing *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1016-17.) Counsel also has "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." (*Lambright v. Schriro*, *supra,* 485 F.3d at pp. 525-526, quoting *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1254.)

It is unquestioned that the investigation into a client's family and personal history required by prevailing norms is a time-consuming task:

> [I]t is necessary to identify and interview the defendant's family members as well as past and present friends, fellow workers, etc., in order to adequately prepare for a capital trial. It is also necessary to obtain records, such as school records, employment records and medical

> records that may result in identifying mitigation themes and mitigation witnesses.

(*Allen v. Woodford, supra,* 395 F.3d at p. 1001; *see also Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133, fn. 9 ["Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends . . . ." (quoting with approval expert testimony of criminal law specialist who had testified at evidentiary hearing without contradiction)].)

For counsel to compile a comprehensive, reliable and well-documented social history, investigation must therefore begin immediately upon counsel's entry into the case. (*See* ABA Guidelines, 11.4.1.) As the United States Supreme Court noted in *Williams*, it was unreasonable for counsel to wait until one week before trial to prepare for the penalty phase, thus resulting in a failure to adequately investigate and put on mitigating evidence. (*Williams v. Taylor, supra,* 529 U.S. at p. 395.) This court has also recognized the necessity for a timely penalty phase investigation. (*In re Lucas, supra*, 33 Cal.4th at pp. 725-726.)

In *Allen v. Woodford*, the Ninth Circuit noted the consensus that an adequate penalty phase investigation must begin well before trial:

> [L]egal experts agree that preparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase: "Counsel's obligation to discover and appropriately present all potentially

> beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial . . . . The timing of this investigation is critical. If the life investigation awaits the guilt verdict, it will be too late."

(*Allen v. Woodford, supra,* 395 F.3d at p. 1001, quoting Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L.Rev. 299, 320, 324 (1983); *see also Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 841.)

As petitioner will show at the conclusion of the argument set forth in section C of this Part IV, trial counsel's performance in investigating and presenting mitigation evidence was so inadequate as to be grossly incompetent, and a vast amount of compelling mitigating evidence was available. In particular, and as supported by the referee's findings, trial counsel utterly failed to investigate, discover, and present evidence of serious child abuse. Had this evidence been presented, it is far more than reasonably likely that a more favorable result would have been obtained.

B. Exceptions to the Referee's Findings on the Credibility of Witnesses

As she did with respect to the witnesses who testified regarding the juror misconduct referral question, the referee also made witness-by-witness findings regarding the credibility of some of the witnesses who testified at the hearing with regard to the two referral questions which addressed issues of ineffective assistance of counsel. (Findings, at p. 14.) Petitioner's exceptions to these findings follow.

However, before addressing the referee's credibility findings, petitioner notes that the referee entirely omitted any findings regarding the testimony of petitioner's *Strickland* expert, James Thomson, or the testimony of petitioner's expert mitigation specialist, Russell Stetler. Petitioner takes exception to the absence of any discussion of the testimony

of these witnesses, and notes that to some extent it may explain subsequent errors by the referee with respect to the standard of care applicable to capital counsel. Accordingly, petitioner will discuss the omission of this testimony before addressing the referee's findings regarding other witnesses.

In addition, petitioner will address the findings pertaining to the witnesses in a slightly different order from that used by the referee in order to better enable the reader to understand the issues to which each witness's testimony relates. The second referral question required the referee to engage in two separate, though related, inquiries. First, the question asked whether trial counsel adequately investigated potential evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse. Secondly, if trial counsel's investigation was found inadequate, this court asked the referee to determine what additional information an adequate investigation would have disclosed. To assist the reader to understand the significance of each witness's testimony, petitioner groups the witnesses into these two categories.

In addition, with the exception of the testimony of Therese Scarlet Nerad, the referee also did not comment on testimony of defense witnesses who testified at the hearing on issues relating to whether the prosecution's mental health expert, Dr. Daniel Martell, should be permitted to administer neuropsychological testing to petitioner. Petitioner will address this issue in a separate portion of this brief.

1. Exceptions to Credibility Findings Regarding Witnesses Primarily Relevant to Assessing the Adequacy of Trial Counsel's Investigation.

a. Petitioner Takes Exception to the Referee's Failure to Discuss or Make Findings Regarding the Testimony of Expert Witnesses James Thomson and Russell Stetler.

The most notable, even glaring, flaw in the referee's findings concerns the complete and inexplicable omission of any discussion or findings regarding the testimony of two of petitioner's experts on the standard of care in the conduct of mitigation investigations that was applicable to trial counsel at the time of petitioner's trial. In addition, petitioner presented as an exhibit the 1986 edition of a two-volume manual, The California Death Penalty Defense Manual, which was published by California Attorneys for Criminal Justice (hereinafter, "CACJ."). (Exhs. M-1, M-2.) Because this material bears directly upon the second referral question, specifically upon the adequacy of counsel's investigation, petitioner respectfully takes exception to the referee's failure to discuss or make findings regarding the testimony of these two witnesses.

Petitioner presented the testimony of attorney James Thomson, an attorney who has represented 25 capital defendants at trial. None of Mr. Thomson's clients have ever been sentenced to death, a fact he attributes largely to mitigation investigation. Petitioner also presented the testimony of Russell Stetler, a longtime capital investigator and mitigation specialist who also has many years of experience in conducting post-conviction review of trial files in capital cases. Their testimony, combined with the Manual and other exhibits, is of critical importance in analyzing both the performance and prejudice prongs, and more specifically in establishing the standard of care, analyzing trial counsel's performance, and evaluating the

testimony of mental health experts. In particular, Mr. Stetler's testimony is critical in understanding just how shockingly meager counsel's investigation actually was, and the extraordinary amount of very basic investigation counsel did *not* do, failing to perform such simple, obvious preliminary tasks as obtaining easily available public records. For this reason, and because the findings omit any discussion of the testimony of either witness, petitioner sets forth a summary and proposed findings relevant to these two witnesses.

i. James Thomson. James Thomson is a Berkeley attorney who during a 32-year career has represented 25 capital clients in a number of different jurisdictions. (ERT 1008, 1010.) Nine or ten of those 25 cases went to trial, and seven or eight went through penalty phase proceedings. (ERT 1010.) None of those clients received the death penalty. (ERT 1010.) Mr. Thomson is a former officer and past president of California Attorneys for Criminal Justice and co-founded the Bryan Schechmeister Death Penalty College, an annual live-in training conference for capital trial lawyers doing their first cases. (ERT 1011, 1015.) He has taught at the annual capital defense conference co-sponsored by CACJ and was one of the editors of the 1986 CACJ California Death Penalty Defense Manual. (ERT 1014.)

Mr. Thomson summed up the standard of care for counsel in a capital case penalty phase as "the duty to investigate the client's background and social history." (ERT 1021.) "The key with capital cases is the responsibility for conducting the thorough background investigation of the client." (ERT 1022, 1034.) Social history investigation is the key to the penalty phase. (ERT 1051.) Mr. Thomson described the requirement of conducting a thorough background investigation as "the baseline. It's the

minimum of what you have to do." (ERT 1022.) Mr. Stetler similarly described the standard as requiring counsel to obtain "all reasonably available mitigating evidence," and noted that language was not only in the 1989 and 2003 American Bar Association Guidelines for capital counsel, but also in United States Supreme Court case law. (ERT 1248.) Counsel cannot make a tactical choice not to conduct a mitigation investigation. (ERT 1058.)

The penalty phase investigation must begin "immediately" when the attorney first begins work on the case because the investigation may influence settlement negotiations. (ERT 1034-1035, 1038, 1040.) In the two thirds of his capital cases that were settled for less than death, Mr. Thomson never settled a case for any reason other than information obtained during the mitigation investigation. (ERT 1041.) Another reason for beginning the penalty phase investigation long before the guilt phase begins is because it takes time to investigate the client's entire lifetime, and beginning early is the only way to ensure that all potential mitigation evidence is uncovered and developed. (ERT 1036-1038, 1040, 1124.) It is "not conceivable" that a mitigation social history investigation could be conducted in a matter of a few weeks, particularly because matters such as abuse and other sensitive, emotionally charged information requires time to develop. (ERT 1124-1125.) Penalty phase investigation also must begin early so that counsel can develop an overall strategy for the capital trial as a whole. (ERT 1036-1038.)

Mitigation investigation is critically important not merely because it may encourage early settlement of the case, but also because it promotes understanding of who the client is and why he was involved in the crime in

the first place. (ERT 1040.) Mitigation evidence is also important to investigate because it assists in combating aggravating evidence, such as evidence of future dangerousness. (ERT 1056.) However, perhaps the most important function of mitigation investigation lies in developing witnesses and information that will humanize the client. Lay witnesses who have known the client at various stages in his life have greater credibility with jurors than experts because they have not been retained solely to work on the case. (ERT 1122-1123.) They have also personally witnessed many of the incidents the significance of which the experts will explain, and thereby improve the credibility of the expert. (ERT 1123.)

Mr. Thomson distinguished between the standard of care (i.e., the duty to perform a thorough background investigation) and the standard of practice (i.e., the methods or techniques for putting the standard into practice). (ERT 1029-1030.) He explained that the standard of care in mitigation investigations was a national standard and had been in place in many southern states, including Kentucky and Tennessee, before the death penalty was restored in California in the late 1970s. (ERT 1028, 1030, 1120.) However, the standard of practice was higher in California because funding provided via Penal Code section 987.9 permitted counsel access to investigators and experts which was often not provided in the southern states, and California counsel were thus better able to live up to the standard in ways southern counsel could not. (ERT 1028-1030.) In addition, the large, unified defense bar in California had created a network for training and sharing resources. (ERT 1030.)

During the 1980s, attorneys learned the standards of care and practice in several ways. The primary training resource for California

capital trial attorneys was the Death Penalty Defense Manual, published jointly by California Attorneys for Criminal Justice and the California Public Defenders Association. (ERT 1022, 1024.) The Manual, sometimes referred to within the capital defense profession as "the Bible," was first published in 1980, periodically updated thereafter, and by the time of the crimes in this case in 1986 occupied two five-inch-thick three-ring binders. (Exhs. M-1, M-2; ERT 1156.) The second of these volumes was devoted entirely to penalty phase mitigation investigation and presentation and other issues related to the penalty phase, such as confronting aggravating evidence presented by the prosecution. (Exh. M-2; ERT 1025.) When Mr. Thomson was appointed as second-chair counsel in his first capital case, the first thing he was told to do by lead counsel was to read the Manual. (ERT 1026.)

Other published resources included a monthly publication called Death Penalty Update, which was published by the Office of the State Public Defender and, subsequently, by the California Appellate Project, which also created a publication called RECAP which reported on case law developments. (ERT 1022-1023.) Excerpts from the Update and RECAP were often reprinted in the Manual, along with articles on death penalty subjects. (ERT 1024.)

In addition, seminars and other trainings were regularly presented by CACJ, CPDA, and the State Public Defender. (ERT 1023.) The foremost of these was the annual Monterey conference, which Mr. Thomson first attended at Asilomar in 1982. (ERT 1031.)

In all of these various training resources, a central emphasis is on mental health issues; as phrased by Mr. Stetler, it is a "huge component of

capital defense training." (ERT 1185.) Thomas Broome, David Welch's attorney prior to the appointment of Mr. Strellis and Mr. Selvin, reported that he had begun attending the annual death penalty conference in Monterey at about the same time as Mr. Thomson (i.e., in about 1982), and continued attending the conference for five years before he began working on David Welch's case. (ERT 221-222, 226.) At the Monterey conferences, Mr. Broome learned to recognize many of the symptoms of mental illness and received training in recognizing the symptoms of schizophrenia, brain damage, bipolar disorders, child abuse, and other mental disorders. (ERT 225-227.)

In addition to the written resources and periodic seminars and other trainings, the standard of care was also transmitted to capital trial counsel through guidelines and standards adopted by professional organizations. (ERT 1032, 1120.) The American Bar Association had adopted standards applicable to the defense bar generally beginning in the early 1980s, and some of these are referenced in *Strickland v. Washington* (1984) 466 U.S. 688. (ERT 1032-1033, 1121.) Formal written guidelines were adopted by the National Legal Aid and Defenders Association in 1987, and the American Bar Association adopted substantially similar guidelines in 1989 and then revised and expanded upon them in 2003. (ERT 1032-1033, 1174, 1181.) In the context of penalty phase investigation, the United States Supreme Court has referred to the ABA Guidelines for capital counsel as "well-defined norms" by which the performance of capital counsel can be judged. (ERT 1244.) The general standard of care applicable to California capital trial attorneys, however, predated the formal adoption of the guidelines and had been in place since the late 70s and early 80s. (ERT

1033.) That standard required counsel to discover all reasonably available mitigation evidence. (ERT 1233.)

In actual practice, a reasonably competent attorney begins a capital trial investigation by assembling a team. (ERT 1042, 1185.) The team approach was well established in the 1980s. (ERT 1192.) Lead counsel should select a competent second counsel to assist, both to share the workload and to complement lead counsel's skills. (ERT 1042, 1193.) For example, lead counsel may lack particular expertise in mental health issues that may arise in the penalty phase. (ERT 1042.) After the attorneys, trial counsel typically selects at least one investigator, but commonly retains a guilt phase investigator and a penalty phase investigator. (ERT 1042.) While these may be separate individuals, some investigators may be skilled in both forms of investigation; and at the time of trial it was not uncommon for competent counsel to use the same investigator for both purposes. (ERT 1128, 1193, 1216.) In the majority of cases he worked on during the 1980s, Mr. Stetler wore both hats, handling both the guilt and penalty phase investigation, though he also had a partner in the private firm he worked in who sometimes helped out. (ERT 1193-1194.) However, the better practice is to use two separate investigators because the amount of time required for both investigations dictates the use of separate investigators. (ERT 1129, 1195.) For this reason, Mr. Thomson has never used fewer than two separate investigators in his cases. (ERT 1129.) Whether counsel used one investigator or two, the standard of care required counsel to conduct an investigation designed to uncover all reasonably available mitigating evidence. (ERT 1216.)

A penalty phase investigator, often called a mitigation specialist, is trained in sociological and psychological issues and in techniques for obtaining social science information, such as information on child abuse or sexual abuse, or other matters that may be embarrassing or difficult to talk about. (ERT 1045, 1182-1183.) The guidelines require that one member of the defense team must be qualified by training and experience to screen for mental disorders and impairments, and that person is usually the mitigation specialist. (ERT 1185.) Often counsel will also retain a separate social history expert, whose task it is to compile the records and information gathered by the mitigation specialist and review it for mental illness risk factors, abuse histories, and other social or mental health themes. (ERT 1051-1052.) Finally, counsel will require mental health experts to diagnose the client and to explain their diagnosis and the significance of the testimony of lay witnesses to the jury. (ERT 1123.)

Since at least 1980, competent penalty phase investigation has been understood within the profession as requiring a two-track approach; first, the defense team must obtain social history documents; and second, the team must interview social history witnesses. (ERT 1042-1043, 1179-1181.) While the two tracks overlap somewhat, record gathering is usually the first focus. During this phase, the investigation focuses on obtaining school records, birth records, hospital records, employment records, military records, probation reports, and similar historical documents. (ERT 1042-1043, 1179.) Since the focus in this phase is on obtaining records, mitigation specialists or other penalty phase investigators will begin this process by obtaining the client's release, as well as those of other family members contacted later, and will attempt to develop a list of all addresses

where the client lived previously, schools he attended, and similar information. (ERT 1186-1187.) Probation reports are essential because they will both provide information that may be relevant to combating aggravation and because they too will provide leads for witnesses to contact. (ERT 1043.) From the record-gathering, the investigation is developing firm biographical dates and markers as well as a framework for understanding the client's history, and is also developing lists of potential interview subjects; for example, school records will provide leads for interviews with teachers and school principals. (ERT 1043- 1044, 1050, 1190.) Social history documents are also important because they have inherent credibility because they were not created for the litigation and were created by neutral professionals. (ERT 1188.) Such documents also tell important stories that interview subjects might have forgotten or might fail to provide. Mr. Stetler gave as an example the social worker's report referenced in *Williams v. Taylor* which documented appalling conditions in the home where the client was raised. (ERT 1189.)

In interviewing, the team ideally begins with the client, then moves out to siblings and other relatives to develop a history of the family. (ERT 1042-1043.) Initial client interviews focus not merely on obtaining information, but are also "observational." (ERT 1187. The mitigation specialist or other interviewer is also looking for clues to possible mental illness, such as pressured speech, fixed false delusions, hallucinations, or other symptoms. (ERT 1187, 1195, 1198.) Mitigation specialists are also attempting during early interviews to form a relationship of trust with the client, and thus avoid confronting delusions directly and instead attempt to listen empathically to establish a relationship and obtain information. (ERT

1196.) Competent counsel and mitigation specialists are aware that clients, often because of mental illnesses, are often "the worst reporters of events," and thus may rely more heavily on family members other than the client for accurate, reliable social history information. (ERT 1039.)

Interviews of family members and other social history witnesses come next, and these are best performed by a mitigation specialist or other person with specialized training in mental health issues and techniques such as "reflective listening" designed to encourage people to be forthcoming with sensitive social history information. (ERT 1184, 1187.) The investigation must be multi-generational and relatives from prior generations, such as grandparents, aunts and uncles, must be interviewed. (ERT 1045, 1151.) One reason for this multi-generational focus is to examine potential mental illness histories, particularly where the illness involves a significant genetic component, such as schizophrenia or substance abuse. (ERT 1046.) This information is in turn important both because it "makes for a more powerful presentation," both in settlement negotiations and at the penalty phase, and because mental health experts require this material as a foundation for their opinions and diagnoses. (ERT 1046.) Interviews should be conducted in the homes or on the "turf" of the witness, partly in order to see where the client grew up, what kind of housekeeping the family had, and what their living situation says about their socioeconomic status and other factors. (ERT 1225.) This may require making accommodations for witnesses who may work multiple jobs, or waiting long hours for witnesses to show up. (ERT 1225.) Witnesses may be substance abusers, may not be high-functioning, or may have mental illnesses themselves. (ERT 1226.) Although many potential witnesses may

live out-of-state, or even overseas, it was standard practice in the 1980s to travel to locate and interview potential social history witnesses as needed. (ERT 1210.)

As information is coming in from the records and interviews the team is performing, it is managed with various "tools of the trade." For example, a mitigation specialist or other penalty phase investigator will typically make a family tree in order to keep track of the client's family members and their relationships with one another, and also to spot trends, such as a history of substance abuse, arrest histories, domestic violence, or mental health problems experienced by various family members. (ERT 1190-1191.) Another tool is a social history chronology which shows the dates particular events occurred in chronological order. (ERT 1191, 1240-1241.) This permits the mitigation specialist to spot significant coincidences, such as grades falling off at the time when there are domestic disruptions in the client's life, that might otherwise have been missed. (ERT 1191.)

Having obtained the initial social history documents and done the initial social history interviews, the mitigation specialist will then typically consult with counsel to assist in selecting one or more appropriate mental health experts. (ERT 1197.) Typically the mitigation specialist will at this time have formed a hypothesis as to the kinds of mental illness or other mental health issue from which the client may suffer and will be able to assist in finding someone with appropriate expertise. (ERT 1197-1198.) Thus, if a client has suffered from sexual trauma, an expert who has a clinical practice dealing with survivors of sexual abuse would be sought, rather than a generic psychologist. (ERT 1198.) The initial mental health

screening is usually done by a mitigation specialist or penalty phase investigator rather than a mental health expert for cost reasons. (ERT 1199.) In addition to the fact that the mitigation specialist is paid at a substantially lower rate than the mental health expert, the mitigation specialist will see the client over a longer period of time, which is essential since mental illnesses and their symptoms typically wax and wane over time. (ERT 1199, 1234.) Moreover, many witnesses may be unnerved by mental health experts. (ERT 1234.)

It is of critical importance to establish a relationship of trust with the client, and this is a matter that is emphasized in seminars and in the Manual. (ERT 1115, 1117.) This relationship is important not merely for investigating the mitigation evidence but also because the interaction between the client and his counsel is an important factor in humanizing the client before the jury. (ERT 1115.) As described in the 1986 Manual:

> Before you can portray your client as a human being to the jury, you must first accept him as one. Take the time to explain your role and what the client can expect from you. Nothing will hurt you more than a client who does not understand what you want and expect from him. The actions of you and your associates toward and with the client in the courtroom can facilitate the humanizing process. By interacting with the client at counsel table, everyone can convey his or her feelings for the defendant to the jury. By involving the client in the proceedings, such as by having him or her take notes, ask voir dire questions, assist with jury selection decisions or make part of the closing argument, you take important steps to your ultimate goal of having the jurors view your client as a human being.

(ERT 1116.)

In cases in which the client is mentally ill, reticent to provide information, or otherwise difficult to obtain information from, counsel is not excused from investigating but must instead work around the client. (ERT 1057-1058.) It is not uncommon to have uncooperative clients or

clients reluctant to give information. (ERT 1153.) In fact, dealing with difficult clients has been a part of every Monterey conference since the 1970s. (ERT 1153.) In cases where child abuse or sexual abuse is suspected, counsel may encounter resistance in disclosing the information from the client himself, the victim of the abuse, or from the parents, who are the likely perpetrators. (ERT 1138-1139.) In such cases, the investigation must work outward to interviews with siblings, aunts or uncles, probation officers, or similar sources. (ERT 1057, 1138-1139.) The client, who is in jail or prison at the time the investigation is conducted, is not in a position to control the activities of the investigation or investigator. (ERT 1151.)

At the time of David Welch's trial in 1989, capital case attorneys were required to have a general grasp of mental health issues. (ERT 1047.) This included a working knowledge of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and general familiarity with conditions that had a genetic or generational component. (ERT 1048-1049.) Attorneys also needed an understanding that various factors, such as environmental pollutants, could have an impact on the client's mental health during the developmental period. (ERT 1049.)

In particular, counsel at the time of David Welch's trial were required to investigate serious child abuse. (ERT 1154.) Contemporary counsel were also aware of post-traumatic stress disorder. (ERT 1053.) The diagnosis had entered the DSM in 1980 and the condition was well understood in the defense bar in both capital and non-capital cases in several contexts, including defending Vietnam veterans, battered spouse cases, and child abuse cases. (ERT 1054-1055, 1152.) Investigation of

child abuse and sexual abuse require inquiry into sensitive areas. However, while sexual abuse is often difficult to investigate, both because it is often a shameful family secret and may only be known to the victim and the perpetrator, evidence of physical abuse is much easier to obtain. (ERT 1200.) Parents often have reputations as severe disciplinarians and other children may stay away from the house for that reason. (ERT 1200.) Others may see black eyes or other evidence of physical injuries, scars, beating or whip marks that are visible on the victim's body or that appear in medical records. (ERT 1201.)

In addition to social history investigation, capital trial counsel were also required to investigate each of the factors in aggravation noticed by the prosecution, regardless of the number of aggravators, and could not simply decline to investigate because there were too many factors in aggravation. (ERT 1059-1060.) For example, investigation was required in order to challenge, if possible, the sufficiency of prior convictions or to mitigate the impact of the prior convictions or violent incidents. (ERT 1061.) Counsel were also required to understand the basic aggravating and mitigating factors set forth in Penal Code section 190.3 and in the Rules of Court applicable in non-capital sentencing. (ERT 1118-1119.)

In actually presenting the penalty phase, counsel would ideally present a mix of both lay witnesses and mental health experts. (ERT 1123-1124.) Presenting only mental health experts without lay witnesses was not advisable because mental health experts are often perceived by jurors as "hired guns," and the direct evidence of lay witnesses as to the underlying events or behaviors that the experts later explain thus improves the

credibility of the experts, in addition to humanizing the client in the eyes of the jury. (ERT 1122-1124.)

ii. Russell Stetler. Russell Stetler is a mitigation specialist whose experience in capital case mitigation investigation dates to approximately 1980. (ERT 1169.) Mr. Stetler conducted trial level investigations from 1980 through 1990, when he began working as the California Appellate Project's chief investigator on mitigation in post-conviction cases. (ERT 1169.) For ten years, from 1995 to 2005, he worked for the New York State Capital Defender Office providing assistance to trial and direct appeal lawyers in capital cases in that state; since then he has worked on post-conviction mitigation investigations for the Capital Habeas Unit of the Office of the Federal Public Defender in Oakland. (ERT 1166-1168.) Mr. Stetler taught mitigation investigation and other subjects at continuing legal education programs for most of his career and has frequently served on the planning committee and co-chaired the annual Monterey capital training conference. (ERT 1171-1172.) Although not an attorney, Mr. Stetler has written extensively in training manuals for attorneys and has authored a number of law review articles on mitigation investigation. (ERT 1173.) In his work at the California Appellate Project and the Federal Public Defender's office, he devotes much of his time to reviewing trial counsel files in capital cases to advise habeas counsel on potentially fruitful areas of investigation, particularly in determining what was and was not done by trial counsel in mitigation investigations. (ERT 1177.)

Mr. Stetler reviewed the trial counsel file in this case and found no mitigation materials other than the probation reports and school records. (ERT 1203-1204.) The probation records were obtained in discovery from

the district attorney's office in connection with incidents offered in aggravation. (ERT 1206.) Thus, even these probation records were not obtained as a result of any investigation by trial counsel but were provided by the prosecution. (ERT 1206.) The file contained no interview reports with any social history or other mitigation witnesses done by trial counsel. (ERT 1204.) The only interview that even remotely resembled a mitigation interview was one interview with David Welch's father, and that was done by Harold Adams, the investigator for prior counsel Thomas Broome, and was not connected to mitigation. (ERT 1204.) Trial counsel's investigator, Brian Olivier, performed some guilt phase work and served a number of subpoenas, but there was no indication from his billing records that he had done any mitigation investigation at all. (ERT 1205.) The files contained no interview reports with David Welch's parents or siblings, nor with teachers, other people in the neighborhood, uncles, aunts or grandparents, children, or other potential social history sources. (ERT 1206.) Although trial counsel had testified to having been to the neighborhood on one occasion, counsel did not say what was done or whether the person they sought to contact was home. (ERT 1205.) No apparent substantive discussions were had with David Welch's parents. (ERT 1205.)

Mr. Stetler noted that the trial file did not contain easily obtainable court records, such as the parents' divorce files, that were sitting in the Superior Court and would have told the investigators and jurors something about the condition of the parents' marriage. (ERT 1206.) The file also contained no social security detailed earnings reports to disclose what the family was living on, no birth records or medical records, not even the birth certificate for David Welch himself. (ERT 1207.) He noted that David

Welch's father was known to have been in the Merchant Marines, yet there were no employment or disciplinary records from the Merchant Marines in the trial file. (ERT 1207.) When obtained by post-conviction counsel, these records showed that David Welch's father had been disciplined for alcohol-related problems. (ERT 1207.) Mr. Stetler considered these records to be "the basics," and not the sort of files that would have been obtained in a more sophisticated investigation. (ERT 1207.) The file also contained no suggestion of any investigation into environmental records, building inspection records, or other investigation into the physical environment in which David Welch grew up. (ERT 1208.) When asked whether trial counsel or someone in the chain of custody after they left the case might have misplaced documents that had once been in the trial file, Mr. Stetler responded that while that was possible, Mr. Olivier's billing records were maintained and they indicated that there was no mitigation investigation, or at least that he was not doing it. (ERT 1231.)

All of these documents were obtained by post-conviction counsel in an investigation conducted in a period of less than 90 days some 13 years after trial had ended. Trial counsel had 18 months in which to conduct their investigation, a sufficient time for investigation of most capital cases, and did essentially no social history investigation at all. (ERT 1209-1210.) As Mr. Stetler noted, from an investigative standpoint post-conviction counsel are in a much worse position than trial counsel because records are less likely to have been destroyed, continuances are easier to obtain at trial, and often impossible in federal habeas, and individual witnesses are more difficult to find or may have died. (ERT 1209.)

Mr. Strellis and Mr. Selvin presented no social history witnesses at all. (ERT 1237.) The only witnesses presented in the penalty phase at David Welch's trial were Dr. Benson and Dr. Pierce. (ERT 1237.) As Mr. Thomson had testified, Mr. Stetler noted that it was understood within the profession that without the support of lay witnesses, it was very dangerous to rely solely on the testimony of mental health professionals for credibility reasons. (ERT 1237.) Moreover, there was no indication that Dr. Pierce had seen any interview reports with social history witnesses. (ERT 1238.) In Mr. Stetler's opinion, Dr. Pierce could not have performed a social history investigation that typically requires a year in only the two weeks between the end of the guilt phase and the beginning of the penalty phase. (ERT 1239.)

Although trial counsel had suggested he suspected David Welch of thwarting the defense investigation, Mr. Stetler saw no evidence of this in the files or the record of this hearing. (ERT 1245.) He indicated that there was evidence that David Welch's mother, Minnie Welch, did not keep some appointments, but did not see that as "thwarting" the investigation, and saw no other evidence of any attempts by counsel to contact other social history witnesses. (ERT 1245-1246.)

The California Appellate Project has long maintained a database containing basic statistical information on all capital cases in California in which a death sentence was issued. (ERT 1217-1218.) Among the information maintained on the database are the names of both first and second counsel. (ERT 1218.) Mr. Stetler commonly relies on the database for reports. (ERT 1218.) Mr. Stetler reviewed a report generated by the CAP database on August 20, 2010, and found that both Mr. Strellis and Mr.

Selvin each have eight former trial clients on death row. (ERT 1220, Exhibit R.) No other lawyer in the state of California has more, and only one other attorney has as many. (ERT 1220; Exhibit R.)

iii. Proposed Findings Derived from the Thomson and Stetler Testimony.

James Thomson is a Berkeley attorney who, during a 32-year career, has represented 25 capital clients in a number of different jurisdictions. Nine or ten of those 25 cases went to trial, and seven or eight went through penalty phase proceedings. None of those clients received the death penalty. Mr. Thomson is a former officer and past president of California Attorneys for Criminal Justice and co-founded the Bryan Schechmeister Death Penalty College, an annual live-in training conference for capital trial lawyers doing their first cases. He has taught at the annual capital defense conference co-sponsored by CACJ and was one of the editors of the 1986 CACJ California Death Penalty Defense Manual. (ERT 1008, 1010, 1011, 1015, 1014.)

Russell Stetler is a mitigation specialist whose experience in capital case mitigation investigation dates to approximately 1980. Mr. Stetler conducted trial level investigations from 1980 through 1990, when he began working as the California Appellate Project's chief investigator on mitigation in post-conviction cases. For ten years, from 1995 to 2005, he worked for the New York State Capital Defender Office providing assistance to trial and direct appeal lawyers in capital cases in that state; and for the last five years he has worked on post-conviction mitigation investigations for the Capital Habeas Unit of the Office of the Federal Public Defender in Oakland. Mr. Stetler taught mitigation investigation and other subjects at continuing legal education programs for most of his career and has frequently served on the planning committee and co-chaired the annual Monterey capital training conference. Although not an attorney, Mr. Stetler has written extensively in training manuals for attorneys and has authored a number of law review articles on mitigation investigation. In his work at the California Appellate Project and the Federal Public Defender's office, he devotes much of his time to reviewing trial counsel files in capital cases to advise habeas counsel on potentially fruitful areas of investigation, particularly in determining what was and was not done by trial counsel in mitigation investigations. (ERT 1169, 1166-168, 1171-1173, 1177.)

The standard of care for counsel in a capital case penalty phase at the time petitioner's trial[11] required a thorough social history investigation of the client's background and social history. (ERT 1021, 1022, 1034, 1051.)

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[11] Unless otherwise indicted, where the standard of care is discussed, the standard of care referred to is the standard of care for counsel in a capital case at the time petitioner's trial.

Both the 1989 and 2003 American Bar Association Guidelines for capital counsel and United States Supreme Court case law required counsel to obtain all reasonably available mitigating evidence. (ERT 1248.)

Counsel cannot make a tactical choice not to conduct a mitigation investigation. (ERT 1058.)

The penalty phase investigation must begin immediately when the attorney first begins work on the case for the following reasons, among others:

The investigation may influence settlement negotiations; (ERT 1034-1035, 1038, 1040.)

It takes time to investigate the client's entire lifetime, and beginning early is the only way to ensure that all potential mitigation evidence is uncovered and developed; (ERT 1036-1038, 1040, 1124.)

So that counsel can develop an overall strategy for the capital trial as a whole; (ERT 1036-1038.)

Because it promotes understanding of who the client is and why he was involved in the crime; (ERT 1040, 1056.)

Because it assists in combating aggravating evidence, such as evidence of future dangerousness, and will humanize the client; (ERT 1040, 1056.)

It is "not conceivable" that a mitigation social history investigation could be conducted in a matter of a few weeks, particularly because evidence on matters such as abuse and other sensitive, emotionally charged information requires time to develop. (ERT 1124-1125.)

Lay witnesses who have known the client at various stages in his life have greater credibility with jurors than experts because they have not been retained solely to work on the case and they have also personally witnessed many of the incidents the significance of which the experts will explain, and thereby improve the credibility of the expert. (ERT 1122- 1123.)

There is a distinction between the standard of care (i.e., the duty to perform a thorough background investigation) and the standard of practice (i.e., the methods or techniques for putting the standard into practice). The standard of care in mitigation investigations was a national standard that had been in place before the death penalty was restored in California. The standard of practice was higher in California because funding provided via Penal Code section 987.9 permitted counsel access to investigators and experts which was often not provided in the southern states, and California counsel were thus better able to live up to the standard in ways southern counsel could not. (ERT 1028-1030, 1120.)

During the 1980s, attorneys learned the standards of care and practice in several ways including use of the primary training resource for

California capital trial attorneys -- the Death Penalty Defense Manual, published jointly by California Attorneys for Criminal Justice and the California Public Defenders Association. The Manuel was first published in 1980, periodically updated thereafter, and by the time of the crimes in this case in 1986 occupied two five-inch-thick three-ring binders. Other published resources included the monthly publication "Death Penalty Update"and "RECAP" which reported on case law developments. (EERT 1022-1024, 1156.)

At the time of petitioner's capital trial, seminars and other trainings were regularly presented by CACJ, CPDA, and the State Public Defender, including was the annual Monterey conference. (ERT 1023, 1031.)

In all of the training resources, a central emphasis is on mental health issues. (ERT 1185.)

The standard of care was also transmitted to capital trial counsel through guidelines and standards adopted by professional organizations including the American Bar Association standards applicable to the defense bar generally beginning in the early 1980s. Formal written guidelines were adopted by the National Legal Aid and Defenders Association in 1987, and the American Bar Association adopted substantially similar guidelines in 1989 and then revised and expanded upon them in 2003. In the context of penalty phase investigation, the United States Supreme Court has referred to the ABA Guidelines for capital counsel as "well-defined norms" by which the performance of capital counsel can be judged. The general standard of care applicable to California capital trial attorneys, however, predated the formal adoption of the guidelines and had been in place since the late 70s and early 80s. (ERT 1032-1033, 1120-1121 1174, 1181, 1244.)

The standard of care at the time of petitioner's trial required counsel to discover all reasonably available mitigation evidence. (ERT 1233.)

A reasonably competent attorney begins a capital trial investigation by assembling a team. The team approach was well established in the 1980s. Lead counsel should select a competent second counsel to assist, both to share the workload and to complement lead counsel's skills. After the attorneys, trial counsel typically selects at least one investigator, but commonly retains a guilt phase investigator and a penalty phase investigator. While these may be separate individuals, some investigators may be skilled in both forms of investigation; and at the time of trial it was not uncommon for competent counsel to use the same investigator for both purposes. (ERT 1042, 1128, 1185, 1192-1193, 1216.)

Whether counsel used one investigator or two, the standard of care required counsel to conduct an investigation designed to uncover all reasonably available mitigating evidence. (ERT 1216.)

A penalty phase investigator, often called a mitigation specialist, is trained in sociological and psychological issues and in techniques for obtaining social science information, such as information on child abuse or sexual abuse, or other matters that may be embarrassing or difficult to talk

about. The guidelines require that one member of the defense team must be qualified by training and experience to screen for mental disorders and impairments. Often counsel will also retain a separate social history expert, whose task it is to compile the records and information gathered by the mitigation specialist and review it for mental illness risk factors, abuse histories, and other social or mental health themes. Finally, counsel will require mental health experts to diagnose the client and to explain their diagnosis and the significance of the testimony of lay witnesses to the jury. (ERT 1045, 1051-1052, 1123, 1182-1183, 1185.)

Since at least 1980, competent penalty phase investigation required a two-track approach; first, the defense team must obtain social history documents; and second, the team must interview social history witnesses. While the two tracks overlap somewhat, record gathering is usually the first focus. During this phase, the investigation focuses on obtaining school records, birth records, hospital records, employment records, military records, probation reports, and similar historical documents. (ERT 1042-1043, 1150, 1179-1181, 1186-1188, 1190.)

Since the focus in this phase is on obtaining records, mitigation specialists or other penalty phase investigators will begin this process by obtaining the client's release, as well as those of other family members contacted later, and will attempt to develop a list of all addresses where the client lived previously, schools he attended, and similar information. Probation reports are essential because they will both provide information that may be relevant to combating aggravation and because they too will provide leads for witnesses to contact. From the record-gathering, the investigation is developing firm biographical dates and markers as well as a framework for understanding the client's history, and is also developing lists of potential interview subjects; for example, school records will provide leads for interviews with teachers and school principals. Social history documents are also important because they have inherent credibility because they were not created for the litigation and were created by neutral professionals. Such documents also tell important stories that interview subjects might have forgotten or might fail to provide. (ERT 1042-1043, 1150, 1179-1181, 1186-1188, 1190.)

In interviewing, the team ideally begins with the client, then moves out to siblings and other relatives to develop a history of the family. Initial client interviews focus not merely on obtaining information, but are also "observational." The mitigation specialist or other interviewer is also looking for clues to possible mental illness, such as pressured speech, fixed false delusions, hallucinations, or other symptoms. Mitigation specialists are also attempting during early interviews to form a relationship of trust with the client, and thus avoid confronting delusions directly and instead attempt to listen empathically to establish a relationship and obtain information. Competent counsel and mitigation specialists are aware that clients, often because of mental illnesses, are often "the worst reporters of events," and thus may rely more heavily on family members other than the client for accurate, reliable social history information. (ERT 1039, 1042-1043, 1187, 1195-1198.)

The investigation must include the immediate family and be multi-generational. One reason for this multi-generational focus is to examine potential mental illness histories, particularly where the illness involves a significant genetic component, such as schizophrenia or substance abuse. (ERT 1045-1046, 1151.)

A family tree and a social history chronology are usually employed in order to keep track of the client's family members and their relationships with one another, and to spot trends, such as a history of substance abuse, arrest histories, domestic violence, or mental health problems experienced by various family members. (ERT 1190-1191, 1240-1241.)

Having obtained the initial social history documents and done the initial social history interviews, the attorney will select one or more appropriate mental health experts. (ERT 1197-1199.)

It is of critical importance to establish a relationship of trust with the client. (ERT 1115, 1117.) [12]

In cases in which the client is mentally ill, reticent to provide information, or otherwise difficult to obtain information from, counsel is not excused from investigating but must instead work around the client. (ERT 1057-1058.)

At the time of petitioner's trial, capital case attorneys were required to have a general grasp of mental health issues. This included a working knowledge of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and general familiarity with conditions that had a genetic or generational component. Attorneys also needed an understanding that various factors, such as environmental pollutants, could have an impact on the client's mental health during the developmental period. (ERT 1047-1049.)

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"Before you can portray your client as a human being to the jury, you must first accept him as one. Take the time to explain your role and what the client can expect from you. Nothing will hurt you more than a client who does not understand what you want and expect from him. The actions of you and your associates toward and with the client in the courtroom can facilitate the humanizing process. By interacting with the client at counsel table, everyone can convey his or her feelings for the defendant to the jury. By involving the client in the proceedings, such as by having him or her take notes, ask voir dire questions, assist with jury selection decisions or make part of the closing argument, you take important steps to your ultimate goal of having the jurors view your client as a human being." (ERT 1116.)

At the time of petitioner's trial capital case attorneys were required to investigate serious child abuse. (ERT 1154.)

At the time of petitioner's trial capital case attorneys were aware of post-traumatic stress disorder, which diagnosis had entered the DSM in 1980. The condition was well understood in both capital and non-capital cases in several contexts, including defending Vietnam veterans, battered spouse cases, and child abuse cases. (ERT 1053-1055, 1152.)

In addition to social history investigation, capital trial counsel were also required to investigate each of the factors in aggravation noticed by the prosecution, regardless of the number of aggravators, and could not simply decline to investigate because there were too many factors in aggravation. (ERT 1059-1060, *see Rompilla v. Beard* (2005) 545 U.S. 374.)

Counsel were also required to understand the basic aggravating and mitigating factors set forth in Penal Code section 190.3 and in the Rules of Court applicable in non-capital sentencing. (ERT 1118-1119.)

Based upon his review of the discoverable portion of the trial counsel file, mitigation specialist Russell Stetler concluded that the file contained no mitigation materials other than probation reports and school records. (ERT 1203-1204.) Mr. Stetler's review of the trial file also disclosed the following:

> The probation records were obtained in discovery from the district attorney's office in connection with incidents offered in aggravation. (ERT 1206.)
>
> The file contains no interview reports with any social history or other mitigation witnesses done by trial counsel. (ERT 1204.)
>
> The only interview that even remotely resembled a mitigation interview was one interview with David Welch's father, and that was done by Harold Adams, the investigator for Mr. Broome, and was not connected to mitigation. (ERT 1204.)
>
> The files contained no interview reports with David Welch's parents or siblings, nor with teachers, other people in the neighborhood, uncles, aunts or grandparents, children, or other potential social history sources. (ERT 1206.)
>
> The trial file did not contain easily obtainable court records, such as the parents' divorce files, that were sitting in the Superior Court and would have told the investigators and jurors something about the condition of the parents' marriage. (ERT 1206.)
>
> The file also contained no social security detailed earnings reports to disclose what the family was living on, no birth records or medical records, not even the birth certificate for David Welch himself. (ERT 1207.)

There were no employment or disciplinary records from petitioner's father's service in the Merchant Marines in the trial file. (ERT 1207.)

The file contained no suggestion of any investigation into environmental records, building inspection records, or other investigation into the physical environment in which petitioner grew up. (ERT 1208.)

Trial counsel had 18 months in which to conduct their investigation, which is a sufficient time for investigation of most capital cases, and did essentially no social history investigation at all. (ERT 1209-1210.)

From an investigative standpoint post-conviction counsel are in a much worse position than trial counsel because records are less likely to have been destroyed, continuances are easier to obtain at trial, and often impossible in federal habeas, and individual witnesses are more difficult to find or may have died. (ERT 1209.)

Mr. Strellis and Mr. Selvin presented no social history witnesses at all. (ERT 1237.)

The only witnesses presented in the penalty phase at David Welch's trial were Dr. Benson and Dr. Pierce. (ERT 1237.)

Even if he had been assigned to or attempted to do so, Dr. Pierce could not have performed a social history investigation that typically requires a year in only the two weeks between the end of the guilt phase and the beginning of the penalty phase. (ERT 1239.)

As of the commencement of the evidentiary hearing in 2010, both Mr. Strellis and Mr. Selvin each had eight former trial clients on death row. (ERT 1220, Exhibit R.) No other lawyer in the state of California had more, and only one other attorney had as many. (ERT 1220; Exhibit R.)

b. Petitioner Takes Exception to Certain Credibility Findings Regarding Other Witnesses Primarily Relevant to Assessing the Adequacy of Trial Counsel's Investigation.

Overview. Petitioner was initially, and very briefly, represented by James Giller, an Oakland attorney who did not testify at the hearing. Mr. Giller was replaced by Thomas Broome and Robert Cross, who represented petitioner for over a year, through the conclusion of the preliminary examination and the early pre-trial motion period. Harold Adams was an investigator retained by Mr. Broome. Mr. Broome also retained the services of Dr. William Pierce, a psychologist. Mr. Broome and Mr. Cross

were replaced by Spencer Strellis and Alexander Selvin, who actually represented petitioner at trial. Dr. Pierce continued working with the defense after Mr. Strellis and Mr. Selvin took over the case. It was at his recommendation that Dr. Samuel Benson, a psychiatrist, was retained by Mr. Strellis and Mr. Selvin.

i. Thomas Broome, Robert Cross, and Harold Adams.

(a) The referee's findings.

The referee's findings with respect to the testimony of Thomas Broome occupy only one page of the findings and repeatedly emphasize petitioner's supposed refusal to cooperate with the defense. (Findings, at p. 17.) In petitioner's view, these findings do not accurately summarize Mr. Broome's actual testimony. To the contrary, these findings not only misinterpret but greatly distort the thrust of Mr. Broome's testimony.

For example, the referee states that "Mr. Broome also testified that petitioner thwarted the defense team by refusing to cooperate. Petitioner talked to Dr. Pierce, but would not let Dr. Pierce to take (sic) notes during the interview." (Findings at p. 17, citing ERT 222.) The referee makes a number of other comments during this one-page summary emphasizing petitioner's supposed uncooperative attitude. (*Ibid.*)

In fact, the thrust of Mr. Broome's testimony was not that petitioner intentionally "thwarted" the defense– a word never used by Mr. Broome at any point during his testimony– but rather that petitioner was paranoid and severely mentally ill. Mr. Broome also gave important testimony regarding the standard of care applicable to capital case attorneys at the time of petitioner's case, significant facts he discovered suggesting that petitioner had suffered serious child abuse and intended to investigate had he

remained on the case, and the cooperation he received from petitioner's mother– testimony which contradicted that later given by trial counsel Alexander Selvin. However, none of this important material was mentioned anywhere in the findings.

With respect to Robert Cross, the referee's summary consists of a single paragraph, which again emphasizes petitioner's lack of cooperation without any indication that the difficulties counsel had working with petitioner were due to his paranoia and mental illness.

The omission of any reference in the findings pertaining to these witnesses to the fact that petitioner was mentally ill creates a profoundly false impression that petitioner intentionally refused to cooperate through sheer obstinacy when he is in fact neurologically damaged as a result of severe child abuse and profoundly mentally ill. The findings also gloss over the highly significant fact that Mr. Broome learned from petitioner's mother that petitioner had suffered serious child abuse. The fact that prior counsel was so easily able to uncover this lead directly from petitioner's mother, whom he found extremely cooperative, is of enormous significance not only in assessing the adequacy of trial counsel's investigation into child abuse issues but also in assessing the credibility of trial counsel's claim that he could not obtain cooperation from "the family."

Accordingly, petitioner respectfully takes exception to the referee's findings regarding the testimony of Mr. Broome and Mr. Cross. To set the record straight, petitioner presents a more accurate and complete summary of the testimony of these two witnesses, followed by proposed findings petitioner sought as a result of their testimony.

(b) Testimony of Thomas Broome and Robert Cross.

The first attorney appointed to represent David Welch was James Giller. (ERT 168, 177.) Mr. Giller represented Petitioner for only a few months and was replaced in May, 1987, by Thomas Broome and Robert Cross. (ERT 168, 177, 243.) During the time Mr. Giller represented Petitioner, it was understood that this would be a capital case, but Petitioner had not been formally arraigned yet. (ERT 177.) This was not unusual in Alameda County because the district attorney wanted to have all the discovery prepared and ready to turn over in a single packet, and this took time to prepare. (ERT 177.)

Both Mr. Broome and Mr. Cross had been involved in the Alameda County criminal justice system for many years before they became attorneys. Mr. Broome had been a probation officer for twelve years, both in the juvenile and adult probation systems, and Mr. Cross had been a deputy sheriff, primarily serving as a courtroom bailiff, during that same period. (ERT 167, 169, 245-246.)

Although Mr. Broome had done previous capital cases, petitioner's case was the first capital case he handled that had not settled. (ERT 220-221.) Mr. Broome had attended the annual death penalty conference in Monterey for the preceding five years and had also attended other continuing education courses on capital cases. (ERT 221-222, 226.) At the Monterey conferences, Mr. Broome learned to recognize many of the symptoms of mental illness and received training in recognizing the symptoms of schizophrenia, brain damage, bipolar disorders, child abuse, and other mental disorders. (ERT 225-227.) Mr. Cross had worked as second-chair counsel on the Al Dyer capital case prior to this case and had

attended a seminar that covered penalty phase investigation at that time. (ERT 253.)

It was Mr. Broome's practice to begin the investigation for the penalty phase soon after being appointed. (ERT 173.) It was his understanding that an attorney in a capital case needed to obtain school records, psychiatric records, and family history material by contacting family members, other relatives, and other witnesses to obtain a complete history of the client before actually proceeding to trial. (ERT 222-223.) He understood the need to conduct a social history investigation in order to prepare for the penalty phase of the case, and to be particularly aware of the need to investigate serious child abuse if there appeared to be evidence of such abuse. (ERT 221-222, 227.) He also understood that to investigate issues relating to child abuse or sexual abuse, it is usually necessary to obtain the information from someone other than the client, because the client will commonly be hesitant to reveal such sensitive information, particularly when the abuser is a family member or caregiver. (ERT 229.)

Mr. Broome understood that even when the client himself is uncooperative, or even states unequivocally that he does not want any mitigation evidence presented, the attorney must still conduct a complete social history investigation, and that "the [ABA] guidelines are very clear that he must conduct that investigation regardless of what your client's opinion on it is. . . . it's ineffective assistance of counsel if you fail to conduct a complete social background and put on a penalty phase case." (ERT 223.) Accordingly, Mr. Broome retained an investigator, Harold Adams, to begin doing a mental health background investigation. (ERT

173.) He also retained a mental health expert, Dr. William Pierce, with whom Mr. Cross had worked on the Dyer case. (ERT 173, 259.)

In reviewing the police reports and other discovery in the case, Mr. Broome noticed several facts which led him to believe that Petitioner might have been abused as a child. Petitioner believed– incorrectly– that he had fathered a baby born to Dellane Mabrey, one of the victims in the case. (ERT 171, 201.) For this reason, Petitioner attempted to care for the child by buying milk, clothing, and other items for the baby, including a bed. (ERT 171.) One day, Petitioner went to the Mabrey residence and found Ms. Mabrey's brother having sex with another man in the bed Petitioner had bought for the baby. (ERT 171.) This homosexual conduct so upset Petitioner that he took Ms. Mabrey and the baby out of the house at gunpoint and put them in a motel near the Oakland Coliseum, where he kept them for several days, in order to get the baby away from homosexuals.[13]

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[13]/ At one point in respondent's cross-examination of Mr. Broome, respondent inquired about an incident in which Petitioner chased Leslie Morgan, one of the shooting victims and the actual father of Dellane Mabrey's baby, out of the Mabrey house at gunpoint, causing Mr. Morgan to flee in his underwear. (ERT 201-203.) Respondent stated that police reports showed that Petitioner took Dellane Mabrey and her baby out of the house after Petitioner chased Mr. Morgan out of her bed at gunpoint. (ERT 203, lns. 8-10.) Respondent implied that jealousy of Mr. Morgan was the actual reason Petitioner had removed Ms. Mabrey and her baby from the house and placed them in a motel, and that Mr. Broome was incorrect in recalling that Petitioner's real reason for removing Ms. Mabrey and her baby out of the house was that he had discovered Sean Mabrey having sex with another male. (ERT 201-202.)

In fact, Mr. Broome's recollection was correct, and respondent's recollection was incorrect. Respondent appears to have conflated two different incidents. Petitioner took Ms. Mabrey and her baby to the motel on October 9, 1986. (TRT 4200-4201.) The incident involving Mr. Morgan did not occur under October 29, 1986, more than two weeks after Ms. Mabrey had returned from the motel to the Mabrey crack-house. (TRT 4111-4112, 4116, 4214-4218, 4441, 4443-4445.)

(ERT 172, 201-202.) Mr. Broome's training and reading had suggested to him that feelings of extreme homophobia among young men often indicated that they had been sexually abused as a child. (173-175.) Mr. Broome felt that Petitioner's homophobia was so severe, even when compared to prevailing attitudes in a community that viewed homosexuality very negatively, that he suspected Petitioner had been sexually abused. (ERT 173-175.)

Mr. Broome therefore spoke to Mrs. Minnie Welch, Petitioner's mother, "about the family background and what had occurred, basically, with she and David and the father." (ERT 174.) Mrs. Welch told Mr. Broome that Petitioner's father, David Welch Jr., had been "very abusive" toward her and Petitioner . (ERT 174.) Mr. Broome found that Mrs. Welch was "very cooperative" and was sure she would have been available for additional interviews if he had wanted to have them done. (ERT 224.) Mr. Broome also found from speaking to Petitioner himself that Petitioner was very resentful about his father's abuse of his mother. (ERT 175.)

Petitioner also had a reputation within his community for being "crazy" or mentally ill. (ERT 170, 200-201, 254.) During the time Mr. Broome had served as a senior deputy probation officer, Petitioner had been one of the juveniles in his caseload, and Mr. Broome had noted indications of Petitioner's erratic behavior even then. (ERT 168, 170.) Mr. Broome believed that law enforcement officers and others in the Alameda County criminal justice system were also aware of Petitioner's reputation for mental illness. (ERT 170.) Petitioner also had a history as a juvenile of taunting police to induce them to chase him on his motorbike, even though the Sobrante Park neighborhood in which he lived was a cul-de-sac with only

one entrance and exit available to vehicles. He did not seem to understand that this exit could be easily blocked and he would inevitably be apprehended. (ERT 197, 203.)

In addition, the facts of the case and their own contacts with him persuaded Mr. Broome and Mr. Cross that Petitioner was mentally ill. (ERT 170, 255.) For example, witnesses had reported in their statements to police that they thought Petitioner was mentally ill, and people in the Sobrante Park neighborhood to whom Mr. Cross had spoken told him they thought Petitioner was "crazy," had a legitimate mental problem, and was "not mentally stable." (ERT 171, 254, 262.) In addition, Petitioner acted out impulsively in a number of instances during the time Mr. Broome and Mr. Cross represented him. (ERT 174, 186.) He often spoke out in court, sometimes interposing his own objections. (ERT 177.) Petitioner also could not "stay on target" in discussing the case with Mr. Broome and Mr. Cross, and instead tended to focus on minor, unimportant issues. (ERT 176.) Petitioner could not seem to grasp the "big picture" of the case. (ERT 218, 231.) Mr. Cross recalled that, "[b]asically, David Welch wasn't there. I mean, in street vernacular, he was dingy.[14] He was all over the place when we talked to him." (ERT 258-259.) Mr. Cross also recalled that Petitioner had no insight into the fact that he was mentally ill. "He didn't want to be crazy. He didn't want to have anything to do with the fact he was not sane or anything like that." (ERT 259.)

Although advised that his counsel needed time to prepare for such a complex, high- stakes case, and that they could not possibly be prepared to

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[14]/ Mr. Broome pronounced this word to rhyme with "dinghy."

do a competent job in 60 days, Petitioner did not want to waive time. (ERT 219.) In fact, Mr. Broome found that it was not merely difficult but "impossible" to persuade Petitioner to waive any right. (ERT 231.) Mr. Broome also concluded that although Petitioner was capable of copying motions out of form books he found in the jail library, he did not have "the slightest understanding of the law." (ERT 237.)

One particular incident that struck Mr. Broome as strongly indicating mental illness occurred soon after he was appointed when he went with Petitioner to be arraigned. (ERT 177.) During the proceedings, Petitioner got into an argument and made challenging statements to the bailiff, and after being removed from the court was beaten severely for attempting to butt the bailiff with his head, even though he was chained and shackled at the time. (ERT 179.) Petitioner was "beaten up" and "bloody" when he returned to the courtroom. (ERT 185.)

Ultimately, Mr. Broome concluded that Petitioner was incompetent to stand trial and, on November 2, 1987, moved for competency proceedings pursuant to Penal Code section 1368. (ERT 180, 182-183.) That Petitioner's mental illness was particularly severe is indicated by the fact that, in a 36-year career that has spanned more than two thousand cases, Mr. Broome has filed only two or three competence motions. (ERT 225.) In this case he reported to the court that Petitioner could not concentrate on a single subject and was "very inept" in trying to understand or assist in his defense. (ERT 183.) He concluded that Petitioner was mentally "deteriorating." (ERT 184.) Mr. Broome also felt that the beating he had received after his arraignment had negatively impacted Petitioner's mental functioning, and recalled that Petitioner complained of headaches "all the

time" after that incident. (ERT 184-185.) Petitioner also had persistent problems with the sheriff's deputies that resulted in his being "roughed up" and for a time placed on a disciplinary diet. (ERT 186-187.) The competency motion was ultimately denied. (TCT 778-783, 2117, 2120-2123, 2144.)

In addition to Petitioner's impulsivity and inability to focus on a single subject for more than a brief period, Mr. Broome believed Petitioner had memory problems and was "extremely paranoid." (ERT 180, 195-196, 235.) He recalled that when he showed Petitioner a ballistics report he had received in discovery and then mentioned it again at a later date, Petitioner denied ever having seen the report. (ERT 181, 194, 210.) When he was then shown the report again, he claimed Mr. Broome and Mr. Cross had doctored the report and were part of a conspiracy against him. (ERT 181, 194.) Petitioner also saw Mr. Broome speaking with the district attorney and concluded that Mr. Broome was in collusion with the prosecution. (ERT 181.)

Partly because of his belief that his own attorneys were part of a conspiracy against him, Petitioner did not want Dr. Pierce to make any notes or write down anything Petitioner said to him because he believed it would be turned over to the prosecution. (ERT 192-193, 204.) Petitioner was also convinced, in spite of assurances to the contrary from Mr. Broome, that his conversations with his own attorneys would be electronically recorded. (ERT 193, 212.) Mr. Broome found it difficult even to communicate with Petitioner. (ERT 194.) In other cases in which defendants had been overly concerned about electronic monitoring of their conversations with counsel, Mr. Broome had asked them to write down

what they wanted to say to avoid being overheard. However, Petitioner could not physically do this because the guards at the jail insisted on keeping him shackled even when he was speaking with his lawyers. (ERT 193-194.) Petitioner also performed a number of actions that were detrimental to his own case, once filing a Code of Civil Procedure section 170.1 challenge to a judge who had merely heard preliminary matters in the case, and initially refusing to cooperate with counsel or Dr. Pierce in preparing for the penalty phase. (ERT 217-218.)

One of the most obvious indications of Petitioner's mental illness occurred during proceedings on a motion in Judge Richard A. Haugner's court. (ERT 187-188.) Judge Haugner had initially been assigned to the case when it reached Superior Court, but due to an incident in a prior case, Petitioner did not want to appear before Judge Haugner. (ERT 189.) Accordingly, Mr. Broome moved to have Judge Haugner recuse himself from the case, and Judge Haugner had agreed to do so. (ERT 189.) However, as the proceedings were concluding, Petitioner became fixated on a small comic doll which sat on the clerk's desk and which held a sign stating "You're in contempt of clerk!" (ERT 189.) Petitioner concluded that the doll had been placed there to send an intimidating message to him and insisted that Mr. Broome make a motion objecting to the doll. (ERT 189-190.) Mr. Broome knew the doll had been there for a long time and that there was no factual basis to Petitioner's belief, but when he was unable to mollify him, Petitioner filed a *Marsden* motion to have Mr. Broome removed from the case. (ERT 190.)

The matter was referred to Judge Larry Goodman, who granted the motion on January 20, 1987, and Mr. Broome and Mr. Cross were removed

from the case. (ERT 190, 192, 218.) At that point Mr. Broome and his team had been unable to do any substantial penalty phase preparation apart from conversations between Mr. Broome and petitioner's mother. (ERT 220, 260.)

Harold Adams was an investigator who worked on the case very briefly for Mr. Broome. Mr. Adams interviewed Petitioner's father, but Mr. Broome recalled that the interview focused primarily on guilt phase issues, not penalty phase matters. (ERT 220, 680.) Mr. Adams also took photographs of petitioner to memorialize injuries he had received in a beating by sheriff's deputies prior to trial. (ERT 680-681.) Petitioner gave Mr. Adams the names of at least two relatives to contact and perhaps as many as four people who were involved in a pending assault case. (ERT 681-682.) Asked if petitioner had been cooperative, Mr. Adams replied that he "had no particular problems with him." (ERT 681.) Apart from the work described above, Mr. Adams did no other work on the case. (ERT 682.) Mr. Adams had conducted no penalty phase or social history interviews or did any other work on the penalty phase. (ERT 220, 235.)

After Mr. Broome handed the case over to Petitioner's successor counsel, Spencer Strellis, neither Mr. Strellis nor Mr. Selvin ever contacted him to discuss the case. (ERT 236.) At some point after Mr. Broome's removal from the case, Petitioner encountered Mr. Broome in court and asked him if he would come back into the case. (ERT 234.)

(c) Proposed Findings Derived from Testimony of Thomas Broome, Robert Cross, and Harold Adams.

The first attorney appointed to represent petitioner was James Giller. Mr. Giller represented petitioner for only a few months and was replaced in May, 1987, by Thomas Broome and Robert Cross. During the time Mr. Giller represented petitioner, it was understood that this would be a capital case. (ERT 168, 177, 243.)

Both Mr. Broome and Mr. Cross had been involved in the Alameda County criminal justice system for many years before they became attorneys. Mr. Broome had been a probation officer for twelve years, both in the juvenile and adult probation systems, and Mr. Cross had been a deputy sheriff, primarily serving as a courtroom bailiff, during that same period. (ERT 167, 169, 245-246.)

Thomas Broome, attended the annual death penalty conference in Monterey for five years before he began working on petitioner's case. At the Monterey conferences, Mr. Broome learned to recognize many of the symptoms of mental illnesses including schizophrenia, brain damage, bipolar disorders, child abuse, and other mental disorders. (ERT 221-222, 225-227.)

Mr. Cross had worked as second-chair counsel on the Al Dyer capital case prior to this case and had attended a seminar that covered penalty phase investigation at that time. (ERT 253.)

It was Mr. Broome's practice to begin the investigation for the penalty phase soon after being appointed. (ERT 173.) Mr. Broome's understanding of the obligations of an attorney in a capital case to conduct a mitigation investigation included all of the following:

> He understood that an attorney in a capital case needed to obtain school records, psychiatric records, and family history material by contacting family members, other relatives, and other witnesses to obtain a complete history of the client before actually proceeding to trial. (ERT 222-223.)
>
> He understood the need to conduct a social history investigation in order to prepare for the penalty phase of the case, and to be particularly aware of the need to investigate serious child abuse if there appeared to be evidence of such abuse. (ERT 221-222, 227.)
>
> He understood that to investigate issues relating to child abuse or sexual abuse, it is usually necessary to obtain the information from someone other than the client, because the client will commonly be hesitant to reveal such sensitive information, particularly when the abuser is a family member or caregiver. (ERT 173, 221-223, 227, 229.)
>
> Mr. Broome understood that even when the client himself is uncooperative, or even states unequivocally that he does not want any mitigation evidence presented, the attorney must still conduct a complete social history investigation. (ERT 223.)

Mr. Broome retained investigator, Harold Adams, to begin doing a mental health background investigation and mental health expert, Dr. William Pierce, with whom Mr. Cross had worked on the Dyer case. (ERT 173, 259.)

In reviewing the police reports and other discovery in the case, Mr. Broome noticed several facts which led him to believe that petitioner might have been abused as a child, including when he took Dellane Mabrey and her baby out of her house at gunpoint and put them in a motel near the Oakland Coliseum, where he kept them for several days, in order to get the baby away from homosexuals. Mr. Broome's training and reading had suggested to him that feelings of extreme homophobia among young men often indicated that they had been sexually abused as a child. Mr. Broome felt that petitioner's homophobia was so severe, even when compared to prevailing attitudes in a community that viewed homosexuality very negatively, that he suspected petitioner had been sexually abused. (RT 173-175.)

Petitioner's mother, Minnie Welch told Mr. Broome that petitioner's father, David Welch Jr., had been "very abusive" toward her and petitioner. Mr. Broome found that Mrs. Welch was "very cooperative" and was sure she would have been available for additional interviews if he had wanted to have them done. Mr. Broome also found from speaking to petitioner that he was very resentful about his father's abuse of his mother. (ERT 174-175, 224.)

During his brief involvement with the case, Harold Adams found petitioner to be cooperative. Petitioner provided Mr. Adams with the names of two family members and several other people, perhaps as many as four, who were potential witnesses in connection with an assault case petitioner had pending. (ERT 681-682.)

Petitioner had a reputation within his community for being "crazy" or mentally ill. During the time Mr. Broome had served as a senior deputy probation officer, petitioner had been one of the juveniles in his caseload, and Mr. Broome had noted indications of petitioner's erratic behavior even then. Mr. Broome believed that law enforcement officers and others in the Alameda County criminal justice system were also aware of petitioner's reputation for mental illness. (ERT 168, 170, 200-201.)

The facts of the case and their own contacts with him persuaded Mr. Broome and Mr. Cross that petitioner was mentally ill. (ERT 170, 255.) In particular, the following facts suggested to these attorneys that petitioner was mentally ill.

> Witnesses reported in their statements to police that they thought petitioner was mentally ill, and people in the Sobrante Park neighborhood to whom Mr. Cross had spoken told him they thought petitioner was "crazy," had a legitimate mental problem, and was "not mentally stable." (ERT 171, 254, 262.)
>
> Petitioner acted out impulsively in a number of instances during the time Mr. Broome and Mr. Cross represented him. (ERT 174, 176, 177, 186, 218, 231.)
>
> Petitioner often spoke out in court, sometimes interposing his own objections. Petitioner also could not "stay on target" in discussing

the case with Mr. Broome and Mr. Cross, and instead tended to focus on minor, unimportant issues. Petitioner could not seem to grasp the "big picture" of the case. (ERT 174, 176, 177, 186, 218, 231.)

Mr. Cross recalled that petitioner had no insight into the fact that he was mentally ill. (ERT 259.) [15]

Mr. Broome found that it was not merely difficult but "impossible" to persuade petitioner to waive any right. Mr. Broome also concluded that although petitioner was capable of copying motions out of form books he found in the jail library, he did not have "the slightest understanding of the law." (ERT 219, 231, 237.)

Mr. Broome concluded that petitioner was incompetent to stand trial and moved for competency proceedings pursuant to Penal Code section 1368. He reported to the court that petitioner could not concentrate on a single subject and was "very inept" in trying to understand or assist in his defense. He concluded that petitioner was mentally "deteriorating. Mr. Broome also felt that the beating he had received after his arraignment had negatively impacted petitioner's mental functioning, and recalled that petitioner complained of headaches "all the time after that incident. (ERT 180, 182-185.)

Mr. Broome believed petitioner had memory problems and was "extremely paranoid." (ERT 180, 195-196, 235.)

Given petitioner's extreme paranoia and distrust, Mr. Broome found it difficult to communicate with petitioner. Partly because of his belief that his own attorneys were part of a conspiracy against him, petitioner did not want Dr. Pierce to make any notes or write down anything petitioner said to him. Petitioner was also convinced, in spite of assurances to the contrary from Mr. Broome, that his conversations with his own attorneys would be electronically recorded. (ERT 192-194, 204, 212.)

Petitioner acted in a manner detrimental to his own case.

Partly because of his belief that his own attorneys were part of a conspiracy against him, petitioner did not want Dr. Pierce to make any notes or write down anything petitioner said to him. Petitioner was also convinced, in spite of assurances to the contrary from Mr. Broome, that his conversations with his own attorneys would be electronically recorded. (ERT 192-194, 204, 212.)

Petitioner filed a Code of Civil Procedure challenge to a judge who had merely heard preliminary matters in the case, and ultimately

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[15] "He didn't want to be crazy. He didn't want to have anything to do with the fact he was not sane or anything like that." (ERT 259.)

refused to cooperate with counsel or Dr. Pierce in preparing for the penalty phase. (ERT 217-218.)

During one hearing petitioner became fixated on a small comic troll doll which sat on the clerk's desk and which held a sign stating "You're in contempt of clerk!" Petitioner concluded that the doll had been placed there to send a message to him or to intimidate him and insisted that Mr. Broome make a motion objecting to the doll.[16] Mr. Broome knew the doll had been there for a long time and that there was no factual basis to Petitioner's belief, but when he was unable to mollify him, petitioner filed a *Marsden* motion to have Mr. Broome removed from the case. (ERT 189-190.)

Petitioner's *Marsden* motion was granted and Mr. Broome and Mr. Cross were removed from the case. At that point Mr. Broome and his team had been unable to do any substantial penalty phase preparation. (ERT 190, 192, 218, 220, 235, 260.)[17]

Neither Mr. Strellis nor Mr. Selvin ever contacted Mr. Broome to discuss the case. (ERT 236.)

ii. Spencer Strellis and Alexander Selvin.

(a) The referee's findings.

As noted previously, petitioner was represented at trial, and for approximately 18 months prior to trial, by Spencer Strellis, who served as lead counsel, and Alexander Selvin, a former district attorney who had only recently begun to work as a defense attorney at the time he represented petitioner as second-chair. Both attorneys testified at the hearing, though Mr. Strellis had no independent recollection of the case and his testimony

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[16]/ As noted in the testimony of several mental health experts discussed *infra*, in psychiatry a fixed, false belief that an ordinary or innocuous item is specifically intended to convey a message to the person perceiving it is termed a *delusion of reference*. Such delusions, which may focus on written material, television programs, song lyrics, or in this case a sign held by a comic troll doll, are common indicators of psychosis.

[17]Apart from an interview with petitioner's father, Mr. Adams had conducted no penalty phase or social history interviews or did any other work on the penalty phase. (ERT 220, 235.)

was quite brief. Petitioner has no particular objection to the referee's summary of Mr. Strellis's testimony, apart from the fact that the summary is overly brief.

With regard to Mr. Selvin, the referee found him to be a "very credible witness." (Findings, at p. 16.) Petitioner does not dispute most of Mr. Selvin's testimony with respect to historical facts. Petitioner generally agrees with the referee's conclusions that Mr. Selvin "readily acknowledged counsel's duty to obtain background material even with an uncooperative client," that his testimony was "neither coached nor defensive," and that he "testified as best as he could remember and admitted when he could not." (Findings at p. 16.)

However, petitioner respectfully disagrees with the referee's findings endorsing Mr. Selvin's testimony regarding the supposed lack of cooperation the defense attorneys received from petitioner's mother and "family." That testimony was contradicted not only by the testimony of petitioner's mother and sister, but also by the testimony and experience of petitioner's counsel both prior to and after the period during which Mr. Strellis and Mr. Selvin represented petitioner. Apart from the fact that petitioner's mother and sister both testified they would have cooperated but were never asked to do so, and apart from the fact that everyone acknowledges that petitioner's mother attended most of the trial, petitioner's mother clearly cooperated and was forthcoming with Mr. Broome. Indeed, she freely told Mr. Broome that petitioner's father had been physically abusive toward her and toward petitioner. Furthermore, both petitioner's mother and sister have been cooperative and forthcoming with postconviction counsel. It simply makes no sense that petitioner's

mother would fully cooperate with counsel who represented petitioner both before and after Mr. Selvin, even with regard to issues pertaining to serious child abuse, but not with Mr. Selvin.

Petitioner does not mean to suggest that Mr. Selvin was intentionally lying or dissembling on this point. To the contrary, his recollection of a lack of cooperation from petitioner's family is likely a result of Mr. Selvin incorrectly attributing Mrs. Welch's failure to attend at least one meeting at his office as intentional non-cooperation.

As is the case with the referee's findings pertaining to most of the witnesses who testified with regard to questions 2 and 3, petitioner also believes the findings omit material that is of significance. In particular, while Mr. Selvin appeared to have at least a general grasp of the obligations of counsel to conduct a mitigation investigation, the findings fail to reflect the inadequacy of counsels' social history and mitigation investigation. These attorneys failed to obtain any social history documents other than school records, which they appear to have obtained only on the eve of the penalty phase when their mental health experts requested them after the guilt phase was over, and failed to conduct any social history interviews even when names of potential social history witnesses were staring them in the face. For example, the findings indicate that Mr. Selvin testified he would not have pursued further investigation of Glenn Riley, one of petitioner's childhood friends whose name was included in one of the probation reports the prosecution provided to defense counsel, but fail to reflect that any competent attorney would have at least sent an investigator

to speak to petitioner's childhood friends.[18] Moreover, the findings do not reflect the fact that the report in question concerned an incident the prosecution had announced its intent to use, and did in fact use, in aggravation, yet Mr. Selvin indicated he would not have investigated the incident any further.

Accordingly, petitioner respectfully submits the following more complete summary of the testimony of Mr. Strellis and Mr. Selvin, followed by proposed findings derived from the testimony of these two witnesses.

(b) Testimony of Spencer Strellis and Alexander Selvin.

From late January, 1988, throughout his trial in June and July, 1989, and during post-conviction proceedings in the trial court, petitioner was represented by Spencer Strellis, who served as lead counsel. In approximately mid-1988, Alexander Selvin came into the case as second counsel. (ERT 457.)

Mr. Strellis had been the law partner of Judge Stanley Golde, who presided over the trial in this case, and they remained close friends until Judge Golde's death. (ERT 536.) Mr. Strellis recalled that at the time of trial, he believed that David Welch was mentally ill. (ERT 536.) He said that he wanted to enter a plea of not guilty by reason of insanity, but that David Welch would not agree to do so. (ERT 536.) He said his understanding of the law was that the defendant had to agree to a plea of not guilty by reason of insanity (hereinafter, "NGI") and thought this was unreasonable.

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[18]/ Mr. Riley testified at the hearing regarding, among other matters, physical abuse petitioner had received from his father, the loop marks on petitioner's back received as a result of whipping with an extension cord, and petitioner's neurological damage. His testimony is summarized *infra*.

> I'm troubled by the logic of saying someone who we're arguing is mentally ill and not even responsible for a crime is the one who can decide whether he's mentally ill or not, which flies in the teeth of my understanding of the real world.

(ERT 537.)

However, Mr. Strellis did not appear to believe petitioner was actually insane within the M'Naghten[19] standard. He thought that a plea of NGI "would have failed, but it might have gotten us information and a whole series of things that might have been helpful to us, . . ." (ERT 537.) Nevertheless, Mr. Strellis "at all times thought he was mentally ill." (ERT 537.) He said he did not believe petitioner was capable of assisting counsel rationally in his own defense because of his mental illness, but could not recall making a competence motion. (ERT 538.) He said that he recalled there had been a *Faretta* motion and that "at that time theoretically the test is the same." (ERT 538.)

Apart from this, Mr. Strellis said he had no independent recollection of the case. (ERT 538.) He said he could not recall what preparations had been made for the penalty phase of the case, and could not recall the number of victims. (ERT 539.) He recalled having tried the case and

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[19]/ As this court knows, the reference is to the seminal British common-law case of Daniel M'Naghten, reported as *M'Naghten's Case* (1843) 10 Cl. & Fin. 200, 8 Eng. Rep. 718. As stated in the English Reports, the test for insanity is as follows:

> the jurors ought to be told . . . that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

(*Id.*, at 210, 8 Eng. Rep., at 722.)

losing. (ERT 540.) He never looked at the transcript or any of the pleadings. (ERT 540-541.) He did not recall the mental health defense being an important defense in this case but agreed that he did not see another viable defense. (ERT 540.)

Alexander Selvin testified that he had passed the bar in 1968 or 1969 and then went to work in the Alameda County District Attorney's office, where he remained for 16 years, until 1985 or 1986. (ERT 454.) While at the district attorney's office, Mr. Selvin prosecuted one or two death penalty cases, and for about four years, from 1981 to 1985, had served on the committee within the office that determined whether to charge a defendant with special circumstances. (ERT 455, 494-496.) After leaving the district attorney's office, Mr. Selvin went into private practice and began doing criminal defense work exclusively. (ERT 454.) He had never done criminal defense work prior to working at the district attorney's office, and thus became a defense lawyer for the first time in 1986. (ERT 494.) He recalled having done 16 capital cases in his career that actually went to trial, and had a number of other cases that settled before trial. (ERT 455.) About half of those 16 clients had received the death penalty. (ERT 485.) He believed he had done two or three capital cases prior to representing David Welch in 1988 and 1989. (ERT 455.) He could not recall whether he had done any specialized training or continuing education in capital defense work prior to representing David Welch. (ERT 455.)

Mr. Selvin testified that he had reviewed the trial file at his home in New Mexico a few months prior to his appearance at the hearing in September, 2010, and had asked to have a number of documents added to the portion of the trial file that would be included in the discoverable

portion of the trial file for the evidentiary hearing. (ERT 459, 473.) However, Mr. Selvin testified that he did not recall the case well, could not recall the number or names of victims in the case, did not remember where petitioner was born, and did not recognize petitioner when he saw him in the courtroom. (ERT 455, 460, 498, 515, 519.) He said his principal memory of the case was "the problem we had dealing with David Welch." (ERT 498-499.)

He did not initially recall having an investigator on the case, but agreed that the name Brian Olivier sounded familiar. (ERT 460.) He recalled that Mr. Strellis had employed a retired probation officer named Jackie Lesmeister to be a penalty phase investigator and thought she had reviewed the probation reports "and tried to make whatever contacts she made." (ERT 460.) He said he was not aware of Ms. Lesmeister leaving behind any work product, did not see any when he reviewed the files, and did not ever see a bill from her. (ERT 461.) He did not recall what work she had specifically done or whether she had ever met with David Welch or his family members.[20] (ERT 461.) He said there was no social historian on this case, though he has used them in subsequent cases. (ERT 462.) Mr. Selvin recalled presenting Dr. Benson and Dr. Pierce as defense witnesses at the trial, but incorrectly thought the defense had presented them as witnesses in the guilt phase of the trial, or even in both phases of the trial. (ERT 464, 475.)

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[20]/ Ms. Lesmeister is now deceased. (Exh. EE, Death Certificate of Jackie Lesmeister.) Mr. Olivier was seriously ill and unable to testify at the hearing. (ERT 186.)

Mr. Selvin testified that he did not recall whether he reviewed files that had been prepared by Mr. Broome or Mr. Cross when they were on the case. (ERT 462.) He did not recall whether he ever contacted Mr. Broome after taking over the case, though he thought he might have.[21] (ERT 462.)

Mr. Selvin said that Petitioner was "impossible" to work with because "he was mentally ill." (ERT 463.) He noted that Petitioner's nickname on the street was "Crazy Moochie." (ERT 469.) He did not recall whether he or Mr. Strellis took steps to have Petitioner plead not guilty be reason of insanity in the guilt phase or take other steps with respect to Petitioner's mental illness, but he thought Mr. Strellis "probably knows as much about mental health" of all the lawyers he knew. (ERT 463, 478.) He also did not think they had taken steps to have Petitioner declared incompetent to stand trial, but recalled that in response to a *Faretta* motion by Petitioner, Judge Golde had declared him competent to stand trial but not competent to represent himself. (ERT 479.) However, he said that while Petitioner at some level "sort of knows what he's doing," he was also "mentally ill and doesn't really know what he's doing." (ERT 490.) At several points during his testimony, Mr. Selvin emphasized that the defense strategy in both the guilt and penalty phase was to show that Petitioner was mentally ill and should not be executed for that reason. (ERT 463-464, 476-478, 481, 521.)

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[21]/ As noted previously, Mr. Broome testified that he had not been contacted by either Mr. Strellis or Mr. Selvin about the case after passing on the case file to them. (ERT 236.)

Mr. Selvin was asked what his understanding was with regard to trial counsel's duty to perform a penalty phase investigation at the time of trial. (ERT 476.) He said that counsel's task was to obtain

> all the background information that you can get at the time and try to develop . . . material to show mitigation. Why the jury should not impose the death penalty. What you want to do is show this is a human being, and it's a human being who– these are the things that have happened in his life that should not necessarily, you know, excuse what he did but provide an understanding why he did what he did.

(ERT 476.)

He said preparation for the penalty phase should begin early in the case and that "obviously you shouldn't have wait [sic] after the guilt phase." (ERT 527.) He noted that in Alameda County it is sometimes not known for some time whether the case will be filed as a capital case, but agreed that an attorney should know what penalty phase he planned to present prior to jury voir dire. (ERT 528.)

He said that the duty to conduct a mitigation investigation was not excused if the client was difficult to work with. (ERT 480.) In this particular case, he reiterated, the defense strategy was to show that Petitioner was mentally ill, and they sought to prove mental illness through the use of a psychologist or psychiatrist. (ERT 476-478, 481, 521.) Because they were not getting cooperation, they decided to "go with what we have which is, essentially, the records, . . ." (ERT 480.) He said he understood that it was the attorney's duty at the time of trial to provide the mental health expert with raw materials to permit them to do their job, not the mental health expert's job to develop mitigation material. (ERT 481-482.) However, he indicated that "one can look at a psychologist like Dr.

Pierce in the same role as you call a social historian because he's supposed to take a social history, he's supposed to develop that. (ERT 482.)

Mr. Selvin recognized that jurors often view defense mental health experts with a jaundiced eye. "The jury comes in, in general, believing that these are, quote, "defense-paid people," you know, and you're fighting that, you're fighting that to begin with." (ERT 505-506.) He noted that in his most recent death penalty case he had the best mental health experts he could find, but that the jury disregarded their testimony when they heard the rates charged by the experts. (ERT 531.) He recalled another case from the time when he was a prosecutor in which the defendant had been clearly mentally ill, the defense presented nine mental health experts, and the jury disregarded all of them. (ERT 531.) Accordingly, he said, "there's always a risk" the jurors will disregard mental health experts. (ERT 532.)

Mr. Selvin agreed that reviewing the client's life history records could reveal the names of potential social history witnesses. (ERT 483.) He said that he had gone through each probation report and thought Mr. Strellis had too, but could not recall the names of any individuals who were contacted as a result of this review, or actually sending any investigator out to contact the witnesses. (ERT 484.) He said "the names were there and Dr. Pierce was satisfied or we were satisfied . . . we had enough to accomplish what we were trying to accomplish. (ERT 484-485.)

Mr. Selvin was directed by respondent to read two paragraphs from a mental evaluation in a juvenile probation report concerning the MacPherson incident, an incident in which Petitioner, at the age of 17, allegedly fired a shotgun at the MacPherson home a few doors down the street from his home. (ERT 503.) Mr. Selvin did not recall that the incident was used in

aggravation at trial. (ERT 520.) However, he stated that he would not rush out to interview the probation officer who had written the report. (ERT 503.) Mr. Selvin knew that probation reports are often inaccurate and thought there had never been a case in which he had not found some kind of error in a probation report. (ERT 517-518.) However, Mr. Selvin said he probably would not have investigated each report. (ERT 518.) With respect to the MacPherson incident report, he said he probably would not have put the name of Glenn Riley, a person mentioned as a witness to the incident, on a list of someone to contact for more information about Petitioner. (ERT 519-520.) He said that even if he had known the incident was going to be used in aggravation at trial, he would not necessarily have investigated the incident in this case because there were so many other aggravating factors involving violence that "showing that one of them is not completely correct doesn't change anything."[22] (ERT 521.)

Asked how he would investigate abuse, he said he would begin by talking to the parents and perhaps other family members. (ERT 477-478.) He also said he would look at probation reports. (ERT 478.) He did not recall uncovering any evidence of serious child abuse or sexual abuse in this case. (ERT 491.)

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[22]/ As discussed in greater detail in connection with petitioner's exceptions to the referee's findings regarding social history witness Glenn Riley, Mr. Selvin's testimony on this point constituted a patent admission of incompetence, a fact that the referee failed to grasp. Capital counsel *must* investigate each incident in aggravation the prosecution intends to use in the penalty phase. (See, ABA Guideline 10.7, "Investigation," and Commentary.) Invalid prior convictions cannot be used as aggravating evidence in a penalty phase. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 586.) In addition, even if the aggravating prior conviction or violent incident is valid, investigation may disclose mitigating information. Finally, probation and similar reports may disclose the names of potential social history witnesses, just as this one did.

When asked whether they had gathered social history documents, Mr. Selvin testified that he and Mr. Strellis had to work from records because Petitioner's "family" was "totally uncooperative." (ERT 464-465.) He said that he and Mr. Strellis had set up "at least four or five appointments for the family to come in." (ERT 464.) He said "we had . . . explained to them that we needed a social history from them, background." (ERT 465.) However, "it became obvious to us after the first two of three times that they were not cooperating. And, you know, our feeling was that Petitioner was telling them not to cooperate with us." (ERT 465.) "We were stonewalled, absolutely." (ERT 465.) "Since we weren't getting what I call human cooperation, we worked off the record." (ERT 465.) Mr. Selvin said petitioner's family members did not actually say they would not cooperate, but "there was always some reason or another, they did not show up." (ERT 489.) Mr. Selvin found Petitioner himself to be uncooperative and said he and Mr. Strellis had formed the opinion that Petitioner was not cooperating because he did not want anyone to think he was mentally ill. (ERT 469.) However, Petitioner also did not say that he did not want his parents to cooperate. (ERT 489.) The attorneys felt that Petitioner's parents were not cooperating because Petitioner was "in control of them" and "did not want them to cooperate." (ERT 489.) However, Mr. Selvin agreed that Mrs. Minnie Welch, Petitioner's mother, was present at the trial on "some days" and took an interest in the case. (ERT 491.) He did not recall whether she had been working at the time of trial. (ERT 491.) He did not recall what Mrs. Welch looked like, whether she was particularly high-functioning, or whether she and Petitioner's father were still married at the time of trial. (ERT 491.) He recalled that Petitioner had filed some of

his own motions but did not recall whether he had prepared them himself. He thought some were handwritten. (ERT 490.)

When asked when they had obtained social history records and what records had been obtained, Mr. Selvin thought "they were probably already in the files when I joined up." (ERT 469. The records were "primarily , his juvenile records, the juvenile probation reports, the adult probation reports, we probably got all the information from the district attorney's office, . . ." (ERT 470.) He recalled that "Mr. Anderson would have given us all the penalty phase material." (ERT 470.) He thought the prosecutor, James Anderson, had initially noticed "fifty-plus factors in aggravation" but that he and Mr. Strellis had litigated this and "got it down to, let's say, twenty-five or thirty which were presented to the court." (ERT 470.)

Apart from the materials obtained from the prosecution in discovery, Mr. Selvin did not recollect anyone working for the defense obtaining social history records. (ERT 470.) Asked to examine a copy of the order from Judge Golde to the Oakland Unified School District to produce Petitioner's school records and a copy of the district's letter transmitting the files, he noted that both documents were dated June 26, 1989, and assumed that was the date the school records were obtained. (ERT 471-472.) He could not recall what posture the case was in at that point, but agreed that if the guilt verdict came down on June 19, the records would have been obtained between the guilt and penalty phases. (ERT 472-473.) He was not sure whether this was the first time the school records had been obtained, or whether they might have obtained an uncertified copy earlier and then used the subpoena to obtain a certified copy to present as evidence at trial. (ERT 474.)

Mr. Selvin recalled that they had set up appointments for Petitioner's parents, and also thought there had been an appointment for someone else in the family but could not remember whether it was "one of his brothers or one of his uncles. It was someone else." (ERT 465.) These appointments with family members were to have been held at Mr. Strellis's and Mr. Selvin's law office. (ERT 467.) He believed that either he or Mr. Strellis had gone to the Welch home at one point to try to contact the family, but could not recall this specifically. (ERT 466.) Mr. Selvin did not recall contacting anyone other than these family members for social history information. He thought he and Mr. Strellis had left "a number of those contacts to Dr. Pierce primarily." (ERT 467.) He did not think they had asked Dr. Benson to contact social history witnesses, but said "we let them [Benson and Pierce] try to do the contacts since they were building up the history, the mental health history." (ERT 467.)

Mr. Selvin did not recall ever sending an investigator to Alabama or Mississippi, and did not recall whether Petitioner had relatives in other parts of the country. (ERT 467.) He also did not recall anyone on the defense team performing social history interviews, obtaining declarations or witness statements, or going out into the field to speak to social history witnesses. (ERT 467-468.) He did not recall having seen any such statements or similar documents in the trial file when he reviewed it in New Mexico. (ERT 468.)

Mr. Selvin described his clients as "some of the worst people in Alameda County," and the "worst of the worst." (ERT 485.) Mr. Selvin recalled that Petitioner was chained throughout the trial and sat between Mr. Strellis and himself. (ERT 493.) Mr. Selvin sat to Petitioner's left and sat

"away from the extension of his hand and the pencil in his hand." (ERT 494.) Asked if he was physically fearful of Petitioner, Mr. Selvin stated that he was not fearful, "but I did not want to have a pencil stuck in my eye." (ERT 494.)

He also noted that this was a particularly difficult and unsympathetic case. He recalled that "up to that time and at least maybe to date, [this] was the worst case they had in Alameda County in terms of the number of people killed ," and also that children had been among the victims. (ERT 507.) Mr. Selvin also recalled that the killings had been triggered by the fact that Petitioner thought someone had stolen his dogs, and that there was a long list of factors in aggravation, including a physical altercation Petitioner had with a "lady police officer" inside a police station.[23] (ERT 507-508.) "You know, that's what we're dealing with." (ERT 508.) He also indicated that for some jurors, mental illness was a double-edged sword. (ERT 522.) "Are you more afraid of a guy who just does bad things or are you more afraid from a guy who is mentally ill and does horrible, bad things?" (ERT 509.) He agreed that a jury was more likely to accept a mental health defense if it was shown that the mental illness was not the fault of the defendant, and gave the example of an Alameda County case in which the defense had shown that the defendant had been a "cocaine baby" and the jury did not impose the death penalty. (ERT 523.) In that case, in which there had been five murders, a juror interviewed after trial explained

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[23]/ The incident in question was the Rosemary Dixon incident, which the prosecution used in aggravation at the penalty phase. Mr. Selvin agreed that it would be obvious to a person with a properly functioning mind that one should not attack a police officer in a police station, and said "that's how we treated it." (ERT 527.)

"well, it's not his fault the mother was a cocaine addict. He never had a chance." (ERT 523.) He agreed that it would be "absolutely" more mitigating if the defense could show that the defendant had been born with a mental illness or condition. (ERT 523.) He could not explain what mental condition would arise from being a cocaine baby, though he thought one mitigating impact was that "the odds are against you to start with." (ERT 523-524.) He said he was not familiar with the symptoms or behaviors associated with frontal lobe brain damage. (ERT 524-525.) He thought a

fair picture of Petitioner's mental illness had been presented to the jury and that the jurors realized that Petitioner was mentally ill. (ERT 510.)

He did not think Judge Golde had placed any limitations on the penalty phase presentation. (ERT 533.) Asked if he had a tactical reason for not presenting any additional witnesses in the penalty phase, he said "we thought we had enough to accomplish what we were trying to do." (ERT 533.)

(c) Proposed Findings Derived from the Testimony of Mr. Strellis and Mr. Selvin.

From late January, 1988, through and after his trial in June and July, 1989, petitioner was represented by Spencer Strellis, who served as lead counsel. In approximately mid-1988, Alexander Selvin came into the case as second counsel. (ERT 457.)

Mr. Strellis had been the law partner of Judge Stanley Golde, who presided over the trial in this case, and they remained close friends until Judge Golde's death. (ERT 536.)

Mr. Strellis recalled that at the time of trial, he believed that petitioner was mentally ill. He wanted to enter a plea of not guilty by reason of insanity, but petitioner would not agree to do so. (ERT 536.)

Mr. Strellis did not believe petitioner was capable of assisting counsel rationally in his own defense because of his mental illness. (ERT 538.)

Mr. Strellis did not make a competency motion.

Mr. Strellis had little independent recollection of the case. He could not recall what preparations had been made for the penalty phase of the case, and could not recall the number of victims. He never looked at the transcript or any of the pleadings. He did not recall the mental health defense being an important defense in this case but agreed that he did not see another viable defense. (ERT 538-541.)

After he passed the California bar examination, Alexander Selvin went to work in the Alameda County District Attorney's office, where he remained for 16 years, until 1985 or 1986. While at the district attorney's office, Mr. Selvin prosecuted one or two death penalty cases, and for about four years, from 1981 to 1985, served on the committee within the office that determined whether to charge a defendant with special circumstances. After leaving the district attorney's office, Mr. Selvin went into private practice and began doing criminal defense work exclusively. He had never done criminal defense work prior to working at the district attorney's office, and thus became a defense lawyer for the first time in 1986. He recalled having done 16 capital cases in his career that actually went to trial, and had a number of other cases that settled before trial. About half of those 16 clients had received the death penalty. (ERT 454-455, 485, 494-496.)

Mr. Selvin believed he had done two or three capital cases prior to representing petitioner Welch in 1988 and 1989. He could not recall whether he had done any specialized training or continuing education in capital defense work prior to representing petitioner Welch. (ERT 455.)

Mr. Strellis had employed a retired probation officer named Jackie Lesmeister to be a penalty phase investigator.

Ms. Lesmeister did not produce work product that was given to Mr. Strellis or Mr. Selvin or contribute any investigation to the case or file. (ERT 460-461.)

Mr. Selvin said his principal memory of the case was "the problem we had dealing with David Welch." (ERT 498-499.)

Mr. Selvin said that David Welch was "impossible" to work with because "he was mentally ill." He noted that David Welch's nickname on the street was "Crazy Moochie." (ERT 463, 469.)

The defense strategy of Selvin and Strellis in both the guilt and penalty phase was to show that David Welch was mentally ill and should not be executed for that reason. (ERT 463-464, 476-478, 481, 521.)

Mr. Selvin was aware of his duty to collect background information and try to develop material to show mitigation and portray his client as "a human being." (ERT 476.)

Mr. Selvin was aware that preparation for the penalty phase should begin early in the case. (ERT 527.)

Mr. Selvin was aware that the duty to conduct a mitigation investigation was not excused if the client was difficult to work with. (ERT 480.)

Mr. Selvin understood that it was the attorney's duty to provide the mental health expert with raw materials to permit them to do their job, not the mental health expert's job to develop mitigation material. (ERT 481-482.) [24]

Mr. Selvin's and Mr. Strellis's strategy was to prove mental illness through the use of a psychologist or psychiatrist. (ERT 476-478, 481, 521.)

Mr. Selvin recognized that jurors often view defense mental health experts with a jaundiced eye. (ERT 505-506.)

Mr. Selvin agreed that reviewing the client's life history records could reveal the names of potential social history witnesses. (ERT 483.

Mr. Selvin knew that probation reports are often inaccurate, but he would not and did not investigate each report. (ERT 517-518.) [25]

Mr. Selvin did not uncover any evidence of serious child abuse or sexual abuse in this case. (ERT 491.)

Rather than conduct a thorough social history investigation, Mr. Selvin and Mr. Strellis worked from records. (ERT 464-465.)

Apart from the materials obtained from the prosecution in discovery, Mr. Selvin and Mr. Strellis did not obtain social history records or have an investigator do so until after the conclusion of the guilt phase. (ERT 470.)

School records were obtained between the guilt and penalty phases. (ERT 472-473.)

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[24]However, he indicated that "one can look at a psychologist like Dr. Pierce in the same role as you call a social historian because he's supposed to take a social history, he's supposed to develop that. (ERT 482.)

[25]He said "the names were there and Dr. Pierce was satisfied or we were satisfied . . . we had enough to accomplish what we were trying to accomplish. (ERT 484-485.) He said that even if he had known the MacPherson incident was going to be used in aggravation at trial, he would not necessarily have investigated the incident in this case because there were so many other aggravating factors involving violence that "showing that one of them is not completely correct doesn't change anything." (ERT 521.)

Mr. Selvin did not contact anyone other than petitioner's father, mother, and possibly one other family member for social history information. (ERT 467.)

Mr. Strellis and Mr. Selvin did not direct anyone on the defense team to perform social history interviews, obtain declarations or witness statements, or go out into the field to speak to social history witnesses. (ERT 467-468.)

Mr. Strellis and Mr. Selvin did not send an investigator to Alabama or Mississippi. (ERT 467.)

Mr. Strellis and Mr. Selvin did not ask Dr. Benson to contact social history witnesses. (ERT 467.)[26]

Mr. Selvin thought petitioner's was a particularly difficult and unsympathetic case. (ERT 507.) [27]

Mr. Selvin was not familiar with the symptoms or behaviors associated with frontal lobe brain damage. (ERT 524-525.)

Judge Golde had not placed any limitations on the penalty phase presentation. (ERT 533.)

iii. Dr. William Pierce and Dr. Samuel Benson

(a) The referee's findings.

As noted previously, Mr. Broome retained the services of a psychologist, Dr. William Pierce, when Mr. Broome and Mr. Cross represented petitioner. Dr. Samuel Benson, a psychiatrist, was retained by

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[26] Mr. Selvin initially said "I think we left a number of those contacts to Dr. Pierce primarily. I don't even think we left them for Dr. Benson, but we may have." He then said "we let them [Benson and Pierce] try to do the contacts since they were building up the history, the mental health history." (ERT 467.) As noted later, neither Dr. Pierce nor Dr. Benson understood their task as including conducting a social history investigation, and by the time Dr. Pierce was brought back into the case after the guilt phase was over and the penalty phase was about to begin, there was no time to conduct such an investigation. (ERT 316.)

[27]He recalled that "up to that time and at least maybe to date, [this] was the worst case they had in Alameda County in terms of the number of people killed ," and also that children had been among the victims. (ERT 507.)

Mr. Strellis and Mr. Selvin, and Mr. Pierce was brought back into the case later.

The referee's findings are generally accurate in summarizing the testimony of these two expert witnesses with respect to their diagnoses of petitioner at the time of trial and, to a somewhat lesser extent, their view of the significance to their diagnoses of new information on serious child abuse developed in post-conviction. Petitioner agrees with the referee's assessment of Dr. Pierce's testimony as "credible in every respect" (Findings at p. 28), and of Dr. Benson as "a credible witness." (Findings, at p. 30.) However, the findings omit significant facts to which these witnesses testified regarding the performance of trial counsel, the significance of the lack of social history investigation in the case, and counsels' failure to investigate or prepare for the penalty phase until after the guilt phase was over, when only two weeks remained before the beginning of the penalty phase.

The findings also sometimes misinterpret and misstate the points being made by these witnesses. For example, the findings state that Dr. Pierce testified he "would not have put a lot of weight on" the fact that post-conviction investigation showed one of petitioner's uncles may have been schizophrenic because, according to the findings, "an uncle who hallucinates does not mean that his nephew is schizophrenic, and petitioner denied he has any mental illness." (Findings, at p. 27, discussing testimony at ERT 346-347.) The quoted language completely misstates the testimony and misses the points the witness was making. Dr. Pierce actually testified that having a schizophrenic uncle does not necessarily mean the nephew is schizophrenic, but that if the nephew exhibits disordered thinking,

hallucinations, or delusions, these symptoms would support an Axis I diagnosis of schizophrenia. (ERT 346.) Dr. Pierce then stated that petitioner did in fact demonstrate such symptoms, including "definitely persecutory" delusions, as well as "disordered thinking, . . . Illogical, tangential thinking is part and parcel of psychosis." (ERT 346.) With respect to the statement in the findings that "petitioner denied he has any mental illness," Dr. Pierce actually testified that it is common in his experience for people who are mentally ill to deny that they are mentally ill– "it's not atypical for them not to think anything is wrong with them"– and that petitioner is one of these people. (ERT 346-347.) Dr. Pierce's testimony on petitioner's lack of insight into his symptoms had nothing to do with the relative significance of a family history of schizophrenia or psychosis.

Thus, the foregoing passage of the findings not only omits two very significant facts to which Dr. Pierce testified– i.e., the fact that petitioner exhibits symptoms of schizophrenia or psychosis, and the fact that it is common for people with psychosis to deny their own mental illness due to lack in insight– and instead mischaracterizes this testimony as the basis for Dr. Pierce's unremarkable conclusion that a family history of schizophrenia or psychosis is less significant than whether the patient himself exhibits psychotic symptoms.

The findings also significantly understate the significance of Dr. Pierce's testimony regarding counsels' lack of preparation for the penalty phase. Indeed, preparation did not really begin until after the guilt phase verdicts had come in and only two weeks remained before the penalty phase was to begin. Prior to that time, Mr. Broome and trial counsel had arranged

for Dr Pierce and/or Dr. Benson to meet directly with petitioner himself, and apparently two abortive attempts were made to permit the two experts to meet with petitioner's mother. However, when the two experts met with counsel to begin preparing for the penalty phase only two weeks before it was to begin, no social history investigation had been conducted at all. No attempt had been made to gather any social history documents, not even such basic and easily obtainable documents such as school records, which were then obtained by subpoena only after Dr. Pierce suggested they were necessary. Indeed, apart from school records obtained at the last minute, the only social history material the experts had to work with consisted of juvenile and adult probation reports which had been provided to them in discovery by the prosecution.

The referee's findings also improperly discount the testimony of Dr. Benson with respect to the importance of evidence developed during post-conviction investigation of serious child abuse and the results of neurological testing disclosing substantial evidence of serious frontal lobe brain damage which may have resulted from prenatal abuse and child abuse. The portion of the findings which improperly undervalues Dr. Benson's testimony follows:

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

> Benson, no test results would have been available at the time of the penalty phase.

(Findings, at p. 30.)

Petitioner completely disagrees with the referee's conclusion that the testimony of petitioner's family and friends differed substantially from their declarations. The referee does not explain which facts from the social history declarations relied on by Dr. Benson she thought were different from the testimony of the declarants, nor does she ever explain how the testimony supposedly differed from the declarations. To the contrary, the referee's findings list eleven "bullet" points in the post-conviction social history declarations that Dr. Benson thought particularly significant (Findings, at p. 29), and every one of these bullet points was fully supported by the testimony of social history witnesses. Indeed, many of the facts Dr. Benson thought particularly significant were supported by multiple witnesses and by documentary evidence obtained during post-conviction investigation. These eleven bullet points, and citations to the testimony of the witnesses and exhibits supporting the facts in the declarations, are as follows:

o Petitioner lived in a poverty-stricken neighborhood. (ERT 1527-1531, 1564 [Minnie Welch]; ERT 1607, 1633 [Cathie Diane Welch]; 600-602, 604, 608 [Konolus Smith]; ERT 1479, 1485 [Glenn Riley]; ERT 558-559 [Roy Millender]; ERT 1267-1268 [Sarah Perine]; see also Hearing Exh. O, Building Department records pertaining to Welch apartment, Fremont Street, Emeryville.)

o Petitioner's father was a severe alcoholic. (ERT 1544-1545, 1553 [Minnie Welch]; ERT 1621-1622 [Cathie Diane Welch]; ERT 561 [Roy

Millender]; ERT 1271-1273 [Sarah Perine]; see also Hearing Exh. N-1, Tab 61, David Welch, Jr., Merchant Marine Disciplinary Record.)

o Petitioner's father did not supply sufficient clothing or food for his family. (ERT 1561 [Minnie Welch]; ERT 1269-1270 [Sarah Perine].)

o Petitioner's father beat petitioner and petitioner's mother including when she was pregnant with petitioner. (Re beatings: ERT 1622-1631, 1633-1636 [Cathie Diane Welch]; ERT 595-599, 610-611 [Konolus Smith]; ERT 1491-1492, 1499-1501 [Glenn Riley]; ERT 1271, 1273-1283; re beatings, "including while pregnant" [Sarah Perine]; ERT 1549-1553, 1554-1558, 1566-1568, 1586-1587 [Minnie Welch].)

o Mrs. Welch was malnourished when she was pregnant with petitioner. (ERT 1266 [Sarah Perine].)

o Life was extremely difficult for petitioner. (ERT 1570-1571, 1554-1558, 1566-1568, 1572 [Minnie Welch]; ERT 1611, 1616, 1619, 1641-1642, 1643-1644 [Cathie Diane Welch]; ERT 594-595, 605, 609, 622-623 [Konolus Smith]; ERT 1487 [Glenn Riley]; ERT 555, 562, 566-568 [Roy Millender]; ERT 1283 [Sarah Perine].)

o During childhood petitioner tended to become isolated and withdrawn. (ERT 1569 [Minnie Welch]; 564 [Roy Millender].)

o Petitioner had difficulty in school. (ERT 1570-1571, 1573 [Minnie Welch]; ERT 1618-1619 [Cathie Diane Welch]; ERT 590-593 [Konolus Smith]; ERT 1487-1488 [Glenn Riley].)

o Petitioner was thin and pale and malnourished as a child. (ERT 1616 [Cathie Diane Welch]; ERT 1269-1270 [Sarah Perine].)

o Petitioner's social life was reasonable but friends had to be careful how they said things because petitioner wouldn't quite understand what was

being said and would get fighting mad. (ERT 586-590, 612-613 [Konolus Smith].)

∘ Petitioner received more punishment from his father than his siblings did. (ERT 1557-1558 [Minnie Welch]; ERT 1632 [Cathie Diane Welch]; ERT 611-612 [Konolus Smith]; ERT 1283 [Sarah Perine].)

In short, the referee is simply wrong in stating that any of the listed facts for which Dr. Benson relied on the declarations differed from the testimony of the witnesses.

Moreover, the referee is wrong in concluding that petitioner would not have agreed to undergo psychological testing in 1989 despite the "best efforts" of his attorneys. (Findings, at p. 30.) First, the evidence does not show that petitioner's attorneys exercised their "best efforts." It is generally poor practice for an attorney to send a mental health expert in to see a client before the social history investigation is done, or at least before the investigation is well advanced. This is not only because a complete and accurate social history is a prerequisite for a competent diagnosis, but also because a complete social history will assist the expert to assess the client's ability to accurately recall, interpret, and relate events in his history; arrive at a working diagnosis; identify appropriate areas of testing; and persuade the client to participate in clinical interviews, testing, and other means of evaluation. By contrast, these attorneys did no social history investigation *at all.* They did not interview or even meet with the many dozens of friends and relatives who might have helped persuade petitioner to agree to testing. They barely met with petitioner at all, and instead sent in a psychologist to do testing without even taking into account the rather obvious fact that a

mentally ill client might naturally resist testing due to his psychotic symptoms, a matter discussed in more detail below.

The findings do correctly indicate that petitioner's post-conviction team required about six months in 2001 and 2002 to persuade petitioner to undergo neuropsychological testing and meet with a psychiatrist. (ERT 978-981, 1065-1066.) However, it is by no means uncommon for a mentally ill client to initially refuse to undergo psychological testing.[28] Mentally ill people, particularly schizophrenics or others with forms of psychosis in which paranoia is a prominent symptom, seldom understand that there is anything wrong with them. Studies of schizophrenics and other patients with psychotic illnesses (e.g., bipolar disorder and schizoaffective disorder) typically show that between 60% and 80% do not realize that they are ill. (Amador, *I Am Not Sick, I Don't Need Help* (Vida Press, 2000) pp. 12-13, 175-177, and research there cited.) This inability to comprehend the presence of psychotic symptoms is not "denial," a term that implies some degree of willful defensiveness, but rather a lack of insight and self-awareness that results from brain dysfunction that is symptomatic of the disease. (*Id.*, at pp. 13, 181-184, and research there cited.)

The phenomenon of lack of insight in persons suffering from schizophrenia and other psychoses was also well known at the time of trial. (World Health Organization, *Report of the International Pilot Study of Schizophrenia,* (Geneva, World Health Organization Press, 1973) [study found 81% of schizophrenics have poor insight into their illness]; Wilson, Ban, Guy, "Flexible System Criteria in Chronic Schizophrenia,"

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[28]/ It also took several months for the post-conviction team to persuade petitioner to meet with psychologist Dr. Julie Kriegler in 2009-2010. (ERT 965.)

Comprehensive Psychiatry, 27: 259-265 (1986) [study found poor insight in 89% of schizophrenics].) Dr. Pierce, the trial psychologist, agreed that mentally ill clients typically have little insight into their illnesses and may even deny that they are ill. (ERT 346-347.)

Partly for this reason, counsel must operate on the assumption that *most* capital clients are mentally ill; often, like petitioner, they are severely ill:

> Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."

(Commentary, ABA Guideline 10.5, "Relationship with the Client," quoting Kammen and Norton, "Plea Agreements: Working with Capital Defendants," *The Advocate*, Mar. 2000, at p. 31.)

Mentally ill clients are difficult to work with and are frequently uncooperative. (ERT 1153.) For this reason, the annual CACJ/CPDA Monterey conference on capital defense always includes at least one session on dealing with difficult and mentally ill clients. (ERT 1153.) This is also one of the many reasons that penalty phase preparation must begin at least a year, if not more, prior to a capital trial and cannot possibly be completed in a matter of only two weeks. (ERT 1124-1125, 1239; see *In re Lucas* (2004) 33 Cal.4th 682, 725.)

Furthermore, the fact that petitioner *did* in fact undergo testing in 2002 contradicts the referee's illogical conclusion that petitioner would not have undergone testing at the time of trial. To the contrary, the fact that

petitioner agreed to testing in 2002 suggests that if he had been approached with the same respect and patience by counsel in 1989 that the post-conviction team utilized in 2002, petitioner surely *would* have participated in testing. (See Testimony of Therese Scarlet Nerad, ERT 978-981; Testimony of Dr. Karen Froming, 1065-1066.) The fact that petitioner did not undergo testing at the time of trial therefore does not reflect that he would not have done so if he had been approached in a respectful, empathetic manner, but instead underscores his trial attorneys' incompetence in not approaching him in that manner.

> Often, so-called "difficult" clients are the consequence of bad lawyering– either in the past or present. Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.

(Commentary, ABA Guideline 10.5, *supra.*)

Trial counsel in this case not only failed to approach petitioner in a respectful, sympathetic way, but to the contrary treated petitioner with thinly veiled disgust, contempt, and even fear. A former career prosecutor who at the time of petitioner's trial had only recently hung out a shingle as a defense lawyer, Mr. Selvin testified at the hearing that his clients were "some of the worst people in Alameda County" and the "worst of the worst." (ERT 485.) Even though petitioner was chained throughout the trial, Mr. Selvin was afraid petitioner would stick a pencil in his eye and therefore sat "away from the extension of his hand and the pencil in his hand." (ERT 494.) One can only imagine the message this body language conveyed to the jury. It is little wonder that at the time of the hearing Mr. Selvin shared the top spot in the state of California for lawyers with the most former clients on death row, with eight. (ERT 1220; Exh. R.)

In short, the fact that petitioner agreed to undergo testing in 2002 and did not do so in 1988 and 1989 was not because petitioner's "incentives might be different," as the findings suggest (Findings at p. 30),[29] but

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[29]/ The referee does not explain how petitioner's "incentives" to agree to testing would have been different in post-conviction proceedings than at trial. However, if it was not clear prior to the hearing, it should have been clear to the referee after the hearing that petitioner is not capable of making rational, strategic decisions about his case and that any such "incentives" would have been meaningless.

During the first week of the evidentiary hearing, the referee ruled that petitioner should undergo testing by respondent's expert. Although petitioner's counsel believed this ruling was in error, counsel and a defense team that included Ms. Nerad, Kendra Ing, and Laura Roberts all attempted to persuade petitioner that they and Dr. Froming had all concluded it was in his best interests to participate in the testing. (ERT 958, 970, 981-984.) However, petitioner refused to do so, fearing that the results of any such testing would be used against him in future proceedings or would be used to forcibly medicate him. (ERT 958, 982.) He also believed that the deputy attorney general was attempting to place his mental state in issue and that the referee's offhand comment about her plan to attend the William Rehnquist dinner at the United States Supreme Court indicated that the referee was involved in a conspiracy against him. (ERT 970, 988.) During these discussions, petitioner was "scattered" and often segued into discussions of other issues, such as the shoes he had been given in the county jail or Dr. Froming's testimony that he had attempted to kiss her goodbye after the testing she administered, into which petitioner read unwarranted significance. (ERT 966-967, 981-984.) Ms. Nerad testified that she had encountered similar problems of paranoia and lack of focus in persuading petitioner to be tested by Dr. Froming in 2002. (ERT 987.)

Counsel then obtained a protective order, signed by the referee, to guarantee to petitioner that the results of the testing could not be used in future proceedings or to forcibly medicate him. (Referee's Order of 11/20/10.) However, petitioner continued to refuse to be tested even after he was told about and finally shown the protective order, and even when told he might be subject to sanctions that could damage his case if he did not undergo testing. (ERT 987-988.) As had been the case previously, none of petitioner's objections to the testing were based on any strategic or tactical basis rationale (ERT 962, 972, 983), but were instead solely the product of petitioner's paranoia, mental illness, and brain impairment. (ERT 992-993.)

When the referee ruled (again erroneously, in petitioner's view) that petitioner should testify regarding his reasons for declining to be tested, petitioner

because his post-conviction defense team applied the training and experience required by the standard of reasonable competence applicable to attorneys in capital cases while his trial counsel did not.

Moreover, the referee's decision to ignore Dr. Froming's test results, as well as any portion of any other expert's findings that rely on Dr. Froming's test results, places petitioner in an impossible position. His refusal to submit to testing with Dr. Pierce at the time of trial was clearly and solely due to his psychosis and brain damage. To refuse now to admit evidence of the severity of that psychosis and brain damage developed through the testing administered by Dr. Froming– the reliability of which was endorsed by respondent's expert neuropsychologist, Dr. Daniel Martell– effectively punishes petitioner for his mental illness.

Petitioner accordingly sets forth a summary of the testimony of these two expert witnesses which includes their reliance upon Dr. Froming's test results, followed by proposed findings derived from their testimony.

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gave testimony about the lack of separation of powers and ex post facto laws in the proceedings, complained that the deputy attorney general was persecuting and insulting him, and ultimately refused to answer questions, asserting his Fifth Amendment rights even though the court ruled he had no such right to invoke in this proceedings. (ERT 1896.)

In short, petitioner demonstrated as clearly as it could be shown that he cannot make rational strategic or tactical decisions about his case, particularly not when the decision involves submitting to psychological or neuropsychological examinations. Each time he has cooperated with mental health professionals it has been the result of a patient, months-long efforts of the defense team to overcome his frank paranoia, and not the result of some rational cost-benefit analysis of competing "incentives" that might be conducted by a person not suffering from psychosis. The referee's suggestion that unexplained "incentives" led petitioner to make a tactical choice to be tested in 2002 is not supported by substantial evidence, and in light of the evidence at the hearing, does not bear scrutiny.

(b) Testimony of Dr. William Pierce and Dr. Samuel Benson.

Dr. William Pierce, a clinical psychologist who testified in the penalty phase of Petitioner's 1989 trial, testified at the hearing on September 14, 2010. (ERT 302-385.) Dr. Pierce has been working on capital cases and with capital defense teams since the reinstatement of capital punishment in California in 1978. (ERT 310.) Dr. Pierce estimated that at the time of Petitioner's 1989 trial, he had assisted in twelve to fourteen capital cases and had testified as an expert witness in nine cases. (ERT 307.)

Dr. Pierce's work with capital defense teams typically involved conducting clinical evaluations of defendants, providing counsel with confidential opinions, assisting counsel in development of penalty phase presentations, and testifying as a mental health expert at capital trials. (ERT 307, 308.) Dr. Pierce testified that a competent evaluation requires a thorough clinical interview, administration of a battery of psychological tests, and a review of relevant social history information, such as educational and occupational records and interviews with individuals significant in the defendant's life. (ERT 314-315.) Dr. Pierce described the kind of work he does in anticipation of a penalty phase, which includes interviewing the capital defendant's family members, teachers, and other significant individuals and conferring with defense counsel and other defense experts about the penalty-phase presentation. (ERT 310-311.)

In 1987, Dr. Pierce was contacted by attorney Thomas Broome and asked to evaluate Petitioner for psychological or psychiatric issues which could be relevant to his defense and, if necessary, to assist in developing the penalty phase presentation. (ERT 312.) After being retained by Mr.

Broome, Dr. Pierce met with Petitioner on one occasion for approximately one hour. (ERT 313.) During this meeting, Dr. Pierce attempted to establish rapport with Petitioner and formed an initial clinical impression that Petitioner was paranoid. However, Dr. Pierce did not perform a full evaluation. (ERT 313.) Dr. Pierce attempted a second and third meeting with Petitioner, but Petitioner refused both times because he was afraid that their discussion would be taped or overheard. (ERT 315-316, 319-320.) Dr. Pierce testified that this response further supported Dr. Pierce's impression that Petitioner was paranoid. (ERT 315.)

Dr. Pierce said that he had no further contact with any member of Petitioner's defense until May, 1988. By that time, Mr. Broome had been replaced by attorney Spencer Strellis[30]. (ERT 316-318.) Dr. Pierce testified that Mr. Strellis contacted him at the urging of psychiatrist Samuel Benson, who knew of Dr. Pierce's previous involvement in the case. (ERT 316-317.) Dr. Pierce had never worked with Mr. Strellis or with his co-counsel, Alex Selvin, before rejoining Petitioner's defense. (ERT 318.)

Dr. Pierce testified that after Mr. Strellis was appointed to the case, Dr. Pierce made two unsuccessful attempts to meet with Petitioner's mother at Mr. Strellis's office and, in September, 1988, one unsuccessful attempt to meet with Petitioner. (ERT 318, 320.) Dr. Pierce took no further action on the case, and he had no further contact with Petitioner's counsel until June, 1989, when, after having had no word on the status of the case, he was

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[30]/ Spencer Strellis was appointed to represent David Welch on approximately February 1, 1988. He prepared his first funds request on February 11, 1988. (Exh. N-3, Tab 114.)

contacted by Mr. Strellis and informed that the guilt phase was complete.[31] (ERT 319-321.) Dr. Pierce estimated that this was approximately two weeks before the beginning of the penalty phase. (ERT 330.) Dr. Pierce testified that at this point, he had reviewed no social history documents, had interviewed no social history witness, and had reviewed no reports of any interviews conducted by another member of the defense team. (ERT 321-322.)

Dr. Pierce said that soon after hearing from Mr. Strellis, he and Dr. Benson met with Mr. Strellis to begin brainstorming mitigation themes. (ERT 322.) At the time of this meeting with Mr. Strellis, the doctors requested social history records. (ERT 322-323.) Counsel had not obtained educational records or juvenile or other correctional records by that time. (ERT 323.) Dr. Pierce testified that when the records were finally provided, the social history records made available to Dr. Pierce were limited to seven years of educational records, one year of juvenile correctional records, select medical records, adult correctional records, and police reports.[32]

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[31]/ Pre-trial motions occurred over 31 court days from November 9, 1988 to January 19, 1989. (CT 2124-2266; RT 1-981.) Jury selection occurred over 50 court days beginning on January 19, 1989 (RT 1059), and ending with the jury and alternates being sworn on May 16, 1989. CT 2423; RT 3856-3857.

On June 19, 1989, the jury found petitioner guilty of all counts and found the multiple-murder special circumstance to be true. (CT 2473-2492; RT 5648-5656.) The penalty phase began before the same jury on June 26, 1989. (CT 2493; RT 5668.) Dr. Pierce and Dr. Benson testified on July 5 and 6, 1989.

[32]/ The trial file indicates that David Welch's school records were subpoenaed and received in June, 1989, after the conclusion of the guilt phase. The cover letter from the Oakland Public Schools microfilm section which accompanied the records is dated June 26, 1989, mere days before the beginning of the penalty phase. (Exh. N-3, Tab 100 [approximately 20 pages from the end of the exhibit].)

(ERT 324.) Dr. Pierce was never provided with any statement from any social history witness. (ERT 323.) Because counsel had provided so few records to work from, Dr. Pierce suggested using excerpts of guilt phase transcripts, which he hoped would provide some additional information about Petitioner's behavior and mental health. (ERT 325.) Dr. Pierce estimates that he had two weeks between the completion of the guilt phase and the beginning of the penalty phase, during which time he brainstormed mitigation themes, reviewed social history records, developed a working diagnosis, and prepared to testify. (ERT 322-330.)

Using the criteria laid out in the DSM-III and based on his single hour-long interview of Petitioner, the few social history records he was provided, and evidence of Petitioner's behavior collected from the trial record, Dr. Pierce diagnosed Petitioner as having delusional paranoid disorder, persecutory type; psychoactive substance use disorder with dependence on cocaine, alcohol, heroin, and morphine; and impulsive personality disorder. (ERT 326, 354.) Dr. Pierce testified that he was unable to rule out paranoid schizophrenia or organic personality syndrome, explosive type without further information. (ERT 326, 328-329.) Dr. Pierce testified that psychological testing would have helped him determine whether Petitioner was schizophrenic, and neurological testing would have helped him determine if the symptoms were the result of a medical disorder. (ERT 327, 329, 337.) Dr. Pierce explained that the availability of additional social history records, and neuropsychological testing would have also

assisted him in making a more complete diagnosis. (ERT 332, 337, 368, 375.)

Dr. Pierce recalled seeing social history information gathered after Petitioner's trial, and he testified that this information would have been informative to his diagnosis. Dr. Pierce stated that evidence that Petitioner had been a sickly child, had been the victim of childhood abuse, was the child of a mother abused during pregnancy, and was characterized as aggressive, hyperactive, and immature as a child would have suggested early brain damage and made him more insistent that a neurological evaluation be preformed. (ERT 339-343.) Dr. Pierce testified that EEGs and CAT scans were widely available at the time of Petitioner's trial, and that by that time, he had been involved in capital cases in which such neurological testing devices were used. (ERT 344.)

Dr. Samuel Benson is a neuropsychiatrist who was retained by Spencer Strellis to assist the defense in Petitioner's 1989 capital trial. (ERT 386.) He testified on September 14, 2010. Dr. Benson testified that in addition to a Doctorate of Medicine, he holds Ph.D.s in both Physiology and Pharmacology. (ERT 387.) Dr. Benson explained that neuropsychiatry is a relatively new field which focuses on the structure and function of the in much the same way that cardiology focuses on the heart. (ERT 393.)

At the time of his involvement in the Welch case, Dr. Benson had worked on eight to ten capital cases. (ERT 397.) This case continues to stand out for Dr. Benson because of the lack of social history on which to base his diagnosis. (ERT 449.)

Dr. Benson stated that between January and June, 1989, he conducted five clinical interviews with Petitioner. (ERT 399.) Prior to

meeting with Petitioner on those five occasions, Dr. Benson knew very little about Petitioner because he had been provided with no social history documents other the relevant police reports. (ERT 398-400, 416-417.) Dr. Benson testified that he was able to observe Petitioner's behavior during these visits, but because of Petitioner's paranoia and other symptoms–including his belief that a floor drain was a listening device–Dr. Benson was able to learn little about Petitioner's social history from him. (ERT 430-431, 437, 440.)

Dr. Benson explained that a competent mental health evaluation requires familiarity with an individual's medical and psychosocial history, and that he relies to a great extent on historical information in order to provide an accurate diagnosis. (ERT 400, 412, 416.) Relevant social history information includes an individual's access to nutrition during gestation, infancy, childhood and adolescence; history of abuse during gestation; and circumstances of delivery. (ERT 390-391.) Information about an individual's developmental milestones, exposure to violence, medical history, behavior, and access to medical care also assists in diagnosis. (ERT 391, 400.) Dr. Benson testified that in Petitioner's case, he requested this type social history information from Mr. Strellis, but none was provided prior to the completion of the guilt phase of Petitioner's trial. (ERT 401-402, 409-410, 411.) Dr. Benson recalled that before testifying in the penalty phase, he was provided with only juvenile records and adult correctional records. (ERT 407.) He said that when he was finally provided these records, he had doubts about Petitioner's competency to stand trial, though, of course, by then Petitioner had already been tried. (ERT 402-403.)

Dr. Benson recalled that he tried unsuccessfully to meet with Petitioner's mother. (ERT 401.) Dr. Benson testified that despite "really pushing" Mr. Strellis, no information about other potential social history witnesses was provided to him, and in fact, before making his diagnosis and testifying at trial, Dr. Benson was never provided with any information obtained from any social history witness. (ERT 401, 408.) Dr. Benson was not aware of any of petitioner's family members other than his mother. (ERT 401.)

Based on his interviews of Petitioner and the limited social history information he was provided, Dr. Benson made a differential diagnosis of intermittent explosive personality disorder, persecutory delusional disorder, or organic personality disorder. (ERT 405.) He could not rule out schizophrenia without psychological testing. (ERT 405.) In addition, Dr. Benson recalled pushing counsel "very, very hard" to get neurological testing done prior to the penalty phase. (ERT 404.)

Dr. Benson testified that the social history information that he has reviewed since his 1989 testimony is full of significant information, including the facts that Petitioner comes from a poverty-stricken neighborhood; that his father was an abusive alcoholic; that his mother was abused during his her pregnancy with Petitioner; that the Welch family often lacked food; that Petitioner tended to withdraw; that he had difficulty in school; that he had difficulty understanding social interactions; that he was pale and thin; and that he has a history of substance abuse. (ERT 408-411.) Dr. Benson testified that Petitioner's behavioral history shows that he is unable to evaluate stimuli quickly enough to react to it and that he has little control over his own emotional responses. (ERT 418.) Dr. Benson

explained that gestational abuse is one of the principle causes of infantile brain disease. (ERT 411.) Dr. Benson testified that when a child drinks hard liquor before puberty, as Petitioner did, it is often a sign that he is treating the anxiety attendant with organic brain disease. (ERT 423.) This information has led Dr. Benson to the opinion that Petitioner suffers from traumatic brain disease, which explains his impulse control problems and his misperception of reality. (ERT 419, 441-446.)

(c) Proposed Findings Derived from the Testimony of Dr. Pierce and Dr. Benson

Dr. William Pierce, is a clinical psychologist who testified in the penalty phase of David Welch's 1989 trial. Dr. Pierce has been working on capital cases and with capital defense teams since the reinstatement of capital punishment in California in 1978. At the time of David Welch's 1989 trial, he had assisted in twelve to fourteen capital cases and had testified as an expert witness in nine cases. (ERT 302-305, 307, 310.)

Dr. Pierce's work with capital defense teams typically involved conducting clinical evaluations of defendants, providing counsel with confidential opinions, assisting counsel in development of penalty phase presentations, and testifying as a mental health expert at capital trials. (ERT 307, 308.)

A competent evaluation requires a thorough clinical interview, administration of a battery of psychological tests, and a review of relevant social history information, such as educational and occupational records and interviews with individuals significant in the defendant's life. (ERT 310-311, 314-315.)

In 1987, Dr. Pierce was contacted by attorney Thomas Broome and asked to evaluate petitioner for psychological or psychiatric issues which could be relevant to his defense and, if necessary, to assist in developing the penalty phase presentation. (ERT 312.)

After being retained by Mr. Broome, Dr. Pierce met with petitioner Welch on one occasion for approximately one hour. During this meeting, Dr. Pierce attempted to establish rapport with petitioner and formed an initial clinical impression that petitioner was paranoid. Dr. Pierce did not perform a full evaluation. Dr. Pierce attempted a second and third meeting with petitioner, but petitioner refused both times because he was afraid that their discussion would be taped or overheard. Dr. Pierce's formed the impression that petitioner was paranoid. (ERT 313, 315-316, 319-320.)

Dr. Pierce had no further contact with any member of petitioner's defense until May, 1988 when Mr. Strellis contacted him at the urging of

psychiatrist Samuel Benson, who knew of Dr. Pierce's previous involvement in the case. (ERT 316-318.)

After Mr. Strellis was appointed to the case, Dr. Pierce made two unsuccessful attempts to meet with petitioner's mother at Mr. Strellis's office and one unsuccessful attempt to meet with petitioner.

Dr. Pierce took no further action on the case, and he had no further contact with petitioner's counsel until June, 1989, when, after having had no word on the status of the case, he was contacted by Mr. Strellis and informed that the guilt phase was complete. (ERT 318-321.)

At this point, Dr. Pierce had reviewed no social history documents, had interviewed no social history witness, and had reviewed no interview conducted by another member of the defense team. (ERT 321-322.)

Dr. Pierce and Dr. Benson met with Mr. Strellis to begin brainstorming mitigation themes. The doctors requested social history records. Counsel had not obtained educational records or juvenile or other correctional records by that time. Dr. Pierce testified that when the records were finally provided, the social history records made available to Dr. Pierce were limited to seven years of educational records, one year of juvenile correctional records, select medical records, adult correctional records, and police reports. Dr. Pierce was never provided with any statement from any social history witness. Because counsel had provided so few records to work from, Dr. Pierce suggested using excerpts of guilt phase transcripts, which he hoped would provide some additional information about petitioner's behavior and mental health. (ERT 322-330.)

Using the criteria laid out in the DSM-III and based on his single hour-long interview of petitioner, the few social history records he was provided, and evidence of petitioner's behavior collected from the trial record, Dr. Pierce diagnosed petitioner as having delusional paranoid disorder, persecutory type; psychoactive substance use disorder with dependence on cocaine, alcohol, heroin, and morphine; and impulsive personality disorder. (ERT 326, 354.)

Dr. Pierce was unable to rule out paranoid schizophrenia or organic personality syndrome, explosive type without further information. (ERT 326, 328-329.)

Psychological testing would have helped Dr. Pierce to determine whether petitioner was schizophrenic, and neurological testing would have helped him determine if the symptoms were the result of a medical disorder. (ERT 327, 329, 337.)

Additional social history records, and neuropsychological testing would have also assisted Dr. Pierce in making a more complete diagnosis. (ERT 332, 337, 368, 375.)

The social history information gathered after petitioner's trial would have been informative to his diagnosis. This evidence included that

petitioner had been a sickly child, had been the victim of childhood abuse, was the child of a mother abused during pregnancy, and was characterized as aggressive, hyperactive, and immature as a child. This information would have suggested early brain damage and made him more insistent that a neurological evaluation be preformed. (ERT 339-343.)

EEGs and CAT scans were widely available at the time of petitioner's and had been used in capital cases. (ERT 344.)

Dr. Samuel Benson is a neuropsychiatrist who was retained by Spencer Strellis to assist the defense in petitioner's capital trial. (ERT 386.)

Dr. Benson conducted five clinical interviews with petitioner. Prior to meeting with petitioner on those five occasions, Dr. Benson knew very little about petitioner because he had been provided with no social history documents other the relevant police reports. Dr. Benson was able to observe petitioner's behavior during these visits, but because of petitioner's paranoia and other symptoms–including his belief that a floor drain was a listening device– Dr. Benson was able to learn little about petitioner's social history from him. (ERT 398-400, 416-417.430-431, 437, 440.)

A competent mental health evaluation requires familiarity with an individual's medical and psychosocial history, and relies to a great extent on historical information in order to provide an accurate diagnosis. (ERT 400, 412, 416.)

Relevant social history information includes an individual's access to nutrition during gestation, infancy, childhood and adolescence; history of abuse during gestation; and circumstances of delivery. Information about an individual's developmental milestones, exposure to violence, medical history, behavior, and access to medical care also assists in diagnosis. (ERT 390-391, 400.)

Dr. Benson requested this type social history information from Mr. Strellis, but none was provided prior to the completion of the guilt phase of petitioner's trial. (ERT 401-402, 409-410, 411.)

Prior to testifying in the penalty phase, Dr. Benson had been provided with only juvenile records and adult correctional records. When he was finally provided these records, he had doubts about petitioner's competency to stand trial, though by then petitioner had already been tried. (ERT 402-403, 407.)

Despite "really pushing" Mr. Strellis, no information about other potential social history witnesses was provided to him, and in fact, before making his diagnosis and testifying at trial, Dr. Benson was never provided with any information obtained from any social history witness. (ERT 401, 408.)

Dr. Benson pushed counsel "very, very hard" to get neurological testing done prior to the penalty phase. (ERT 404.)

Based on his interviews of petitioner and the limited social history information he was provided, Dr. Benson made a differential diagnosis of intermittent explosive personality disorder, persecutory delusional disorder, or organic personality disorder. He could not rule out schizophrenia without psychological testing. (ERT 405.)

The social history information that he has reviewed since his 1989 testimony contains significant information, including the facts that David Welch comes from a poverty-stricken neighborhood; that his father was an abusive alcoholic; that his mother was abused during his her pregnancy with petitioner; that the Welch family often lacked food; that petitioner tended to withdraw; that he had difficulty in school; that he had difficulty understanding social interactions; that he was pale and thin; and that he has a history of substance abuse. (ERT 408-411.)

Petitioner suffers from traumatic brain disease, which explains his impulse control problems and his misperception of reality. (ERT 419, 441-446.)

iv. Additional information relevant to adequacy of counsel's investigation.

In addition to petitioner's *Strickland* and mitigation experts, petitioner's prior counsel, trial counsel themselves, and the two trial mental health experts, the social history witnesses who testified at the evidentiary hearing also provided important evidence relevant to the adequacy of counsel's investigation with respect to mitigation generally and serious child abuse specifically. Accordingly, petitioner will include here a brief summary of the testimony of these witnesses as it pertained to referral question two on the adequacy of counsels' investigation.

(a) Testimony of Social History Witnesses Relevant to Counsel's Performance.

With the exception of Minnie Welch, petitioner's mother, none of the social history witnesses who testified at the hearing had ever been contacted by the defense or asked to testify at petitioner's trial, and all six stated they would have testified if asked. (ERT 569 [Roy Millender]; ERT 617 [Konolus Smith]; ERT 1288 [Sarah Perine]; ERT 1505 [Glenn Riley]; ERT 1581 [Minnie Welch]; ERT 1640 [Cathie Diane Thomas].

For a period of time, Dwight Welch, petitioner's brother, was being tried at the same time and on the same floor of the courthouse where petitioner's trial was taking place. (ERT 1640-1641.)

Although attorney Selvin believed that petitioner's family was uncooperative and that petitioner had instructed them not to cooperate, that recollection was contradicted by Minnie Welch. Mrs. Welch testified that she would have done anything she could to help petitioner, including providing documents or testifying at trial. (ERT 1581.) She said if she had been asked by Mr. Selvin or Mr. Strellis to testify, she would have offered the same information she did at petitioner's evidentiary hearing. (ERT 1581.)

Petitioner never asked Mrs. Welch to refuse to speak with his lawyers or anyone else connected with his defense. (ERT 1582.) Petitioner never asked Mrs. Welch to refuse to speak with any particular individuals. (ERT 1582.) Mrs. Welch said she was aware that petitioner did not want issues of mental health raised during the penalty phase. (ERT 1592.) However, she said she would still have cooperated in raising issues of mental health in the penalty phase even if petitioner had asked her not to do so. (ERT 1593.)

Minnie Welch recalled attending almost every day of petitioner's trial . (ERT 1574, 1576.) She regularly saw attorneys Spencer Strellis and Alexander Selvin at court. (ERT 1578.) She said that although she was present in court nearly every day, attorneys Strellis and Selvin did not talk to her in court. (ERT 1578.) Mrs. Welch recalled that the office of attorney

Selvin or Strellis was on 17th or 18th Street in downtown, Oakland.[33] (ERT 1599.) Mrs. Welch recalled visiting the office during petitioner's trial but she could not recall the reason for the visit. (ERT 1599.)

Although she did not recall petitioner's first attorney, James Giller, Mrs. Welch recalled petitioner's previous attorneys Thomas Broome and Robert Cross. (ERT 1578.) Mrs. Welch recalled that the office of attorney Broome was on 2nd or 3rd Avenue and East 14th Street in Oakland. (ERT 1599.) Mrs. Welch could not recall if Mr. Broome had ever visited her at her home. (ERT 1600.) However, she said she never went to the lawyers'[34] office for a meeting, and said that the lawyers[35] never asked Mrs. Welch to come into their office for a meeting. (ERT 1591.)

Attorneys Strellis and Selvin never came to Mrs. Welch's home. (ERT 1578.) Someone came to see Mrs. Welch at her home but she couldn't recall who it was.[36] (ERT 1591.) She thought that two policeman, one white and one African-American, came to Mrs. Welch's home. (ERT 1578.)

At the time of petitioner's trial, Mrs. Welch lived at 521 La Prenda Drive in Oakland, CA. (ERT 1574.) During that period, Mrs. Welch,

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[33]/ For many years, Mr. Strellis's office suite has been located in the Latham Square Building at 1611 Telegraph Avenue in Oakland. This "flatiron" building sits at the point of the acute angle formed by the intersection of Telegraph and Broadway, and is between 16th and 17th Streets. At the time of trial and for some time thereafter, Mr. Selvin also worked in one office in the suite.

[34]/ Respondent did not specify which lawyers when she questioned Mrs. Welch. (ERT 1591.)

[35]/ *See* footnote above regarding respondent's question.

[36]/ Mrs. Welch was asked by respondent if "someone" came to her house. The implication was someone related to petitioner's defense. (ERT 1591.)

worked at a retirement home, Piedmont Garden, located at 41st Street and Piedmont Avenue in Oakland, CA. (ERT 1573.)

Mrs. Welch cannot drive a car. (ERT 1538.) Mrs. Welch traveled from her home to work by bus. (ERT 1575.) It required her about one hour to reach her work from her home. (ERT 1575.) Since she worked from 5 a.m. to 1:30 p.m., Mrs. Welch left her house by 4 A.M. in order to arrive at work on time. (ERT 1575.) Mrs. Welch sometimes rose at 3:30 A.M. to arrive at work on time. (ERT 1578.)

After she finished work, during the time petitioner was on trial, Mrs. Welch traveled by bus to the courthouse where petitioner's trial was in progress. (ERT 1575.) Petitioner's trial lasted for months.[37] (ERT 1576.) After the end of the day's trial, Mrs. Welch traveled about an hour by bus to return from the courthouse to her home in Sobrante Park. (ERT 1578.)

Throughout the trial, Mrs. Welch brought petitioner clothes to wear in court. (RT 1576.) Mrs. Welch also ran errands for petitioner during the trial, including taking petitioner's handwritten pleadings to be typed for him. (ERT 1576.)

Mrs. Welch produced receipts showing that on February 21, 1989, she had brought petitioner's papers from the courthouse in downtown Oakland to The Business Office, a business support establishment on University Avenue in Berkeley, so that petitioner's handwritten papers could be put in typewritten form. (ERT 1576, Petitioner's Exh. J.) Mrs. Welch visited The Business Office several times on behalf of petitioner.

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[37]/ Petitioner's jury trial began on November 9, 1988 and concluded on July 25, 1989. (Trial CT Master Index.) Evidence was presented during May, June, and July, 1989.

(ERT 1578.) She recalled that she traveled 45 minutes by bus to reach The Business Office from the courthouse. (ERT 1578.) If she was going directly home instead of going to court, Mrs. Welch traveled about an hour and a half from The Business Office back to her home in Sobrante Park. (ERT 1578.)

As previously noted, during the time he represented petitioner, Mr. Broome spoke to Minnie Welch "about the family background and what had occurred, basically, with she and David and the father." (ERT 174.) Mrs. Welch told Mr. Broome that petitioner's father, David Welch Jr., had been "very abusive" toward her and petitioner. (ERT 174.) Mr. Broome found that Mrs. Welch was "very cooperative" and was sure she would have been available for additional interviews if he had continued on the case and wanted to have them done. (ERT 224.)

Cathie Diane Thomas recalled that when her two brothers, petitioner and Dwight, were being tried simultaneously for separate crimes, her mother went back and forth between the two trials. She could not recall if petitioner was being tried for the instant offense. (ERT 1641.)

(b) Proposed Findings Based on the Testimony of Social History Witnesses Regarding Counsel's Performance.

With the exception of Minnie Welch, petitioner's mother, none of the social history witnesses who testified at the hearing had ever been contacted by the defense or asked to testify at petitioner's trial, and all six stated they would have testified if asked. (ERT 569 [Roy Millender]; ERT 617 [Konolus Smith]; ERT 1288 [Sarah Perine]; ERT 1505 [Glenn Riley]; ERT 1581 [Minnie Welch]; ERT 1640 [Cathie Diane Thomas].

For a period of time, Dwight Welch, petitioner's brother, was being tried at the same time and on the same floor of the courthouse where petitioner's trial was taking place. (ERT 1640-1641.)

Minnie Welch would have cooperated with counsel and done anything she could to help petitioner, including providing documents or testifying at trial. (ERT 1581.) In addition to Mrs. Welch's own testimony to this effect, several facts support this finding:

Minnie Welch attended some portion of almost every day of petitioner's trial. (ERT 1574, 1576.)

She regularly saw attorneys Spencer Strellis and Alexander Selvin at court. (ERT 1578.)

Attorneys Strellis and Selvin did not talk to Mrs. Welch in court. (ERT 1578.)

Mrs. Welch recalled that the office of either attorney Selvin or attorney Strellis was on 17th or 18th Street in downtown, Oakland.[38] (ERT 1599.) Mrs. Welch recalled visiting the office during petitioner's trial but she could not recall the reason for the visit. (ERT 1599.)

Mrs. Welch went to great lengths to help petitioner in any way she could. At the time of petitioner's trial, Mrs. Welch lived at 521 La Prenda Drive in Oakland, CA. (ERT 1574.) During that period, Mrs. Welch, worked at a retirement home, Piedmont Garden, located at 41st Street and Piedmont Avenue in Oakland, CA. (ERT 1573.)

Mrs. Welch doesn't drive. (ERT 1538.) Mrs. Welch traveled from her home to work by bus. (ERT 1575.) It required her about one hour to reach her work from her home. (ERT 1575.) Since she worked from 5 a.m. to 1:30 p.m., Mrs. Welch left her house by 4 A.M. in order to arrive at work on time. (ERT 1575.) Mrs. Welch sometimes rose at 3:30 A.M. to arrive at work on time. (ERT 1578.)

After she finished work, during the time petitioner was on trial, Mrs. Welch traveled by bus to the courthouse where petitioner's trial was in progress. (ERT 1575.) Petitioner's trial lasted for months.[39] (ERT 1576.) After the end of the day's trial, Mrs. Welch traveled about an hour by bus to return from the courthouse to her home in Sobrante Park. (ERT 1578.)

Throughout the trial, Mrs. Welch brought petitioner clothes to wear in court. (ERT 1576.) Mrs. Welch also ran errands for petitioner during the trial, including taking petitioner's handwritten pleadings to be typed for him. (ERT 1576.)

Mrs. Welch produced receipts showing that on February 21, 1989, she had brought petitioner's papers from the courthouse in downtown Oakland to The Business Office, an establishment on University Avenue in

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[38]/ For many years, Mr. Strellis's office has been located in the Latham Square Building at 1611 Telegraph Avenue in Oakland. The office is in a building at the point of the acute angle formed by the intersection of Telegraph and Broadway, and is between 16th and 17th Streets.

[39]/ Petitioner's jury trial began on November 9, 1988 and concluded on July 25, 1989. (Trial CT Master Index)

Berkeley, so that petitioner's handwritten papers could be put in typewritten form. (ERT 1576, Petitioner's Exh. J.) Mrs. Welch visited The Business Office several times on behalf of petitioner. (ERT 1578.) She recalled that she traveled 45 minutes by bus to reach The Business Office from the courthouse. (ERT 1578.) If she was going directly home instead of going to court, Mrs. Welch traveled about an hour and a half from The Business Office back to her home in Sobrante Park. (ERT 1578.)

Mrs. Welch's willingness to cooperate with counsel to support her son is supported by other witnesses. During the time he represented petitioner, Mr. Broome spoke to Minnie Welch "about the family background and what had occurred, basically, with she and David and the father." (ERT 174.) Mrs. Welch told Mr. Broome that petitioner's father, David Welch Jr., had been "very abusive" toward her and petitioner. (ERT 174.) Mr. Broome found that Mrs. Welch was "very cooperative" and was sure she would have been available for additional interviews if he had wanted to have them done. (ERT 224.)

Petitioner's sister, Cathie Diane Thomas recalled that when her two brothers, petitioner and Dwight, were being tried simultaneously for separate crimes, her mother went back and forth between the two trials. She could not recall if petitioner was being tried for the instant offense. (ERT 1641.)

Petitioner did not ask Mrs. Welch or anyone else to refuse to speak with his lawyers or anyone else connected with his defense. (ERT 1582.) Petitioner never asked Mrs. Welch to refuse to speak with any particular individuals. (ERT 1582.)

Petitioner had told his mother that he did not want issues of mental health raised during the penalty phase. (ERT 1592.) However, she would still have cooperated with counsel or mental health experts in raising issues of mental health in the penalty phase even if petitioner had asked her not to do so. (ERT 1593.)

Attorneys Strellis and Selvin never came to Mrs. Welch's home. (ERT 1578.) Someone came to see Mrs. Welch at her home but she couldn't recall who it was.[40] (ERT 1591.) She thought that two policeman, one white and one African-American, came to her home. (ERT 1578.)

2. Exceptions to Credibility Findings Regarding Lay Witnesses Primarily Relevant to Evidence of Serious Child Abuse a Reasonably Competent Investigation Would Have Disclosed.

As noted above, the second component of the second referral question the referee was required to address was, if trial counsel's

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[40]/ Mrs. Welch was asked by respondent if "someone" came to her house. The implication was someone related to petitioner's defense. (ERT 1591.)

investigation was found inadequate, what additional information an adequate investigation would have disclosed. The referee made credibility findings regarding the testimony of several witnesses relevant to this question. Petitioner will address these findings here. Because the three expert witnesses made reference to the declarations and testimony of lay witnesses, petitioner will discuss the findings pertaining to the lay witnesses first, followed by petitioner's proposed findings regarding their testimony, and will then discuss the findings pertaining to the experts, followed by petitioner's proposed findings concerning that testimony.

a. Exceptions to Findings Pertaining to Lay Witnesses

i. Minnie Welch

Minnie Millender Welch is petitioner's mother. She is an elderly woman– 76 years old at the time of the hearing– who was born and raised in extreme poverty in racially segregated rural Alabama and, based upon her own testimony and that of others, was physically abused for many years by petitioner's father, David Welch, Jr.

The referee briefly summarized Mrs. Welch's testimony (Findings, at pp. 18-20), but ultimately discounted it in its entirety because, the referee found, she would not have cooperated with trial counsel or testified at trial. Petitioner respectfully but strenuously takes exception to the referee's finding in this regard, and further takes exception to the highly selective nature of the referee's summary of her testimony.

First of all, contrary to the findings, and as set forth above, the record shows that Mrs. Welch did everything she possibly could to assist her son at his trial. Mrs. Welch herself testified that she would have done anything she could to help petitioner, including providing documents or testifying at

trial. (ERT 1581.) She said if she had been asked by Mr. Selvin or Mr. Strellis to testify, she would have offered the same information she provided at petitioner's evidentiary hearing. (ERT 1581.)

The referee, however, states that she found this testimony not credible. As stated in the Findings:

> Both her actions at the time and her testimony belied that claim: at the time she didn't go to meet with the lawyers when asked, and admitted as much in her testimony. Her testimony was also in stark contrast to that of Mr. Selvin as well as Dr. Pierce and Dr. Benson. The Referee finds that Minnie Welch's selective help– making the effort to go to court everyday and running errands for petitioner, yet never managing to meet with counsel for any of the scheduled meetings– shows that she chose not to cooperate with counsel. Therefore the Referee finds that she would not have been available as a witness in petitioner's case.

(Findings, at p. 20.)

While Mrs. Welch clearly had memory issues and often appeared confused by the forms of the questions, petitioner agrees that the totality of evidence at the hearing shows that she did not appear for at least one, and probably two, meetings that were scheduled to be held at trial counsel's office with Dr. Pierce and Dr. Benson. However, petitioner submits that the referee's conclusion that her failure to appear at these meetings indicated willful non-cooperation, and somehow justifies the rejection of all her testimony, is completely unwarranted.

As is evident from her testimony, Mrs. Welch is not only elderly but also not a particularly high-functioning person. She was born and raised in severe poverty on a farm in rural southern Alabama. (ERT 1257, 1258, 1262, 1536, 1539, 1257, 1540, Exh. N-1, Tab 65.) The family had no electricity or running water. (ERT 1259, 1536.) Her grandmother was a midwife for the neighboring community who advised pregnant women to

eat "gully dirt"– a kind of white clay– as a cure for morning sickness, and who administered this substance to all her family members to treat other illnesses as well. (ERT 1262-1263.) The family had no car, and her father rode a mule to his job at a lumber mill 20 miles away. (ERT 1260.) She and her siblings attended a segregated, 200-student, two-room school in Beatrice, about four or five miles from the family's farm. Mrs. Welch never graduated from high school. (ERT 1536-1537.) When she worked during petitioner's youth, it was on an assembly line in canning plants. By the time of petitioner's trial, she was working preparing meals in a senior residence. She could not drive a car, and at the time of trial traveled back and forth from her home in Sobrante Park to her job in North Oakland and to the courthouse in downtown Oakland on a series of buses. (ERT 1574, 1576.)

Trial counsel in a capital case cannot expect potential social history witnesses like Mrs. Welch to appear in their offices for meetings at scheduled times and then simply give up any further attempt to contact the witness when the witness fails to appear. Mrs. Welch is not a professional person with a Day Planner, and it was apparent from her testimony, summarized below, not only that simply working and traveling in the East Bay was an ordeal for her, but also that during the time of petitioner's trial she was completely overwhelmed. That is one reason why the standard of practice in capital cases requires that interviews should be conducted in the home or on the "turf" of the witness, in addition to the need to see where the client grew up, what kind of housekeeping the family had, and what their living situation says about their socioeconomic status and other factors. (ERT 1225.) This may require making accommodations for

witnesses who may work multiple jobs, or waiting long hours for witnesses to show up. (ERT 1225.) Witnesses may be substance abusers, may not be high-functioning, or may have mental illnesses themselves. (ERT 1226.) Accordingly it was standard practice in the 1980s to travel to locate and interview potential social history witnesses as needed. (ERT 1210.)

The fact that Minnie Welch missed one or two meetings with mental health experts at the attorneys' offices does not justify the referee's conclusion that she would not have testified at trial and that all of her testimony should now be ignored. Indeed, a review of the whole record shows that in fact Minnie Welch would have done anything she possibly could have done to assist her son, and certainly would have testified at trial.

Minnie Welch recalled attending almost every day of petitioner's trial, in spite of the fact that she was working at the time and had to travel by bus everywhere she went. (ERT 1574, 1576.) Petitioner's trial lasted for months, and during some period of time, petitioner's brother, Dwight Welch, was also being tried in another courtroom nearby.[41] (ERT 1576, 1641.) Cathie Diane Welch, petitioner's sister, recalled that Mrs. Welch attended both petitioner's trial and Dwight's trial regularly, sometimes going back and forth between the two trials. (ERT 1641.)

Mr. Selvin also agreed that Mrs. Welch was present at the trial on "some days" and took an interest in the case. (ERT 491.) She regularly saw attorneys Spencer Strellis and Alexander Selvin at court. (ERT 1578.) She said that although she was present in court nearly every day, attorneys

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[41]/ Petitioner's jury trial began on November 9, 1988 and concluded on July 25, 1989. (Trial CT Master Index) Dwight Welch's trial for auto theft took place in the summer of 1989. He was convicted and sentenced on July 11, 1989. (Findings at p. 44 n. 3.)

Strellis and Selvin did not talk to her in court. (ERT 1578.) In short, if counsel wished to ask for Mrs. Welch's assistance, she was right behind them in court on most days of the trial for months on end, and all they had to do was turn around and ask her.

It also stretches credulity to believe that Mrs. Welch would undergo the staggering hardships she went through on petitioner's behalf during petitioner's trial but then refuse to assist trial counsel. Petitioner has previously described the extraordinary lengths to which Mrs. Welch went to assist her son during the trial while simultaneously attending the trial of her younger son, Dwight Welch, which was taking place in another courtroom. (See section (1)(b)(iv)(*a*) above.) Plainly, if counsel had begun contacting her at least a year prior to the commencement of trial, as the standard of care requires, or had even turned around to speak to her in court when trial began in November, 1988, she would have done anything counsel asked her to do. (ERT 1581.)

The referee concludes that Mrs. Welch's efforts on petitioner's behalf were "selective." (Findings at p. 19.) However, this finding flies in the face of evidence of her cooperative behavior assisting the other attorneys who have represented petitioner both before and after petitioner's trial. Mrs. Welch was very cooperative and forthcoming with Mr. Broome, who represented petitioner before Mr. Strellis and Mr. Selvin, and was willing to discuss with him a subject as sensitive as the abuse she and petitioner received at the hands of her husband, petitioner's father. She was also forthcoming during habeas corpus investigation in 2002 and provided the defense team with a declaration at that time. In addition, she obviously had no qualms about appearing and testifying at the evidentiary hearing. It

defies logic to suppose that she would voluntarily assist and cooperate with petitioner's counsel both before and after trial, but would willfully refuse to cooperate with Mr. Selvin or Mr. Strellis. It is far more likely that she forgot the meetings at trial counsel's office or became confused about when or where they were to take place.

In any event, the record shows that trial counsel made two attempts to have her come in to their office for meetings and after that did absolutely nothing to secure her assistance in spite of the fact that she was in court nearly every day. Given the obstacles Mrs. Welch faced and the efforts she made to help petitioner's case, the fact that she did not testify is not attributable to her but to trial counsel's failure to have an investigator or mitigation specialist go to her home to interview her, as the standard of care required. The referee's finding discounting her entire testimony at the hearing is wholly unwarranted.

ii. Sarah Perine.

Sarah Perine is petitioner's aunt, the younger sister of petitioner's mother, Minnie Welch. She testified about her and her siblings' upbringing in Alabama and the period from Mrs. Welch's pregnancy with petitioner in 1957 and 1958 through 1961, when she and her husband moved to Los Angeles. After this, Ms. Perine did not see her sister or petitioner very much.

The referee found Ms. Perine's testimony regarding the abuse inflicted on petitioner and Mrs. Welch to be credible and appears to believe Ms. Perine would have been available to testify at the trial. Thus, while the findings regarding her testimony are rather brief and petitioner believes

should be more fully set forth, as he has done below, petitioner has no major objection to the referee's general conclusions.

However, petitioner does respectfully take exception to the referee's observation that Ms. Perine testified petitioner's father drank at home, while Mrs. Welch and petitioner's sister, Cathie Diane Welch, both testified that petitioner's father rarely drank at home. (Findings at p. 20.) In view of the significance and scope of Ms. Perine's testimony regarding the abusive, alcoholic David Welch Jr., the brevity of the referee's summary of her testimony, and the rather trivial nature of the discrepancy, it is not clear why the referee thought this matter noteworthy. However, the explanation is that Ms. Perine was testifying only about the period of time when petitioner's parents lived in two dilapidated apartment buildings on Fremont Street in Emeryville from 1957 to 1961. (ERT 1270-1271.) Ms. Perine moved with her husband to Los Angeles in 1961 and thus had little if any knowledge of petitioner's father's drinking habits from that time on. Furthermore, Mrs. Perine did testify that she also saw petitioner's father's car parked outside bars such as Amy's Place on Grove Street in Oakland, and thus knew he did much of his drinking away from home. As for the testimony of Cathie Diane Welch, she was not born until October 1, 1956, and thus would not have been aware of her father's drinking habits during this period. Mrs. Welch's testimony regarding her husband's drinking covered the whole period of her marriage to petitioner's father, both in Emeryville and Sobrante Park, and her testimony that petitioner's father "never" drank at home was hyperbole that cannot be taken literally. (ERT 1544, 1548, 1553.)

iii. Cathie Diane Welch Tingle Thomas

Cathie Diane Welch Tingle Thomas is petitioner's sister and is two years' older than petitioner. Because the referee refers to her as "Ms. Thomas," petitioner will do so as well. Ms. Thomas gave powerful testimony describing the evidence of neurological impairment with which petitioner was born and the brutal whippings and other abuse he endured at the hands of his father. The referee found Ms. Thomas's testimony regarding the abuse petitioner suffered at the hands of his father to be credible. Petitioner completely agrees with this finding.

However, the referee makes the remarkably incorrect finding that when Ms. Thomas was living with her mother and at home during petitioner's trial, "counsel visited their house for the sole purpose of discussing social history and obtaining background information. Counsel received no information from anyone during that visit, including Ms. Thomas." (Findings at p. 21.) At the conclusion of her findings regarding Ms. Thomas's testimony, the referee makes clear that she believes the "counsel" in question was Mr. Selvin. This finding is not supported by substantial evidence and wildly misstates the testimony of this witness. There is no citation to the record to support the finding, and petitioner is at a loss to understand how the referee arrived at it.

Ms. Thomas testified that she attended the trial on some days but never spoke to petitioner's lawyers and neither of them ever spoke to her. (ERT 1640.) She was asked whether "anyone" came to the house to speak to her and she replied, "Somebody came to the house. I want to say came to talk to my mother, but nobody ever talked to me." (ERT 1640. She recalled this person was a "Caucasian man." (ERT 1640.) She then

testified that if she had been asked by counsel to testify, she would have done so. (ERT 1640.) There was no cross-examination on this testimony.

That is the sum total of Ms. Thomas's testimony regarding the person who came to the house. The question and answer implied that the person had some connection to the defense, but she never described this person as "counsel," and her answers to previous questions about whether she ever spoke to or was spoken to by petitioner's lawyers clearly show that she knew who Mr. Selvin and Mr. Strellis were and would have recognized them if the Caucasian man who came to the house had been one of petitioner's lawyers. Moreover, there is nothing anywhere in Ms. Thomas's testimony to support the wholly unsupported finding that "counsel visited their house for the sole purpose of discussing social history and obtaining background information." (Findings at p. 21.)

There is also no testimony anywhere else in the record to support this conclusion. Mr. Selvin testified that "I believe and – I don't recollect, I myself or Spencer and I actually went to their place at one time. But I can't recollect specifically." (ERT 466.) However, Mr. Selvin also could not recall where petitioner's parents lived, or where Sobrante Park is. (ERT 466-467.) Petitioner's mother testified that attorneys Strellis and Selvin never came to her home. (ERT 1578.) "Someone" came to see Mrs. Welch at her home but she couldn't recall who it was.[42] (ERT 1591.) She thought that two policeman, one white and one African-American, came to her home. (ERT 1578.)

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[42]/ Mrs. Welch was asked by respondent if "someone" came to her house. The implication was someone related to petitioner's defense. (ERT 1591.) In view of her answer, it is not entirely clear whether Mrs. Welch understood the thrust of the question.

Thus, the state of the evidence is that there is *no* substantial evidence that either trial attorney ever actually went to the Welch home, but there *is* substantial evidence (i.e, Mrs. Welch's testimony at ERT 1578) that they did not. Mr. Selvin's vague "belief," which he took pains to explain was not a specific recollection, is not substantial evidence. There are also no notes of any such meeting in the trial file. There was also no other social history investigation at all. Counsel gathered no social history documents– not even petitioner's birth certificate– and had no list of family, friends, teachers, or others to contact for social history interviews. The only record of any interview with any family member was the report of an interview of petitioner's father that Harold Adams performed when he was working for Mr. Broome, and the content of that report demonstrates that the interview was for guilt-phase purposes, not for the purposes of obtaining social history. Dr. Benson testified that he was not even aware of any family members other than Mrs. Welch. (ERT 401.) Accordingly, petitioner strenuously objects to this unsupported finding.

The findings also make a similarly unsupported finding that Ms. Thomas's testimony that she would have testified if asked "contradicts Mr. Selvin's testimony: although counsel did not testify that he had talked specifically to Mrs. Welch or Cathie Thomas during that visit, he was clear that no one from the family was cooperative." (Findings, at p. 22.) Once again, the referee's conclusion that the person who came to the house was Mr. Selvin is unsupported by any substantial evidence. As for the finding that "no one in the family was cooperative," even setting aside the self-serving nature of his testimony and taking it at face value, Mr. Selvin never suggested that Ms. Thomas was one of the supposedly uncooperative family

members. Mr. Selvin did repeatedly use the term "family" and claimed that the "family" was uncooperative. However, when asked to identify the uncooperative family members more specifically, Mr. Selvin recalled that the attorneys had set up appointments for David Welch's parents, and also thought there had been an appointment for someone else in the family but could not remember whether it was "one of his brothers or one of his uncles. It was someone else." (ERT 465.) These appointments with family members were to have been held at Mr. Strellis's and Mr. Selvin's law office. (ERT 467.) Mr. Selvin did not recall contacting anyone other than these family members for social history information. (ERT 467.)

Thus, again taking Mr. Selvin's testimony at face value, he never once testified or implied that Cathie Thomas was uncooperative. Mr. Selvin's recollection was that the uncooperative "family" consisted of petitioner's parents, and he only vaguely thought there might have been one other family member, such as an uncle or brother. Ms. Thomas was obviously not one of petitioner's parents, nor was she his brother or uncle. The referee's finding of a contradiction between Ms. Thomas's testimony and Mr. Selvin's testimony is wholly unsupported, and petitioner takes exception to it.

Furthermore, nothing in the trial file substantiates this portion of Mr. Selvin's testimony or suggests any effort by trial counsel or anyone on their behalf to contact petitioner's father or anyone in the family other than Mrs. Welch. Contrary to Mr. Selvin's recollection, when Mr. Broome sent an investigator to interview petitioner's father, petitioner's father cooperated, provided that investigator with information, and the investigator prepared a report, which is the only family interview report in the trial file. It is hard to

see why petitioner's father would cooperate with Mr. Broome's investigator but not with petitioner's trial counsel, and petitioner submits Mr. Selvin's self-protective testimony on this point is not credible. As noted above, Dr. Benson testified that he was not even aware of the existence of any family members other than Mrs. Welch. (ERT 401.)

Thus, Mr. Selvin's self-serving testimony that he tried but was unable to secure the cooperation of petitioner's "family" really amounts to Mrs. Welch missing two appointments to meet at his office with Dr. Benson and Dr. Pierce. There is simply no substantial evidence to support the referee's unwarranted findings that Mr. Selvin ever visited the Welch home or that anyone in the family was uncooperative, apart from the fact that Mrs. Welch failed to appear at two meetings at the attorneys' offices. However, there is substantial evidence that Cathie Thomas would have testified if asked, and the referee's remark that she was "not convinced Ms. Thomas would have cooperated any more than her mother did" is both unsupported and vague. It is not a finding, has no basis in any evidence, and this court should ignore it.

iv. Konolus Smith

Konolus Smith was one of petitioner's childhood friends and schoolmates when they both lived in Sobrante Park. Mr. Smith witnessed three specific incidents in which petitioner was struck or otherwise abused by his father in public. The referee found his testimony to be credible (Findings at p. 23), and petitioner agrees.

Petitioner notes in passing that in spite of her finding that Mr. Smith's testimony was credible, the referee later appeared to fault Dr. Kriegler for relying on statements Mr. Smith made to her in a personal

interview that the referee felt differed from his testimony. As petitioner will discuss at greater length during his discussion of the referee's credibility findings pertaining to Dr. Kriegler, various discrepancies the referee claimed to find in this regard either do not in fact exist or are so trivial as to be irrelevant. Petitioner also notes that in spite of her finding that Mr. Smith's testimony was credible, the referee does not include it among the testimony of the social history witnesses she considers on the issue of serious child abuse. Accordingly, petitioner does not understand what findings the referee actually makes with respect to Mr. Smith's testimony.

Petitioner finally submits that the referee's summary of Mr. Smith's testimony was excessively brief and thus provides a more extensive summary below.

v. Roy Millender

Roy Millender is the brother of Minnie Welch and Sarah Perine, and thus petitioner's uncle. He testified regarding his experiences with petitioner as a child, petitioner's father's alcoholism and criminality, and provided some additional evidence of physical abuse. The referee found his testimony to be credible (Findings at p. 23), but again summarized it quite briefly in two paragraphs. Petitioner agrees that Mr. Millender's testimony was credible and provides a more extensive summary below.

vi. Glenn Riley

Glenn Riley is another childhood friend and schoolmate of petitioner's from the time they grew up in Sobrante Park. Mr. Riley saw evidence of beatings of petitioner by his father and personally witnessed a violent incident involving petitioner and his father when petitioner was 17.

The referee finds Mr. Riley's testimony to be credible (Findings at p. 24), and petitioner agrees.

Petitioner strongly takes exception to the referee's conclusion that "[t]he testimony is of little value, however, because the Referee credits Mr. Selvin's testimony and judgment that he would not have conducted further investigation or called Mr. Riley as a witness in the penalty phase." (Findings, at p. 24.) This finding essentially makes Mr. Selvin– one of the attorneys whose performance is under review– the standard for determining what investigation should have been done. In fact, Mr. Selvin's testimony regarding Mr. Riley constituted a jaw-dropping admission by Mr. Selvin of the profound depths of his incompetence.

At the evidentiary hearing, Mr. Selvin was directed by respondent to read two paragraphs from a mental evaluation in a juvenile probation report concerning the MacPherson incident, an incident in which petitioner, at the age of 17, allegedly fired a shotgun at the MacPherson home a few doors down the street from his home. (ERT 503.) Glenn Riley was mentioned in the report as a neighbor and witness to the shooting incident who had given a statement to police. The document had been given to the defense in discovery by the prosecution because the prosecution had alleged the MacPherson incident as one of a large number of incidents in aggravation the prosecution intended to use in the penalty phase, and because the defense had done no social history investigation of its own, this was one of the few documents in the defense file that could conceivably be considered to be relevant social history information. (ERT 470.)

Mr. Selvin did not recall that the incident was used in aggravation at trial. (ERT 520.) However, Mr. Selvin said he probably would not have

investigated each report, even though he knew that probation reports are often inaccurate and thought there had never been a case in which he had not found some kind of error in a probation report. (ERT 517-518.) With respect to the MacPherson incident report, he said he probably would not have put the name of Glenn Riley on a list of people to contact for more information about David Welch. (ERT 519-520.) He said that even if he had known the incident was going to be used in aggravation at trial, he would not necessarily have investigated the incident in this case because there were so many other aggravating factors involving violence that "showing that one of them is not completely correct doesn't change anything." (ERT 521.)

First of all, Mr. Selvin's testimony he would not investigate to determine the accuracy of an incident report on an incident in aggravation that the prosecution intended to use in the penalty phase of a capital case is a staggering admission of ineffective assistance, as well as just plain sloth. It does not matter how many factors in aggravation there are; defense counsel in a capital case has a duty to investigate them. *All* of them. He cannot simply throw up his hands and give up because there are too many. Counsel may not "sit idly by, thinking that investigation would be futile." (*Voyles v. Watkins* (N.D. Miss 1980) 489 F.Supp. 901, 910, *accord, Austin v. Bell* (6th Cir. 1997) 126 F.3d 843, 849 [counsel's failure to investigate and present mitigating evidence at penalty phase on the grounds he "did not think it would do any good" is ineffective assistance].) Specifically, capital defense counsel must investigate, inter alia, "the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; . . ." (Commentary, ABA Guideline 10.7.)

> Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

(*Ibid.*; see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [invalid prior conviction not relevant to sentencing decision in capital case and provides no legitimate support for death sentence].)

As petitioner's *Strickland* expert testified, at the time of petitioner's trial capital trial counsel were required to investigate each of the factors in aggravation noticed by the prosecution, regardless of the number of aggravators, and could not simply decline to investigate because there were too many factors in aggravation. (ERT 1059-1060.) Indeed, apart from the professional standards in existence at the time, *Johnson v. Mississippi, supra*, had declared the year before petitioner's trial that invalid priors could not be used in aggravation. Such an investigation of aggravating factors was required in order to challenge, if possible, the sufficiency of prior convictions or to mitigate the impact of the prior convictions or violent incidents. (ERT 1061.) Counsel were also required to understand the basic aggravating and mitigating factors set forth in Penal Code section 190.3 and in the Rules of Court applicable in non-capital sentencing. (ERT 1118-1119.)

In short, the referee's decision to "credit" Mr. Selvin's appalling admission that he would not have investigated the MacPherson incident is not merely illogical but runs squarely contrary to the Eighth Amendment jurisprudence of the United States Supreme Court and the standard of care applicable to counsel in a capital case. Far from being credit-worthy, Mr. Selvin's testimony was an outright declaration of his incompetence.

Furthermore, and apart from the duty to investigate incidents in aggravation, it is also counsel's duty to conduct a *mitigation* investigation for the penalty phase. As petitioner's experts testified, since at least 1980 competent penalty phase investigation has been understood within the profession as requiring a two-track approach; first, the defense team must obtain social history documents; and second, the team must interview social history witnesses. (ERT 1042-1043, 1179-1181.) While the two tracks overlap somewhat, record gathering is usually the first focus. During this phase, the investigation focuses on obtaining school records, birth records, hospital records, employment records, military records, probation reports, and similar historical documents. (ERT 1042-1043, 1179.)

Probation reports are essential because they will both provide information that may be relevant to combating aggravation and because they too will provide leads for witnesses to contact. (ERT 1043.) From the record-gathering, the investigation develops firm biographical dates and markers as well as a framework for understanding the client's history, and also develops lists of potential interview subjects; for example, school records will provide leads for interviews with teachers and school principals. (ERT 1043- 1044, 1050, 1190.)

In the case of the MacPherson incident report, and contrary to the referee's finding, *any* competent attorney or mitigation investigator would have reviewed the report, noted the name of Glenn Riley, and placed his name on a list of potential interview subjects. Not only was Mr. Riley a percipient witness to an aggravating incident any competent capital attorney was duty-bound to investigate, he was also a neighbor and was present at an incident involving an altercation between petitioner and his father. After

discussing Mr. Riley's statement to police, the MacPherson report states that petitioner admitted that he shot out the window of his father's car "because he was mad at his father who David states threw coffee in his face." (Habeas Petition, Exh. 56, MacPherson Incident Report, p. 5.)

Thus, the report disclosed evidence which, if true, would show that petitioner's father had thrown hot coffee in his face. Any capital attorney or mitigation specialist– indeed, any reasonable person– reviewing this document would understand that such conduct by a father toward his son is unlikely to have been an isolated occurrence and would likely suggest a history of other abuse. Yet even though this document was sitting in his file, having been handed to him by the prosecutor, and even though the prosecutor had announced his intention to use the incident in aggravation in the penalty phase, and even though the document disclosed the tip of the iceberg of serious child abuse in this case, Mr. Selvin declared under oath that he would not have investigated it or placed Mr. Riley's name on a list of people to contact for information. Mr. Selvin's blithe admission in open court that he would not have done anything about this report is perhaps even more appalling than his conduct because it shows Mr. Selvin is not even aware that his failure to investigate this incident reflects badly on his competence as an attorney.

In short, the referee's dismissal of Mr. Riley's testimony on the grounds that she "credits" Mr. Selvin's judgment that he would not have conducted further investigation of the MacPherson incident or interviewed Glenn Riley is simply wrong. Mr. Selvin's own opinion about what he should or should not have investigated cannot itself be used as the standard for determining his competence. The finding is therefore illogical. The

standard of care is not Mr. Selvin himself, but the standard of care prevailing in the profession at the time of petitioner's trial. As petitioner's *Strickland* expert testified, that standard required counsel to investigate every incident the prosecution sought to use as a factor in aggravation.

It should also be noted that counsel's failure to investigate the incident and interview Glenn Riley was extremely prejudicial. A competent investigation would have shown that the MacPherson incident occurred immediately after an altercation between petitioner and his father that was the last instance of child abuse inflicted on petitioner by his father. For the first time, petitioner actually fought back, and his father never abused him again. A competent investigation would have permitted counsel to show that the MacPherson incident occurred when petitioner was in a state of emotional agitation immediately following an incident of child abuse and thus enabled counsel to mitigate this aggravating factor.

Accordingly, petitioner sets forth below the evidence of serious child abuse provided by the foregoing lay witnesses that would have been uncovered had counsel conducted a competent investigation.

b. Hearing Evidence From Lay Witnesses Regarding David Welch's Social History Background and Serious Child Abuse.

Petitioner's mother, Minnie Millender Welch, was the second of Roy and Jency Millender's seven children. Minnie, her younger sister, Sarah Millender, and their younger brother, Roy Millender, Jr., all testified at the hearing. (ERT 1257-58)

The Millenders were all born on a small farm in the very rural community of Natchez, Alabama. Minnie Millender was born in 1934. (ERT 1257, 1258, 1262, 1536, 1539, 1257, 1540, Exh. N-1, Tab 65.) There was one paved road in Natchez; it was about three or four miles from

the farm. (ERT 1258, 1261.) Natchez had a general store but no electricity, and whenever they wanted popsicles, ice cream, and the like, they paid ten cent cents to the driver of the local mail truck to give them a ride to Beatrice, the nearest town. (ERT 1261-1262.) However, even in Beatrice and other nearby towns, there were no movie theaters, and Minnie's younger sister, Sarah, did not see a movie or television until she moved to California at about the age of 19. (ERT 1259, 1260)

With no electricity, the Millenders lit their home with kerosene lamps and flashlights. (ERT 1259.) Sarah recalled that they didn't get electricity until 1952 or 53. (ERT 1536, 1258-1259.) The Millenders had no refrigerator and made due with an ice box instead. (ERT 1259.) With no running water, someone in Minnie's family walked regularly about the length of a city block to draw water from a well on their grandmother's adjacent property (ERT 1536.) The family ate corn, peas, butter beans, tomatoes and other vegetables that they raised by their own labor on their farm (ERT 1259.) Minnie's mother, Jency Millender, and her children did field work and picked cotton on the local plantations in the summer. (ERT 1261) Jency frequently disciplined her children by whipping them with a branch off a tree.[43] (ERT 1539)

Minnie's grandmother served as a midwife to both black and white women. In that capacity she advised pregnant women to eat "gully dirt" as a treatment for morning sickness. (ERT 1262, 1263.) Gully dirt was a hard red soil with veins of white clay that locals could dig from the hillsides.

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[43]/ Years later, Minnie also whipped her children with a switch cut from a tree in her own backyard in Oakland. (ERT 1539, 1540).

(ERT 1263.) In addition, the whole Millender family ate gully dirt as a palliative for conditions other than pregnancy. (ERT 1263.)

Minnie's father, Roy Millender, Sr., was employed as a sawyer by the Peterman Lumber Company, which was about 20 miles from the family farm. The family had no car, so when he couldn't get a ride in another worker's car or truck, Roy rode to work on the family mule. (ERT 1260.) Sarah couldn't remember when her father finally got a car, but she knows he made do without one for a long time. (ERT 1260.) One day at work, some time in the mid-1950s, a log rolled over on Roy and shattered his arm. (ERT 1264.)

In addition to struggling with rural poverty, the Millender family also had a history of mental illness. In particular, Lee Irvin "Son" Millender, the son of one of the Millender brothers, was described by Roy Millender as "a little mental." (ERT 556-557.) According to Roy, "he talk to himself a lot. He . . . at night he gets up all through the night and go in the kitchen and drinking coffee and talking to his self and everything, so it's a little scary sometime– when you're in the house with him." (ERT 557.) Roy recalls that Son Millender was not always "mental," but "was a normal kid when he was coming up, a little fella." However, when Roy returned home for a funeral in 1988 he noticed that Son "seemed to have a problem." (ERT 557.) Roy did not know whether Son had ever been in a mental institution, but knew that he took medication for his condition.[44] (ERT 557.)

Minnie and her siblings attended elementary school at a two-room schoolhouse that served around 200 children, none of whom were white.

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[44]/ A photograph of Son Millender appears as Tab 117 in Exhibit N-3.

(ERT 1536-1537.) She began high school at another segregated school – this one several miles away in Beatrice – but she never graduated. (ERT 1537.)

After dropping out of high school, Minnie worked away from the farm when she was in her late teens at places like the Castigliola Shrimp Company of Pascagoula, Mississippi. (Exh. N-1, Tab 68) In 1955, at the age of 21, she decided to move to California to find better employment. (ERT 1265, 1540-1541.) Three of her aunts – Eunice Washington, Helen Collin, and Leatha Gregory – already lived there.[45] (ERT 1541.) Soon after she arrived and while still searching for work, Minnie met an unemployed former serviceman, David Welch, Jr., whose mother was a neighbor of Minnie's Aunt Eunice. (ERT 1542-1543.)

David Welch, Jr., was one of six children of a woman named Ollie Jackson, whose reputation as an alcoholic and "party lady" were so notable that these traits were discussed during her funeral service. (ERT 563, 564.) Her children grew up to be violent drinkers. (ERT 1626.) In addition to the history of apparent schizophrenia on the Millender side of petitioner's family, there is also evidence of mental disease on the Welch side of the family. Minnie recalled that Ollie's grandson, the son of Ollie's daughter, Carrie, suffered from a mental illness that required his institutionalization. (ERT 1547, 1548)

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[45]/ The relocation of much of much of the Millender family from Alabama to California was part of a postwar departure of African-Americans from the South that is sometimes called "the Great Migration." (*See* Isabel Wilkerson, *The Warmth of Other Suns*, Random House, 2010.)

Soon after they began dating, Minnie found herself pregnant with the child of David Welch, Jr. (ERT 1543.) They married in Reno on March 10, 1956. (RT 1543, Exh. N-1, Tab 69.)

The newlyweds moved into a rundown apartment at 5848 Fremont Street in Oakland. (ERT 1266, 1526.) Built as a single family home in 1890, the building had been cut up into six substandard units that were illegally rented out as apartments. (Exhibit O.) The building was not well-maintained and was in the process of disintegrating.[46] (ERT 1267-1268, 1529, Exh. O.) Broken pipes extended the entire length of the walls in some places. (ERT 1529.) Staircases had no railings. (ERT 1528.) The exterior and interior stairs and landings all needed repair. (ERT 1267, 1528.) The roof was damaged and water leaked into the Welch apartment. (ERT 1530.) Peeling paint posed a danger to small children. (ERT 1267.) The backyard was never cleaned and the mounting pile of garbage invited colonies of rats and roaches. (ERT 1531.)

Minnie's first child, a daughter named Cathie Diane, was born on October 1, 1956. (ERT 1522.) Before they were married, Minnie's husband had never struck her. (ERT 1549) However, now that he was employed in construction and making his own money, David Welch, Jr. regularly went out at night and drank until he was intoxicated. (ERT 1544, 1545, 1549.) Sometimes he stayed out all night. (ERT 1545.) He primarily drank at bars and at the homes of his friends and family. (ERT 1272, 1544,

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[46]/ In July, 1957, Oakland's Bureau of Sanitation found thirty-six violations of the Sanitation Code at the Welch's apartment building. (Exh. O.) The violations were never remedied while the Welch family lived at 5848 Fremont Street, and later, the home was declared a nuisance and ordered demolished. (Exh. O.)

1548, 1553.) He also drank when he was with his mother and his siblings. (ERT 1546, 1548.)

Whenever her husband drank, he physically assaulted Minnie. (ERT 1550.) Approximately every other week, but sometimes on multiple occasions over a single weekend, Mr. Welch returned to Fremont street after a drinking bout "wanting to fight." On these occasions he would slap and punch Minnie anywhere on her body. (ERT 1552, 1553.) In June, 1957, Minnie Welch's sister, Sarah Millender, made her way from Alabama to California. (ERT 1257, 1263.) Sarah recalled what a startling change it was for her to move from rural Alabama to Oakland. When she first arrived her aunts took her to see the fireworks in San Jose for the Fourth of July which delighted Sarah because, at home in Alabama, fireworks were rare and were usually just boys setting off firecrackers in the woods. (ERT 1264.) When Sarah visited Minnie, she found her sister living in squalor. Sarah saw rats, roaches and lizards ran through the apartment. (ERT 1268.) Already pregnant with petitioner, Minnie had lost weight and looked "puny" and "frail." "She just didn't look the same Minnie." (ERT 1266)

It was the middle of 1957 when Sarah first saw Mr. Welch strike Minnie. Sarah was climbing the dilapidated stairs that led to the Welch apartment when she heard fighting. Inside the apartment she witnessed Mr. Welch kicking and slapping his pregnant wife. (ERT 1273.) Sarah recalled that Mr. Welch was "always, you know, slappin' on her and beatin' on her, pushin' her around" and that he spoke to her "with profanity, a lot of profanity languages. He used to call her names." (ERT 1271.)

Both Minnie and Sarah remembered when their cousin General Thomas, known by his nickname, "Red," paid an unexpected visit. He too found an intoxicated Mr. Welch striking and hitting his pregnant wife. (ERT 1550.) Believing that Minnie had called Red for help, Mr. Welch fought with Red as well. (ERT 1550.) When the fight was over, Red took Minnie and Cathie Diane to their aunt's home. Sarah was there and listened as "Red" explained to her aunt why Minnie had a black eye and was bruised and crying. (ERT 1550-1552, 1277.)

On March 21, 1958, David Esco Welch was born. Minnie brought petitioner home to the crumbling Fremont Street apartment. (ERT 1522, 1526-1527, Exh. N-1, Tab 48.) Her new baby was asthmatic and suffered from rashes and nose bleeds. (ERT 1267, 1269) In an attempt to help him, Minnie stuffed paper towels in the windows to keep out the cold and set up a ventilator in the room where petitioner slept. (ERT 1269.) Sarah's memory of petitioner as an infant was that he was "tremblin.' He was a nervous baby." (ERT 1269.)

At the time of petitioner's birth, Sarah enjoyed watching a television program called "Spin and Marty," in which one of the characters was named "Moochie." Sarah liked the name, and began referring to her infant nephew as Moochie. Soon, the rest of the family did as well. (ERT 1254.)

Before Moochie's first birthday, the family moved to another apartment nearby, at 5540 Fremont Street. (ERT 1527). With very little money at their disposal (Exh. N-1, Tab 62) the Welches' new apartment "wasn't a nice place to be."[47] (ERT 558) Like their former apartment, this

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[47]/ Roy Millender repeated this phrase three different times during his testimony as though the unpleasantness of the apartment had stayed with him.

apartment was located in a large, run-down, old house that had been divided into smaller units. (ERT 558-559.) Also like their former building, it was rife with garbage and infested with cockroaches. (ERT 558.) It was here that Minnie gave birth to Dwight Chenier Welch on March 12, 1959. (ERT 1522-1523, Exh. N-1, Tab 75) He was her third and last child. At this point, Minnie had been pregnant for 27 of the previous 40 months. (ERT 1522, 1523.)

According to Minnie, Mr. Welch began hitting petitioner with his hand when the Welches were living at the second Fremont Street apartment. (ERT 1585.) About once a week, Mr. Welch spanked petitioner or slapped him. (ERT 1281) Sometimes petitioner was hit because he had done something wrong, but sometimes Mr. Welch hit him for no apparent reason. The punishment was random. (ERT 1557) Mr. Welch called petitioner names like "crazy" and "stupid." (ERT 1283)

Moochie shook and trembled noticeably around his critical and violent father. (ERT 1269, 1283.) He clung more tightly to his mother and his Aunt Sarah when his father was around. (ERT 564, 1283.) He was a nervous and withdrawn little boy. (ERT 564, 1283)

Though Mr. Welch was working, his salary often fed his alcoholic habits rather than his family. He spent most of what he earned drinking and let Minnie and their children go hungry. (ERT 1561) About once a month, the Welch home had no electricity or gas. (ERT 1269, 1270.) Minnie's sister Sarah and her aunts gave the family food and money when they could because Minnie and her children were clearly thin and hungry. (ERT 1269, 1270, 1276.) Doctors determined that Dwight was undernourished (ERT 1560), and that Minnie was having a nervous breakdown. (ERT 1560.)

Beaten and neglected by her husband and struggling to raise three young children with less than subsistence-level support, Minnie was depressed. (ERT 1561-1562.) Sarah Millender visited Minnie and her children often. (ERT 1271) She recalled how brutal their lives were:

> [W]hen he left, [David Jr.] gave my sister about $10 so she could have something in her pocket at that time. But he didn't know that I was spending the night that night, and I spent the night, and during the night he came back, and he jumped on her. He came back to retrieve the money that he had given her, and I heard him in the bedroom fighting her, and I heard the childrens was cryin', and he was saying, give me back my so and so money I know you got it. You got to give it to me, and she was trying to, you know, say, "David don't do that. Don't do that, David."

(ERT 1272, 1274.)

Minnie's younger brother, Roy Millender, moved to California in 1961 with a total of $33 to his name. (ERT 558.) Having been warned against the ways of city people, he hid a $20 bill in his socks. (ERT 559.) He spent his first night at the Welch apartment on Fremont Street. While Roy relaxed in the bath Minnie drew for him, Mr. Welch's brother Henry took the $20 from Roy's socks and disappeared. (ERT 560.) Roy was perplexed but Minnie knew immediately what had happened. (ERT 560) Soon after this incident, Mr. Welch took Roy to a party. (ERT 561.) Roy saw Mr. Welch rummage through an unconscious woman's purse and steal her money. (ERT 562.) From that point forward, Roy tried to keep a good distance between his brother-in-law and himself. (ERT 565-566.)

However, Roy continued to see his nephews, David and Dwight, as they grew older. He was particularly fond of Moochie, who gravitated to his Uncle Roy. Roy Millender recalled that "when I met Moochie, you know, I– I became very close to him . . . when he got to me, look like he was he wanted to– look like something had happened and he became– he

wanted to be my friend. He didn't want to leave me almost, you know?" (ERT 555)

In 1960 or 1961, the G.I. Bill made it possible for the Welch family to buy a home. (ERT 1563-1564.) For a monthly mortgage payment of $89 a month, they were able to purchase a small house in the Sobrante Park neighborhood of Oakland. (ERT 1563-1564, 1624.) Sobrante Park was a residential enclave within an industrial zone. (ERT 600, 1607, 1608, Exh N-1, Tabs 77, 78.) The neighborhood occupied an area of a few square miles in East Oakland that was adjacent to the San Leandro border. On a map, the area is roughly triangular, separated from the surrounding area by train tracks on one side and by San Leandro Creek on another. In the 1960s and 1970s, when Moochie lived there, the only way in or out of the neighborhood by car was through the intersection at 105th Avenue. (ERT 606.)

Although the neighborhood had once been integrated, by the early 1960s it was almost entirely African-American. (ERT 586, 602, 603, 1608.) Minnie remembered Sobrante Park as "real nice when we moved out there." (ERT 1564.) However, other witnesses recalled Sobrante Park in the 1960s as "rough" (ERT 1479), "thug-ish" (ERT 1607), violent (ERT 1609, 1480, 602), drug-ridden (ERT 1610), isolated (ERT 1608), and deprived. (ERT 600.) Konolus Smith recalled Sobrante Park as a lethal neighborhood "where you learn everything you don't need to know. You know, it's gun death, it's drug addiction death, people just seem to die there all the time." (ERT 602) Minnie Welch acknowledged that the neighborhood declined while the Welches lived there. (ERT 1564)

Though the family lived in a new environment, David Welch, Jr., had not changed. He continued to drink away his weekends, then returned to the house "angry, violent, and abusive." (ERT 1622.) Cathie Diane could not recall a time in her life when her father didn't drink, and recalled that he almost always drank to the point of intoxication. (ERT 1621, 1622.)

Cathie Diane slept just across the hall from her parents' bedroom and could clearly hear whatever went on in there. (ERT 1624.) Whenever her father came home after a night of drinking, she heard lamps falling, furniture being knocked around, and the sound of her father's slaps and punches striking her mother. (ERT 1625.) "Well, he'd come in and start arguing first, and we'd all be in bed sleep. He turned the light off, and then you'd hear banging around. And I'd get up and go in and turn the light on and beg him to stop." (ERT 1623) In the mornings, Minnie bore bruises, black eyes, and swollen lips. (ERT 1625-1626.) On one occasion, Mr. Welch hit Minnie so hard that he broke her dentures. She went without them for a month while they were repaired. (ERT 1626.)

Nor was Mr. Welch's violence restricted to Minnie. Sarah recalled that before she moved to Los Angeles in 1961 (ERT 1284), a time when Moochie would only have been about three years old, Mr. Welch slapped petitioner if he dropped something or spilled something on the floor or wet himself. "He would slap him upside his head, his little head, and he would cry, you know, and he would just slap him, spank him with the belt or extension cord or with his shoe, you know, just and then thump him, just flick him upside his head." (ERT 1282)

The descriptions of family members and friends paint a portrait of Moochie as a child who was neurologically compromised from birth. (ERT

1712-1713.) He was so small and scrawny that from a very young age that people thought Dwight was the older brother. (ERT 1615, 1616.) Petitioner had such difficulty speaking, with an impediment that sounded like a lazy tongue, that his father couldn't understand him at all, and his mother could only understand some of what Moochie said. (ERT 1572, 1611.) Form about the time he was four, his older sister Cathie Diane had to serve as an interpreter, translating what Moochie was saying for their father. (ERT 1611.) He didn't outgrow this impediment until he saw a speech therapist at school. (ERT 1572)

Petitioner was also extremely uncoordinated. He walked with his toes pointed out to the sides and he frequently fell down. Petitioner could not tie his own shoes until he was well into kindergarten, so Cathie Diane had to tie them for him. Cathie Diane learned to double-knot petitioner's shoes for him because otherwise the laces would come undone and petitioner would get in trouble for walking on his shoelaces. (ERT 564, 1613, 1614, 1486.) Petitioner's childhood friend Glenn Riley recalled that didn't tease him about it, "but the way he ran was not a normal way to run." (ERT 1486) Moochie was so uncoordinated that he could not catch pop flies at baseball. When he was older and played baseball with other boys, his team usually put him in right field where baseballs rarely landed. (ERT 1486.) Moochie was also cruelly picked on by other children. Cathie Diane recalled that the other children sometimes egged Moochie on so that he would get into fights for their own amusement and so they could bet on the outcome. (ERT 1643-1644.) To Cathie Diane's knowledge, none of the other children in the neighborhood were treated this way. (ERT 1619, 1644.)

When Moochie was around six, Mr. Welch's beatings of his two sons seemed to become more violent and unpredictable. Arriving home drunk in the wee hours of the morning, he roused his sleeping sons in order to whip them. Entering their bedroom, he held an electrical extension cord with "the socket portion that you plug into the wall in his hand, but he'd wrap it around his wrist so it was like a loop." (ERT 1628.) Then he used the loop as a whip. (ERT 1630, 1627-1628.) Mr. Welch lashed and lashed his sons. Sometimes the beatings went on for as long as five minutes. (ERT 1630, 1631) Cathie Diane was able to hear the beatings of her brothers just as she could the assaults on her mother. She heard the sound of the extension making contact with her brothers' skin. She heard the sound of her father's yells and Dwight's screams, but she never heard petitioner cry out though he often received the worse beating. (ERT 1629, 1632.) "It was almost as if he would whip Moochie longer because he wouldn't cry."[48] (ERT 1632.)

Mr. Welch seemed to hit the boys anywhere on their bodies. (ERT 1632.) The beatings from their father left telltale welts so Minnie could tell if Mr. Welch had beat his sons while she was away at work. (ERT 1567, 1586.) Glenn Riley, Moochie's childhood friend, knew that Moochie was being whipped with an extension cord because he recognized the distinctive loop-marks left on petitioner's back and legs. (ERT 1492.) Riley had those marks himself from an extension cord used by his own father. Nothing else he knew would leave marks like that. (ERT 1492.) Moochie often went to school with black eyes, scratches, and loop-shaped welts on his back and

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[48]/ Dr. Kriegler stated that this behavior indicated petitioner was likely dissociating during these beatings. (ERT 1717-1718.)

legs. (ERT 1491.) Mr. Welch never hit Cathie Diane, and according to her recollection, he only hit Minnie when he was drunk. (ERT 1552, 1557.) However, he hit Moochie whether he was drunk or sober. (ERT 1630)

Minnie noticed that Moochie's reaction to punishment was unusual. Both Minnie and David Jr. disciplined their boys by putting them in the closet. Minnie typically closed them in the closet for about an hour. (ERT 1558.) David Jr. told the boys to "go to jail" and kept them there until he was ready to let them out. (ERT 562.) Unlike his brother, whenever Moochie was put in the closet, he went to sleep. Minnie said, "He was always quiet. He didn't -- he was just different. He never would -- I mean, you didn't know how to really punish him because he would just -- whatever you did, he'd just go ahead and go to sleep, you know." (ERT 1569)

In 1965, Mr. Welch joined the Merchant Marines. (ERT 1620.) (Exh. N-1, Tab 62.) In 1969, Mr. Welch was disciplined after being found in a deep alcoholic coma during his assigned watch aboard the USNS Ranger Tracker. (Exh. N-1, Tab 61.) In the course of his duties, Mr. Welch was away from home for extended periods but lived with the family for roughly six weeks at a time. Whenever he was home, his abuse of his family continued unabated. (ERT 1586, 1622.)

In 1971, Minnie and Mr. Welch divorced. (ERT 1634, 1565-1566.) (Exh. N-1, Tab 72) After the divorce, Mr. Welch moved out of the house. (ERT 1634.) He eventually remarried twice. (ERT 1634.) Yet Minnie allowed him to live with her and her children for months at a time after the divorce and during and in between his other marriages. (ERT 1634.) Just as when he returned on leave from the Merchant Marines, Mr. Welch's stays in Sobrante Park were characterized by drunkenness and violence.

Moochie was beaten repeatedly at the whim of his father during these periods. (ERT 597-598, 1635.)

Minnie Welch never called the police about the violence inflicted on her or her children, at least in part because she was afraid of the effect it would have on the family's income. (ERT 1553-1554, 1590-1591.) Sometimes Minnie told her daughter to call the police, but she always changed her mind before the call was made. (ERT 1631.)

David Welch, Jr., also carried his abuse of his son Moochie into public view. Childhood friend and schoolmate Konolus Smith recalled three incidents when he witnessed Mr. Welch using violence against Moochie in public. One day in elementary school, while petitioner was lined up with his class after recess, his father entered through the school yard's back entrance and hit Moochie in the head in front of all his peers. (ERT 595.) The teacher of Moochie's "special class" intervened. (ERT 595.)

On a second occasion, when Moochie was around ten years old, he was walking down the street with a group of friends when a car carrying his father pulled up beside them. Mr. Welch said something to his son that caused him to take off running. As petitioner fled from his father, Mr. Welch hurled a glass soda bottle at him. (ERT 597.)

On a third occasion, when he was fifteen, petitioner was standing with friends in a neighborhood restaurant when his father came up and slapped him so hard on the head that petitioner fell to the floor. (ERT 597-598.) Mr. Welch's own friends confronted him and dragged him away from the restaurant. (ERT 598.)

Moochie's friends knew he "had kind of a mean father" and made it a point to avoid Mr. Welch. (ERT 589.) For that reason, they often avoided playing at the Welch house. (ERT 589.) If petitioner's friends did happen to be there and Mr. Welch walked in, the mood changed from "happy-go-lucky down to almost sitting still." (ERT 1490) All of the kids in Sobrante Park were whooped by there fathers but petitioner's father "He seemed to kind of go overboard with it." (ERT 610-611.)

As he grew older, Moochie became unusually fastidious, and his behavior grew more obsessive– a sign of anxiety. (ERT 1571, 1696.) Moochie didn't want anyone disturbing anything in his room and he set up his possessions so that he would know if anything had been moved by even a few inches. (ERT 1619.) He insisted that his clothes be starched, ironed and well-matched, and he became upset when he had to wear a shirt torn or ripped by his brother Dwight, with whom he shared clothes. (ERT 1617-1618.) When he was in kindergarten, Moochie started a fight with Konolus Smith, even though Moochie was by far the younger, smaller, and weaker of the two, because Konolus had accidentally ripped Moochie's shirt in the cafeteria. (ERT 587, 589.) Moochie started a fight with Smith over the shirt each of the next two days, until Smith finally gave Moochie a shirt to make him stop. (ERT 589-590.)

Another example of Moochie's obsessive-compulsive behavior became clear after he began attending Sobrante Park Elementary School. (ERT 1569, Exh. D.) Moochie always got completely undressed whenever he had to use the bathroom to have a bowel movement. (ERT 1571. 1618.) When his schoolmates learned of this and Moochie went to use the bathroom, his schoolmates amused themselves by peeking in at him over

the top of the toilet stall. (ERT 1570.) After this humiliation, Moochie refused to use the school bathrooms. (ERT 1570.) Instead of altering his obsessive behavior, Moochie ran home during recess to use the bathroom and then faced disciplinary action for truancy when he didn't return before class resumed. He continued this behavior for years, and no punishment dissuaded him; and in those days many of the teachers, including at least one who taught petitioner, hit the students with switches, rulers or razor straps. (ERT 591-593.) When his mother tired of being contacted by school staff regarding her son's problems, she transferred Moochie out of Sobrante Park to Highland Elementary. (ERT 1572-1573.)

Academically, Moochie was severely impaired. He was assigned to a "special class" for children who could not function in regular classrooms. (ERT 590.) His writing looked like chicken scratches, and his spelling was inadequate for someone of his age. (ERT 1614) Glenn Riley questioned whether Moochie could even read when he was ten years old. Riley noticed that Moochie relied on the pictures rather than the text of billboards to make sense of them. (ERT 1488.)

Like all children growing up in Sobrante Park, Moochie had to adjust to violence and death. When he was about eleven, petitioner watched as his friend, James Miles, was dragged under the wheels of a moving diesel truck. (ERT 601, 602) Cathie Diane's friend, Wendy Martin, was stabbed to death with a poker. (ERT 1610, 1611) Glenn Riley's brother was murdered. (ERT 1483) Another local teenager, Kenny Ross, lost his life in a game of Russian roulette. (ERT 1610, 1482) Young Ray was accidentally shot to death by his brother while they were playing with other children at San Leandro Creek. (ERT 1481.) Some children were merely wounded. (ERT

1482) Among them was fifteen year old Benny Nixon, who was shot. Another boy, Willie Torrence was stabbed.

Death was ever-present in Sobrante Park. Konolus Smith recalled that every week for several years, the military sent a car to Sobrante Park to inform parents that their sons had died in Viet Nam. The neighborhood children recognized the car because it was green; they chased the car on their bikes to see whose homes were being visited. (ERT 603)

For these reasons, and others, children growing up in Sobrante Park had a sense of a foreshortened future. Glenn Riley never planned for his future because he expected to be dead by 21. (ERT 1484) Because of the easy access to heroin, crack cocaine, and marijuana in Sobrante Park (ERT 1610), Cathie Diane knew a number of people who died from AIDS, among whom were Sam and David Crockett who lived across the street from the Welch's on La Prenda Drive. (ERT 1610, 1611) Of the eight boys who made up Konolus Smith's inner circle, only three are still alive. (ERT 604)

In the violent environment of Sobrante Park, there were territorial rules every boy had to know. "[Y]ou were limited. You was on your street. But if you branch out, you might run into some trouble. It might be just around the corner, sometimes across the street ... [I]t's a territorial thing. You know, as kids they mark they spot. You have to defend your spot. You defend your spot." (ERT 1480.) Fist fighting was common. (ERT 1480.) Older boys took younger ones under their wings. "It's more or less to teach them the ropes, how to and then how to protect yourself at all times, and if it was too heavy for you, then I will step in." (ERT 1485.)

In this way Moochie came to be adopted by Glenn Riley and Konolus Smith as a sort of younger brother. (ERT 1484-87, 612.) When

Riley was ten and Moochie was several years younger, Riley introduced petitioner to Ripple, the cheapest wine in town. They obtained the wine through a local wino named Pee Wee, who bought it for them at the nearby liquor store. Riley and Moochie usually took their bottle to the creek to share it together. (ERT 1494, 1496.) Within about three years time, Riley estimates, they had graduated to gin, whiskey, and Schnapps. (ERT 1497.)

Although Moochie was a kind of adoptive member of a pack, his friends recognized that he was not like the other boys in the neighborhood. "We all ... thought he was kind of crazy." (ERT 612.) Moochie's friends wanted him around but realized they had to "alter a lot of things to deal with him." (ERT 612.) They had to be concrete and consistent with him. They couldn't change plans spontaneously. (ERT 612, 613.) His friends couldn't joke or tease Moochie because he personalized everything and would respond physically. They didn't want to fight Moochie because he was younger and smaller than they were and they didn't want to hurt him. (ERT 613.)

Konolus Smith feared for Moochie's safety. (ERT 610.) Moochie and his friends went regularly to San Leandro to find the movies and swimming pools that weren't available to them in Sobrante Park,[49] but they weren't wanted there and white boys hurled rocks at them to keep them away. (ERT 608, 609.) The Sobrante Park boys threw a few rocks back and headed home– all except Moochie. Moochie couldn't recognize when he was outnumbered or outsized by his opponents and bound to lose. (ERT 609.)

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[49]/ Without recreational facilities, petitioner and his friends used the street, junk yards, burnt-out factories, and polluted local creek as their playground. (ERT 600-601, 605-608.) (Exh. N-1, Tabs 77 and 78)

Overshadowing everything else in his life was Moochie's relationship with his father. Before he was a teenager, Moochie began to stay away from home overnight whenever his father was around the house. (ERT 605.) Though he had friends like Konolus Smith who sometimes snuck him into their bedrooms (ERT 605), Moochie did not go home even if he had no place to stay. (ERT 605.) Sometimes Moochie stayed with his uncle Roy Millender. (ERT 567.) He stayed in the basement of his uncle's home for weekends– for as long as six weeks if school was out– and neither Minnie nor Mr. Welch ever attempted to bring him home. (ERT 567.) To the contrary, Minnie brought food to the house to encourage Roy to keep Moochie with him. Moochie stayed with Uncle Roy on and off until he was around 16. Though Roy knew Moochie was having problems with his father, Moochie said very little about them. (ERT 567-568.)

In 1976, 17-year-old Moochie finally fought back against his father, apparently for the first time. (ERT 1635-1636.) Cathie Diane recalled that started as the typical beating in petitioner's bedroom turned into a physical fight that spilled into the hallway. (ERT 1636.) Glenn Riley arrived to find petitioner outside his house on the street, shirtless, on a cold December night. From the porch, Mr. Welch told Riley that he was welcome to come inside but, pointing to petitioner, "that nigger can't." (ERT 1499) After five or ten minutes, Moochie came in out of the cold at Minnie's request. (ERT 1500.) He removed himself to his bedroom. (ERT 1501.) A drunken David Jr. went to the kitchen, retrieved a cup of coffee, and walked down the hallway. (ERT 1501, 1502, 1624.) Riley then heard Moochie holler, and saw Mr. Welch reenter the hallway with an empty coffee cup. (ERT 1501.) Riley tried to get Moochie away from the house, but Moochie got hold of a

sawed-off shotgun and shot out the window of his father's car. (ERT 1635, 1500-1502.) As Moochie walked down the street, his neighbors, the McPhersons, looked at him from their open window. Petitioner said "What they looking at?" and fired the shotgun at their house. Petitioner took off into the night. (ERT 1502)

The two McPherson boys, Tony and Cecil, were older and a lot bigger than petitioner, and they had tormented both petitioner and Dwight from the time they all lived together in Sobrante Park. (ERT 1641, 1642.) During the last two years, while Glenn Riley had been away from Sobrante Park, the McPherson boys had been "jumping" petitioner. (ERT 1502.) The whole Welch family suspected the McPhersons were responsible for the disappearance of a watch that Minnie had given either Dwight or petitioner. (ERT 1642.)

Mr. Welch never beat his son again. (ERT 1635-1636.)

c. Proposed Findings Derived from the Testimony of Lay Witnesses Regarding Social History and Serious Child Abuse.

All of the witnesses below would have been available to trial counsel, but were dead by the time post-conviction counsel were appointed to the case:

Petitioner's father, David Welch, Jr., died in 1999. (Exh. U.)

Petitioner's and Cathie Diane's brother, Dwight, was shot to death in 1992 when he was 33. (ERT 1524, Exh. F, Exh N-1, Tab 75)

In 1991, Dwight's wife, Pamela Rena Pippins-Welch also died from a gunshot wound. (ERT 1532, Exh. G)

Petitioner married Terri West in 1981 (Exh. N-1, Tab 53) and together they had a son, David Esco Welch IV, known by the family nickname of "Peanut." (Exh. N-1, Tab 54) Terri had a child from a previous relationship, Darius Maurice Esters. (ERT 1534-1535.) Terri died of an aneurysm in July 1994 when she was 36. (ERT 1533, Exh. H, Exh. N-1, Tab 76.)

Petitioner's stepson, Darius, was shot and killed six years later. (ERT 1535, Exh. I.)

Each of the following witnesses, all of whom testified at the hearing, confirmed that they would have testified at the time of trial if they had been contacted by the defense at that time:

David Welch's mother, Minnie Millender Welch;

His maternal aunt, Sarah Millender Perine;

His maternal uncle, Roy Millender;

His childhood friends, Konolus Smith and Glenn Riley;

His sister, Cathie Diane Welch Tingle Thomas.

Petitioner did not ask Minnie Welch, his mother, not to talk to his lawyers or not to talk to anyone connected with the defense. (ERT 1582.)

Petitioner's mother, Minnie Millender Welch, was the second of Roy and Jency Millender's seven children. Minnie, her younger sister, Sarah Millender, and their younger brother, Roy Millender, Jr., all testified at the hearing. (ERT 1257-1258)

The Millenders were all born on a small farm in the very rural community of Natchez, Alabama. Minnie Millender was born in 1934. There was one paved road in Natchez; it was about three or four miles from the farm. Natchez had a general store but no electricity, and whenever they wanted popsicles, ice cream, and the like, they paid ten cent cents to the driver of the local mail truck to give them a ride to Beatrice, the nearest town. Even in Beatrice and other nearby towns, there were no movie theaters, and Minnie's younger sister, Sarah, did not see a movie or television until she moved to California at about the age of 19. (ERT 1257, 1258, 1259, 1260-1262, 1536, 1539, 1257, 1540, Exh. N-1, Tab 65.)

The Millenders lit their home with kerosene lamps and flashlights. They didn't get electricity until 1952 or 1953. The Millenders had no refrigerator and made due with an icebox instead. With no running water, someone in Minnie's family walked regularly about the length of a city block to draw water from a well on their grandmother's adjacent property. The family ate corn, peas, butter beans, tomatoes and other vegetables that they raised by their own labor on their farm Minnie's mother, Jency Millender, and her children did field work and picked cotton on the local plantations in the summer. Jency frequently disciplined her children by whipping them with a branch off a tree. (ERT 1259, 1261, 1536, 1539, 1258-259)

Minnie later whipped her own children with a switch cut from a tree in her own backyard in Oakland. (ERT 1539, 1540).

Minnie's grandmother served as a midwife to both black and white women. In that capacity she advised pregnant women to eat "gully dirt" as a treatment for morning sickness. Gully dirt was a hard red soil with veins of white clay that locals could dig from the hillsides. In addition, the whole

Millender family ate gully dirt as a palliative for conditions other than pregnancy. (ERT 1261-1263.)

Minnie's father, Roy Millender, Sr., was employed as a sawyer by the Peterman Lumber Company, which was about 20 miles from the family farm. The family had no car, so when he couldn't get a ride in another worker's car or truck, Roy rode to work on the family mule. One day at work, some time in the mid-1950s, a log rolled over on Roy and shattered his arm. (ERT 1260.)

The Millender family has a history of mental illness.

Lee Irvin "Son" Millender, the son of one of the Millender brothers, was described by Roy Millender as "a little mental." (ERT 556-557.) According to Roy Millender, "he talk to himself a lot. He . . . at night he gets up all through the night and go in the kitchen and drinking coffee and talking to his self and everything, so it's a little scary sometime– when you're in the house with him." (ERT 557.) Roy recalls that Son Millender was not always "mental," but "was a normal kid when he was coming up, a little fella." However, when Roy returned home for a funeral in 1988 he noticed that Son "seemed to have a problem." (ERT 557.) Roy did not know whether Son had ever been in a mental institution, but knew that he took medication for his condition.[50] (ERT 557.)

Minnie and her siblings attended elementary school at a two-room schoolhouse that served around 200 children, none of whom were white. (ERT 1536-1537.)

Minnie began high school at another segregated school several miles away in Beatrice, but she never graduated. (ERT 1537.)

After dropping out of high school, Minnie worked away from the farm when she was in her late teens at places like the Castigliola Shrimp Company of Pascagoula, Mississippi. (Exh. N-1, Tab 68)

In 1955, at the age of 21, Minnie decided to move to California to find better employment. (ERT 1265, 1540-1541.) Three of her aunts – Eunice Washington, Helen Collin, and Leatha Gregory – lived in California. (ERT 1541.)

Soon after she arrived and while still searching for work, Minnie met an unemployed former serviceman, David Welch, Jr., whose mother was a neighbor of Minnie's Aunt Eunice. (ERT 1542-1543.)

David Welch, Jr., was one of six children of a woman named Ollie Jackson, whose reputation as an alcoholic and "party lady" were so notable that these traits were discussed during her funeral service. (ERT 563, 564.)

Ollie Jackson's children, including David Welch, Jr., grew up to be violent drinkers. (ERT 1626.)

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[50]/ A photograph of Son Millender appears as Tab 117 in Exhibit N-3.

In addition to the history of schizophrenia on the Millender side of petitioner's family, there is also evidence of mental disease on the Welch side of the family. Minnie recalled that Ollie's grandson, the son of Ollie's daughter, Carrie, suffered from a mental illness that required his institutionalization. (ERT 1547, 1548)

Soon after they began dating, Minnie found herself pregnant with the child of David Welch, Jr. (ERT 1543.)

They married in Reno on March 10, 1956. (ERT 1543, Exh. N-1, Tab 69.)

They moved into a rundown apartment at 5848 Fremont Street in Oakland. (ERT 1266, 1526.) The building was dilapidated, below code, and eventually demolished. Among other problems, building inspection records show the following:

> Built as a single family home in 1890, the building had been cut up into six substandard units that were illegally rented out as apartments. (Exhibit O.)
>
> The building was not well-maintained and was in the process of disintegrating.[51] (ERT 1267-1268, 1529, Exh. O.)
>
> Broken pipes extended the entire length of the walls in some places. (ERT 1529.)
>
> Staircases had no railings. (ERT 1528.)
>
> The exterior and interior stairs and landings all needed repair. (ERT 1267, 1528.)
>
> The roof was damaged and water leaked into the Welch apartment. (ERT 1530.)
>
> Peeling paint posed a danger to small children. (ERT 1267.)
>
> The backyard was never cleaned and the mounting pile of garbage invited colonies of rats and roaches. (ERT 1531.)

Minnie's first child, Cathie Diane, was born on October 1, 1956. (ERT 1522.)

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[51]/ In July, 1957, Oakland's Bureau of Sanitation found thirty-six violations of the Sanitation Code at the Welch's apartment building. (Exh. O.) The violations were never remedied while the Welch family lived at 5848 Fremont Street, and later, the home was declared a nuisance and ordered demolished. (Exh. O.)

Once he was employed in construction and making his own money, David Welch, Jr. regularly went out at night and drank until he was intoxicated. (ERT 1544, 1545, 1549.)

Sometimes he stayed out all night. (ERT 1545.)

He primarily drank at bars and at the homes of his friends and family. (ERT 1272, 1544, 1548, 1553.)

He also drank when he was with his mother and his siblings. (ERT 1546, 1548.)

Mr. Welch spent most of what he earned drinking and let Minnie and their children go hungry. (ERT 1561)

About once a month, the Welch home had no electricity or gas. (ERT 1269, 1270.)

Minnie's sister Sarah and her aunts gave the family food and money when they could because Minnie and her children were clearly thin and hungry. (ERT 1269, 1270, 1276.)

Doctors determined that Dwight was undernourished and that Minnie was having a nervous breakdown. (ERT 1560.)

Beaten and neglected by her husband and struggling to raise three young children with less than subsistence-level support, Minnie suffered from depression. (ERT 1561-1562.) [52]

Petitioner's father stole money form family members and others. (ERT 558-556.)

Before they were married, Minnie's husband had never struck her. (ERT 1549)

Whenever her husband drank, he physically assaulted Minnie. (ERT 1550.)

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[52]/ Per Sarah: [W]hen he left, [David Jr.] gave my sister about $10 so she could have something in her pocket at that time. But he didn't know that I was spending the night that night, and I spent the night, and during the night he came back, and he jumped on her. He came back to retrieve the money that he had given her, and I heard him in the bedroom fighting her, and I heard the childrens was cryin', and he was saying, give me back my so and so money I know you got it. You got to give it to me, and she was trying to, you know, say, "David don't do that. Don't do that, David." (ERT 1272, 1274.)

Approximately every other week, but sometimes on multiple occasions over a single weekend, Mr. Welch returned to Fremont street after a drinking bout "wanting to fight."

Cathie Diane could not recall a time in her life when her father didn't drink, and recalled that he almost always drank to the point of intoxication. (ERT 1621, 1622.) On these occasions he would slap and punch Minnie anywhere on her body. (ERT 1552, 1553.) [53]

Family members witnessed petitioner's father kicking and slapping petitioner's pregnant mother. (ERT 1273.) [54] [55]

Petitioner was born on March 21, 1958. (ERT 1522, 1526-1527, Exh. N-1, Tab 48.)

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[53]/ After they moved to Sobrante Park, Cathie Diane slept just across the hall from her parents' bedroom and could clearly hear whatever went on in there. (ERT 1624.) Whenever her father came home after a night of drinking, she heard lamps falling, furniture being knocked around, and the sound of her father's slaps and punches striking her mother. (ERT 1625.) "Well, he'd come in and start arguing first, and we'd all be in bed sleep. He turned the light off, and then you'd hear banging around. And I'd get up and go in and turn the light on and beg him to stop." (ERT 1623) In the mornings, Minnie bore bruises, black eyes, and swollen lips. (ERT 1625-1626.) On one occasion, Mr. Welch hit Minnie so hard that he broke her dentures. She went without them for a month while they were repaired. (ERT 1626.)

[54]/ In June, 1957, Minnie Welch's sister, Sarah Millender, made her way from Alabama to California. When Sarah visited Minnie, she found her sister living in squalor. Sarah saw rats, roaches and lizards ran through the apartment. Already pregnant with petitioner, Minnie had lost weight and looked "puny" and "frail." "She just didn't look the same Minnie." (ERT 1257, 1263, 1266, 1268) Sarah recalled that Mr. Welch was "always, you know, slappin' on her and beatin' on her, pushin' her around" and that he spoke to her "with profanity, a lot of profanity languages. He used to call her names." (ERT 1271.)

[55]/ Both Minnie and Sarah remembered when their cousin General Thomas, known by his nickname, "Red," paid an unexpected visit. He too found an intoxicated Mr. Welch striking and hitting his pregnant wife. Believing that Minnie had called Red for help, Mr. Welch fought with Red as well. When the fight was over, Red took Minnie and Cathie Diane to their aunt's home. Sarah was there and listened as "Red" explained to her aunt why Minnie had a black eye and was bruised and crying. (ERT 1550-1552, 1277.)

Petitioner was asthmatic and suffered from rashes and nose bleeds. (ERT 1267, 1269)

In an attempt to help him, Minnie stuffed paper towels in the windows to keep out the cold and set up a ventilator in the room where petitioner slept. (ERT 1269.) Sarah's memory of petitioner as an infant was that he was "tremblin.' He was a nervous baby." (ERT 1269.)

Family members referred to petitioner as "Moochie." (ERT 1254.)

Before petitioner's first birthday, the family moved to another apartment nearby, at 5540 Fremont Street. (ERT 1527).

With very little money at their disposal the Welches' new apartment "wasn't a nice place to be."[56] (ERT 558; Exh. N-1, Tab 62)

This apartment was located in a large, run-down, old house that had been divided into smaller units. (ERT 558-559.)

It was rife with garbage and infested with cockroaches. (ERT 558.)

Minnie gave birth to Dwight Chenier Welch on March 12, 1959. (ERT 1522-1523, Exh. N-1, Tab 75)

He was her third and last child. Minnie had been pregnant for 27 of the previous 40 months. (ERT 1522, 1523.)

Mr. Welch began hitting petitioner with his hand when the Welches were living at the second Fremont Street apartment. (ERT 1585.)

About once a week, Mr. Welch spanked petitioner or slapped him. (ERT 1281)

Sometimes petitioner was hit because he had done something wrong, but sometimes Mr. Welch hit him for no apparent reason. The punishment was random. (ERT 1557) [57]

Mr. Welch called petitioner names like "crazy" and "stupid." (ERT 1283)

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[56]/ Roy Millender repeated this phrase three different times during his testimony as though the unpleasantness of the apartment had stayed with him.

[57]/ Sarah recalled that before she moved to Los Angeles in 1961 (ERT 1284), a time when Moochie would only have been about three years old, Mr. Welch slapped petitioner if he dropped something or spilled something on the floor or wet himself. "He would slap him upside his head, his little head, and he would cry, you know, and he would just slap him, spank him with the belt or extension cord or with his shoe, you know, just and then thump him, just flick him upside his head." (ERT 1282)

Petitioner shook and trembled noticeably around his critical and violent father. (ERT 1269, 1283.)

Petitioner clung more tightly to his mother and his Aunt Sarah when his father was around. (ERT 564, 1283.)

Petitioner was a nervous and withdrawn little boy. (ERT 564, 1283)[58]

Petitioner was unusually uncoordinated. (ERT 564, 1486, 1613, 1614, 1643-1644.)

When petitioner was around six, Mr. Welch's beatings of his two sons became more violent and unpredictable. (ERT 1629)

Drunk in the wee hours of the morning, petitioner's father roused his sleeping sons in order to whip them. Entering their bedroom, he held an electrical extension cord he'd wrap around his wrist then he used the loop as a whip. (ERT 1630, 1627-1628.)

Mr. Welch lashed and lashed his sons. Sometimes the beatings went on for as long as five minutes. (ERT 1630, 1631) [59]

The beatings from their father left telltale welts so Minnie could tell if Mr. Welch had beat his sons while she was away at work. (ERT 1567, 1586.)

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[58]/ The descriptions of family members and friends paint a portrait of petitioner as a child who was neurologically compromised from birth. (ERT 1712-1713.) He was so small and scrawny that from a very young age that people thought Dwight was the older brother. (ERT 1615, 1616.) Petitioner had such difficulty speaking, with an impediment that sounded like a lazy tongue, that his father couldn't understand him at all, and his mother could only understand some of what petitioner said. (ERT 1572, 1611.) From about the time he was four, his older sister Cathie Diane had to serve as an interpreter, translating what petitioner was saying for their father. (ERT 1611.) He didn't outgrow this impediment until he saw a speech therapist at school. (ERT 1572)

[59]/ Cathie Diane was able to hear the beatings of her brothers just as she could the assaults on her mother. She heard the sound of the extension making contact with her brothers' skin. She heard the sound of her father's yells and Dwight's screams, but she never heard petitioner cry out though he often received the worse beating. (ERT 1629, 1632.) "It was almost as if he would whip Moochie longer because he wouldn't cry." (ERT 1632.)

Glenn Riley, petitioner's childhood friend, knew that petitioner was being whipped with an extension cord because he recognized the distinctive loop-marks left on petitioner's back and legs. (ERT 1492.) [60]

Petitioner often went to school with black eyes, scratches, and loop-shaped welts on his back and legs. (ERT 1491.)

Mr. Welch never hit Cathie Diane, and according to her recollection, he only hit Minnie when he was drunk. (ERT 1552, 1557.)

He hit petitioner whether he was drunk or sober. (ERT 1630)

Both petitioner's mother and father disciplined their boys by putting them in the closet.
Minnie typically closed them in the closet for about an hour. (ERT 1558.)

David Jr. told the boys to "go to jail" and kept them there until he was ready to let them out. (ERT 562.)

Unlike his brother, whenever petitioner was put in the closet, he went to sleep. (ERT 1569.) [61]

Petitioner was loved by other family members. [62]

In 1960, or 1961, the Welches purchased a small house in the Sobrante Park neighborhood of Oakland. Sobrante Park was a residential enclave within an industrial zone. The neighborhood occupied an area of a few square miles in East Oakland that was adjacent to the San Leandro border. On a map, the area is roughly triangular, separated from the surrounding area by train tracks on one side and by San Leandro Creek on another. (ERT 600, 606, 1563-1564, 1607, 1608, Exh N-1, Tabs 77, 78.)

In the 1960s and 1970s, when petitioner lived there, the only way in or out of the neighborhood by car was through the intersection at 105th Avenue. (ERT 606.)

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[60]/ Riley had those marks himself from an extension cord used by his own father. Nothing else he knew would leave marks like that. (ERT 1492.)

[61]/ Minnie said, "He was always quiet. He didn't -- he was just different. He never would -- I mean, you didn't know how to really punish him because he would just -- whatever you did, he'd just go ahead and go to sleep, you know." (ERT 1569)

[62]/ Roy Millender recalled that "when I met Moochie, you know, I– I became very close to him . . . when he got to me, look like he was he wanted to– look like something had happened and he became– he wanted to be my friend. He didn't want to leave me almost, you know?" (ERT 555)

Although the neighborhood had once been integrated, by the early 1960s it was almost entirely African-American. (ERT 586, 602, 603, 1608.)

Witnesses recalled Sobrante Park in the 1960s as "rough" (ERT 1479), "thug-ish" (ERT 1607), violent (ERT 1609, 1480, 602), drug-ridden (ERT 1610), isolated (ERT 1608), and deprived. (ERT 600.) [63]

Although once "nice," Minnie Welch acknowledged that the neighborhood declined while the Welches lived there. (ERT 1564)

The neighborhood became increasingly violent.[64]

Throughout petitioner's life in Sobrante Park he was surrounded by death and violence. Among other fatal or violent incidents in his life were the following:

When he was about eleven, petitioner watched as his friend, James Miles, was dragged under the wheels of a moving diesel truck. (ERT 601, 602)

Cathie Diane's friend, Wendy Martin, was stabbed to death with a fireplace poker. (ERT 1610, 1611.)

Glenn Riley's brother was murdered. (ERT 1483)

Kenny Ross, lost his life in a game of Russian roulette. (ERT 1610, 1482)

Young Ray was accidentally shot to death by his brother while they were playing with other children at San Leandro Creek. (ERT 1481.)

Other children were merely wounded. Others died of AIDS and drugs. (ERT 1482)

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[63]/ Konolus Smith recalled Sobrante Park as a lethal neighborhood "where you learn everything you don't need to know. You know, it's gun death, it's drug addiction death, people just seem to die there all the time." (ERT 602)

[64]/ In the violent environment of Sobrante Park, there were territorial rules every boy had to know. "[Y]ou were limited. You was on your street. But if you branch out, you might run into some trouble. It might be just around the corner, sometimes across the street ... [I]t's a territorial thing. You know, as kids they mark they spot. You have to defend your spot. You defend your spot." (ERT 1480.) Fist fighting was common. (ERT 1480.) Older boys took younger ones under their wings. "It's more or less to teach them the ropes, how to and then how to protect yourself at all times, and if it was too heavy for you, then I will step in." (ERT 1485.)

In 1965, Mr. Welch joined the Merchant Marines. (ERT 1620; Exh. N-1, Tab 62.)

In 1969, Mr. Welch was disciplined after being found in a deep alcoholic coma during his assigned watch aboard the USNS Ranger Tracker. (Exh. N-1, Tab 61.)

In the course of his duties, Mr. Welch was away from home for extended periods but lived with the family for roughly six weeks at a time. Whenever he was home, his abuse of his family continued unabated. (ERT 1586, 1622.)

One day in elementary school, while petitioner was lined up with his class after recess, his father entered through the school yard's back entrance and hit petitioner in the head in front of all his peers. (ERT 595.) The teacher of Moochie's "special class" intervened to stop it. (ERT 595.)

When petitioner was around ten years old, he was walking down the street with a group of friends when a car carrying his father pulled up beside them. Mr. Welch said something to his son that caused him to take off running. As petitioner fled from his father, Mr. Welch hurled a glass soda bottle at him. (ERT 597.)

When petitioner was fifteen, while standing with friends in a neighborhood restaurant his father came up and slapped him so hard on the head that petitioner fell to the floor. (ERT 597-598.) [65] Petitioner's father's friends confronted him and dragged him away from the restaurant. (ERT 598.)

Before he was a teenager, petitioner began to stay away from home overnight whenever his father was around the house. (ERT 605.)

In 1976, 17-year-old petitioner fought back against his father. (ERT 1635-1636.) [66]

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[65]/ Petitioner's friends knew he "had kind of a mean father" and made it a point to avoid Mr. Welch. (ERT 589.) For that reason, they often avoided playing at the Welch house. (ERT 589.) If petitioner's friends did happen to be there and Mr. Welch walked in, the mood changed from "happy-go-lucky down to almost sitting still." (ERT 1490) All of the kids in Sobrante Park were whooped by there fathers but petitioner's father "He seemed to kind of go overboard with it." (ERT 610-611.)

[66]/ Cathie Diane recalled that started as the typical beating in petitioner's bedroom turned into a physical fight that spilled into the hallway. (ERT 1636.) Glenn Riley arrived to find petitioner outside his house on the street, shirtless, on a cold December night. From the porch, Mr. Welch told Riley that he was welcome to come inside but, pointing to petitioner, "that nigger can't." (ERT 1499) After five or ten minutes, Moochie came in out of the cold at Minnie's

After this incident, which occurred earlier on the same night as the McPherson incident, Mr. Welch never beat his son again. (ERT 1635-1636.)

Minnie Welch never called the police about the violence inflicted on her or her children, at least in part because she was afraid of the effect it would have on the family's income. (ERT 1553-1554, 1590-1591.)

Sometimes Minnie told her daughter to call the police, but she always changed her mind before the call was made. (ERT 1631.)

In 1971, Minnie and Mr. Welch divorced. (ERT 1634, 1565-1566; Exh. N-1, Tab 72)[67]

As he grew older, petitioner became unusually fastidious, and his behavior grew more obsessive. (ERT 1571, 1696.)

He didn't want anyone disturbing anything in his room and he set up his possessions so that he would know if anything had been moved by even a few inches. (ERT 1619.)

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request. (ERT 1500.) He removed himself to his bedroom. (ERT 1501.) A drunken David Sr. went to the kitchen, retrieved a cup of coffee, and walked down the hallway. (RT 1501, 1502, 1624.) Riley then heard Moochie holler, and saw Mr. Welch reenter the hallway with an empty coffee cup. (ERT 1501.) Riley tried to get Moochie away from the house, but Moochie got hold of a sawed-off shotgun and shot out the window of his father's car. (ERT 1635, 1500-1502.) As Moochie walked down the street, his neighbors, the McPhersons, looked at him from their open window. Petitioner said "What they looking at?," and fired the shotgun at their house. Petitioner took off into the night. (ERT 1502)

The two McPherson boys, Tony and Cecil, were older and a lot bigger than petitioner, and they had tormented both petitioner and Dwight from the time they all lived together in Sobrante Park. (ERT 1641, 1642.) During the last two years, while Glenn Riley had been away from Sobrante Park, the McPherson boys had been "jumping" petitioner. (ERT 1502.) The whole Welch family suspected the McPhersons were responsible for the disappearance of a watch that Minnie had given either Dwight or petitioner. (ERT 1642.)

[67]/ After the divorce, Mr. Welch moved out of the house. (ERT 1634.) He eventually remarried twice. (ERT 1634.) Yet Minnie allowed him to live with her and her children for months at a time after the divorce and during and in between his other marriages. (ERT 1634.) Just as when he returned on leave from the Merchant Marines, Mr. Welch's stays in Sobrante Park were characterized by drunkenness and violence. Petitioner was beaten repeatedly at the whim of his father during these periods. (ERT 597-598, 1635.)

Petitioner always got completely undressed whenever he had to use the bathroom to have a bowel movement. (ERT 1571. 1618.) [68]

Academically, petitioner was severely impaired. He was assigned to a "special class" for children who could not function in regular classrooms. (ERT 590.)

His writing looked like chicken scratches, and his spelling was inadequate for someone of his age. (ERT 1614)

Glenn Riley questioned whether petitioner could even read when he was ten years old. Riley noticed that petitioner relied on the pictures rather than the text of billboards to make sense of them. (ERT 1488.)

When Riley was ten and petitioner was several years younger, Riley introduced petitioner to Ripple, the cheapest wine available. Within about three years time, Riley estimates, they had graduated to gin, whiskey, and Schnapps. (ERT 1494, 1496, 1497.)

Petitioner's friends recognized he was mentally ill.[69]

3. Exceptions to the Referee's Findings Regarding Petitioner's Expert Witnesses.

a. Exceptions to Findings Pertaining to Expert Witnesses

In addition to lay testimony regarding serious child abuse, petitioner submitted expert testimony and social history records which supplemented this testimony. The testimony of petitioner's three mental health experts– neuropsychologist Dr. Karen Froming, psychiatrist Dr. Pablo Stewart, and

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[68]/ When his schoolmates learned of this they amused themselves by peeking in at him over the top of the toilet stall. After this humiliation, petitioner refused to use the school bathrooms. Instead of altering his obsessive behavior, petitioner ran home during recess to use the bathroom and then faced disciplinary action for truancy when he didn't return before class resumed. He continued this behavior for years, and no punishment dissuaded him; and in those days many of the teachers, including at least one who taught petitioner, hit the students with switches, rulers or razor strops. (ERT 591-593.) When his mother tired of being contacted by school staff regarding her son's problems, she transferred petitioner out of Sobrante Park to Highland Elementary. (ERT 591-593, 1569-1573; Exh. D.)

[69]/ "We all ... thought he was kind of crazy." Petitioner's friends wanted him around but realized they had to "alter a lot of things to deal with him." (ERT 612.)

psychologist and trauma expert Dr. Julie Kriegler– served two purposes. First, these experts explained the significance of the lay testimony and commented on the question of whether the traumatic events petitioner endured constituted "child abuse" and, if so, whether that abuse was "serious." Thus, the experts' testimony addressed this court's second referral question regarding whether a competent social history investigation would have disclosed evidence of serious child abuse. Second, the testimony explained the mitigating effect of evidence of serious child abuse and thus addressed this court's third referral question, showing why competent counsel would have presented such evidence.

Petitioner will first set out his exceptions to the referee's findings regarding the testimony of these three witnesses and will then summarize the testimony of three mental health expert witnesses below. Petitioner will address the credibility findings regarding Dr. Martell separately.

i. Dr. Karen Froming

Dr. Froming is a clinical psychologist and board-certified neuropsychologist who administered testing to petitioner over a period of six days in 2002. (ERT 693-694.) Her test results showed that petitioner has an IQ of 78[70] and that his frontal lobes, particularly his orbitofrontal cortex, and memory functions were profoundly impaired. Some of his frontal lobe test results showed him to be in the first percentile, meaning that 99% of all adults taking a particular test would perform better than he did, and on some tests he was not even able to complete the assigned task. In 2010, at the request of Dr. Kriegler, Dr. Froming conducted additional,

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[70]/ Respondent's expert neuropsychologist, Dr. Daniel Martell, said that petitioner's score of 78 meant that 98 percent of the general population had an IQ higher than petitioner. (ERT 1854.)

more specific neuropsychological testing to determine whether petitioner's damage is consistent with his having suffered serious child abuse or trauma. (ERT 702, 824-825.) She concluded that it is. (ERT 863.)

Although Dr. Froming's testimony regarding her test results occupied approximately 150 pages of hearing transcript, the referee's findings summarize the results of the testing in two paragraphs. (Findings at pp. 33-34.) This two-paragraph summary is not particularly inaccurate, as far as it goes, but is so brief that it fails to convey to the reader even a hint of the severity of petitioner's impairments. Accordingly, petitioner takes exception and will set forth a more complete summary of Dr. Froming's testing below.

Petitioner also specifically takes exception to four passages in the findings the referee made at the conclusion of her summary of Dr. Froming's testimony. (Findings at pp. 34-35.)

First, the referee thought it suitable to include in the findings a summary of a portion of respondent's cross-examination during which respondent directed Dr. Froming to review portions of the trial transcript, and then asked a number of questions regarding specific incidents of what respondent contended were goal-oriented behavior by petitioner during and after the commission of the crimes. (Findings at p. 34; see, e.g., ERT 854.) Through this cross-examination, respondent was attempting to show that these supposedly goal-oriented behaviors were inconsistent with Dr. Froming's diagnoses, and the findings state that "Dr. Froming acknowledged there are other possible interpretations of the facts." (Findings at p. 34.) It also became clear later that respondent was seeking to elicit from Dr. Froming opinions she had not given on direct examination

so that respondent's expert, Dr. Daniel Martell, could later "rebut" that cross-examination. (See Section V, B, 4, a, *infra.*)

It is not at all clear to petitioner why the referee included this passage or what this court is expected to do with it. The passage does not make any finding with respect to Dr. Froming's test results or the credibility of her testimony. However, to the extent that the passage implies that Dr. Froming acknowledged these supposed behaviors suggested any inconsistency with her diagnosis, petitioner takes strong exception. Dr. Froming made no such acknowledgment and in fact stressed that "my data is my data, and he performed the way he performed." (ERT 858.) Nor is there any inconsistency between Dr. Froming's testimony regarding petitioner's test performance or impairments and the behaviors respondent alleges petitioner engaged in at the time of the crimes. Dr. Froming never suggested that petitioner is incapable of engaging in volitional or goal-oriented behavior. Respondent's cross-examination questions also had nothing whatsoever to do with whether petitioner suffered from serious child abuse. To the contrary, they are an example of respondent's strategy throughout the hearing to continually remind the referee of the horror of the crimes themselves.

Furthermore, respondent's questions were not based on petitioner's actual behavior, but upon hypotheticals that transparently reflected respondent's highly biased *interpretation* of facts in the record. For example, as summarized by the findings, respondent asked whether "when petitioner waited until nighttime when the family was asleep before he broke in and shot them, it showed a rational approach to the shooting." (Findings at p. 34, citing ERT 356.) Dr. Froming acknowledged that this

was "a rational approach *if that's what he was thinking, yeah.*" (ERT 856, emphasis added.) Throughout this portion of cross-examination (ERT 845-858), Dr. Froming stressed that each of respondent's questions assumed the truth of assumptions that were not necessarily true. In the question quoted above, the *fact* is that the shooting incident began at night when the family was asleep; the *assumption* that petitioner intentionally waited until nighttime and that this showed "a rational approach to the shooting" is purely the product of respondent's imagination.

Moreover, many of respondent's assumptions, even to the extent they are based upon facts reflected in the trial transcript, are simply not accurate. As petitioner's counsel explained prior to the testimony of respondent's expert (ERT 1801, 1804-1808), trial counsel's guilt phase investigation was no better than their penalty phase investigation. The prosecution's evidence in the guilt phase went largely unchallenged, and as a result the actual facts regarding petitioner's actions prior to, during, and after the crime are not what respondent makes them out to be.

For example, respondent forgets that blood samples taken from petitioner after his arrest tested positive for the presence of alcohol, cocaine, and heroin. (TRT 5154, 5158, 5337, 5342, 5343, 5352-5353.) However, no test was ever performed to determine the *quantity* of drugs and alcohol in petitioner's system. (See, generally, Habeas Petition, Claim 8, and exhibits cited therein.) The Oakland Police Department's evidence officer, Sergeant Peterson, inexplicably waited ten days to attempt to obtain the blood samples from the hospital, a period of time in which blood samples would have been destroyed in the normal course of hospital procedures, and Sergeant Peterson's training would have made him aware that the samples

would likely have been destroyed during that time. (Habeas Petition, Exh. 34, Declaration of William Welch, p. 2.) When Sergeant Peterson finally did obtain blood samples from the hospital, they were from later dates, too small to be tested, or were mislabeled. As a result, the defense was never able to test the samples to determine the quantity of these drugs in petitioner's system at the time of the crime. (TRT 5157, 5159-5161.)

Trial counsel made an issue of the mishandled blood samples at trial (TRT 5159-5156, 5345), but never conducted any other investigation that would have helped to determine petitioner's degree of intoxication at the time of the crimes. Post-conviction counsel has done so, however, and has located witnesses who could have testified that due to his combined use of drugs and alcohol in the hours prior to the crimes, together with his profound brain impairments, petitioner was extremely intoxicated and at most semi-conscious at the time of the killings. Moreover, the killings were not planned, but impulsive. (See, e.g., Habeas Petition Exh. 18, Declaration of Rita May Lewis, p. 5; Exh. 29, Declaration of Randy Street, pp. 3-4; Exh. 36, Declaration of Billy Williams , pp. 1-2.)

When it became clear that respondent intended to have her expert, Dr. Daniel Martell, testify regarding petitioner's supposedly rational state of mind at the time of the crimes– under the guise that this testimony somehow constituted "rebuttal" to petitioner's evidence of serious child abuse– petitioner's counsel requested leave from the referee to at least be permitted to present evidence showing that the assumptions made by respondent and her expert regarding petitioner's supposed state of mind on the night of the crimes were incorrect. (ERT 1796-1810.) Petitioner's request was refused, however, and respondent's expert was permitted to testify that in his

opinion– which he acknowledged was based solely upon the selected materials he had been provided by respondent's counsel– petitioner's behavior at the time of the crimes was not consistent with some of the findings of other experts. (ERT 1845-1848.)

For all the foregoing reasons, petitioner takes exception to the referee's inclusion in the findings of the summary of cross-examination which appears at page 34 of the Findings. The passage makes no finding regarding the witness's credibility, the line of questioning was irrelevant to the purpose of the hearing and designed solely to generate testimony through cross-examination that respondent could then "rebut," and the questions themselves were based on a biased interpretation of petitioner's behavior that does not actually reflect petitioner's true state of mind at the time of the crimes.

Petitioner further takes exception to the referee's finding that Dr. Froming's opinions are of "limited value." (Findings, at p. 34.) The referee bases this rather vague finding on testimony of social history witnesses that has nothing to do with Dr. Froming's testing, which after all was the basis of most of her opinions, and which even respondent's expert thought reliable. (ERT 1839, 1841.) At most, the lay testimony to which Dr. Froming referred reveals minor discrepancies between the declarations upon which Dr. Froming relied in her initial review of the case before she began testing petitioner and the testimony of the witnesses at the hearing.

For example, the referee finds that "[n]one of the witnesses to petitioner's childhood," whom the referee identifies as Cathie Thomas, Konolus Smith, and Sarah Perine, "said that petitioner's father kicked or struck Mrs. Welch in the abdomen when she was pregnant with petitioner."

(*Ibid.*) Petitioner agrees that these witnesses gave no such testimony, but Cathie Thomas was less than one year old when Mrs. Welch became pregnant with petitioner, and Konolus Smith did not even meet petitioner under petitioner was in kindergarten at Sobrante Park Elementary School. As for Sarah Perine, she did not testify that she specifically saw Mr. Welch strike Minnie in the abdomen during her pregnancy. However, she testified that one day in 1957 as she was climbing the dilapidated stairs that led to the Welch apartment, she heard the sound of fighting. Inside the apartment she witnessed Mr. Welch kicking and slapping his pregnant wife. (ERT 1273.) Minnie was pregnant with petitioner in 1957. Sarah recalled that Mr. Welch was "always, you know, slappin' on her and beatin' on her, pushin' her around" and that he spoke to her "with profanity, a lot of profanity languages. He used to call her names." (ERT 1271.) Moreover, Minnie Welch, who was not mentioned by the referee at this portion of the findings, also testified that when petitioner's father beat her during this period, he would slap and punch her anywhere on her body. (ERT 1552, 1553.) Both Sarah Perine and Minnie Welch remembered that when their cousin General Thomas, known by his nickname, "Red," paid an unexpected visit, he too found an intoxicated Mr. Welch striking and hitting his pregnant wife. (ERT 1550.)

Dr. Froming's recollection of a reference to petitioner's father striking petitioner's mother in the abdomen during her pregnancy with petitioner may have been derived from a review of Sarah Perine's 2002 declaration. While that declaration does not clearly state that petitioner's father struck petitioner's mother in the abdomen when she was pregnant, the declaration does state that "David Jr. beat Minnie often when she was

pregnant with David and Dwight. Without caring that she was carrying babies in her stomach, he hit her, pushed her, kicked her, and treated her in all kinds of ways that were not good for her babies." (Habeas Petition Exh. 21.) Thus, it would appear that in the mass of materials she reviewed prior to administering her testimony, and after reading the declarations of Minnie Welch and Sarah Perine about David Jr. beating Minnie while she was pregnant with petitioner, Dr. Froming may have misread two lines in one declaration which do clearly state that petitioner's father beat petitioner's mother during her pregnancy with petitioner. The declarations and testimony of both Sarah Perine and Minnie Welch both make clear that Mr. Welch was beating her regularly during her pregnancy with petitioner and was hitting her anywhere on her body, and it is thus entirely possible that Mr. Welch struck a blow to Mrs. Welch's abdomen.

However, without regard to whether he did or did not strike her in the abdomen, the *point* Dr. Froming was making in her testimony was that the abuse to Minnie Welch would have caused her cortisol levels to surge, and elevated cortisol levels are highly toxic to a developing fetus. (ERT 718.)

Petitioner also takes exception to the referee's findings that there is "no foundation to support Dr. Froming's opinion that petitioner was at risk because he was exposed *in utero* to high levels of stress hormones from his mother." (Findings at p. 35.) The referee agrees that the evidence showed that petitioner's mother suffered from a pattern of spousal abuse when she was pregnant with petitioner, but finds "there was no evidence this raised the cortisol levels in her bloodstream or that this was neuropsychologically

toxic when and if it was transferred to petitioner as a developing fetus." (Findings, at p. 35.)

The referee is simply wrong on this point. While petitioner was understandably unable to produce blood samples taken from Minnie Welch when she was abused while pregnant with petitioner in 1957 and 1958, Dr. Froming's expert opinion– an opinion that was endorsed by other experts– itself constitutes substantial evidence.

During her testimony, Dr. Froming was asked "can you tell us more specifically what are the effects of physical abuse on the mother, specifically with respect to the hormone cortisol?" (ERT 719.) She replied as follows:

> Well, cortisol is a stress hormone, and what happens during the course of physical abuse or anticipatory anxiety and fear is that cortisol levels are elevated, so that circulates within the mother's blood stream. And by virtue of being connected to the baby, those hormones are then transferred to the baby. So it alters the cortisol level of the child as well. So what that does -- and it's also a toxin because we know also that persistent violence and abuse and raised cortisol levels as a result of those things damage the hippocampus and produce memory problems.

(ERT 719.)

This was unquestionably an appropriate matter for expert testimony. Furthermore, Dr. Froming's expert testimony on this point was also endorsed by the testimony of Dr. Julie Kriegler. Dr. Kriegler also testified that high levels of stress or trauma alter a pregnant woman's biology so that abuse of petitioner's mother by his father during her pregnancy with petitioner inflicted ongoing stress on his mother, which created high levels of neurologically toxic stress hormones in her bloodstream, and that these stress hormones were shared with petitioner through intrauterine transmission. (ERT 1709, 1711.) Dr. Benson also reviewed the post-

conviction evidence that Minnie Welch was abused while pregnant with petitioner and found it to be highly significant, noting that gestational abuse is one of the principal causes of infantile brain disease. (ERT 411.) Dr. Pierce also testified that evidence that petitioner was the child of a mother abused during pregnancy, among other factors, would have suggested early brain damage and made him more insistent that a neurological evaluation be performed. (ERT 339-343.) In short, all four of the experts who were asked about the effects of physical abuse to Minnie Welch on petitioner as a developing fetus came to the conclusion that this gestational abuse was a likely cause of petitioner's brain damage, and two of them specifically explained that the mechanism for the damage was the surge in cortisol and other stress hormones in his mother's body. It should also be noted that Dr. Pierce and Dr. Benson were not even petitioner's experts, but fact witnesses on the performance of trial counsel.

The testimony of these experts that petitioner was neurologically impaired *in utero* is also confirmed by lay testimony that showed petitioner was neurologically impaired from birth. As previously noted, he was so small and scrawny that from a very young age that people thought Dwight was the older brother. (ERT 1615, 1616.) Petitioner had such difficulty speaking, with an impediment that sounded to his sister like a lazy tongue, that his father couldn't understand him at all, and his mother could only understand some of what petitioner said. (ERT 1572, 1611.) From about the time he was four, his older sister Cathie Diane had to serve as an interpreter, translating what petitioner was saying for their father. (ERT 1611.) Petitioner did not outgrow this impediment until he saw a speech therapist at school. (ERT 1572)

Petitioner was also extremely uncoordinated. He walked with his toes pointed out to the sides and he frequently fell down. He could not tie his own shoes until he was well into kindergarten, so his sister had to tie them for him. Cathie Diane learned to double-knot petitioner's shoes for him because otherwise the laces would come undone and petitioner would get in trouble for walking on his shoelaces. (ERT 564, 1613, 1614, 1486.) Petitioner's childhood friend Glenn Riley recalled that he didn't tease him about it, "but the way he ran was not a normal way to run." (ERT 1486) Petitioner was so uncoordinated that he could not catch pop flies at baseball. When he was older and played baseball with other boys, his team usually put him in right field where baseballs rarely landed. (ERT 1486.)

Dr. Kriegler testified that she found evidence both in the social history materials and interviews she performed that petitioner had been born with neurological damage. (ERT 1712-1714). She noted evidence that petitioner suffered from psychomotor disability. (ERT 1713.) She also testified that petitioner's speech impediment was also a likely marker of neurologic damage *in utero*. (ERT 1713-1714.) Dr. Pierce testified that post-conviction evidence that petitioner had been a sickly child and was characterized as aggressive, hyperactive, and immature as a child would have suggested early brain damage and made him more insistent that a neurological evaluation be preformed. (ERT 339-343.) Dr. Benson also thought the evidence of petitioner drinking hard alcohol prior to puberty suggested he was likely self-medicating the anxiety secondary to organic brain disease. (ERT 423.) Even *respondent's* expert, Dr. Martell, noted that "it's actually a very consistent picture when you look at each doctor

over time independently going in and seeing him, they all paint the same picture of his problems." (ERT 1844.)

In short, Dr. Froming's opinion that abuse suffered by his mother when she was pregnant with him caused damage *in utero* due to a surge of cortisol and other stress hormones was not merely supported by substantial evidence in the form of that expert's testimony, but was endorsed by at least four other experts. Her opinion was also supported by undisputed, and indisputable, evidence that petitioner was neurologically damaged from birth.

The burden of proving a fact is "satisfied when the requisite evidence has been introduced . . . ." (*People v. Belton* (1979) 23 Cal.3d 516, 524, internal citation omitted.) Generally speaking, the testimony of a single witness is sufficient to meet the test of substantial evidence. "Unless a statute requires additional evidence, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact." (Evidence Code section 411.) "In other words, the testimony of a witness normally cannot be disregarded. Unless impeached or contradicted by other testimony or by an inference deducible from the facts proved, or unless it is inherently improbable, the court must accept it as true." (Witkin, *California Evidence* (4th ed.) "Presentation At Trial," §89, pp. 123-124; see also *Sweeney v. Metropolitan Life Ins. Co.* (1937) 30 Cal.App.2d Supp. 767, 771 [where not contradicted or impeached, "neither the jury nor the court had the privilege of arbitrarily disregarding the positive evidence of actual occurrences"]; *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to sustain a criminal conviction'].) The same

principle applies to the testimony of expert witnesses. (*Wirz v. Wirz* (1950) 96 Cal.App.2d 171, 176; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 417; *People v. Smith* (1995) 31 Cal.App.4th 1185, 1190.)

In short, the referee cannot simply ignore the testimony of an expert witness regarding her opinion, particularly not when that opinion is supported by the testimony of other experts and lay testimony showing neurological impairment from birth, and especially not when that evidence was never rebutted. The referee's rejection of expert opinion that petitioner was damaged *in utero* by stress hormones caused by abuse to his mother is simply wrong.

Furthermore, as noted previously in the exceptions to the referee's findings regarding Dr. Benson, petitioner takes strong exception to the referee's finding that all of Dr. Froming's testing data should now be ignored on the grounds that petitioner would not have agreed to be tested at the time of trial. Petitioner will not repeat all of the reasons the referee's conclusion on this point is wrong, but will instead refer the reader to the discussion pertaining to Dr. Benson. (See section IV,B,1,iii, (a).) However, petitioner wishes to re-emphasize that competent counsel would never have sent a psychologist in to see petitioner before a social history investigation had been completed, or was at least well advanced. Had counsel done such an investigation, it would have been obvious that petitioner was neurologically impaired from birth, and also suffered from psychosis and paranoia, and therefore would need to be approached with understanding and finesse over an extended period of time before he would be likely to agree to testing. Contrary to the referee's findings, the fact that petitioner agreed to be tested in 2002 and 2010 when approached by counsel who had

performed such a social history investigation is strong evidence that petitioner would have agreed to be tested at the time of trial if counsel had performed competently and approached him with sensitivity to his illness rather than treating him with disgust, contempt, and fear, as Mr. Selvin did.

Petitioner also wishes to re-emphasize that the referee's refusal to consider neuropsychological test results whose validity is unchallenged solely because petitioner did not agree to testing at the time of trial creates a perfectly circular Catch-22. Petitioner refused to agree to testing by Dr. Pierce because, as all the experts agree, he is paranoid and mentally ill. He would not even allow the experts to take notes and was afraid the interview room was bugged. The most powerful proof of petitioner's neurological and mental illness is the neuropsychological test data post-conviction counsel was able to obtain in 2002 and 2010. To exclude those test results now because petitioner refused to be tested at the time of trial effectively punishes him for his mental illness by excluding the best evidence of his mental illness. The referee's finding is erroneous and if adopted by this court will thwart the search for truth.

ii. Dr. Pablo Stewart

Dr. Pablo Stewart is a forensic psychiatrist retained by petitioner's counsel in 2002. Dr. Stewart who was able to meet with petitioner once in 2002. The referee summarizes his testimony and then finds that his testimony has "questionable credibility" on the grounds that his diagnosis does not differ greatly from that of Dr. Benson and Dr. Pierce at trial and is based upon some facts in the declarations he reviewed that were not proved at the hearing. Petitioner takes exception to these findings for the reasons set forth below.

First of all, as set forth below in the discussion of his testimony, there are substantial differences between Dr. Stewart's diagnosis of petitioner and those which Drs. Pierce and Benson arrived at prior to trial. Both trial experts also agreed that social history materials discovered in post-conviction would have substantially assisted their diagnosis, and Dr. Benson testified that his diagnosis would have been substantially altered by the additional material discovered in post-conviction.

However, even if Dr. Stewart's diagnosis had been *identical* to that of Dr. Pierce or Dr. Benson at trial, and even if both trial experts had testified their diagnoses would have been unchanged even with the benefit of the post-conviction evidence, the referee ignores the fact that the additional evidence provided powerful support for diagnoses that were at best tentative guesses at the time of trial. By contrast, Dr. Stewart had the benefit of Dr. Froming's neuropsychological testing data and the social history declarations which were not available to Drs. Pierce and Benson and his diagnosis was therefore much better supported and persuasive.

The referee's findings also ignore the fact that it is not the mere diagnosis itself that matters to a penalty phase jury, but its persuasive effect. A mental health expert alone, unsupported by social history witnesses and documentary evidence, is seldom very persuasive to a jury. As petitioner's *Strickland* expert testified, at the time of trial it was well understood that mental health experts are often perceived by jurors as "hired guns," and the direct evidence of lay witnesses as to the underlying events or behaviors that the experts later explain thus improves the credibility of the experts, in addition to humanizing the client in the eyes of the jury. (ERT 1122-1124.) Even Mr. Selvin recognized that jurors often view defense mental health

experts with a jaundiced eye. "The jury comes in, in general, believing that these are, quote, 'defense-paid people,' you know, and you're fighting that, you're fighting that to begin with." (ERT 505-506.) For counsel to have presented even a thoroughly accurate diagnosis from two mental health experts that was unsupported by anything other than the experts' own guesswork was ineffective.

Once again, as discussed above in connection with the referee's findings regarding Dr. Benson, the findings appear to discount Dr. Stewart's findings in part on the grounds that statements made in the declarations reviewed by Dr. Stewart were exaggerated. (Findings at p. 32.) Apart from a reference to an allegation that petitioner suffered open wounds after being hit in the head by his father, the referee does not specify what declaration statements she found to be exaggerated.[71] Petitioner has shown that a similar remark the referee made in connection with Dr. Benson was unfounded and that testimony at the hearing actually supported all the new facts Dr. Benson found to be significant. Petitioner has also shown that any problems the referee had with testimony of individual social history witnesses were either unfounded or trivial in nature. Without some more specific indication from the findings regarding what declaration statements

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[71]/ The referee does not include any citation to the record with respect to her reference to allegations of "open wounds" at page 32 of the Findings, and petitioner is therefore unsure as to which declaration or testimony she is referring. However, Dr. Stewart did testify that he observed numerous scars on petitioner's face, forehead, head and arms and that petitioner had told him some of these injuries had resulted from altercations with his father that, in Dr. Stewart's opinion, constituted severe child abuse. (ERT 661-665.) Accordingly, if petitioner bore scars on his head from injuries inflicted by his father, there were indeed at one time open wounds resulting from being hit in the head by his father. Thus, contrary to this finding, there was substantial evidence supporting Dr. Stewart's testimony on this point.

she found to be "exaggerated," there is no substantial evidence to support this finding, if it can be called a finding at all.

Lastly, petitioner is again unsure what the referee's findings regarding Dr. Stewart actually indicate. Although she finds his testimony of "questionable credibility" and accords is "very little weight," she does not reject it entirely. Once again, without some indication regarding which testimony the referee accepts or rejects, it is difficult for petitioner to meaningfully address these findings. Accordingly, petitioner will present his own summary of Dr. Stewart's testimony below.

iii. Dr. Julie Kriegler

Dr. Julie Kriegler is a psychologist and trauma expert retained by petitioner's counsel to assist in preparing for and testifying at the hearing after this court ordered a hearing on issues of trauma and serious child abuse, Dr. Kriegler's primary field of specialization. (ERT 1664, 1676.) She met personally with and interviewed many of the social history witnesses and also met with petitioner himself to evaluate him for behaviors consistent with trauma. Her testimony explained the severity of the trauma petitioner experienced as a result of serious child abuse, petitioner's neurological impairment, his tendency to dissociate– a symptom common among trauma sufferers– and other matters petitioner will set forth in greater detail below.

The referee briefly summarized Dr. Kriegler's testimony and made the following finding:

> The Referee does not give much weight to the opinions of Dr. Kriegler because– like Dr. Stewart and Dr. Froming– many of the facts upon which Dr. Kriegler relied were exaggerated, misstated, or not shown at the hearing. For example, she assumed petitioner suffered in utero injury from an assault on Mrs. Welch's abdomen, but there was no evidence of such an

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

(Findings at p. 37.)

Petitioner respectfully takes great exception to the referee's foregoing finding. First of all, Dr. Kriegler's opinion was based not only on testimony at the hearing or declarations she reviewed, but also on direct interviews she personally conducted with witnesses who observed petitioner's father inflicting abuse upon him or the sequelae of serious child abuse, as well as direct interviews with petitioner himself. She is entitled to rely on her personal interview data in forming her opinion. An expert in child abuse can observe and testify to symptoms and sequelae of trauma resulting from serious child abuse. To the extent any other percipient witnesses told her facts that were not also repeated in front of the referee, or were related with slight differences, these discrepancies are trivial when compared to the totality of their testimony and the overall thrust of the

testimony of those witnesses and Dr. Kriegler herself. The referee's repeated reliance on such trivial details as a basis for discounting testimony that is thoroughly supported by numerous witnesses and endorsed not only by petitioner's experts but also by the trial experts and even in some cases by respondent's expert, is both frustrating and puzzling. However, petitioner will again address the referee's specific objections.

With respect to the referee's fixation on the lack of testimony of any blow inflicted by petitioner's father specifically to petitioner's mother's abdomen at the time of her pregnancy, petitioner agrees there was no testimony which clearly made this point. However, Minnie Welch testified that when petitioner's father beat her during this period, he would slap and punch her anywhere on her body. (ERT 1552, 1553.) Sarah Perine gave similar testimony. (ERT 1271, 1273.) Given the testimony of Ms. Perine and Mrs. Welch regarding the beatings petitioner's father inflicted on Minnie Welch during her pregnancy, the fact that the elderly Ms. Perine did not specifically testify to a blow to the abdomen during her testimony is trivial.

However, it bears repeating that neither Dr. Kriegler nor Dr. Froming based their finding that petitioner's neurological damage was caused by *in utero* abuse primarily on evidence of a direct blow to the abdomen, but rather on the well-documented hormonal effects experienced by a women who are subjected to spousal abuse. Dr. Froming's testimony on this point has already been quoted. Dr. Kriegler never actually testified that it was significant the petitioner's father had struck Minnie Welch in the abdomen during her pregnancy with petitioner. Her testimony on this point was "because Mr. Welch's mom was severely abused by his father during

the time that she was pregnant with him, that means that she was highly stressed, and she was being assaulted in the area she was carrying David." (ERT 1709.) Dr. Kriegler then immediately explained the significance of these assaults:

> And when you have that high-level, ongoing, unremitting stress, then you have high levels of stress hormones. And while at low levels they're there for a reason, when you have chronically high levels of stress hormones in the bloodstream which is being shared with the baby, they're toxic. They're actually neurologically or neuropsychologically toxic.

(ERT 1709.)

Thus, the primary significance of the social history evidence that petitioner's father repeatedly assaulted her while she was pregnant with petitioner is not that direct blows to Minnie Welch's abdomen injured the fetus but rather that such assaults are known to cause a surge of cortisol and stress hormones in the bloodstream of a pregnant, abused woman that produce toxic effects which neurologically damage the unborn infant. Both Dr. Froming and Dr. Kriegler testified to this, and both Dr. Pierce and Dr. Benson– who were not petitioner's experts but fact witnesses– agreed with them. Under the circumstances, the referee's attribution of significance to this supposed discrepancy is unwarranted.

Dr. Kriegler also conducted a personal interview with Konolus Smith, petitioner's childhood friend, who personally witnessed three public incidents of abuse. Mr. Smith also testified at the hearing regarding these three incidents, among other matters. His testimony about these three incidents, and the referee's comments regarding discrepancies pertaining to his testimony, follow:

(1) One day in elementary school, while petitioner was lined up with his "special class" after recess, his father entered through the school yard's

back entrance and slapped petitioner "upside the head" in front of all his peers. (ERT 595.) The teacher of petitioner's "special class" intervened. (ERT 595.) The referee finds it noteworthy that Dr. Kriegler understood from her interview with Mr. Smith that petitioner's father had punched, rather than slapped, him. The distinction is trivial, particularly in view of the thrust of Dr. Kriegler's testimony regarding the significance of these incidents, discussed below.

(2) On a second occasion, when petitioner was around ten years old, he was walking down the street with a group of friends when a car carrying his father pulled up beside them. Mr. Welch said something to his son that caused him to take off running. As petitioner fled from his father, his father hurled a glass soda bottle at him. (ERT 597.) The referee's comment, set forth in full above, implies that Dr. Kriegler's opinion is unreliable because she "assumed . . . that petitioner's father jumped out of a car and threw a bottle at petitioner's head." (Findings at p. 37.) Petitioner is at a loss to understand what discrepancy the referee finds meaningful here. To the extent that Mr. Smith's testimony only said Mr. Welch threw a glass bottle at petitioner, whereas his interview with Dr. Kriegler specifically said the bottle was thrown at petitioner's head, the discrepancy is so trivial as to be meaningless, particularly in view of Dr. Kriegler's explanation of the significance of these incidents, given below.

(3) Mr. Smith also testified that on a third occasion, when he was fifteen, petitioner was standing with friends in a neighborhood restaurant when his father came up from behind him and "slapped him on the back of the head." (ERT 598.) Asked to clarify whether Mr. Welch had "slapped" his son or struck him with a closed fist, Mr. Smith stated that he had

"whacked" him, but that he couldn't tell whether it was with an open palm or a closed fist. He said, however, that "I can tell you when he hit Moochie, Moochie fell." (ERT 598.) Mr. Welch's own friends then "got in his face and pulled him out of the restaurant." (ERT 598.) Petitioner "stayed down for a couple of seconds." (ERT 598.) Asked if it appeared that petitioner was unconscious, Mr. Smith testified that "he might have been stunned, he didn't jump up immediately." (ERT 598.)

As noted above, the referee states with regard to this incident that Dr. Kriegler "assumed that petitioner was beaten by his father with his fist into a state of unconsciousness in public, when the evidence really showed petitioner's father slapped him on the back of the head causing petitioner to fall down for a couple of seconds, at which point petitioner appeared stunned." (Findings, at pp. 36-37, citing Dr. Kriegler's testimony at ERT 1716-1717.) However, in Dr. Kriegler's brief passing reference to this incident, she did not say petitioner was "beaten" by his father, as the referee states, but rather that he was "physically assaulted" by him. (ERT 1716.) When the referee then asked Dr. Kriegler to explain to what occasion she was referring, Dr. Kriegler replied, "At the restaurant on the corner, when he [Mr. Welch] came up and, as they say, coldcocked him [petitioner] with a closed fist and he fell to the ground. And his friend [Mr. Smith] said that was the first time he had ever seen someone unconscious." (ERT 1717, identifying information supplied by petitioner's counsel.)

A comparison of Dr. Kriegler's reference to the incident, which was based on her interview with Mr. Smith, to Mr. Smith's actual testimony at the hearing reveals the following discrepancies: (1) in his testimony Mr. Smith could not be certain whether Mr. Welch had used a closed fist, only

that he had "whacked" petitioner from behind in the head with sufficient force to knock petitioner to the floor; and (2) that Mr. Smith was not sure whether petitioner was actually unconscious or merely stunned, but he "stayed down." Contrary to the referee's finding, Mr. Smith's testimony was not that petitioner's father had "slapped" him but rather that he could not be sure whether he used his open palm or closed fist. However, once again, and particularly in view of the significance of the testimony, these discrepancies are at best trivial.

Petitioner cannot fathom how the referee could find these hair-splitting discrepancies of sufficient note to mention in such a brief summary of Dr. Kriegler's lengthy and detailed testimony, much less conclude they somehow undermine confidence in Dr. Kriegler's opinion. Petitioner submits that the discrepancies, such as they are, between what Mr. Smith told Dr. Kriegler and what he actually testified under oath are best explained by the fact that Mr. Smith took extraordinary pains at the hearing to testify only to facts of which he was absolutely certain. That does not even begin to suggest that Mr. Smith's statements to Dr. Kriegler were wrong or unreliable; it merely means that he was extremely careful on the stand.

More importantly, however, Dr. Kriegler's testimony regarding why these incidents were significant had nothing to do with such trivialities as whether Mr. Welch struck his son with an open palm or closed first. Rather, in Dr. Kriegler's view, the incidents were significant primarily because they occurred *in public*. Dr. Kriegler testified that "trauma and abuse goes underground a lot, is hidden, is the family secret." (ERT 1716.) The fact that petitioner's father assaulted his son in public "indicates a level

of dysregulation, reactivity, or just illness on his part that is quite striking." (ERT 1716, 1771, 1779-1782.) Another significance of these public incidents for Dr. Kriegler was also that petitioner was "being sort of tracked down by his own father, who is supposed to be– *supposed to,* right?– be the person providing safety and care, right?" (ERT 1716.) Whether Mr. Smith told Dr. Kriegler privately that petitioner's father had "punched," "slapped," or "whacked" him was of no relevance to Dr. Kriegler's opinion, nor was it significant to her whether petitioner was "unconscious" or merely "stunned." (ERT 1771.)

Other discrepancies the referee purports to find with Mr. Smith's testimony are also remarkable for their triviality. The referee states:

> Dr. Kriegler testified that petitioner was deprived of a home and ended up sleeping in cars, at the creek, or under friends' beds. (ET 1716.) In fact, Mr. Smith testified that petitioner stayed with him for two nights and slept in a bed, not under one. And on those two occasions Mr. Smith did not know if petitioner was having a problem at home.

(ERT 605.)

Mr. Smith did in fact make these statements in his personal interview with Dr. Kriegler. In his testimony, he stated that petitioner stayed at his house twice. "It was like I don't know if he had some problem at home and then kind of snuck him into the bed." (ERT 605.) Mr. Smith testified that petitioner also stayed with other friends at various times, and when asked if he ever stayed away from home at night and did not stay at anyone's house, he testified "I believe so." Asked what was taking place at that time, he testified "I think problems with his parents, his father." When asked where petitioner would stay on these occasions, Mr. Smith testified, "Moochie used to hang out at the creek all the time." (ERT 605.) In short, the only discrepancy between Mr. Smith's statements to Dr. Kriegler and his

testimony at the hearing was that he did not specifically say petitioner slept *under* his or someone else's bed. Petitioner fails to understand how this omission from his testimony has any meaning with respect either to Mr. Smith's or Dr. Kriegler's credibility. Once again, the significance of this evidence to Dr. Kriegler was that petitioner's problems with his abusive father were so severe that he stayed away from home to avoid him, sleeping at the homes of friends or even outdoors by the creek in a dangerous neighborhood.

The referee is wrong in stating that Mr. Smith did not know whether petitioner had problems at home. Although he did make that statement initially, he later clarified that he thought petitioner stayed away from home because of "problems with his parents, his father." (ERT 605.) However, once again, the referee is focusing on hair-splitting minutiae and missing the point. Whether petitioner slept under a bed or in one when he stayed with Mr. Smith, the point is that he often stayed away from home due to problems with his father and sometimes slept by the creek. There is simply no question that petitioner stayed away from home because of "problems" with his father. Mr. Smith's testimony on this score is also supported by that of Roy Millender, whom the referee found to be credible, and who testified that petitioner stayed with him for as much as six weeks at a time when he was having problems at home. (Findings at p. 23, citing ERT 566-567.)

As noted above, in some instances in the long quoted paragraph regarding Dr. Kriegler the referee is simply wrong in finding a discrepancy. For example, the paragraph quoted appears to find Dr. Kriegler's opinion undermined because she "assumed" that "petitioner's father threw a cup of

hot coffee in petitioner's face. (ERT 510.)" Again, the implication of the finding is that this incident did not take place, or at least was not supported by evidence at the hearing, but that Dr. Kriegler erroneously believed it did. The citation the referee included refers to the testimony of Mr. Selvin and does not contain any reference to a cup of coffee. However, Glenn Riley testified that on the evening of the MacPherson incident, he personally witnessed the drunken Mr. Welch go into the kitchen, get a cup of hot coffee, follow petitioner into his bedroom, and throw the coffee on petitioner. (ERT 1501, 1502, 1624.) It was to this incident that Dr. Kriegler was referring. Furthermore, Mr. Riley's testimony is supported by the MacPherson incident report that was closely contemporaneous with the incident, and which shows petitioner complaining specifically that his father had thrown hot coffee in his face. (Hearing Exh. N-1, Tab 56, p. 5.) More puzzling still is that while the referee seems to find this statement a discrepancy when Dr. Kriegler relies upon it, the referee herself actually included a reference to this incident in her summary of Mr. Riley's testimony and did not appear to find anything incredible about it then. (Findings, at p. 24.). And once again, the point Dr. Kriegler was making in referring to it was that it is remarkable that incidents in which petitioner's father abused petitioner occurred in public, or in the case of this incident, "quasi-public in the sense that Glenn Riley is present." (ERT 1780.)

In short, the referee's noted discrepancies either do not actually exist or are absurdly trivial, and in either case do not justify her conclusion that Dr. Kriegler's opinion is "undermined" by them. (Findings, at p. 37.) More troubling is the fact that while the referee was focusing on these supposed discrepancies, she entirely missed the point Dr. Kriegler was making about

what these incidents indicated about the degree of petitioner's father's dysregulation.

Petitioner notes that at the conclusion of the paragraph quoted above, the referee did find "some credible evidence" to support Dr. Kriegler's opinion that petitioner was the victim of serious child abuse" based on the testimony of Sarah Perine, Cathie Thomas, and Roy Millender. (Findings, at p. 37.) As petitioner has shown, the referee's decision to ignore the testimony of Glenn Riley on the grounds that Mr. Selvin testified he would not have interviewed him is wrong on Eighth Amendment law and under the standard of care applicable to capital counsel. (See Section V, B, 2, a, vi.) Accordingly, the testimony of Mr. Riley, summarized previously, must also be considered by this court. In addition, for the reasons set forth previously, the referee is also incorrect in refusing to consider the testimony of Minnie Welch on the grounds that she would not have testified at trial. In fact, substantial evidence actually shows that she would have done so if asked.

Finally, the referee gives mixed signals with respect to the testimony of Konolus Smith. Her credibility findings regarding Mr. Smith state that she found his testimony credible, and she included in her summary of his testimony the information about the three public incidents he witnessed in which petitioner's father assaulted petitioner. (Findings at pp. 22-23.) However, she does not list Mr. Smith as one of the witnesses who provide "some" support for Dr. Kriegler's opinion. To the extent that there is any doubt on the matter, petitioner submits that Mr. Smith's testimony must also be considered by this court, particularly in view of the trivial nature of the

supposed discrepancies the referee purports to find between his statements to Dr. Kriegler and his testimony at the hearing.

Petitioner will now set forth a summary of the testimony provided by his three expert witnesses.

b. The Testimony of Petitioner's Mental Health Experts Regarding Serious Child Abuse.

i. Testimony of Dr. Karen Froming, neuropsychologist.

Dr. Karen Froming, a clinical psychologist and board-certified clinical neuropsychologist, testified on September 20, 2010. (ERT 693-694.) As a neuropsychologist, one of Dr. Froming's areas of specialization has been emotion-processing, more particularly with regard to the way in which arousal, anxiety, and trauma all affect emotion processing by the brain. (ERT 698-699.) She has also done work on trauma treatment at the National University of Rwanda, where for several years she has taught trauma treatment methods for the University's clinical psychology programs in the wake of the genocide that followed the Rwandan civil war in the early 1990s. (ERT 700.)

Dr. Froming explained that as the two fields developed, clinical psychology sought to address psychiatric disorders, whereas neuropsychology developed as a field which examined the functioning of the central nervous system. (ERT 703.) She said that as these two fields have continued to develop in recent years, there has been a recognition that the distinction between organic disorders and functional disorders is artificial and that the two concepts cannot be separated. (ERT 704. Prior to and at the time of trial, in 1988 and 1989, the distinction between organic and psychiatric disorders was still generally maintained. However, in the field of trauma and attachment research at that time, there was clearly an

understanding and increased research interest in the neurobiological underpinnings of maternal health, the *in utero* effects of trauma, and the post-natal effects of attachment and trauma. (ERT 704.)

Dr. Froming explained that neuropsychological testing involves the use of primarily "paper-and-pencil" tests to evaluate the health of different brain functions. (ERT 704.) Since different functions are associated with different regions of the brain, a lowered functionality can signify damage to the brain itself. (ERT 713.) The frontal lobes of the brain are associated with executive functions, namely behavioral control and regulation, motor performance, starting and stopping behavior, attention, and to some extent, the processing of emotion. (ERT 705, 735.) The orbitofrontal cortex, part of the frontal lobes, has direct connections to temporal lobe and the limbic lobe. The temporal lobe is associated with memory, emotion processing, and facial recognition. The limbic system is associated with emotion regulation. (ERT 709.)

Dr. Froming briefly discussed the historical development of neuropsychology in the late 19th Century as neurologists and psychiatrists learned that particular areas of the brain appeared to control specific functions, such as speech and comprehension of language. (ERT 706.) As an example, she cited the case of Phineas Gage, a 19th Century railroad foreman who suffered an injury to the orbitofrontal portion of his brain– the portion immediately between and behind the eyes– and underwent a profound personality change, transforming from a moral, upstanding citizen before the injury to a hard-drinking, irreverent, and virtually homeless vagabond afterwards. (ERT 708, 709; Exh. Q.) She then discussed the development of the Halsted-Reitan neuropsychological test battery after

World War II. (ERT 708-709.) This test battery had been in existence since the late 1950s, and accurate "norms" for the battery had been in place since the late 1970s, or ten years prior to the time of petitioner's trial. (ERT 710.) Dr. Froming also provided a brief explanation of the various parts of the brain, their functions, their relationship to one another, and how damage to particular areas can be inferred from performance on neuropsychological tests. (ERT 710-713.)

Dr. Froming administered the Halsted-Reitan neuropsychological testing battery to David Welch in June, 2002. (ERT 700, 709.) The purpose of the testing was to determine whether petitioner suffered from neuropsychological impairment and if so, "to try to identify the locations or the symptoms involved in those impairments and how they would manifest themselves in behavior." (ERT 701.)

(a) Dr. Froming's Record Review.

Dr. Froming said that before administering testing, she normally seeks to begin by reviewing social history records and materials to obtain as much information as possible about the patient's background. (ERT 714.) She stressed the importance of obtaining family history for mental and psychiatric issues, information regarding the mother's pregnancy and the patient's birth, the patient's school records, information about physical abuse, toxin exposure, substance abuse in the parent or the patient, and other medical and psychiatric history information pertaining to the patient. (ERT 715.) She then conducts a clinical interview of the patient, and administers the test battery. (ERT 715-716.)

In petitioner's case the records she recalled reviewing included various vital records, declarations from social history witnesses and other

family history, and an environmental impact map pertaining to a creek in petitioner's neighborhood. (ERT 716.) She found evidence of serious substance abuse in the family and a serious psychiatric disorder– schizophrenia– on petitioner's mother's side of the family. (ERT 716.)

She particularly found the declaration of Sarah Perine, Minnie Welch's sister, informative. According to this declaration, the apartment in which the Welches lived during Minnie's pregnancy with petitioner was substandard. In addition, building inspection records independently showed that the apartment building was not up to code, had holes in the walls and ceilings, lacked proper windows, had a poor electrical system, and had peeling paint. In addition, Ms. Perine's declaration showed that petitioner's mother had been subjected to domestic violence by her husband during the time she was pregnant with petitioner. (ERT 716.)

Dr. Froming found this information important for two reasons. First, she said, the recollections of Ms. Perine and the building inspection records suggested the possibility that toxins were present in the physical environment to which petitioner's mother was exposed during pregnancy, and to which petitioner himself was exposed during early childhood. These toxins would have created "an unhealthy atmosphere to the developing nervous system." (ERT 718.)

Second, Dr. Froming thought the history of domestic violence meant that Mrs. Welch's pregnancy took place in a highly stressful atmosphere which would have resulted in potentially severe impacts to the developing fetus. (ERT 718-719.) She explained that physical abuse or anticipatory anxiety and fear result in elevated levels of the stress hormone cortisol in the mother's bloodstream. (ERT 719.) During pregnancy, this cortisol is

passed through the bloodstream to the umbilicus. (ERT 719.) Cortisol is a toxin which damages the hippocampus and thereby produces memory problems. (ERT 719.) In addition, research shows that cerebellar development and the "pruning" process, through which unneeded neurons die off as connections are made in the developing brain, are both negatively affected by early exposure to neurotoxins. (ERT 720-721.)

Dr. Froming also found it significant that reports regarding the amount of toxic chemicals found in San Leandro Creek, where petitioner swam and played as a child, showed the presence of two organophosphates which caused chronic health problems to people in the community and may have accounted for or contributed to petitioner's lifelong skin rashes, breathing problems, and eye irritation. In addition, when compounded on top of *in utero* exposure to stressors and domestic violence, Dr. Froming believed these organophosphates may have had an additive affect. (ERT 722-723.) She noted that the effects of organophosphate exposure on the developing brain were well known at the time of trial. (ERT 723.) She noted that the study of biochemical and hormonal attachment between mother and infant were also well understood by the time of trial in 1988-1989.

Dr. Froming found it significant from the social history materials that petitioner's father drank excessively, and was documented to have drunk to unconsciousness while in the Merchant Marines. (ERT 725.) She noted that petitioner had a family history of mental illness: specifically, of schizophrenia on his mother's side of the family. (ERT 725.) She also noted that Mrs. Welch was reported to have suffered postpartum depression, or the "baby blues," which is a risk factor for mood disorders, anxiety

disorders, and psychotic disorders (ERT 725), and that Mr. Welch– petitioner's father– had suffered physical abuse as a child. (ERT 716.) She also noted that petitioner had significant problems in school, including behavioral disregulation, attention problems, learning problems, relatively low functioning in academic areas, and lived in a very dangerous neighborhood. (ERT 717.)

(b) The Testing.

Dr. Froming met with petitioner on five occasions in 2002. She noted that it was remarkable for her to meet with a test subject for that length of time because the administration of the Halsted-Reitan battery typically requires only two days of testing. (ERT 726, 734.) She also noted that from the very beginning of the interview process, petitioner exhibited "clear paranoia," a thought disorder, and what she described as psychological "fragility." (ERT 726.) She explained that while many patients find it potentially "scary" to "expose themselves" through neuropsychological testing, petitioner's paranoia and psychological fragility made it even more difficult for him to tolerate. He exhibited this fragility during the interview through interruptions, digressions, and tangential commentary. (ERT 727.) He appeared to be obsessed or "stuck" on a number of issues that occurred at his trial and to return to these issues again and again during the clinical interview, a trait she referred to as "perseveration," which she described as "a classic frontal lobe sign." As an example she noted that petitioner seemed obsessed with the presence of a doll in Judge Haugner's courtroom during one of the pretrial proceedings in his case. The doll – a small "troll" doll dressed in prison stripes and holding a sign stating "You're in Contempt of Clerk!"– was clearly a mass-

produced, humorous knick-knack the court clerk kept on her desk. However, petitioner was convinced that the doll had been intentionally placed there to intimidate him and to be disrespectful to him personally.[72] (ERT 729.)

During her clinical interview, Dr. Froming also found petitioner exhibited loose associations. (ERT 730.) She described this as a process of "jumping from topic to topic," as distinct from tangential thinking, which she described as breaking free from the topic or changing the subject. (ERT 732.) She also said petitioner exhibited "derailment," and that his thought processes were "consistently paranoid and defensive." (ERT 730.) She found his mood was "dark" and "intensely serious," and that he exhibited no sense of humor, though he would sometimes laugh inappropriately. (ERT 730, 732.) He also appeared to ask socially inappropriate questions, asking whether Dr. Froming was married or had children, and at the end of the testing situation attempted to kiss her. (ERT 733.) He reported sleep disturbance as a constant throughout his life. (ERT 731.)

Dr. Froming reported that the Halsted-Reitan typically requires about five or six hours on two consecutive days, but that if the patient is very psychiatrically disordered or had substantial brain dysfunction, the testing could require more time. (ERT 734.) She said that testing petitioner "stands out as one of the longest evaluations I've ever done." (ERT 734.) She said that while petitioner was cooperative and did his best, he had difficulty recalling what the instructions for a given test were as a result of

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[72]/ A person's erroneous or obsessive belief that unrelated or innocuous objects or phenomena refer to them personally, or have unusual personal significance to them, is described as an "idea of reference" or a "delusion of reference." Such ideas or delusions are hallmarks of various psychotic disorders, such as schizophrenia.

attentional and memory problems and said that these attentional and memory issues were what caused the testing to take five days as opposed to the usual two days. (ERT 734-735.) She observed that the length of testing was also extended in part because petitioner had a significant memory disorder. (ERT 731.)

Of the Halsted-Reitan tests, Dr. Froming said she administered the category test, which tests problem solving; a newer version of the trails test; the tactual performance test, a speech sounds perception test, which tests attention; the seashore rhythm test; the finger tapping test, the grooved pegboard test, the Rey-Osterrieth Complex Figure, and the Dellis-Kaplan Executive Functioning Scale. (ERT 737-739.) She also gave the Wisconsin Card Sort and a card sorting test from the Dellis-Kaplan scale. (ERT 742.) She also administered an updated version of the Wechsler Adult Intelligence Scale which had been normed for African-Americans, such as petitioner, so that the results would not be affected by cultural bias. (ERT 743.) She also administered the Wide Range Achievement Test, which involves a word recognition and pronunciation subtest, a mathematical subtest, and a spelling test.

She explained that as a general rule, neuropsychological testing is devised so that a standard score will be 100 points, with standard deviations of 15 points. Thus, an above average score will be 115, or one standard deviation above the average, and superior performance would be 130, or two standard deviations above the average. Below average would then be 85, and an impaired range would be around 70, or two standard deviations below the average. (ERT 745.) She also explained that tests are "normed" by administering the tests to groups of people in various age and education

ranges to determine standard performance levels for particular demographic groups. (ERT 740.) She attempted throughout her testing to administer the tests that had the best, most accurate "norms." (ERT 741.) She indicated the ethics of her profession require that only current versions of tests may be administered, so she was not ethically able to administer only versions of tests which existed in 1988-1989, but instead administered the current versions of tests which did exist at that time in order to duplicate to the maximum extent possible the results that would have been obtained had counsel retained her at the time of trial. (ERT 741.)

On the Wechsler IQ test, he received a score of 78, which was perfectly consistent with the IQ score he received on the Lorge-Thorndike test, according to his school records.

On the Wide Range Achievement test, petitioner received an 81, or a tenth percentile score, on reading and word recognition. His spelling ability was 103, or average, and his arithmetic score was 83, or the 13th percentile. These scores indicated that he read at the 8th grade level, spelled at a high school level, and that his mathematical abilities were at the 6th grade level. (ERT 745.)

On memory tests, however, petitioner showed pronounced impairment. On the Wechsler Memory Scale, he received a 71 score for verbal memory, nearly two standard deviations below the average. His score on visual memory was 81, or more than one standard deviation below the mean, but his ability to retain and recall visual memory tested in only the third percentile, indicating that 97% of people would perform better on this test that he did. (ERT 747.) Verbal delayed memory– the ability to recall verbal information over time, was 67, or in only the first percentile.

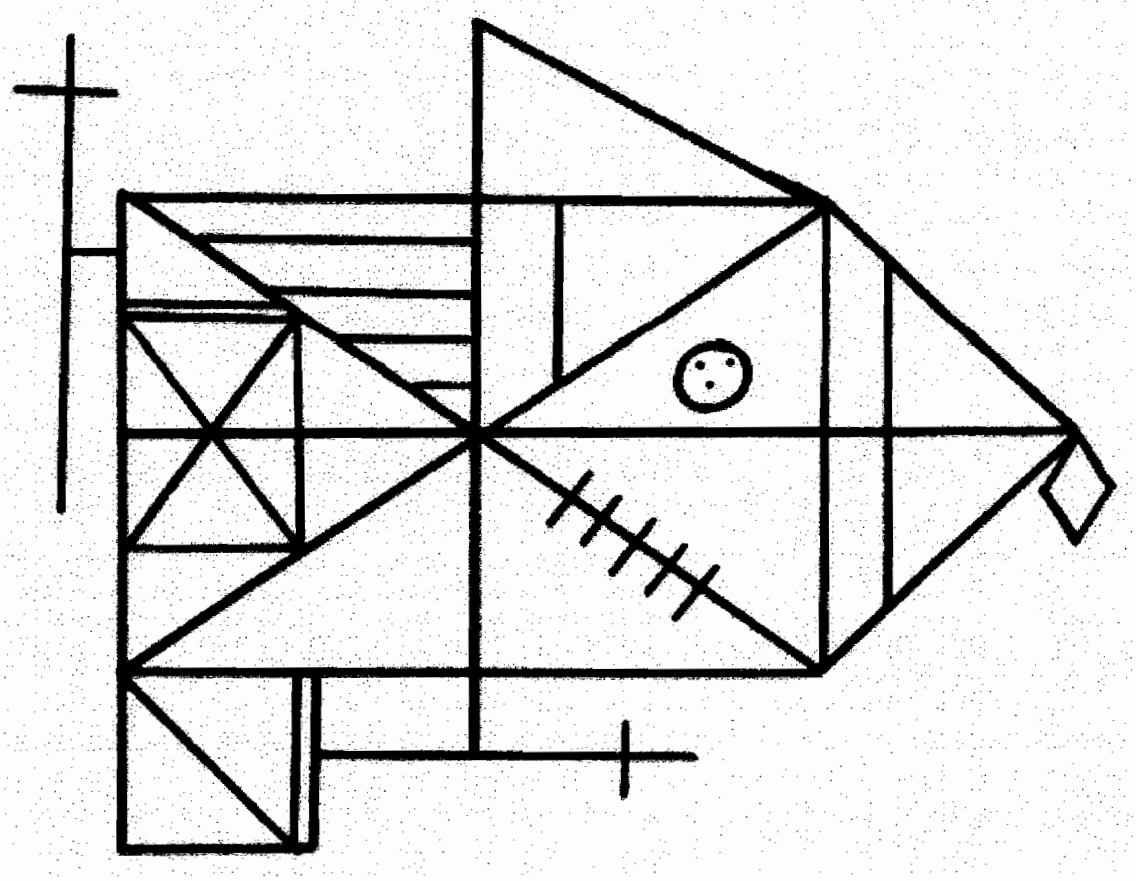
Visual delayed memory was slightly better, at 78 or in the seventh percentile. (ERT 748.)

In particular, petitioner showed significant difficulty with memory tasks which required him to make new associations. (ERT 749.) She described a task of "list learning" in which the patient is required to recall pairs of words. Some pairs have logical associations whereas some do not, and for these pairs the patient is required to make novel associations in order to recall the paired word when a trigger word is mentioned. Petitioner was particularly poor at this task. (ERT 749.) This indicated not merely memory deficits but an inability to devise a strategy for recalling the pairs. She gave as an example the paired words "clown" and "reptile," which have no particular association, and thus the subject is required to devise some internal strategy for recalling the word "reptile" when the word "clown" is mentioned. Petitioner could not devise such a strategy and complained that the words "clown" and "cartoon" should go together instead. (ERT 750.)

As an example of petitioner's poor visual memory Dr. Froming referred to a test called "Family Pictures." In this test, the patient is shown pictures of four family members and a dog engaged in various activities. The patient sees the picture for ten seconds and then is asked to recall and described which family members were in the picture and what they were doing. (ERT 750.) Petitioner had significant difficulty on all portions. "He couldn't remember who was in them. He couldn't remember who was doing what. He would mix up stories. And then his recall 30 minutes later was even more impaired where he couldn't remember a story at all and confabulated and again messed up the four discrete stories so they were blended rather than discrete stories." (ERT 750.)

On another test of visual memory, the Rey-Osterrieth Complex Figure, petitioner was actually below the first percentile, performing at a level worse than virtually any potential test subject, and was thus severely impaired. (ERT 752.) This test involves viewing and then reproducing a drawing consisting of an abstract figure composed primarily of various polygons and straight-lines both within and attached to a central rectangular figure.[73] The first time, the person is allowed to make a copy of the

[73]/ The Rey-Osterrieth figure can be found on the internet, but a copy is



drawing while looking at the drawing itself, thus double-checking and making sure they have the details in the correct places, without any time limit. (ERT 751-752.) After a 30-minute time lapse, the person is then asked to reproduce the drawing from memory to the best of their ability. (ERT 752.) The drawing contains 36 discrete points. The patient can obtain one point for accurately reproducing the object and another point for placing it correctly in the overall drawing. (ERT 751.)

During the first attempt, when petitioner was attempting to reproduce the drawing while actually looking at it, he scored beneath the first percentile, making such "inattentive" errors as placing the diamond-shaped object on the right of the figure inside the rest of the figure. (ERT 752.) During the second attempt, where he tried to reproduce the drawing 30 minutes later, he scored only 7 out of a possible 36 points, again beneath the first percentile level. (ERT 752.) The memory testing demonstrated that petitioner was impaired for both verbal and nonverbal memory. (ERT 800.)

Dr. Froming noted that these findings suggested impairment to the orbitofrontal cortex and the temporal lobe– results that were demonstrated repeatedly over the course of testing. (ERT 802.) In addition to the scores, petitioner's behavior during the testing showed problems with both working memory and processing speed. He often did not understand the directions the first time they were given and would ask to have them repeated several times. Sometimes he would begin an exercise without understanding what he was supposed to do. (ERT 802.) Dr. Froming thought these characteristics were consistent with behaviors reported in petitioner's

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reproduced here.

school records. As a student, according to his school records, he was "overstimulated" because he could not track all the information directed at him, he was missing pieces of information, and he couldn't disentangle different threads of information. (ERT 802.)

Dr. Froming also gave petitioner the smell test. (ERT 804.) The test evaluates the frontal-subcortical structures that are involved in the smell function. (ERT 804.) A loss of smell function can indicate damage to the orbitofrontal portion of the brain because the olfactory bulbs lie behind the nose in the frontal lobes. Bony protuberances above the eyes can simultaneously cause injury to both the frontal lobes and the olfactory bulbs if there is substantial movement of the brain within the skull. (ERT 736.) Dr. Froming noted that the sense of smell is impacted very early on in major depression, schizophrenia and Alzheimer's disease because these are all illnesses in which frontal-subcortical structures are impaired. (ERT 804.)

In the smell test, a person is asked to scratch a patch that contains encapsulated odor and identify it from a set of choices. (ERT 804.) Of the 40 scents petitioner was asked to recognize, he missed 16. The score placed him in the first percentile, or worse than 99% of the population. This performance defined petitioner as "anosmic," or lacking in smell function. She concluded that his orbitofrontal and olfactory bulbs are likely not functioning. (ERT 805.)

Dr. Froming gave petitioner a test that is analogous to the Trails A and B. The test measures attention by using tasks of visual scanning. Visual scanning is also controlled by portions of the frontal lobes. It tests the ability to pay attention to two things at once and the ability to pay

selective attention. (ERT 805.) The test is highly relevant to performance in the world because

> We have to scan our environment. We have to make sure we don't miss things. We have to sustain attention and pay attention to something without distraction. We have to sometimes listen or do two things at one time so you're listening to me and writing notes. And sometimes we have to select what is the salient thing. So that's like a divided-attention task. You have to be able to figure out what's most important and put the least important thing in the background.

(ERT 805.)

Petitioner had impairments in all these areas. (ERT 805.)

Again petitioner's performance during the test was noteworthy. During a timed test, petitioner was unable to recognize that the test continued from one page to another and sat for 15 seconds until he realized that there was more to do before he was finished with the task. Dr. Froming said that petitioner's performance indicated he had unwittingly scanned only part of his "visual world." Dr. Froming noted that she had only seen this occur previously in patients who had experienced strokes and suffered from a particular neurologic problem involving spatial recognition called "neglect." (ERT 806.) She posited that petitioner's memory problems may be affected by his failure to gather all the information available to him, as demonstrated in this instance (ERT 806), and that his slow processing speeds may also limit the amount of information he can take in. (ERT 807.)

One test Dr. Froming administered as part of the Trails variant involved the sequencing of letters and numbers arranged randomly on a large sheet of paper. Within three minutes, petitioner was required to "connect the dots" moving from "A" to "1" to "B" to "2", and so on,

alternating letters and numbers in sequence. Petitioner took an extraordinarily long period of time to accomplish this task, and used almost all of the maximum time allowed. Dr. Froming noted that this is highly unusual and only occurs in some of her most brain-damaged subjects. (ERT 808.)

Dr. Froming gave petitioner the Interference Test, which tests a person's ability to suppress an "over-learned response." The test was designed for psychiatric diagnosis because people with Axis I psychotic disorders or depression have difficulty with "interference injected into an attentional task." (ERT 809.) In one part of the test, petitioner was asked to look at a word for a color that was written in a contrasting color of ink– e.g. the word "blue" written in red ink– and then tell her the color of the ink. The over-learned response in this case is the written word; in the example above, the impulse would be to say the word "blue" even though the correct answer would be "red." Petitioner received the worst possible score on this task. He had a great deal of trouble understanding the instructions. Often he was not aware that he had made an error or that he was not following the directions. (ERT 810, 811.) In a second part of this test, which also tested the ability to suppress an over-learned response in another way, petitioner again scored a one, three standard deviations below the average. (ERT 812.)

Dr. Froming described petitioner's difficulty as classic evidence of frontal lobe impairment. The tasks showed that petitioner was much more hindered that the general population in his ability to stop and start, follow instructions, suppress an over-learned response, demonstrate mental flexibility and conform his behavior to a changing set of circumstances– all functions associated with the frontal lobes. (ERT 811.) Dr. Froming

suggested that being impaired in this way is like being stuck in a single groove of an old vinyl record. (ERT 811.)

Dr. Froming emphasized that in neuropsychological testing, the numerical score is not the only indicator of performance. The number of errors a subject makes and his behavior during the test are also important to note. (ERT 812.) In the Wisconsin Card Sort, petitioner was asked to determine where to place each card in a deck based upon four target cards that were set in front of him.[74] Dr. Froming noted that "he'll be going along and he'll be doing okay for a while, and suddenly, he'll shift off what's been getting him a correct answer." (ERT 813.) This deflection is called an "impersistent shift." (ERT 814.) The doctor explained that it is unusual to see even one impersistent shift when a person is getting the right answer. In petitioner's test, she witnessed this shift five times. (ERT 814.) Dr. Froming attributed this very unusual performance to petitioner's problems with distractability and memory. She also thought it likely that petitioner saw the problem as more complicated than it actually was. (ERT 814.)

As for how these impairments would be manifested in the real world, Dr. Froming explained

> You're having to figure out in the real world
> what it is you're supposed to be doing and

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[74]/ In the Wisconsin Card Sort, the subject is given a deck of cards which contain different numbers of four different shapes (circles, stars, squares, and crosses) in four different colors of ink (red, green, blue, and yellow). The subject is then asked to sort the cards in various ways according to changing rules and requirements. One of the most significant and complex sorts occurs when the subject is asked to put down cards in a stack based on shifting rules known only to the tester, who tells the subject only whether, not why, each card has been placed correctly. Thus, a subject may put down cards of the same shape until the tester says no, then try matching the next card by color or number until the tester says yes again. The test assesses the subjects ability to "shift sets," or detect and adapt to changing rules.

> categorizing behavior, understanding the rule about how you should be behaving, and you may be able to behave in that way for a while, but you're always either distracted from what it is you should be doing, you're not remembering kind of what it was you were doing, or you're somehow creating a more complicated situation than exists.

(ERT 815.)

A second sorting task was more complicated. petitioner could not complete the task and instead created his own idiosyncratic rules about how the sort was supposed to work. (ERT 815.) In another sorting task that was more complex and detailed, petitioner was supposed to verbally define the rule that governed how items were grouped. He was unable to do this at all. He either perseverated, repeating a wrong explanation over and over again, or invented an idiosyncratic rule. (ERT 816.)

In the Tactual Performance Test (TPT), the subject is blindfolded and has to fit ten distinctly shaped blocks into their corresponding slots on a board. This test, because it involves problem solving, motor and somatosensory skills, is a "whole brain" task as opposed to a test of localized brain function. (ERT 822.) The TPT could not be administered as designed because San Quentin would not allow hands-free testing. (ERT 819.) Dr. Froming therefore administered a variation on the test. (ERT 820.) Petitioner had difficulty identifying the shapes due to what Dr. Froming described as mild somatosensory problems. He then was unable to devise any systematic method for matching the blocks to the board and instead tried to complete the task randomly. There was a time limit associated with the task. Petitioner exceeded the limit and still had placed only six of the ten blocks. This performance was extraordinarily unusual. Dr. Froming said that in the course of her career administering

neuropsychological tasks, which dates to 1979, she has had to discontinue the Tactual Performance Test fewer than five times. (ERT 820.) Petitioner also had significant errors in two other tests, the Speech Sounds Perception and Seashore Rhythm tests, which placed him in the impaired range for sustaining attention on the task and discerning verbal phonemes. (ERT 822.)

Based on the complete battery of tests she performed, Dr. Froming found that petitioner suffered impairments to his frontal and temporal lobes. (ERT 823.) He had problems with his memory and his working memory, problems with tracking and manipulating information, problems with suppressing an overlearned response, problems in shifting back and forth between the demands of the environment, and problems in figuring out the rules that apply in a complex environment. He had somatosensory and motor problems that were also clearly related to the frontal lobes. His memory problems implicated both the frontal lobes and the temporal lobe. (ERT 823.) Behavioral data and observations as well as school records clearly supported these findings. (ERT 823, 824.)

Dr. Froming concluded from the tests that she performed in 2002 that petitioner was seriously impaired: "if you cant manipulate information and you can't remember what just happened or you remember it in a faulty way, and then you are confronted with lots of details in the environment that you have to act on, all of those go together to make someone pretty dysfunctional in terms of operating in the world." (ERT 817.)

Dr. Froming also administered additional testing in September, 2010, in preparation for the evidentiary hearing. (ERT 702.) Dr. Julie Kriegler had asked Dr. Froming to perform tests that would evaluate the regions of

the brain that are involved in trauma. (ERT 824.) Although her frontal and temporal findings already demonstrated trauma, Dr. Froming decided to perform a structured interview focused on anxiety disorders and an emotion processing task associated specifically with the frontal-subcortical region of the brain. (ERT 824, 825.) As mentioned earlier, emotion processing has been an area of particular interest to Dr. Froming for some time. (ERT 825.)

Dr. Froming performed these tests on September 1, 2010. (ERT 824.) She determined that petitioner could not correctly detect emotional prosody– i.e., tone of voice. He was two standard deviations below the average for his age. (ERT 826.) He had trouble naming the emotion in a face – denoting it – which she described as a "verbal labeling" issue. (ERT 827.) He couldn't correctly interpret a statement in which the tone of voice didn't match the content of the words. He always paid attention to the words rather than the prosody. (ERT 827.) He couldn't match an emotional tone of voice to a face demonstrating that emotion. (ERT 827.) Petitioner was most impaired in interpreting fear, surprise, anger and sadness. (ERT 828.)

Dr. Froming explained that ability to recognize meaning from tone is a very old behavior, in evolutionary terms, because, we need to be able to recognize threats from sounds. We also needed to be able to read emotion in faces, gestures, and tone of voice before we had language. (ERT 828.) Dr. Froming deemed this kind of impairment to be very significant. A person who suffers in this way is unable to "pick up all the pieces of the environment" and is likely to misinterpret people. (ERT 828.)

Dr. Froming noted that because his memory and attention are impaired, petitioner does not reliably pick up all of the semantic content in a complex environment and can't remember what he does pick up. Since he is highly dependent on semantic content, his difficulties in reading emotion are compounded. (ERT 828.) Dr. Froming concluded that there was consistent evidence of orbito-frontal and temporal lobe impairment. (ERT 828, 829.)

In using the Dissociative Disorder Interview Scale, Dr. Froming examined petitioner for manifestations of anxiety disorders, including dissociative disorders and PTSD (posttraumatic stress disorder). (ERT 831, 832.) Dissociation is a disconnection between a person and his environment or his experience. (ERT 829.) In dissociative amnesia, a person completely blocks an experience from memory. In dissociative fugue, a person has no knowledge of behavior he has exhibited over an extended period of time. (ERT 830, 831.)

Dr. Froming noticed that petitioner had episodes of dissociation during her testing where he would break from a task and not talk, or would behave in a tangential way. (ERT 830.) She found clear evidence of childhood abuse and exposure to neighborhood violence. petitioner has a sleep disorder, an element of major depression. He sometimes has dreams that are difficult for him. He has paranoid ideation. He laughs at internal stimuli– things that are only known to him. He has features of dissociative disorders including depersonalization and feeling as if things aren't real and as if he is not in his body. He also has somatic complaints which are found in people with trauma history. (ERT 831, 832.)

Based upon her testing in 2002 and 2010, Dr. Froming found evidence here that is consistent with the sequelae of serious child abuse. She pointed to the *in utero* trauma petitioner suffered through the physical abuse directed at Minnie and Minnie's traumatized emotional state, both of which affect brain function. (ERT 833.) There was the possible exposure to toxins as well as parental abuse in failing to keep him away them. (ERT 833.) There was documentation of petitioner having been hit in the head. (ERT 833.) Numerous family members confirmed that petitioner was singled out by his father for abuse and that petitioner left home to avoid his father. (ERT 833, 834.) There was genetic predisposition to mental illness in petitioner's family. All of these elements were interconnected and impacted petitioner's early development. (ERT 834.)

Dr. Froming said that working memory is an important component of consciousness and that if working memory is impaired, consciousness is impaired. She stated that dissociation is also an alteration of consciousness. A person whose working memory is impaired and who also has a tendency to disassociate necessarily has an altered consciousness. Substance abuse would also contribute to altered consciousness in that person because it would increase the possibility that information was not being recollected or processed properly. All of these factors would be important to consider when speculating on what this person might have known at a particular time. (ERT 861.)

Rita Mae Brown defined insanity as repeating the same behavior over and over again and expecting different results. Dr. Froming found this idea descriptive of frontal lobe damage and identified it as perseveration.

Perseveration is an inability to learn from experience or appreciate the consequence that occurs after that experience. (ERT 862, 863)

Having reviewed her test data from 2002 and 2010, Dr. Froming had no doubt in her mind that petitioner suffers from frontal lobe brain damage and that the limbic system and possibly the amygdala and hippocampus are affected. This is a picture consistent with serious child abuse. (ERT 863.)

ii. Testimony of Dr. Pablo Stewart, psychiatrist.

Dr. Pablo Stewart testified as an expert in psychiatry and forensic psychiatry. (ERT 635.) Dr. Stewart's educational background, military service, academic appointments, community service, publications, employment history, and expert qualifications were outlined for the court. (ERT 630-634.) Dr. Stewart is a board-certified psychiatrist who divides his time between clinical and forensic work. He has also acted as an examiner for the American Board of Psychiatry. (ERT 627-628.)

Dr. Stewart's two primary areas of forensic practice include: (1) the inspection of various facilities for the federal courts, the California Department of Corrections, and the U.S. Justice Department Civil Rights Division regarding the quality of mental health and medical care, and (2) serving as a psychiatric expert in civil and criminal cases. Within the latter field, most of Dr. Stewart's work has been in assisting the defense, primarily in capital cases. At the time of his testimony, Dr. Stewart also worked with the San Francisco Police Department in training sessions for police officers regarding how to properly identify, address, and handle mentally ill individuals encountered by officers in the field. (ERT 628-629.)

Dr. Stewart explained that the components of a competent mental health evaluation are the same whether they are done in a clinical setting or

a forensic setting. A competent mental health evaluation requires spending time with the individual being evaluated, reviewing as many records as can be obtained, and speaking to people who know the individual being evaluated. Following the formation of a differential diagnosis, the evaluator then undertakes further testing; such as neuropsychological testing, neural imaging, and any other sort of medical test that might help the evaluator refine his diagnostic assessment. (ERT 636-637.)

Dr. Stewart explained that record review should include school records, juvenile records, criminal records, medical and psychiatric and other mental health records – which collectively constitute what would be described as "social history documents." A review of social history documentation gives context and "the background of understanding from where the person came" when assessing symptoms and behavioral anomalies an individual displays during the evaluator's observation. Dr. Stewart explained that "from a physician standpoint in arriving at a diagnosis, the diagnoses are most usually made by evaluating the person's history." (ERT 637-638.) Because it is part of mental illness to deny the presence of mental illness and/or because certain symptoms interfere, mentally ill people generally do not have the ability to give an evaluator an accurate history. (ERT 639.) With regard to capital criminal cases, Dr. Stewart is typically consulted because there is some evidence of mental illness in the defendant's history. (ERT 638-639.)

Dr. Stewart first became involved in petitioner's case in the spring of 2002. At that time he reviewed a number of social history documents provided by post-conviction counsel, including declarations of family members and friends; juvenile records; the declaration of Dr. Karen

Froming, which described the results of her neuropsychological testing; and the trial testimonies of Dr. Benson and Dr. Pierce, the trial psychiatrist and psychologist. Prior to his testimony at the reference hearing, Dr. Stewart was also provided with and reviewed the recent reference hearing testimony of Dr. Benson, Dr. Pierce, and social history witness Konolus Smith. Dr. Stewart's evaluation did not involve the review of Dr. Froming's raw data, which is not material he would normally review. Dr. Stewart also had not personally spoken directly to the authors of the social history declarations. (ERT 639-641, 655.)

After reviewing the social history materials, Dr. Stewart met with David Welch in June of 2002. Based on his review of materials and his interaction and evaluation, it was obvious to him that petitioner was "significantly mentally ill." (ERT 641-642.) Dr. Stewart believed that it was "very likely" petitioner was suffering from "significant brain damage in addition to having a psychotic illness." (ERT 642.)

With respect to psychosis, Dr. Stewart noted that the social history documents suggested that there was evidence of psychotic illness within petitioner's family, and also that petitioner's psychosis had antecedents in adolescence and early childhood. On reviewing the social history documents, Dr. Stewart noted that the symptoms he observed in June, 2002, had been present in various forms earlier in petitioner's lifetime. Based on the fact that petitioner displayed symptoms of brain damage very early in his childhood, Dr. Stewart concluded that petitioner was suffering from a more chronic and long-standing form of mental illness and brain damage, as opposed to a condition that had developed more recently prior to his evaluation. (ERT 642.) Because the psychosis was chronic, and because of

the family history of psychosis, Dr. Stewart was "pointed in the direction" of a diagnosis of schizophrenia. Dr. Stewart said that could not definitively diagnose petitioner as schizophrenic without spending more time with him. However, he felt "confident that at the end of a more comprehensive evaluation [he] would arrive at that diagnosis." (ERT 643-644.)

Throughout petitioner's social history documentation and the testimony of Konolus Smith, Dr. Stewart also noted a number of examples of serious child abuse. (ERT 646.) Among these were reports that petitioner's father repeatedly had struck him and at least once, threw a bottle at him. Reports indicated that petitioner's father had frequently attacked both petitioner and petitioner's mother, particularly when petitioner's father was drinking, and also that petitioner had been locked in a closet for punishment. Dr. Stewart determined that it was clear that these were not "isolated incidents of abuse from [petitioner's] father upon [petitioner]." (ERT 645-646, 654, 672.)

With respect to the severity of the abuse David Welch suffered, Dr. Stewart explained "I really don't have the adequate vocabulary to describe the extent to which this gentleman was subjected to abuse, physical abuse, emotional abuse, withholding of nutrition. It goes on and on, both in the home and in the community." (ERT 642.) Dr. Stewart personally observed that petitioner had numerous scars on his face, forehead, head and arms. Petitioner told Dr. Stewart that these injuries had been caused by incidents Dr. Stewart considered child abuse. Because there was no evidence that petitioner had received medical care after the episodes of violence that were inflicted upon him, Dr. Stewart had no evidence that petitioner had suffered

fractures or other injuries often associated with child abuse.[75] Nevertheless , Dr. Stewart ultimately described the abuse suffered by petitioner as "very severe." (ERT 661-665.)

Dr. Stewart strongly suspected that petitioner suffered from a trauma-related condition, i.e., post-traumatic stress disorder. He noted that although the diagnostic criteria for the condition first appeared in the DSM-III in 1980, the condition itself had been recognized and described "since ancient times." Because of the severity of both petitioner's psychotic symptoms and his brain damage, Dr. Stewart was unable to perform a more comprehensive post-traumatic stress disorder evaluation. (ERT 642-643, 667-668, 670-671.) Dr. Stewart's preliminary diagnosis was based on information in petitioner's social history, which described extensive physical and emotional abuse, and the withholding of nutrition to which petitioner was subjected in both his home and his community. (ERT 642-643.) However, according to Dr. Stewart, in order to diagnose petitioner with posttraumatic stress disorder "he didn't necessarily have to be the brunt of the abuse, which he was on many occasions . . . but he observed his mother being beat up. That alone would qualify for the trauma portion of . . . posttraumatic stress disorder." (ERT 668.)

Based on indications of petitioner's early alcohol abuse, Dr. Stewart formed the opinion that alcohol abuse was a "multifactorial issue" in the evaluation of petitioner. (ERT 646.) Dr. Stewart noted that insofar as petitioner's father was a severe alcoholic, petitioner himself had a "strong genetic influence" for alcohol abuse. Another possible factor contributing

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[75] Dr. Stewart would not expect that medical records from the 1950s and 60s would be easily obtained. In his experience, before the advent of digital storage, medical facilities would throw out their old records. (ERT 673.)

to petitioner's early alcohol abuse was simply having been raised in a neighborhood with few opportunities for children where it was common for children to turn to substance use at an early age. Additionally, in petitioner's case early alcohol use was linked to his pre-existing psychiatric disorder, for which Dr. Stewart believed petitioner was self-medicating. (ERT 646-647.)

At trial, petitioner had been diagnosed by doctors Pierce and Benson on Axis I with "delusional paranoid disorder persecutory type with a rule out a paranoid schizophrenia" and "psychoactive substance abuse disorder with dependence on cocaine, alcohol, heroin and morphine" and on Axis II, with "impulse personality disorder with a rule out of organic personality syndrome explosive type." (ERT 647.) Dr. Stewart disagreed with this diagnosis but found it understandable that doctors Pierce and Benson would have arrived at these diagnoses in view of the very limited social history and other information available to them. Dr. Stewart had available much more social history information and the neuropsychological testing by Dr. Froming and his own evaluation, and on the basis of that information concluded that Pierce and Benson's diagnoses were not accurate. (ERT 648.)

Dr. Stewart explained that at the time of trial petitioner was far too young for the delusional disorder diagnosed by doctors Pierce and Benson. Moreover, there was an absence of evidence in petitioner's history for delusional disorder diagnosis. (ERT 649.) Based on symptomatology displayed by petitioner in his early childhood and adolescence and the fact that he had a close family relative with schizophrenia, Dr. Stewart was more

confident that schizophrenia rather than a delusional disorder was likely the prominent diagnosis. (ERT 649.)

Further, without the benefit of neuropsychological testing and the knowledge that petitioner had been exposed to toxins and severely abused, doctors Pierce and Benson misdiagnosed petitioner with "impulsive personality disorder with a rule out of organic personality syndrome explosive type." (ERT 650.) According to Dr. Stewart, although Dr. Pierce and Dr. Benson accurately described the same things that he saw, without the benefit of additional social history documentation and the results of Dr. Froming's testing, they tried to explain to symptomatology with different and incorrect diagnoses. (ERT 657-658.)

iii. Testimony of Dr. Julie Kriegler, psychologist and trauma expert.

Dr. Julie Kriegler, a licensed clinical psychologist specializing in trauma, family functioning, and attachment, testified on February 7, 2011. (ERT 1663, 1667-1668.) Dr. Kriegler described her training and experience in her areas of specialization. In pertinent part, while in graduate school, Dr. Kriegler developed an intervention plan for young male victims of abuse. (ERT 1769.) She worked as a family therapy intern, clinical psychologist and a clinical coordinator for the Veteran Administration's National Center for Post-Traumatic Stress where she was involved in the development of a system for measuring child abuse and helped develop treatment protocols for people diagnosed with trauma and chemical dependency. (ERT 1670, 1671, 1672.) Dr Kriegler is a co-author of the CAPS-C, a standardized clinician-administered interview for traumatized children. (ERT 1670, 1672.) Dr. Kriegler testified that she has maintained a clinical practice working with individuals, couples, and families for the past

18 years. (ERT 1673.) Dr. Kriegler explained that her current clinical practice focuses on individuals who experienced early, protracted trauma, including ongoing child abuse. (ERT 1668.)

Dr. Kriegler testified that she was retained in this case to evaluate David Welch for the presence or absence of a history of serious child abuse. (ERT 1676.)

(a) Trauma and Attachment.

Dr. Kriegler explained the significance of trauma and attachment to her evaluation of David Welch. She testified that psychologists have been studying trauma and its effects since the 1800s. (ERT 1679.) Dr. Kriegler explained that trauma stems from experiences which prevent individuals from normative development. (ERT 1676-1677, 1689.) War, sexual abuse, and child abuse are examples of causes of trauma that Dr. Kriegler provided. (ERT 1690.) Trauma causes disintegration, or a disruption in the ability of an individual's nervous system and neurology to work together. (ERT 1690, 1691.) Dr. Kriegler explained that both hyper-arousal and hypo-arousal are common in traumatized individuals. (ERT 1694.) She testified that paranoia is the most common psychotic symptom among the chronically traumatized. (ERT 1695.) Trauma is often comorbid with mood disorders and chemical dependency. (ERT 1698.) Trauma can give rise to anxiety disorders such as phobias, generalized anxiety, obsessive compulsive disorder. (ERT 1696.)

Dr. Kriegler said that psychologists have also investigated the impact of caregiver relationships on human lives since the 1800s, and the understanding within the field is that the nature of relationships with, or attachment to, one's caregiver is developmentally significant. (ERT 1680.)

Dr. Kriegler explained that while her field once viewed "nature" and "nurture" as being separate influences on human development, it has now been understood for many years that "nurture becomes nature," i.e., that experiences to which we are exposed "actually lead[] to the formation of the structure and function of the brain and, thus, to our behaviors and our functioning in the world." (ERT 1667.) The study of the ways in which attachment experiences with caregivers and other experiences in early life actually form the physical brain itself is encompassed within the field of interpersonal neurobiology. (ERT 1668.)

The way in which one relates to others and to the world is an outcome of this attachment process. (ERT 1689.) Dr. Kriegler testified that positive attachment is a survival mechanism in babies because attachment to one's caregiver establishes bonds with a caregiver who will protect and care for the infant. (ERT 1685.) Positive attachment also has positive neuropsychological impacts, such as the ability to regulate one's emotional responses. (ERT 1687-1688.) For example, the ability to self-soothe or calm oneself down from a state of heightened emotion is not inborn, but is a result of the baby internalizing the way caregivers soothe, or fail to soothe, the child. (ERT 1687.) The ability to self-soothe regulates the nervous system and allows an individual to exercise self-control and to tolerate stress. (ERT 1688.)

Dr. Kriegler emphasized the fact that the severity of trauma is measured by its impact on the particular individual rather than by the magnitude of the traumatizing event. (ERT 1704.) She testified that the developmental stage in a person's life at which the trauma occurs influences the way it affects a person. (ERT 1702.) Positive factors such a high I.Q., a

good education, and positive attachment are protective factors in individuals who suffer traumatic experiences, while negative factors, such as genetic predisposition for poor medical or mental health, poverty, and lack of education, are risk factors which can increase trauma's magnitude. (ERT 1684, 1703, 1721.)

(b) Dr. Kriegler's Evaluation of David Welch.

Dr. Kriegler stressed the importance of familiarity with the facts of an individual's history in order to achieve an accurate evaluation. (ERT 1965.) She testified that standards within her profession require a thorough examination of the life history of the individual being evaluated. (ERT 1679.)

Dr. Kriegler explained that she began her evaluation of petitioner by examining his life history and relevant records. (ERT 1677-1678.) Dr. Kriegler stated that she reviewed the declarations of social history witnesses, conducted face-to-face interviews with significant others in petitioner's life, reviewed testimony from the instant proceedings, and interviewed the petitioner himself. (ERT 1678.) She testified that she reviewed the testimony of Dr. Froming, Dr. Stewart, Minnie Welch, Sarah Perine, Roy Millender, Konolus Smith, Glenn Riley and Cathie Diane Welch. She also interviewed petitioner and his mother, Minnie Welch, twice. She interviewed Sarah Perine, Glenn Riley, and Konolus Smith once. (ERT 1678-1679.) Dr. Kriegler testified that she also reviewed social history documents from various sources. (ERT 1678.) Based on her examination of petitioner's social history, Dr. Kriegler testified that David Welch did not have either the experiences or any of the protective factors necessary for healthy development. (ERT 1707-1708, 1725.)

Dr. Kriegler testified that David Welch was exposed to numerous risk factors since before his birth. To begin with, petitioner had a genetic risk for schizophrenia and psychosis; there is evidence that schizophrenia may exist in both sides of petitioner's family. (1708.) Petitioner also had a genetic risk for substance dependence; his father and paternal grandmother were both known to abuse alcohol, and there is other evidence of more widespread substance abuse on his father's side. (ERT 1709.) She testified that petitioner also suffered from several psychosocial risk factors, including low educational status, poverty, and racism. (ERT 1709.)

Dr. Kriegler testified that abuse trauma is heritable if it is not interrupted or treated, and her review of social history information indicated at least one previous generation of petitioner's family had suffered from traumatic abuse. She noted that petitioner's paternal grandfather was physically abusive to such an extent that his wife left him and abandoned her young children to be raised in an assaultive household without an adult caretaker. (ERT 1710.)

Dr. Kriegler also stated that high levels of stress or trauma alter a pregnant woman's biology so that abuse of petitioner's mother by his father during her pregnancy with petitioner inflicted ongoing stress on his mother, which created high levels of neurologically toxic stress hormones in her bloodstream, and that these stress hormones were shared with petitioner through intrauterine transmission. (ERT 1709.) In addition, the assaults on Mrs. Welch's pregnant body were also assaults on petitioner *in utero*. (ERT 1709.)

In Dr. Kriegler's interview with petitioner's mother, Minnie Welch, she found that Minnie suffered from protracted depression. (ERT 1711.)

She testified that this depression was significant for several reasons. First, depression causes an imbalance in the blood, and like the stress hormones in Minnie's blood during her pregnancy, this could have affected petitioner petitioner while *in utero*. Second, Minnie's depression after petitioner's birth meant that his primary caretaker was unavailable for the care and attachment necessary for normal development. (ERT 1711.)

Dr. Kriegler testified that she found evidence in the social history materials and interviews she performed that petitioner had been born with neurological damage. (ERT 1712-1714). She noted evidence that petitioner suffered from psychomotor disability. (ERT 1713.) She also testified that petitioner's speech impediment could be a marker of neurologic damage. (ERT 1713-1714.) Dr. Kriegler testified that the evidence of petitioner's difficulty in school could be further evidence of brain damage. (ERT 1714.) Dr. Kriegler explained there is evidence that highly compromised children, such as those with neurologic impairment, require a high quality of care in order to have a chance for healthy development. (ERT 1714.) However, research shows that compromised children are usually the most difficult to raise, and when these children are raised by parents who are themselves compromised, there is a high likelihood of child abuse. (ERT 1714-1715.) Petitioner's mother also told Dr. Kriegler that petitioner's mind operated differently. (ERT 1712-1713.) His childhood friends said he could not make sense of other children's behavior. (ERT 1713.)

In addition, Dr. Kriegler found direct evidence of substantial child abuse. During her interview with Konolus Smith, Dr. Kriegler learned that Petitioner was being assaulted by his father inside and outside of the home. (ERT 1716-1717.) Dr. Kriegler testified that child abuse is often hidden, so

the fact that petitioner's father was abusing his son in public indicates a high level of disregulation, reactivity, and mental illness in petitioner's father. (ERT 1716.) She stated that during her interviews with petitioner, he became anxious, agitated and reactive and lapsed into loose associations and idiosyncratic speech when she attempted to discuss discipline imposed by his father. (ERT 1721.)

Dr. Kriegler also noted social history information to the effect that petitioner, unlike his brother, made no noise when his father whipped him with an extension cord. Dr. Kriegler said this was "an indicator of dissociation" during the experience. (ERT 1717.) She described this as a form of "disintegration" and would put him at risk for dissociation in the future. She said that cues of the trauma he had experienced as a child could cause him to re-experience the original trauma effects as if they were happening in the "here and now" and cause him to react "as if somebody is threatening or assaulting him." (ERT 1718.)

Dr. Kriegler found it significant that in addition to his own abuse at the hands of his father, petitioner witnessed his mother being assaulted. She state that this was significant because threats or assaults to significant others can cause the same neuropsychiatric symptoms as being the actual recipient of abuse. (ERT 1719.)

Dr. Kriegler testified that social history information that she reviewed provided consistent evidence that David Welch suffered ongoing, traumatic physical abuse at the hands of his father. (ERT 1715, 1719-1720.) She further testified that she found evidence that was deprived the attachment necessary to facilitate healthy neuropsychiatric development and

that he displays signs of a formal thought order or schizophrenia in addition to the trauma cause by childhood abuse. (ERT 1715.)

Dr. Kriegler testified that the trauma inflicted upon David Welch rendered him "severely neuropsychiatrically impaired, and his functioning and his thought process and his perceptions are impaired, compromised." (ERT 1722.) She concluded that he had "absolutely" been subjected to serious child abuse. (ERT 1723.) She added that even if she had not been able to conduct clinical interviews with him directly, she would still have concluded that he had been severely abused based upon the social history materials she had reviewed and the in-person interviews she had conducted with social history informants. (ERT 1723.) She noted the consistency in the reporting of the social history witnesses in this case, and because those reports are consistent with her knowledge of the effects of early, protracted trauma, she would conclude that petitioner was the victim of severe child abuse even if she had no information other than the accounts of those witnesses. (ERT 1723-1724.)

4. Petitioner Objects to the Admission of Dr. Martell's Testimony and, If It Is Admitted, Takes Exception to Many of the Referee's Findings.

This court's third referral question asked the referee to determine what rebuttal evidence reasonably would have been available to the prosecution. The only evidence respondent attempted to present in rebuttal was the testimony of a neuropsychologist, Dr. Daniel Martell. Petitioner strenuously objected to this proposed testimony on the grounds that it was not rebuttal evidence. (ERT 1796-1812.) However, the court admitted the evidence.

Dr. Martell's testimony regarding petitioner's impairments generally agreed with that of petitioner's experts. However, he found– solely on the basis of materials presented to him by respondent's counsel– that petitioner's behavior at the time of the crime was inconsistent with what he described as testimony given on cross-examination by Dr. Froming and Dr. Kriegler regarding petitioner's neuropsychiatric impairments. (ERT 1846-1847.)

a. Dr. Martell's Testimony Was Improper Rebuttal and Should Be Stricken

Petitioner continues to object that Dr. Martell's testimony should not have been admitted because it was not rebuttal evidence and submits that it must be stricken for that reason. By definition, "rebuttal evidence" is evidence that counters the defense case-in-chief. (*In re Brown* (1997) 17 Cal.4th 873, 889.) In *People v. Carter* (1957) 48 Cal.2d 737, a leading case involving the prosecution's improper presentation of rebuttal at a criminal trial, this court stated that rebuttal is "restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Carter*, *supra*, 48 Cal.2d, at pp. 753-754; *People v. Harrison* (1963) 59 Cal.2d 622, 628.)

Petitioner never asked any expert a question regarding petitioner's behavior at the time of the crimes as part of his case-in-chief, nor would such questioning have been relevant to the issue of whether petitioner suffered from serious child abuse or any of the other referral questions. As noted above, at one point during her cross-examination of Dr. Froming, *respondent* began asking questions of Dr. Froming in a failed attempt to get Dr. Froming to say that petitioner's behavior at the time of the crimes was

inconsistent with her findings regarding his brain damage. (ERT 845-858.) *Respondent* also asked a few similar questions to Dr. Kriegler during cross-examination. (ERT 1786-1787.) However, petitioner's case in chief contains nothing about petitioner's behavior at the time of the crimes or whether it was consistent or inconsistent with Dr. Froming's or Dr. Kriegler's opinions.

By his own admission under oath, Dr. Martell's testimony regarding whether petitioner's behavior at the time of the crimes was consistent with the findings of petitioner's experts was in response to "relatively brief sections of the transcripts from Dr. Kriegler's and Dr. Froming's testimony where they get into this area . . . *And I think it was all on cross examination*, . . ." (ERT 1846-1847, emphasis added.) Respondent may not present rebuttal testimony to rebut her own cross-examination, nor may respondent ask questions in cross-examination as a device to lay the groundwork for rebutting the testimony so elicited.

Furthermore, even if respondent could present a witness to counter new material raised by respondent's own cross-examination, Dr. Froming's answers to respondent's questions regarding petitioner's ability to plan, organize, or engage in goal-directed behavior at the time of the crimes were not contradicted or undermined by Dr. Martell's testimony. Indeed, Dr. Froming *agreed* with respondent on cross-examination that petitioner could engage in goal-directed behavior (ERT 854), weigh his options (ERT 855), take evasive action if the police came (ERT 855-856), and form the intent to kill. (ERT 864.) Thus, Dr. Martell's testimony was improper rebuttal not only because it was directed at respondent's own cross-examination, but also because it did not actually rebut anything.

In addition, this court in *In re Lucas*, *supra*, quite clearly explained that the law does not permit respondent to rebut evidence of child abuse with evidence of a defendant's other misconduct.

> "[T]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24 [230 Cal. Rptr. 667, 726 P.2d 113].) Evidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct. (*In re Jackson, supra*, 3 Cal.4th at pp. 613–614; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1191–1193 [270 Cal. Rptr. 286, 791 P.2d 965].) We do not believe that evidence of specific acts of abuse inflicted on petitioner in early childhood would permit rebuttal with evidence of his subsequent misconduct or his psychiatric diagnosis in later childhood. And evidence and argument intended to demonstrate that petitioner justifiably was abused in the manner he was, because he was a bad boy at the age of five or six years, would be unlikely to carry much weight in the prosecution's favor with the jury.

(*In re Lucas*, *supra*, 33 Cal.4th at p. 733.)

For the foregoing reasons, petitioner submits that the evidence presented at the evidentiary hearing shows that no rebuttal would have been available to the prosecution had petitioner presented evidence of serious child abuse. However, even if this court were to conclude that Dr. Martell's testimony had some tendency to rebut the credibility of petitioner's experts, it is still so insubstantial as to be unworthy of any factual finding by this court.

Respondent made no other attempt to present evidence to rebut petitioner's evidence with respect to any of the referral questions: i.e., whether trial counsel conducted an adequate investigation, whether petitioner suffered serious child abuse, or whether reasonable counsel would have presented such evidence. Because respondent bore the burden with respect to rebuttal evidence, the failure to rebut evidence of serious

child abuse means that those facts must be taken as true.[76] "Unless a statute requires additional evidence, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact." (Evidence Code section 411.) "In other words, the testimony of a witness normally cannot be disregarded. Unless impeached or contradicted by other testimony or by an inference deducible from the facts proved, or unless it is inherently improbable, the court must accept it as true." (Witkin, *California Evidence* (4th ed.) "Presentation At Trial," §89, pp. 123-124; see also *Sweeney v. Metropolitan Life Ins. Co.* (1937) 30 Cal.App.2d Supp. 767, 771 [where not contradicted or impeached, "neither the jury nor the court had the privilege of arbitrarily disregarding the positive evidence of actual occurrences"].)

Accordingly, this court should strike Dr. Martell's testimony and find that no evidence was available to rebut petitioner's case with respect to referral questions two and three.

b. If Dr. Martell's Testimony Is Not Stricken, Petitioner Takes Exception to The Referee's Findings Regarding His Testimony.

As noted above, respondent's only witness who addressed any issues relevant to rebuttal of referral questions two and three was Dr. Daniel Martell, a board certified forensic psychologist in private practice whose educational background, academic appointments, publications, employment history, and expert qualifications were outlined for the court. Petitioner

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[76]/ It should also be noted that respondent provided petitioner with a memorandum dated September 20, 2010, by way of a proffer of the expected testimony of James Anderson, the deputy district attorney who prosecuted the case, to the effect that "had the defense attempted to portray Welch as a victim of child abuse, he [Anderson] would probably not have introduced any evidence different from the evidence he introduced at trial." (Appendix B to Petitioner's Proposed Findings of Fact Regarding Referral Questions, Memorandum, M. O'Connor (9/20/10).)

stipulated that Dr. Martell was a qualified expert in the area of forensic neuropsychology. (ERT 1828-1835.)

Dr. Martell had been asked by respondent to consult on this case and was given various documentation by respondent, including the direct appeal opinion of this court, a statement of facts from the respondent's brief on direct appeal, court and reporter's transcripts of the trial, declarations filed in support of petitioner's petition for writ of habeas corpus, California Department of Corrections records, and the notes and testimony of petitioner's experts Dr. Kriegler and Dr. Froming. Dr. Martell charged a fee of $450 per hour and a flat fee of $4,500 a day. (ERT 1835-1837, 1851-1852.)

At the reference hearing, Dr. Martell discussed the findings of petitioner's three mental health experts and the two trial experts and gave his impressions regarding those findings. (ERT 1839.) Many of the findings of the referee summarizing Dr. Martell's opinions are unobjectionable. For example, Dr. Martell testified that as part of Dr. Froming's neuropsychological testing, Dr. Froming had administered testing to petitioner for the specific purpose of identifying exaggeration or malingering or lack of effort, and that petitioner had passed those tests. Dr. Froming's finding was that petitioner was "effortful and cooperative." Dr. Martell did not disagree with those findings. (ERT 1839, 1841.) The interactions between psychopathy and neurological deficits and their effect on testing caused Dr. Martell to be concerned about the validity of some of Dr. Froming's data. (ERT 1840.) This was the only disagreement voiced by Dr. Martell with Dr. Froming's conclusions.

Dr. Martell opined that petitioner's paranoid delusions and easy distractibility contributed to the low scores that were obtained. It was Dr. Martell's opinion that if petitioner's mental disorder was more effectively treated some of the deficits observed on the testing might resolve. According to Dr. Martell that was "[n]ot to say that they entirely go away, but you generally see an improvement in gross psychological test performance in psychiatric patients that are effectively treated with medications and other treatment. (ERT 1841.) Dr. Martell also noted that if psychological testing were done on days where petitioner's psychotic symptoms were less intrusive he would expect a better performance. (ERT 1842.)

Dr. Martell believed that "the psychosis symptoms"of paranoid delusion and delusions of reference described by Dr. Pierce and Dr. Benson were correctly described, as was petitioner's organic brain dysfunction as evidenced by a low IQ and problems in executive functioning.[77] (ERT 1843-1844.) Although Dr. Pierce and Dr. Benson did not have the benefit of neuropsychological testing, they presented a valid picture of petitioner.

According to Dr. Martell "it's actually a very consistent picture when you look at each doctor over time independently going in and seeing him, they all paint the same picture of his problems." (ERT 1844.) Dr. Martell repeated this observation stating "what I do find striking about the case is the consistency of the description across doctors and over time. That makes me think there probably is something real going on. I'd love to go in and probe it for myself and understand it more completely, but everyone seems

[77] Petitioner's IQ was in "the high 70's," which Dr. Martell said meant that 98 percent of the general population had IQ's higher than petitioner. (ERT 1854.)

to be describing the same person, the same constellation of problems." (ERT 1845.) Dr. Martell was of the opinion that petitioner's psychiatric disorders and organic brain dysfunction were in existence at the time of the penalty phase of petitioner's capital trial. (ERT 1845.)

Petitioner submits, however, that the referee's findings regarding Dr. Martell's testimony about petitioner's behavior at the time of the crimes and the alleged inconsistency between these behaviors and the findings of defense experts are incorrect and accordingly takes exception to this part of the referee's findings. (Findings at pp. 38-39.) All of Dr. Martell's opinions in this regard were based entirely upon materials selected by respondent and respondent's biased interpretation of the facts of the crimes. For example, he cited petitioner's supposed ability to lie in wait at the time of the crime, as well as some behaviors such as allegedly bringing a fully loaded Uzi machine gun to the crime scene, and thought these reported behaviors were inconsistent with some of the experts' conclusions. According to Dr. Martell, these reported behaviors showed intent, planning, organization, and lack of impulsivity. Other facts alleged to have occurred at the time of the offense demonstrated goal directed behavior, which, according to Dr. Martell, demonstrated that petitioner was functioning at a higher level than petitioner's experts testified he would have been able to. (ERT 1847-1848, 1850.)

However, Dr. Martell conceded that his "understanding of that [behavior] may not be complete." (ERT 1846; *see also* 1853.) Dr. Martell agreed that the only materials he had reviewed about the crimes themselves had been provided to him by respondent. (ERT 1855.) These consisted of the appellate opinion, a statement of facts prepared by respondent, and

portions of the trial transcript which had been referenced in respondent's the statement of facts. (ERT 1855.)

Indeed, Dr. Martell's assumptions about petitioner's supposed behavior on the night of the crime are incorrect. For example, declarations presented by petitioner in support of his habeas corpus petition show that petitioner was not lying in wait on the night of the crimes but instead spent the hours leading up to the crime drinking alcohol and using cocaine and heroin. . (See, e.g., Habeas Petition Exh. 18, Declaration of Rita May Lewis, p. 5; Exh. 29, Declaration of Randy Street, pp. 3-4; Exh. 36, Declaration of Billy Williams , pp. 1-2.) These facts are also confirmed by tests of blood taken from petitioner at the time of his arrest that morning, though no quantitative testing was ever done. (TRT 5157, 5159-5161; Habeas Petition, Exh. 34, Declaration of William Welch, p. 2.) That evidence shows that petitioner's acts on the night of the crime were impulsive and committed at a time when petitioner was at most semi-conscious. Though petitioner's counsel asked to be permitted to present witnesses to testify to this evidence at the hearing, that request was denied by the referee. (ERT 1796-1811.) Because the referee would not permit petitioner to present evidence to counter the erroneous assumptions on which Dr. Martell's testimony was based, his testimony on this point cannot be found credible and should not be admitted.

Finally, the referee's findings on this point are not supported by substantial evidence. Factual findings must be supported by "ample, credible evidence" or "substantial evidence." (*See People v. Ledesma* (1987) 43 Cal.3d 171, 219; *In re Ross* (1995) 10 Cal.4th 184; *In re Burton* (2006) 40 Cal.4th 205, 214.) Dr. Martell's testimony, if it accomplished

anything at all, suggested that petitioner's experts somehow overstated the impact of petitioner's impairments on his ability to plan, organize, or engage in goal-directed behavior. However, even if petitioner's experts had said anything of the kind– and they did not– Dr. Martell's testimony made no specific reference to any single piece of testimony by any expert, nor to any specific piece of testing data by Dr. Froming, with which he disagreed. Indeed, with one minor quibble about the interplay between psychopathy and brain damage, which he did not explain (ERT 1840), Dr. Martell endorsed the entirety of Dr. Froming's testing. In view of the fact that his disagreements with petitioner's experts were never clearly specified, they were entirely insubstantial and cannot form the basis of any factual finding.

C. Exceptions and Briefing on Referee's Findings on Question 2.

After addressing the testimony of individual witnesses, the referee then more specifically addressed the court's referral questions. The referee divided the second question into its two component parts and addressed each part separately. That question was as follows:

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

In answering the above question, the referee first summarized her findings, generally (Section 1), then explained those findings in greater detail in following sections (1.a, 1.b, 1.c.) Petitioner will attempt to track the referee's format by first indicating generally which of the referee's findings he agrees with and which he takes exception to followed by detailed exceptions. Petitioner will depart somewhat from the numbering system utilized by the referee.

The referee found that trial counsel did not adequately investigate evidence in mitigation during the penalty phase that petitioner had been the victim of serious child abuse. (Findings at p. 40.) Petitioner agrees with this finding. However, the referee makes further findings in this section to which petitioner takes exception. Specifically, for reasons set forth previously, petitioner objects to the finding that: "Some investigation was done: the attorneys tried to get information from an uncooperative client and from client's uncooperative mother." (Findings at p. 40.) Also, for the most part, petitioner agrees with the referee's finding that: "Counsel, failed however, to go beyond those efforts to undertake their own investigation, or instruct the penalty phase investigator to obtain social history information, from other sources, petitioner's extended family or from petitioner's community, co-workers, teachers, classmates, neighbors or other professionals who had encounters with petitioner in his developmental years." (Findings at p. 40.)

1. Petitioner's exception to the referee's findings regarding counsel's performance.

The referee begins her finding with a description of petitioner's defense team and the investigative efforts undertaken. (Findings at pp. 40-42.) Petitioner takes exception to some of the findings the referee makes in this description.

Insofar as the referee finds or means to imply that petitioner's defense team included a guilt phase investigator (Brian Oliver) and a penalty phase investigator (Jackie Lesmeister) who actively worked on the case, there is insufficient evidence for this finding. Mr. Strellis did not recall what preparations had been made for the penalty phase of the case. (ERT 539.) Mr. Selvin thought the name of Brian Oliver sounded familiar,

and while he "recalled" that Mr. Strellis had employed a retired probation officer (Ms. Lesmeister) to investigate the penalty phase, He agreed that there was no investigative work product or billing to indicate Lesmeister undertook any investigative efforts whatsoever in the case. (ERT 460-462.) There is simply no evidence that Ms. Lesmeister did any work at all on this case. Mr. Olivier's investigative work was focused solely on the guilt phase. (ERT 1205.)

Among the referee's findings about the work performed by Strellis and Selvin is a paragraph indicating that very little penalty phase preparation had been done by petitioner's former attorneys, Mr. Broome and Mr. Cross. (Findings at p. 41 ¶ 2.) Although petitioner agrees with this assessment, the referee mischaracterizes former attorney's Broome's investigative efforts with regard to the penalty phase. While the referee notes that Mr. Broome met with petitioner's mother, the referee fails to note that Mr. Broome found petitioner's mother to be "very cooperative" and learned from petitioner's mother that petitioner had suffered serious child abuse. (ERT 224.) Mr. Broome was also sure petitioner's mother would have been available for additional interviews if he had wanted to have them done. (ERT 224.)

Mr. Broome formed other conclusions and discovered other avenues of penalty phase investigation which were not conveyed to Strellis or Selvin, because neither Strellis nor Selvin consulted with Mr. Broome after their appointment to petitioner's case. For example, Mr. Broome recognized that petitioner was mentally ill and noted that petitioner had a reputation within his community for being "crazy" or mentally ill. (ERT 170, 200-201, 254.) On the basis of the facts of police reports showing that

petitioner had a strong negative reaction to learning that Dellane Mabrey's brother was gay, Mr. Broome hypothesized that petitioner had been a victim of sexual abuse, child abuse or both. (ERT 171-175.) Indeed, it was this information that led him to contact Mrs. Welch and ask whether petitioner had been abused. Mr. Broome and Mr. Cross also identified neighbors and witnesses who also recognized petitioner was mentally ill and could have been avenues of further penalty phase investigation by Mr. Selvin and Mr. Strellis. (ERT 171, 254, 262.)

The referee mischaracterizes the cause of Mr. Broome's inability to do other penalty phase investigation and takes his comment to the trial court out of context. (Findings at p. 41.) While Mr. Broome explained to the trial court that petitioner refused to "allow anybody to do anything," he testified that his difficulties in furthering the penalty phase investigation were grounded entirely in petitioner's severe mental illness, which manifested itself in an inability to concentrate, memory problems, distrust, and paranoia so extreme that it caused petitioner to believe the courts and his own attorneys were conspiring against him. (ERT 180, 182-185, 189-190, 192-196, 204, 212, 235.)

The referee made various findings with regard to Mr. Selvin's and Mr. Strellis's use of mental-health professionals. (Findings at pp. 40-42.) Petitioner takes exception to any finding or implication that the mental health professions were retained by Mr. Selvin and Mr. Strellis to investigate and present social history evidence, specifically evidence of serious child abuse.

Although both Mr. Strellis and Mr. Selvin formed the conclusion that petitioner was mentally ill to the degree that he was incapable of assisting

counsel rationally in his own defense (ERT 463, 469, 536, 538), and although they were aware of their obligations to investigate social history information in spite of any difficulties an individual defendant might present, they prepared petitioner's penalty phase defense only from records provided by the prosecution through discovery. (ERT 463, 469, 470, 527.) None of these records nor any "independent" efforts of Mr. Strellis or Mr. Selvin were directed toward the investigation of serious child abuse or led to the discovery of evidence of serious child abuse. (ERT 491.) Also, the mental health professionals referred to by the referee did not contact potential social history witnesses and did not investigate or prepare for the penalty phase until after the guilt phase was over and only two weeks remained before the beginning of the penalty phase. (ERT 467, 318-321.)

In the third paragraph of page 41, the referee describes documentation that was given to Mr. Strellis by the district attorney. Petitioner agrees with the referee's finding that these documents included petitioner's juvenile and adult probation reports, and reports of prior incidents and convictions which the prosecution relied upon to establish factors in aggravation. (Findings at p. 41.) Petitioner also agrees that such basic social history documents as petitioner's school records were not obtained until after the conclusion of the guilt phase, on or about June 26, 1989– one week before the two experts testified in the penalty phase as the only witnesses for the defense. (Findings, at p. 41.) Petitioner also agrees that none of these other documents were provided to Dr. Benson and Dr. Pierce until after the conclusion of the guilt phase. (Findings at p. 41.)

With the exception of the school records obtained one week before the penalty phase, petitioner takes exception to any finding or implication

that these probation reports provided by the prosecution constituted "penalty phase materials," as the referee describes them. (Findings at p. 41.) These were materials provided by the prosecution in discovery as support for aggravating factors they planned to prove and cannot be considered to be social history or mitigation investigation by defense counsel. Moreover, materials dropped in defense counsels' laps by the prosecution do not constitute investigation.

Petitioner also agrees with the referee's finding that two weeks before the penalty phase, Dr. Pierce was contacted by Mr. Strellis. (Findings at p. 41.) Petitioner addresses the referee's specific findings and his exceptions to those findings regarding the opinions of Dr. Pierce and other mental health professionals to his discussion under section 2.b.

a. Exceptions to the referee's finding that the efforts to interview petitioner were adequate

The referee concludes that Mr. Stellis's and Mr. Selvin's efforts to interview petitioner were adequate. The referee finds that the attorneys did what they could to get appellant to "open up about social history information" and that there was no evidence that petitioner disclosed to either Mr. Strellis or Mr. Selvin that his father had physically abused him or his mother. The referee finds that although petitioner did disclose to Mr. Broome that his father had abused his mother, neither Mr. Strellis nor Mr. Selvin could be faulted for not knowing this information because "Mr. Broome should have passed it on." (Findings at p. 42.)

The referee is again wrong regarding the standard of care applicable to counsel in capital cases. First of all, it is not former counsel's job to contact successor counsel to pass along everything he has learned in his investigation. Rather, it is successor counsel's job to conduct an

investigation, and one requirement of such an investigation is to contact and interview prior counsel. ABA Guideline 10.7 requires that "Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. *This obligation includes at minimum interviewing prior counsel* and members of the defense team and examining the files of prior counsel." (Guideline 10.7.B.1.) The guidelines could not be clearer; contrary to the referee's findings, it is the duty of current counsel to interview prior counsel, not the other way around. While it might have been a professional courtesy for Mr. Broome to call his successor counsel, it was Mr. Selvin's and Mr. Strellis's job to interview Mr. Broome to learn whether he had uncovered any information that might have assisted their investigation. Their failure to do so is yet another example of their incompetence.

Petitioner also takes exception to the implication in this section that petitioner is somehow at fault for the inadequacies of counsel's investigation into serious child abuse. Capital defendants are often mentally ill and are not accurate reporters of their own history. Competent counsel may not simply rely upon what their clients tell them but must investigate any information they receive, particularly when they are aware that the defendant is mentally ill and likely delusional. Even when the client is *not* apparently mentally ill, obtaining information from the client regarding abuse is a delicate matter that requires training and sensitivity. In this instance counsel were at fault for failing to construct a team or even to retain the services of a mitigation specialist or penalty phase investigator. As the Commentary to Guidelines 10.7 states:

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very

> personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer. As noted supra in the text accompanying note 101, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

(Commentary, ABA Guideline 10.7.)

Accordingly, trial counsel is at fault for failing to assemble a team or at least retain a qualified mitigation specialist who could investigate abuse. However, even apart from this, if petitioner was willing to disclose the abuse of his mother to Mr. Broome, there is no reason to conclude that, if similar investigative and interviewing techniques had been employed by Mr. Selvin and Mr. Strellis, petitioner would not have been forthcoming with the same information. And, if petitioner were willing to disclose his father's abuse of his mother to counsel, there is no reason to conclude that with proper investigative and interviewing techniques he would not have been forthcoming with information that he too had been abused. In view of the fact that Mr. Selvin and Mr. Strellis conducted no social history investigation whatsoever, relied on the prosecution to supply them with the few documents that had that could be used for social history purposes, and even relied on petitioner's mother to come to them and then threw up their hands and declared failure when she failed to show up, petitioner submits it is far more likely that counsel is simply blaming others for their own indolence.

Petitioner also takes exception to the referee's finding that "trial counsel's failure to obtain social history information from petitioner was

not due to ineffective representation but to petitioner's own actions." (Findings at p. 42.) As discussed previously in Petitioner's Proposed Findings Derived From the Thomson and Stetler Testimony (Section 1.c. pp. 62-68), at the time of petitioner's trial, the obligations of defense counsel in a capital case had been well established. Counsel were required to fully investigate the prosecution's case in aggravation and investigate all aspects of the petitioner's formative years. (ABA Guideline 10.7, 10.11.5 and commentary thereto.) In the execution of their duties and in the course of their representation, counsel had the duty to establish a relationship of trust with the client. An attorney is not permitted to hide behind claims of a "difficult client" or mental illness to relieve him of the obligation to fully and effectively represent the defendant.

The referee surely does not mean to suggest that petitioner is to blame for his trial attorney's inability to form a trusting and cooperative relationship. This is just not so. As testified to by petitioner's *Strickland* expert, in cases in which the client is mentally ill, reticent to provide information, or otherwise difficult to obtain information from, counsel is not excused from investigating but must instead work around the client. (ERT 1057-1058.) It is not uncommon to have uncooperative clients or clients reluctant to give information. (ERT 1153.) In cases where child abuse or sexual abuse is suspected, counsel may encounter resistance in disclosing the information from the client himself, the victim of the abuse, or from the parents, who are the likely perpetrators. (ERT 1138-1139.) In such cases, the investigation must work outward to interviews with siblings, aunts or uncles, probation officers, or similar sources. (ERT 1057, 1138-1139.) The client, who is in jail or prison at the time the investigation is

conducted, is not in a position to control the activities of the investigation or investigator. (ERT 1151.) Trial counsel was aware of their duty to conduct a mitigation investigation and that this duty was not excused by a client was difficult to work with. (ERT 480.) Additionally, petitioner can not be "blamed" for not disclosing information to his defense counsel, this is so because Mr. Selvin and Mr. Strellis knew that petitioner was incapable of assisting counsel rationally in his own defense because of his mental illness. (ERT 538.) Likewise, Mr. Selvin said that David Welch was "impossible" to work with because "he was mentally ill." (ERT 463, 469.) Finally, even if it were true that these attorneys were unable to form a trusting relationship with the client, that fact did not relieve them from assembling a team and locating someone else who could form such a relationship to take on that role.

b. Petitioner takes exception to the referee's finding that the efforts to interview petitioner's parents were adequate.

The referee makes the findings that in spite of trial counsel's "adequate efforts to contact and obtain social history information from petitioner's mother and father" petitioner's parents "did not show up at the meetings that were scheduled," and were "uncooperative." (Findings at pp. 42-43.) The referee credits Mr. Selvin's self-protective testimony that the attorneys did everything they could to contact the parents and discredits petitioner's mother's testimony that she was available and willing to provide information to petitioner's attorneys and testify at trial. (*Ibid.*) Petitioner takes exception to all of these findings.

First, there is absolutely no evidence to suggest that counsel made any effort to contact anyone in the family other that Minnie Welch. The

only mention of petitioner's father is a single interview report obtained by Harold Adams, who was working for Mr. Broome, and this interview concerned the guilt phase. There is no evidence in the trial file of any contact with anyone else in the family– no list of names, no addresses, no interview reports, no rudimentary family tree, no social history chronology or other working document, nothing at all. There is no evidence that anyone ever billed for doing any social history investigation, and as Mr. Stetler mentioned, this is strong evidence that nothing was done because "people like to get paid." Dr. Benson was unaware that there *was* anyone else in the family than Mrs. Welch.

Petitioner has previously described Minnie Welch's extraordinary efforts to help her son at his trial. These facts are set forth in more detail in the discussion of her testimony. However, briefly, several independent facts support the finding that petitioner's mother would have cooperated with counsel and done anything she could to help petitioner, including providing documents or testifying at trial. For example, although petitioner's mother attended some portion of nearly every day of petitioner's trial, she was never spoken to by Mr. Selvin or Mr. Strellis. Neither attorney disputed this fact. (ERT 1574, 1576, 1578.) During petitioner's trial, petitioner's mother did visit one of petitioner's attorney's offices. (ERT 1599.)

Mrs. Welch's willingness to cooperate with counsel to support her son is supported in the record by other witnesses' testimony. For example, during the time he represented petitioner, Mr. Broome spoke to Minnie Welch "about the family background and what had occurred, basically, with she and David and the father." (ERT 174.) Mrs. Welch told Mr. Broome

that petitioner's father, David Welch Jr., had been "very abusive" toward her and petitioner. (ERT 174.) Mr. Broome found that Mrs. Welch was "very cooperative" and was sure she would have been available for additional interviews if he had wanted to have them done. (ERT 224.)

Rather than conduct a thorough social history investigation, Mr. Selvin and Mr. Strellis were content to work from records. (ERT 464-465.) Even then they did not even attempt to gather pertinent records until after the guilt phase had been completed. (ERT 470.) Mr. Strellis and Mr. Selvin never came to Mrs. Welch's home. (ERT 1578.) Additionally, the record is completely lacking of any contact with petitioner's father which was initiated by Mr. Strellis or Mr. Selvin. What limited contact they had with petitioner's parents seems to be with petitioner's mother. If in fact they found her reticent to cooperate, it was incumbent on them to contact the father or enlist the assistance of other immediate family members, including petitioner's sister who the referee credits and a credible witness regarding the child abuse petitioner's father inflicted on petitioner. They did not.

Moreover, as she did by criticizing Mr. Broome for not sharing the information that petitioner's father beat petitioner's mother, thereby placing trial counsel's obligation on his predecessor instead of the other way around, as the Guidelines require, the referee absolved Mr. Selvin and Mr. Strellis of their professional obligations to seek out and interview witnesses by blaming petitioner's mother for not asking trial counsel to accommodate her schedule. (Findings at p. 43.) However, noting how woefully lacking counsels' penalty phase investigation, preparation, and presentation was overall, it is illogical to blame the failure to contact and thoroughly interview petitioner's mother and father on the witnesses rather than the

attorneys. Mr. Selvin's self-protective testimony blaming "the family" for failing to cooperate flies in the face of the other evidence, and the referee errs in ignoring all this evidence and instead crediting Mr. Selvin.

c. Petitioner's exception to the referee's finding that "the efforts to get interview petitioner's extended family were inadequate."

Petitioner generally agrees with the referee's findings that trial counsel conducted an inadequate penalty phase investigation in failing to obtain social history information about petitioner's mental health and child abuse from other sources. (Findings at p. 43-44.) Petitioner does take exception to some of the assertions made by the referee in the body of this finding.

For example, for the reasons stated above, petitioner takes exception to any characterization of petitioner or his mother or father having "stonewalled" (Findings at p. 43) Mr. Strelllis and Mr. Selvin. Also for the reasons mentioned above, any characterization of an investigation having been undertaken by Ms. Lesmeister is not supported by substantial evidence. The referee finds that Ms. Lesmeister failed to contact several potential witnesses and that Mr. Selvin knew or should have known about this "hole" in the investigation. (Findings at p. 44.) While petitioner agrees that Ms. Lesmeister did no work at all on the case, there was no penalty phase investigation for there to have been "a hole" in. Mr. Selvin agreed that no documents were gathered and no one was interviewed. No social history witnesses testified. There was no investigation, by Ms. Lemeister or anyone else, whatsoever.

The referee also states that Mr. Selvin testified that he and Mr. Strellis decided "to go with what they had, which was, essentially, the

records." (Findings at p. 44.) While it is not entirely clear what the referee intended by including this statement, petitioner takes exception to any implication that counsel's decision to rely on the records they had been provided in discovery by the prosecution, which consisted entirely of criminal records of incidents the prosecution intended to use in aggravation, was a reasonably competent decision based on an adequate investigation.

d. Petitioner's exceptions to the referee's findings that the defense team's efforts to interview community members was inadequate.

Petitioner agrees with the findings of the referee that petitioner's attorneys, in failing to seek social history information from members of petitioner's community, did not conduct an adequate penalty phase investigation. (Findings, at p, 45.) However, petitioner would like to emphasize that counsels' failure was not only in failing to conduct proper interviews of petitioner's immediate and extended family, petitioner, and his community; trial counsel also failed to gather life history records.

As petitioner's experts testified, since at least 1980 competent penalty phase investigation has been understood within the profession as requiring a two-track approach; first, the defense team must obtain social history documents; and second, the team must interview social history witnesses. (ERT 1042-1043, 1179-1181.) While the two tracks overlap somewhat, record gathering is usually the first focus. During this phase, the investigation focuses on obtaining school records, birth records, hospital records, employment records, military records, probation reports, and similar historical documents. (ERT 1042-1043, 1179.)

In petitioner's case the vast majority of these records were never collected. Those that were obtained were collected just prior to the beginning of the penalty phase.

2. Petitioner's exceptions to the referee's findings in Part 2. The additional information that an adequate investigation would have disclosed.

Petitioner agrees with the referee's findings that had there been an adequate investigation, information about severe child abuse would have been disclosed at the time of the penalty phase from petitioner's maternal aunt, petitioner's sister, petitioner's childhood friend Konolus Smith, and petitioner's maternal uncle. (Findings at p. 45.)

Petitioner takes exception to the referee's findings that the testimony of Glenn Riley and petitioner's mother would not have been available at the time of petitioner's trial. As explained elsewhere, Mr. Riley was a percipient witness to an aggravating incident that counsel was duty-bound to investigate. Also, he was a neighbor and was present at an incident involving an altercation between petitioner and his father when petitioner's father had thrown hot coffee in his face – a fact which if true, constituted serious abuse and may have led to the discovery of early instances of violence inflicted on petitioner by his father. A competent investigation would have revealed that this incident occurred immediately after an altercation between petitioner and his father that was the last instance of child abuse inflicted on petitioner by his father. For the first time, petitioner actually fought back, and his father never abused him again. [78]

[78]Petitioner notes that when specifying the evidence of child abuse which would have been discovered, the referee credits this incident as being the first time petitioner fought back against his abusive father. (Findings at pp. 46-47.)

Petitioner disagrees with the referee's finding that petitioner's mother would not have provided information to Mr. Strellis and Mr. Selvin or testified at petitioner's trial. While petitioner has previously explained the evidence supporting the conclusion that Mrs. Welch would have been as cooperative as she could, petitioner also notes that Mrs. Welch could have been interviewed and her information used by a mental health expert in forming his or her opinion even if Mrs. Welch herself had not testified. The referee does not appear to have considered this possibility, and thus refusing to consider her testimony for any purpose is unwarranted even if this court were to disagree with petitioner's contention that her cooperation with prior and present counsel and her actions during trial show that she would, indeed, have testified in her son's defense.

Petitioner agrees with the referee's finding that an adequate investigation which included interviewing petitioner's maternal aunt, petitioner's sister, petitioner's childhood friend Konolus Smith, and petitioner's maternal uncle, would have disclosed that petitioner's father inflicted serious physical abuse upon petitioner as a child up to the time he was 17 years of age. (Findings at p. 45.)

In addition to the referee's findings of child abuse facts that would have been discovered and could have been introduced at the penalty phase, findings with which petitioner agrees, petitioner has previously set out a number of additional findings which also would have been discovered and were available the penalty phase of petitioner's trial. Petitioner asks that the further findings pertaining to neglect, emotional abuse, witnessing physical abuse of his mother, physical abuse of petitioner's mother while he

was *in utero*, the withholding of food and other necessities to survival all constitute serious child abuse and should be considered by this court.

a. Findings Regarding the Effect of an Adequate Investigation On the Opinions of Mental Health Experts

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

The referee finds that "had there been an adequate investigation, additional information would have been available to petitioner's mental health experts, who in turn would have been able to support their opinions with the additional evidence." (Findings, at p., 47.) Petitioner entirely agrees with this finding.

The referee takes a very limited view of what portions of petitioner's experts' testimony would have been available, limiting the social history, testing, and clinical interview information upon which petitioner's experts' would have been able, in her view, to rely. However, petitioner notes that even the referee's very restrictive view of the evidence she finds would have been available to petitioner's experts at trial is sufficient to create a reasonable likelihood of a more favorable result, and thus compels the conclusion that petitioner is entitled to relief for ineffective assistance of counsel in the penalty phase.

Petitioner again takes specific exception to the referee's refusal to consider the testimony of Minnie Welch and Glenn Riley on the grounds that neither would have been available to testify at the hearing. (Findings, at p. 48.) Petitioner has previously explained why the referee erred in excluding this testimony and will not reiterate this discussion here but will instead refer the reader to the discussion of the referee's findings regarding Minnie Welch and Glenn Riley. (See Section V, B, 2, a, I and vi.) Contrary

to the referee's finding, the evidence clearly shows that both witnesses would have been available, and with regard to Mr. Riley, the referee's conclusion that capital defense counsel may choose not to investigate an aggravating incident the prosecution plans to use in the penalty phase because there are too many of them is simply wrong on the law and under the prevailing standard of care. Mr. Selvin's statement to this effect was an outright admission of incompetence.

Petitioner has also explained why the referee erred in excluding the results of neuropsychological testing conducted by Dr. Froming in 2002 and 2010 and again will not repeat this material here. (See Section V, B, 1, b, iii, (a) and Section V, B, 3, a, I.) Briefly, the fact that petitioner's post-conviction counsel was able to persuade petitioner to undergo testing after conducting a social history investigation, recognizing his psychological and neurological impairments, and using a patient and respectful team approach over a period of months, all indicates that petitioner would have tested at the time of trial had counsel performed competently, performed a social history investigation, and built and employed a team approach as the ABA Guidelines and the standard of practice at the time of trial required. (See Section V, B, 1, a.)

The referee does not consider the declarations of several witnesses who did not appear and testify at the hearing. These declarations were included in the exhibits to the habeas petition. (Findings at p. 49.) Although petitioner does not take specific exception to the referee's finding, he disagrees that the witnesses would not have been available at trial. Rather, petitioner did not present these witnesses at the hearing either because the witnesses were elderly or deceased and thus unavailable by the time of the

hearing (Phebia Richardson; Marco Franco), or because, while they might have been important witnesses on other issues, they had little or no information regarding serious child abuse.

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

The referee finds that because petitioner made himself available for clinical interviews with Dr. Benson and Dr. Pierce, he would also have been available for clinical interviews by petitioner's experts had there been an adequate investigation. (Findings at p. 49.) Petitioner agrees with this finding.

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

The referee finds that because petitioner refused to submit to testing in 1989 with Dr. Pierce and Dr. Benson, the additional diagnoses of Dr. Froming based on her testing would not have been available at the time of the penalty phase. (Findings at p. 50.) Petitioner takes strong exception to this finding.

Petitioner has previously set forth his objections to this finding in his discussion of exceptions to the referee's findings regarding the testimony of both Dr. Benson and Dr. Froming, and will again not try the reader's patience by reiterating the entire discussion here. Petitioner's counsel agrees with much that the referee says about petitioner's difficulty trusting mental health professionals. (Findings at p. 50.) As discussed previously, it took six months of patient, consistent, team effort to persuade petitioner to undergo neuropsychological testing with Dr. Froming and meet with Dr. Stewart, once, in post-conviction in 2002, and it took several months of

similar effort to persuade him to meet with Dr. Kriegler in 2010. However, post-conviction counsel had much less time in which to work than trial counsel did and still managed to persuade petitioner to undergo testing. The referee's conclusion that trial counsel could not have done the same had they first satisfied their obligation to build a competent defense team, conduct a social history investigation, and approach petitioner with understanding and sympathy rather than hostility and fear is illogical and unwarranted.

Petitioner also takes great exception to the referee's repeated conclusion that petitioner's refusal to be tested by Dr. Martell was "rational and willful." (Findings at pp. 50-51.) While petitioner is certainly capable of volitional behavior, his refusal to be tested was certainly not rational.

Petitioner first submits that the referee erred in ordering petitioner to undergo testing by Dr. Martell in the first place. Such testing would not have been done at the time of trial. It was not the practice at that time for the prosecution to seek to conduct such testing, and the prosecutor himself declared in the witness statement respondent provided in discovery that he would not have done anything differently if the defense had offered evidence of serious child abuse. Petitioner briefed this issue before the referee, but as explained previously did not brief this issue here because no testing actually occurred and no prejudice to petitioner resulted.

However, when the court so ruled, counsel and a defense team that included Scarlet Nerad, Kendra Ing, and Laura Roberts all attempted to persuade petitioner that they and Dr. Froming had unanimously concluded it was in petitioner's best interests to participate in Dr. Martell's testing. (ERT 958, 970, 981-984.) Petitioner refused to do so, fearing that the

results of any such testing would be used against him in future proceedings or would be used to forcibly medicate him. (ERT 958, 982.) He also believed that the deputy attorney general was attempting to place his mental state in issue and that the referee's offhand comment about her plan to attend the William Rehnquist dinner at the United States Supreme Court indicated that the referee was involved in a conspiracy against him. (ERT 970, 988.) During these discussions, petitioner was "scattered" and often segued into discussions of other issues, such as the shoes he had been given in the county jail or Dr. Froming's testimony that he had attempted to kiss her goodbye after the testing she administered, into which petitioner read unwarranted significance. (ERT 966-967, 981-984.) (Indeed, because of her testimony regarding the kiss attempt, petitioner now refuses to meet with Dr. Froming. (ERT 959-960.)) Ms. Nerad explained in her testimony that petitioner did not understand the connection between testing and the outcome of the hearing. (ERT 993-994.) Ms. Nerad testified that she had encountered similar problems of paranoia and lack of focus in persuading petitioner to be tested by Dr. Froming in 2002. (ERT 987.)

Counsel then obtained a protective order, signed by the referee, to guarantee to petitioner that the results of the testing could not be used in future proceedings or to forcibly medicate him. (Referee's Order of 11/12/10.) However, petitioner continued to refuse to be tested even after he was told about and finally shown the protective order, and even when told he might be subject to sanctions that could damage his case if he did not undergo testing. (ERT 987-988.) As had been the case previously, none of petitioner's objections to the testing were based on any strategic or tactical rationale (ERT 962, 972, 983), but were instead solely the product

of petitioner's paranoia, mental illness, and brain impairment. (ERT 992-993.)

When the referee ruled (again erroneously, in petitioner's view) that petitioner should testify regarding his reasons for declining to be tested, petitioner gave testimony about the lack of separation of powers and ex post facto laws in the proceedings, complained that the deputy attorney general was persecuting and insulting him, and ultimately refused to answer questions, asserting his Fifth Amendment rights even though the court ruled he had no such right to invoke in this proceedings. (ERT 1896.)

Petitioner's counsel agrees that petitioner acted volitionally in refusing to meet with Dr. Martell, but the evidence at the hearing clearly shows his refusal was not rational. A rational person would understand that it was to his benefit to be tested and that the outcome of the hearing could have been much worse if he refused, particularly when his attorneys, defense team, and mental health expert consistently and gently explained this. Indeed, even when he was threatened with sanctions, such as potentially losing all the favorable mental health testimony presented on his behalf at the hearing, he continued to refuse. Contrary to the referee's finding, that is not rational behavior.

Petitioner, like most psychotic people, does not understand that he is mentally ill or neurologically impaired. (Amador, *I Am Not Sick, I Don't Need Help* (Vida Press, 2000) pp. 12-13, 175-177, and research there cited.) The phenomenon of lack of insight in persons suffering from schizophrenia and other psychoses was also well known at the time of trial. (World Health Organization, *Report of the International Pilot Study of Schizophrenia,* (Geneva, World Health Organization Press, 1973) [study

found 81% of schizophrenics have poor insight into their illness]; Wilson, Ban, Guy, "Flexible System Criteria in Chronic Schizophrenia," *Comprehensive Psychiatry*, 27: 259-265 (1986) [study found poor insight in 89% of schizophrenics].) Dr. Pierce, the trial psychologist, also agreed that mentally ill clients typically have little insight into their illnesses and may even deny that they are ill. (ERT 346-347.)

Petitioner's inability to comprehend the presence of psychotic symptoms is not "denial," a term that implies some degree of willful defensiveness, but rather anosognosia, the lack of insight and self-awareness that results from brain dysfunction that is symptomatic of the disease. (*Id.*, Amador, supra, at pp. 13, 181-184, and research there cited.) Like many psychotic people he is distrustful of mental health professionals. He fears that they seek to forcibly medicate him or to harm him in other ways. This resistance can only be overcome by patiently constructing a relationship of trust, a task that requires time, patience, and effort.

The fact that his team was able to persuade him, over a period of six months, to undergo testing with Dr. Froming does not mean that he "had the presence of mind" to make a rational choice in 2002 and is rationally refusing to be tested now, as the findings state. (Findings, at p. 51.) It required time and patience to persuade petitioner to be tested in 2002, and petitioner's ultimate decision to do so was not made as the result of any rational analysis on his part but rather because he developed trust in the defense team and was persuaded that they and Dr. Froming would not harm him. The referee's finding that petitioner is "selective in his cooperation and only wanted his chosen experts, not others, to evaluate him" (Findings at p. 51) is simply not true. Petitioner met once with Dr. Stewart and could

not be persuaded to meet with him again. He did meet with Dr. Froming in 2002 and 2010, but after her hearing testimony that he attempted to kiss her goodbye on one day of the testing, he now refuses to meet with her because she is now the enemy. (ERT 959-960.)

This is not rational behavior; it is the product of psychosis and brain damage. Petitioner takes strong exception to the referee's refusal to admit the results of Dr. Froming's testing. Her refusal effectively punishes petitioner for being mentally ill by excluding the best evidence of his mental illness. The referee's decision also tends to shield grossly incompetent counsel from consideration of the prejudice resulting from their ineffective assistance and thwarts the search for truth.

b. Findings of Fact and Conclusions On Question 3.

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

The referee finds that a reasonably competent attorney would have presented "some" of the social history evidence at trial. Petitioner agrees in general, but believes competent counsel would have presented *all* of the social history evidence presented at the hearing, as well as other evidence that would have been available at trial from many witnesses who are now– 26 years later– deceased.

Petitioner takes issue with the referee's belief that "the strategy for presentation of evidence in a mitigation case is inextricably entwined with the evidence in aggravation" and similar statements made by the referee. (Findings, at p. 52.) These statements are unsupported by any citation to testimony or exhibits and contradict substantial evidence petitioner presented regarding the standard of care, which the referee never summarized.

The defense strategy in a penalty phase is not limited by evidence in aggravation. It is of course true that competent counsel will always investigate and attempt to mitigate factors in aggravation, as Mr. Selvin should have done with the MacPherson incident, for example. However, the referee failed to understand that the penalty phase defense need not have any relationship to the crimes or prosecution evidence. Indeed, it was well-known at the time of trial that any evidence which might cause a reasonable juror to vote for life should be presented, including evidence regarding the defendant's background and character even if it does not "relate specifically to petitioner's culpability for the crime he committed." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *Penry v. Lynaugh* (1989) 492 U.S. 302, 327-328.) ABA Guideline 10.11 requires counsel not only to investigate evidence that would "rebut or explain evidence presented by the prosecutor," but also evidence that "would present positive aspects of the client's life or would otherwise support a sentence less than death." (Guidelines 10.11(F)(1).) Counsel must also investigate and present expert and lay witnesses and supporting documentation "to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that might explain or lessen the client's culpability for the underlying offenses; to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death." (Guideline 10.11(F)(2).)

The referee also states that some evidence of child abuse would have helped "to mitigate the aggravating factors in the case as well as to engender sympathy for petitioner." (Findings, at p. 52.) While this is true

as far as it goes, the finding implies that the defense presentation at the penalty phase focuses on sympathy, when the presentation also seeks to promote understanding about how the defendant came to be the person he is. As this court has explained:

> Had the jurors been provided with such evidence [of child abuse], they would not have been left to consider inexplicable acts of violence, but would have had some basis for understanding how it was that petitioner became the violent murderer he was shown to be at the guilt phase. There exists genuine pathos in the considerable evidence that petitioner was a person who was put up for adoption at birth and reclaimed after five foster home placements at the age of two and a half years, and that as a small child, petitioner was singled out for severe beatings by his mother, his stepfather, and his grandmother, humiliated by being excluded from family meals, fed and clothed inadequately, subjected to bizarre discipline, and finally rejected and excluded from the family altogether and relinquished to the questionable care of state institutions for neglected children at the age of seven years. Such evidence naturally would have given rise to greater understanding, if not also to sympathy. In the words of Dr. Fink (the psychologist who treated petitioner as a child), laypersons long have understood, without relying upon psychological theory, that "as the twig is bent, so grows the tree."

(*In re Lucas* (2004) 33 Cal.3d 682, 732.)

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

The referee finds that a reasonably competent attorney would have introduced the testimony of three of the lay witnesses: Cathie Thomas, Sarah Perine, and Roy Millender. (Findings at p. 53.) In describing the significance of their testimony, the referee uses bullet points and states that these points "in particular" should have been presented. Petitioner thus does not understand the referee's use of bullet points as a limitation on the testimony of these witnesses that would have been presented, but rather as examples of testimony the referee found particularly persuasive. Petitioner

concludes that the referee believes all of the testimony of these three witnesses would have been admitted. To this extent, petitioner agrees.

Petitioner disagrees with the referee's conclusion that it is "unlikely" that the testimony of Konolus Smith would have been presented by reasonably competent counsel. (Findings at p. 54.) It is again not clear what the "unlikely" finding actually means. However, assuming the referee is finding that competent counsel would not have presented this testimony, petitioner strongly disagrees. First of all, the referee specifically found his testimony regarding petitioner's childhood to be credible. (Findings at p. 23.) Mr. Smith was a childhood friend of petitioner and had grown up in Sobrante Park. It is true that he was convicted of homicide and robbery in 1973[79] and served a prison term for that crime, but at the time of trial he had been out of prison since 1981 was employed at Atascadero State Hospital as a psychiatric technician, a trade he had learned in prison. (ERT 578-582.) Mr. Smith was therefore a rehabilitation success story, not a career criminal.

Moreover, his work at Atascadero was primarily devoted to treatment of patients with frontal lobe and other brain injuries, and he was therefore in a unique position to understand and explain to a jury how petitioner's childhood behaviors reflected early brain damage. (ERT 581-583.) Indeed, Mr. Smith probably could have qualified as an expert witness on the treatment of patients with frontal lobe damage.

The referee's concern that counsel might have avoided presenting Mr. Smith because he would have been forced to reveal on cross-examination that petitioner "picked fights" as a child is completely unwarranted. Not only would counsel have presented Mr. Smith, it would

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[79]/ Mr. Smith was not the perpetrator of the homicide. (ERT 575.)

have been the defense that elicited testimony from him about petitioner picking fights as a child. Indeed, at the hearing it was petitioner's counsel who asked Mr. Smith questions that elicited testimony about petitioner picking fights as a child.

In particular, petitioner's counsel asked about the incident in which Mr. Smith first met petitioner in which petitioner, then a kindergartner, began fighting with Mr. Smith, who was years' older and much larger than petitioner, and continued to attack Mr. Smith for two more days over a torn shirt. The referee fails to understand that this testimony was *mitigating*. (ERT 588-590.) Petitioner's conduct in this incident illustrated his early frontal lobe brain damage and particularly the impulsivity and perseveration that are symptomatic of this form of brain damage.

Moreover, Mr. Smith would have testified that petitioner was placed in "special" classes almost immediately, and that these were not disciplinary but "more of a mental health type of situation." (ERT 590.) He also would have testified that petitioner was so compulsive that for several years he could not use the bathrooms in school and was constantly disciplined by teachers for running home to use the bathroom. All of this testimony would have established that petitioner had been severely mentally ill since early childhood, a fact that would have been powerfully mitigating to the jury.

Finally, given the fact that all of the aggravating incidents involved petitioner getting into absurd scrapes, such as a fight with a female police officer, Rosemary Dixon, inside a police station, there was no downside to presenting evidence that petitioner had engaged in fistfights from the time he was a small child. More importantly, however, the jury needed to have someone explain that petitioner's conduct in all of these incidents was the

product of his brain damage. All of these incidents demonstrated petitioner's impulsivity, his inability to understand cause and effect or the consequences that would invariably follow his actions, as well as perseveration, his inability to stop or control behaviors once started. Evidence that he had behaved this way since childhood and that it had been recognized even then as symptomatic of mental illness causing him to be placed in "special" classes therefore would have been explanatory and mitigating. The referee's suggestion that counsel would have been "unlikely" to use Mr. Smith's testimony is wrong.

Once again, petitioner submits that the referee is also wrong in excluding the testimony of Glenn Riley solely because the incompetent Mr. Selvin would have been too lazy to investigate the MacPherson incident in aggravation. Petitioner will not continue to beat this particular horse, but refers the reader to the discussion of his exceptions to the referee's findings regarding Mr. Riley's testimony.

Petitioner also takes exception, again, to the exclusion of the testimony of Minnie Welch. She plainly would have cooperated at trial. The fact that she missed two meetings at counsel's office does not mean she would not have testified or been interviewed by an investigator, and the referee's finding fails to explain why she cooperated fully with petitioner's counsel both before and after Mr. Selvin. Petitioner submits that the referee relied for this finding on Mr. Selvin's testimony and opinions. The evidence showed that Mr. Selvin was a deeply incompetent attorney who had no business trying capital cases, and the referee, who failed to summarize the evidence presented on the standard of care applicable to capital counsel, failed to grasp this fact.

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

The Referee finds that competent counsel would have tendered additional evidence from mental health experts in mitigation had a competent investigation into petitioner's social history been done. (Findings at p. 54.) Petitioner agrees. Petitioner also agrees with the referee's comments to the effect that the additional social history evidence would have given the trial experts, Dr. Pierce and Dr. Benson, badly needed support for diagnoses that were merely educated guesses reached in a brief period after the guilt phase had already been concluded. Petitioner particularly notes the following finding:

> Dr. Pierce and Dr. Benson could not opine as to the origins of petitioner's inability to control his impulses, however, because they did not have the benefit of the additional social history information that would allow them to make the connection between the serious abuse that petitioner had suffered as a child and his inability to control his impulses. The evidence about serious child abuse would have been additional support fo the mental health experts' opinions. The experts could have explained to the jury the significance of the social history evidence to provide a better understanding of the petitioner at the time the crime was committed.
>
> Introducing mitigating evidence, like that proffered at the hearing through Dr. Kriegler, Dr. Stewart, Dr. Froming, and Dr. Benson, that petitioner's functioning was impaired as a result of the serious child abuse he had suffered, would have been in keeping with the strategy to urge the jury that it would be unjust and disproportionate to execute petitioner because he had problems as the result of factors over which he had no control and which shaped and twisted his development. (ERT 476, 477, 481, 521, 523, TRT 6153-6177.) Such evidence would also have been introduced to show that the factors in aggravation were symptomatic of a particular brain injury, disease, or psychiatric condition.

(Findings, at pp. 54-55.)

While petitioner has taken exception to many of the referee's specific findings regarding other matters, he wholeheartedly agrees with the

foregoing passage. The finding succinctly explains the reason competent counsel must conduct a thorough social history investigation and present a mix of lay and professional mental health experts in a penalty phase. Mental health experts by themselves tend to be distrusted by jurors as "hired guns" who will give any opinion for a price. However, when the jury perceives the experts' role as explaining incidents and behaviors they have learned from lay witnesses like themselves, who have witnessed the defendant in his home, school, neighborhood, and other environments, the jury not only benefits by understanding the way the defendant's deficits affect his functioning in the real world, but also the experts are viewed with greater respect, and the defendant is seen as having been "shaped and twisted" by "factors over which he had no control." (Findings, at p. 55.) Once again, petitioner notes that the referee's findings in this regard, in spite of limitations which petitioner believes are unwarranted and unfair, demonstrate prejudice and therefore compel relief for ineffective assistance of counsel in the penalty phase.

Petitioner regrets that he must take exception to the following finding that some of petitioner's experts' opinions must be discounted because the referee has disallowed certain testimony and testing. (Findings at p. 55.)

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

Petitioner has repeatedly addressed many of the referee's findings regarding supposed discrepancies between testimony and information the experts derived from interviews and has shown that many of these discrepancies do not exist, while others are trivial in view of the thrust of the experts' opinions. It does not matter to the opinion of Dr. Kriegler

whether petitioner's father struck him with a fist or open palm of whether he knocked him unconscious; he struck him without warning from behind hard enough to knock him down and did so *in public*. This demonstrated a degree of dysregulation on petitioner's father's part that Dr. Kriegler has seldom seen and suggests that petitioner's father was this abusive toward him in public, one can only imagine what was taking place at home, behind closed doors. However, with respect to the referee's discussion of head injuries (Findings at p. 56), petitioner will again refer the reader to the previous discussions on this subject in the exceptions to the findings pertaining to Dr. Froming, Dr. Kriegler, and Dr. Stewart. There was such evidence, but it did not form a very significant part of the opinion of any of these experts.

With respect to evidence of environmental damage (Findings at pp. 56-57), there was evidence from Mr. Smith regarding the polluted creek, as well as a number of exhibits from the state habeas petition regarding the many violations of the Clean Air Act and Clean Water Act. There was also documentary evidence which the experts all reviewed regarding the dilapidated condition of the apartments the Welch family lived in when petitioner was an infant. Dr. Froming referred to this evidence in her discussion of material she had reviewed and considered in forming her opinion. Petitioner takes exception to the referee's finding discounting this evidence, but agrees it was presented only as part of the total picture of neurotoxins to which petitioner was exposed in infancy and childhood and thus as a factor that could have impacted his neurological condition. While it would have been malpractice for Dr. Froming to have ignored it, it was a

minor element of the evidence in a hearing that focused on serious child abuse.

Petitioner again takes strong exception to the referee's finding discounting evidence that petitioner was neurologically damaged *in utero* by physical abuse inflicted on his pregnant mother by his father. The referee finds that even if petitioner's mother had been available at trial, and the experts could have considered her account of a pattern of spousal abuse while pregnant with petitioner "there was no evidence this in fact raised the cortisol levels in her bloodstream (ERT 718) or that this was 'neuropsychologically toxic' when and if it was transferred to petitioner *in utero*." (Findings, at p. 57.) To the contrary, there was expert testimony not only from Dr. Froming but also from Dr. Kriegler that pregnant women who are physically abused during pregnancy experience a surge in cortisol levels, that cortisol is a neurotoxin, and that the surge of stress hormones neurologically damages the unborn fetus. In their opinion, this was likely the mechanism for causing the neurological damage with which petitioner was unmistakably born. This was not only the testimony of these two experts but was endorsed by Dr. Pierce and Dr. Benson. The opinions of these experts constitute substantial evidence, and because their expert opinion was unrebutted, the referee is bound to accept it. The referee cannot reject the opinion of these experts simply because petitioner was unable to produce a blood sample taken from petitioner's mother in 1957 or 1958 when the abuse was taking place. Furthermore, their opinion is further supported by the also unrebutted testimony that showed petitioner was neurologically damaged from the time he was born. With respect to the referee's qualms about whether Mrs. Welch would or would not have

testified, while petitioner insists she would have testified had she been approached by competent counsel, her testimony would not even have been required for the experts to have testified in this regard. Experts may rely on their own interviews, whether sworn or not, and Sarah Perine, whom the referee apparently agrees would have testified, would also have provided sworn testimony that her sister was abused while pregnant. Once again, the referee is simply wrong.

(ii) What the Experts Would Have Been Able to Say.

The referee finds that the experts opinions would have been altered or further supported by the evidence of serious child abuse. Petitioner agrees with the referee's finding in this respect, though he respectfully submits that for reasons set forth at length herein, her finding is improperly limited. The experts' opinions would have been influenced not only by the testimony of three social history witnesses, but six, and also would have been assisted by Dr. Froming's test result, which the referee excludes.

Before addressing these findings, however, petitioner again notes that even the limited findings of the referee indicate a reasonable likelihood of a more favorable outcome for petitioner and therefore compel relief for ineffective assistance of counsel.

(A) Dr. Benson's Revised Opinion

Petitioner agrees with the referee's finding that even without Dr. Froming's test data and the testimony of Mr. Smith, Minnie Welch, and Glenn Riley– all of which should be considered– Dr. Benson would have changed his diagnosis and confirmed traumatic brain disease "traceable to the abuse petitioner suffered at the hand (sic) of his father." (Findings at pp. 57-58.) The referee also correctly finds that the addition of social

history information regarding abuse would have lent greater credibility and support to Dr. Benson's diagnosis (Findings at p. 58), which otherwise was only his opinion.

The referee fails to note in this section that the social history facts showing petitioner's brain damage was due to serious child abuse was powerfully mitigating because it showed, as the referee previously observed, that petitioner "had problems as the result of factors over which he had no control and which shaped and twisted his development." (Findings, at p. 55.) The addition of new facts showing that petitioner's mental illness was due to serious child abuse completely changes the picture, reduces petitioner's culpability, and would certainly have changed the verdict of at least one juror. Relief is compelled.

(B) Dr. Pierce's Unchanged Opinion

The referee finds that Dr. Pierce's opinion would "not have been substantially different" with the addition of the social history information regarding serious child abuse. (Findings at p. 58.) In her view "the additional social history information and documentation would not have impacted his diagnosis." Findings at p. 60.)

It is true, as the referee states, that Dr. Pierce's primary reaction to the new evidence of social history information was that it would have made him more insistent that neurological and psychological testing should have been done. (Findings, at pp. 58-59.) The referee concludes that no such additional testing would have been done. Petitioner has repeatedly explained why this findings is wrong and contradicted by the fact that when approached with sensitivity by a competent team petitioner in fact has done testing twice in 2002 and 2010.

However, rather than repeat this explanation again, petitioner will simply point out that even assuming *arguendo* that petitioner would not have done any testing at the time of trial, the additional social history information *would* have created a reasonable likelihood of a more favorable result for petitioner even if it had not changed Dr. Pierce's diagnosis. As the referee herself stated at the beginning of this section, the social history information would have shown that petitioner's impairments were not the result of his own conduct, such as alcohol or drug abuse, but were traceable to child abuse and thus resulted from "factors over which he had no control and which shaped and twisted his development." (Findings, at p. 55.) Thus, even taking the referee's erroneous view that petitioner would not have done any testing, the new social history information would have not merely confirmed but explained the cause of the brain impairment Dr. Pierce had diagnosed and thus explained not merely what his condition was, but also that the condition resulted from petitioner's own victimization at the hands of his father. Once again, relief is compelled.

(C) New Experts.

The referee finds that in addition to Dr. Pierce and Dr. Benson, competent counsel would have called a clinical psychologist like Dr. Kriegler to testify, based on the additional information from social history witnesses and her clinical interviews with petitioner, that as a result of serious child abuse petitioner was psychiatrically and neurologically impaired. (Findings at p. 60.) The referee lists nine bullet points to which an expert such as Dr. Kriegler would have testified.

Petitioner agrees with the referee that competent counsel would have called Dr. Kriegler or a similar expert in trauma to testify and that such an

expert would have given all the testimony on pages 60 and 61 of the findings. Once again, and for reasons set forth previously, petitioner submits that the referee overly narrows the scope of the testimony which such an expert could have given and that the expert could have given all the testimony set forth by petitioner in his discussion of Dr. Kriegler's testimony. However, for reasons the referee herself stated at pages 54 and 55, the testimony listed by the referee alone would have created at least a reasonable likelihood that at least one juror would have voted for life, and relief is compelled.

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

The referee finds that the prosecution would have had available and would have called in rebuttal Dr. Martell. The referee finds that the prosecution would have requested an opportunity to have its mental health expert conduct a clinical interview with petitioner and that the court would have granted it. The referee further finds that the prosecution would reasonably have had available rebuttal evidence that petitioner was in control of his behavior at the time of the murders and that petitioner's violent acts were not symptoms of any mental disturbance or illness. (Findings, at p. 61.) The referee could not be more wrong.

First, the prosecution would *not* have requested an opportunity to have its mental health expert conduct a clinical interview of petitioner. This was seldom if ever done at the time of trial, and as petitioner has previously noted, respondent provided petitioner with a memorandum dated September 20, 2010, by way of a proffer of the expected testimony of James Anderson, the deputy district attorney who prosecuted the case, to the effect that "had the defense attempted to portray Welch as a victim of child abuse, he

[Anderson] would probably not have introduced any evidence different from the evidence he introduced at trial." (Appendix B to Petitioner's Proposed Findings of Fact Regarding Referral Questions, Memorandum, M. O'Connor (9/20/10).) There is no evidence to suggest that the prosecution would have made such a request and the evidence available shows that no such request would have been made. The referee is wrong.

Furthermore, as petitioner explained previously in his discussion of Dr. Martell's testimony, the referee erred in admitting this testimony because it was not rebuttal; rather it was in response to answers given to respondent on cross examination, and that is not proper rebuttal. By definition, "rebuttal evidence" is evidence that counters the defense case-in-chief, not the prosecution's cross-examination. (*In re Brown* (1997) 17 Cal.4th 873, 889; see also *People v. Carter* (1957) 48 Cal.2d 737; *People v. Harrison* (1963) 59 Cal.2d 622, 628.) The referee's own findings state that the testimony the referee thinks Dr. Martell's testimony rebutted was the *cross-examination* that respondent directed to Dr. Kriegler. (Findings, at p. 62, ¶4.) Certainly, even under the referee's summary, nothing in Dr. Kriegler's direct testimony had anything to do with petitioner's behavior at the time of the crimes, nor did any of it suggest petitioner could not engage in goal-oriented behavior.

The referee's finding, if adopted, would permit respondent to rebut her own cross-examination, and the law does not allow a party to use their own cross-examination as a ruse for introducing supposed rebuttal witnesses. Moreover, as previously explained, Dr. Martell's testimony does not actually rebut anything in petitioner's case. It is also based upon respondent's highly biased, imaginative interpretation of petitioner's mental

state at the time of the crimes, an interpretation which petitioner offered to prove was incorrect. As petitioner's counsel pointed out at the hearing, if the referee wanted to permit respondent to rebut a case petitioner never presented, it was incumbent upon her to at least permit petitioner to present the case respondent sought to rebut. (ERT 1796-1810.) Because the referee would not allow this, her findings regarding Dr. Martell's "rebuttal" testimony must be discounted for this separate reason. Petitioner was not permitted to present the witnesses who would have shown that respondent's biased assumptions regarding petitioner's mental state at the time of the crimes were nonsense, and Dr. Martell's supposed rebuttal testimony is therefore entitled to no weight.

VI.
PETITIONER'S BRIEFING REGARDING PREJUDICE FROM INEFFECTIVE ASSISTANCE.

Petitioner has previously set forth the law applicable to claims of ineffective assistance of counsel in the penalty phase of a capital trial and will not repeat this material here. However, with respect to the "prejudice" prong of the *Strickland* analysis, as noted above petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at 694.)

However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.* at 693-694.) The standard is thus less than a preponderance of the evidence. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a

preponderance of the evidence to have determined the outcome." (*Id.* at 694.)

In the context of a claim of ineffective assistance of counsel at the penalty phase of a capital case, prejudice analysis involves a comparison of the evidence actually presented at the trial to "the totality of available mitigating evidence." (*Wiggins, supra,* 539 U.S. at 534.) "To determine whether counsel's errors prejudiced the outcome of the trial, we must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133.) The fact that petitioner's counsel presented at least *some* semblance of a mitigation case does not alter the prejudice analysis. "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented.'" (*Sears v. Upton* (2010) ___ U.S., ___, 130 S.Ct. 3259, 177 L.Ed.2d , 1033.)

"As this Court has recognized, it is the duty of only it to determine whether trial counsel's ineffective assistance prejudiced the defendant. (See *In re Ross* (1995) 10 Cal.4th 184.) In doing so, a determination of prejudice for claims of ineffective assistance of counsel at the penalty phase requires this Court to 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" (*In re Lucas, supra,* 33 Ca1.4th at p. 733, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 534.) The question is whether "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability." (*Wiggins* v. *Smith, supra,* 539 U.S. at p. 538, quoting *Williams* v. *Taylor, supra,* 529 U.S. at p. 398.) Prejudice is found where there is a reasonable

probability that "'at least one juror would have struck a different balance.'" (*In re Lucas, supra,* 33 Ca1.4th at p. 690, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 537.)

Strickland v. Washington makes clear that the prejudice prong of an ineffective assistance of counsel claim is to be evaluated by an objective standard: whether it is reasonably likely the outcome would have been different. Thus, this Court is required to decide whether at least one reasonable trial juror would be reasonably likely to have accorded weight to, and been affected by, the new evidence presented in post-conviction.

The Ninth Circuit too has recognized that the determination of prejudice is governed by an objective standard. In assessing prejudice, the court has stated, "we are not asked to imagine what the effect of certain testimony would have been upon us personally," but what the effect would have been on the sentencer. (*Smith v. Stewart* (9th Cir. 1998) 140 F.3d 1263, 1271, cert. denied, 525 U.S. 929 (1998).)"

Under the foregoing standards, petitioner is clearly entitled to habeas corpus relief because the new evidence placed the case in an entirely different light, and this is true whether this court adopts the more expansive view of the evidence for which petitioner argues or the more limited view the referee took. At trial, all the defense had in the penalty phase was the testimony of two mental health experts who had not seen any social history documents until two weeks prior to the beginning of the penalty phase, and who never spoke to any social history witnesses at all. Those experts did their best, but they had no factual support other than what they could cobble together from the transcripts, probation reports, and other documents the prosecution had given to the defense in discovery. Even a document as

basic as petitioner's school record was not obtained until a week prior to the penalty phase, and then only because Dr. Pierce suggested that counsel obtain it. Though the doctors felt that there was something organically wrong with petitioner's brain and were on the right track, the lack of any social history investigation left them at a loss to explain persuasively how petitioner came to be impaired.

By contrast, even with nothing more than the limited social history evidence the referee would permit, trial counsel would have been able to present social history witnesses who could provide powerful testimony regarding the serious child abuse petitioner suffered in early childhood, which the experts could then explain was the cause of his brain damage. They would have been able to persuade the jury that petitioner's odd, impulsive, perseverative, violent behavior was the product of organic brain impairments that were, in the referee's phrase, "traceable to the abuse petitioner suffered at the hand (sic) of his father." (Findings at pp. 57-58.) Accordingly, and even under the referee's limited view of the evidence that would have been available at trial, it is virtually certain that at least one juror would have struck a different balance.

VII.
CONCLUSION

With respect to the first referral question, this court should find that improper communications took place and grant relief for juror misconduct.

With respect to the second and third referral questions, this court should find counsel's performance fell below the standard of care applicable to capital counsel in failing to conduct a competent social history investigation. In view of the powerful evidence of serious child abuse that would have been available had counsel performed competently, counsel's

inadequate performance was prejudicial, and this court should grant relief for ineffective assistance of counsel.

This court should grant the writ.

Dated: September 3, 2013

Respectfully submitted,

Wesley A. Van Winkle
For Wesley A. Van Winkle
and Karen Kelly
Counsel for Petitioner
DAVID ESCO WELCH

APPENDIX 1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
DEPARTMENT 04, JUDGE MARY ANN O'MALLEY

IN RE: DAVID ESCO WELCH, PETITIONER

HABEAS CORPUS

COUNSEL: W. VAN WINKLE
MS. KELLY
LAURA ROGERS

DEP A.G.: C. RIVLIN
DEP D.A.: M. O'CONNOR

TRIAL EXHIBITS

Docket: 05-070855-2

Prty/Number			Date	Date	Date
Pet	Res	Description	I.D.	Admitted	Withdrw
A		Diagram of Courtroom D-9	9/13/10		
B		Large Map-Sobrante Park	9/16/10		
C		Large Map	9/16/10		
D		Small colored map	9/16/10		
	1	Manual of mental disorders	1/19/11		
	2	Business size Fremont Bank Env.	1/26/11	1/26/11	
	2A	Greeting card w/signatures	1/26/11	1/26/11	
	3	Copy of interview w/Joseph Cruz	2/1/11		
E		Declaration of Bernard Wells	2/1/11		
F		Funeral notice of Bernard Wells	2/1/11		
G		Funeral notice of Pamela Welch	2/2/11		
H		Funeral notice of Terri Welch	2/2/11		
I		Funeral notice of Darius Welch	2/2/11		
J		Receipt from The Business Office	2/2/11		
K		The Death Squad article	2/7/11		
L		Decl. of Daniel Martell dated 2/11/11	2/14/11		
	4	Decl. of Daniel Martell dated 2/11/11	2/14/11		
M-1		Vol. 1 Death Penalty Binder	2/28/11	2/28/11	
M-2		Vol. 2 Death Penalty Binder	2/28/11	2/28/11	
N-1		Vol. 1 Exhibits Binder	2/28/11	2/28/11	
N-2		Vol. 2 Exhibits Binder	2/28/11	2/28/11	
N-3		Vol. 3 Exhibits Binder	2/28/11	2/28/11	
O		Bldg. Insp. Records-5848 Fremont St.	2/28/11	2/28/11	

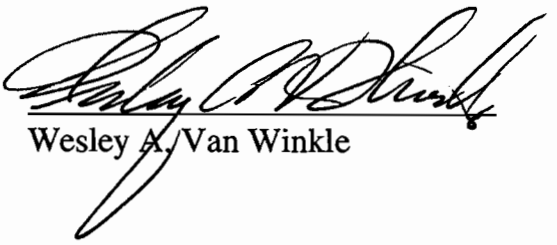
P		Konolus Smith's employment records	2/28/11	2/28/11	
Q		Pictures of Fineas Gauge	2/28/11	2/28/11	
R		List of counsel w/former clients on death row	2/28/11	2/28/11	
S		Copy of newspaper articles and copy of transcript dated 11/8/88	2/28/11	2/28/11	
T		Copy of Birth Cert. of David Welch	2/28/11	2/28/11	
U		Copy of Death Cert. of David Welch, Sr.	2/28/11	2/28/11	
V		Copy of Birth Cert. of Minnie Bell	2/28/11	2/28/11	
W		Marriage certificate dated 3/10/56	2/28/11	2/28/11	
X		Marriage Summons #397816	2/28/11	2/28/11	
Y		Copy of agreement made 4/28/71	2/28/11	2/28/11	
Z		Application & Declaration for Order	2/28/11	2/28/11	
AA		Birth Cert. of David Welch IV	2/28/11	2/28/11	
BB		Death Cert. of Dwight Welch	2/28/11	2/28/11	
CC		Death Cert. of Terri West	2/28/11	2/28/11	
DD		Birth Cert. of Carmen Dimsdale	2/28/11	2/28/11	
EE		Death Cert. of Jacquelyn Lesmeister	2/28/11	2/28/11	
FF		Birth Cert. of Dave Welch, Jr.	2/28/11	2/28/11	

CERTIFICATE OF WORD COUNT

I declare that I am the attorney appointed by this court to represent petitioner DAVID ESCO WELCH in this habeas corpus proceeding, and that I also prepared petitioner's merits brief. On the date set forth below, I calculated the number of words in this brief by using the word count calculator included in WordPerfect X6, the word processing system used to produce this brief. According to that calculator, this brief contains 89,193 words.

Executed this 3rd day of September, 2013, at Berkeley, California.

Respectfully submitted,



Wesley A. Van Winkle

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and am employed in a law office in the City of Berkeley, County of Alameda, State of California. On this date, I served the enclosed **PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT** on the parties in said cause by placing true and correct copies thereof in envelopes with postage thereon fully prepaid in the United States mail at Berkeley, CA to the following individuals:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Berkeley, California on September 24, 2013.

Carol Friedman