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 REPLY TO RESPONDENT'S EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS

DEATH PENALTY

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I.
INTRODUCTION

On September 3, 2013, the parties simultaneously submitted their exceptions to the referee's report and recommendations and briefs on the merits following the evidentiary hearing on referral questions concerning petitioner's claims of juror misconduct and ineffective assistance of counsel arising from his 1989 conviction and death sentence. This court's order of January 4, 2013, contemplated that the parties would then submit simultaneous cross-replies. Petitioner here submits his reply to respondent's briefing.

Petitioner titled his document "Petitioner's Brief on the Merits and

Exceptions to the Referee's Report," and this document is hereinafter described as petitioner's brief on the merits and abbreviated as "PBM." Respondent submitted a document entitled "Exceptions to the Report and Recommendations of the Referee and Brief on the Merits," which is hereinafter described as "respondent's brief" and abbreviated as "RB." In his brief on the merits, petitioner referred to the referee's report in citations as "Findings," and therefore will continue this citation convention here.

Petitioner again briefly notes that while petitioner disagrees with many of the findings in the referee's report, that report nevertheless compels habeas relief for ineffective assistance of counsel in the penalty phase of petitioner's trial.

II.
RESPONDENT'S SUMMARY OF THE EVIDENCE AT TRIAL IS OF LITTLE RELEVANCE TO THESE PROCEEDINGS AND DOES NOT REFLECT THE ADDITIONAL EVIDENCE THAT WOULD HAVE BEEN PRESENTED BY COMPETENT COUNSEL

As respondent did in her briefing and proposed findings to the referee, respondent begins her exceptions and brief on the merits with a summary of the evidence at trial. (RB 1-15.) Although the hearing concerned three specific referral questions focusing solely on petitioner's claims of juror/bailiff misconduct and ineffective assistance of counsel for failing to conduct an adequate investigation in the *penalty* phase, respondent devotes more than a quarter of respondent's brief to a summary of the prosecution's case on *guilt*. Respondent's transparent purpose in doing so is to remind this court of the horror of the crimes in the hope that the emotional impact will distract this court from the issues at hand.

Petitioner agrees that the crimes were horrible. However, the guilt-

phase evidence has little relevance to the referral questions. With respect to the first referral question concerning whether the jury was improperly influenced by extrinsic evidence, guilt-phase evidence might be of some relevance if respondent sought to use it to rebut the presumption of prejudice arising from such misconduct. However, respondent's position on this question is that no such misconduct ever occurred (RB 34-39), and thus respondent's summary of guilt-phase evidence has no relevance to that question. With respect to the two referral questions concerning ineffective assistance of counsel in the penalty phase, the guilt-phase evidence again would be of some relevance in assessing whether it was reasonably likely that a more favorable penalty-phase result might have been obtained had counsel performed competently. However, respondent again does not make such an argument and instead contends that counsel were not ineffective. To the extent respondent addresses *Strickland's* prejudice prong at all, respondent's argument primarily compares the penalty phase that was presented with respondent's view of what the evidence at the hearing showed. (RB 47-51.)

Thus, respondent's summary of the guilt-phase evidence serves no apparent purpose in the context of respondent's exceptions and brief apart from providing respondent with another opportunity to present respondent's own subjective version of the facts of the crime.[1] To the extent this court

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[1]/ Although the version of the facts respondent presents to this court is somewhat less lurid than the version respondent presented to the referee, it is still speculative and inaccurate in many respects. For example, respondent states that while Barbara Mabrey had "obtained around the clock police protection," petitioner "was watching those who were watching him" and committed the killings "at change of shift." (RB 1.) The idea that petitioner was lying in wait monitoring police activity and intentionally timed the killings for a police "change

finds it necessary to refer to any facts concerning either the guilt or the penalty phase, petitioner submits that this court's own opinion in the direct appeal is a more neutral and reliable source for the facts than respondent's version. (*People v. Welch* (1999) 20 Cal.4th 701.)

However, even if respondent had sought to craft a *Strickland* prejudice argument on the basis of evidence at the guilt-phase, the evidence would still be of little relevance to the second and third referral questions. "[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.) Petitioner agrees that to the extent the facts adduced at the guilt phase form a part of the prosecution's evidence in aggravation (see Pen. Code §190.3, subd. (a)), guilt phase evidence is relevant to the *Strickland* prejudice analysis. However, the purpose of the reweighing analysis to which this court referred in *Lucas* is to determine 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.) Thus, the analytical focus is on the totality of

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of shift" is purely a product of respondent's imagination. As discussed in petitioner's brief on the merits (PBM 203), petitioner was not lying in wait but for several hours was drinking and using drugs in an apartment blocks away from the scene and was at most semi-conscious at the time these impulsive killings were committed. Respondent's factual summary also misstates objectively verifiable facts, for example listing petitioner's age at the time of the crimes as 37. (RB 1.) Petitioner was born on March 21, 1958, and was therefore 28 at the time of the killings in December, 1986. (Petitioner's Hearing Exhibit N-1, Tab 48, David Esco Welch – Birth Certificate.)

the available mitigating evidence and whether that evidence might have influenced at least one juror to vote for life rather than death. (*See, In re Lucas, supra,* 33 Ca1.4th at p. 690, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 537 [prejudice is found where there is a reasonable probability that "'at least one juror would have struck a different balance'"].)

In *Lucas* this court took pains to note that evidence of child abuse may persuade a jury that the death penalty is inappropriate even in a case where the circumstances of the crime are extremely aggravated. In that case, this court noted

> We recognize the aggravated nature of the crimes, namely, the brutal and calculating attack on two frail, helpless elderly neighbors who could not have resisted the burglary and theft committed by petitioner, his flight, and his unsuccessful attempt to excuse himself with claims that he had been in a dream state. The circumstances of the crimes and of petitioner's prior attack on the young babysitter demonstrate deep moral culpability.

(*In re Lucas, supra*, 33 Cal.4th at p. 732.)

However, in spite of the gruesome nature of the crimes in *Lucas,* this court granted relief for penalty phase ineffective assistance of counsel for failing to adequately investigate and present evidence of serious child abuse. The court reasoned that evidence of abuse in that case "might well have influenced the jury's appraisal of his moral culpability" because "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." (*Lucas, supra*, 33 Cal.4th at p. 734, citing *Williams v. Taylor* (2000) 529 U.S. 362, 398.)

Accordingly, while petitioner recognizes that the guilt phase facts are of some relevance in assessing prejudice from penalty phase ineffectiveness, the central question is whether it is reasonably likely that at

least one reasonable juror would have made a different appraisal of petitioner's moral culpability on the basis of the evidence of serious child abuse and its sequelae that counsel should have presented. Petitioner will brief this issue in more detail in addressing the *Strickland* prejudice prong.

Finally, as petitioner's counsel explained prior to the testimony of respondent's expert (ERT 1801, 1804-1808) and again in his brief on the merits (PBM 202-203), trial counsel's guilt phase investigation was no better than their penalty phase investigation, and thus the facts stated not only by respondent but even in this court's direct appeal opinion do not fully represent the case competent defense counsel could have presented at the trial on guilt or innocence. Although qualitative testing showed that petitioner had alcohol, cocaine, and heroin in his system at the time of the crimes, the Oakland Police Department's mishandling of the blood samples made it impossible for defense counsel to test the samples to determine the levels of these substances. However, instead of simply throwing up their hands and declaring failure, as trial counsel did, competent counsel could and should have conducted an investigation to determine by other means how much alcohol and drugs petitioner had been using during the hours prior to the offense, thereby permitting an expert to calculate at least approximate levels and give an opinion regarding petitioner's level of impairment at the time of the crimes. A number of witnesses, many of whose declarations were presented with the habeas corpus petition, were available for this purpose.

Petitioner requested leave to present this evidence at the evidentiary hearing as surrebuttal to respondent's "rebuttal" evidence, i.e., Dr. Daniel Martell's opinions regarding petitioner's state of mind at the time of the

offenses, but his request was denied. (ERT 1801, 1804-1808.) While petitioner maintains Dr. Martell's testimony should be struck as improper rebuttal (see PBM 249-253), petitioner further submits that the additional guilt phase evidence petitioner was not permitted to present would have mitigated the impact of Penal Code section 190.3(a) aggravating evidence and thus "'might well have influenced the jury's appraisal' of [the defendant's] moral culpability." (*Lucas, supra*, 33 Cal.4th at p. 734, citing *Williams v. Taylor* (2000) 529 U.S. 362, 398; *Wiggins* v. *Smith* (2003) 539 U.S. 510, 538, also quoting *Williams* v. *Taylor, supra.*) Accordingly, if guilt phase evidence is to be considered for purposes of evaluating *Strickland* prejudice from counsel's inadequate investigation in the penalty phase, evidence of guilt-phase ineffectiveness which petitioner was not permitted to present should also be considered. (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.)

III.
RESPONDENT'S CONTENTION THAT THERE IS NO CREDIBLE EVIDENCE OF IMPROPER COMMUNICATIONS OR OTHER JUROR MISCONDUCT SHOULD BE REJECTED.

Respondent's brief is divided into two sections. The first section summarizes the evidence and either takes exception to or adopts certain of the referee's findings. The second section sets forth respondent's argument on the merits.

In addressing this court's first reference question concerning petitioner's claim of juror misconduct, the first section of respondent's brief described the evidence presented to the referee and then accepted and adopted the referee's credibility findings, findings of fact, and conclusions.

(RB 3-8, 19-20.) Respondent then contended that there was "no credible evidence that there were any improper communications to the jury." (RB 20.)

In the second portion of respondent's brief, respondent contended petitioner had not produced credible evidence of juror misconduct. (RB 34.) According to respondent, the evidence admitted at the hearing supported the referee's findings on witness credibility. After discounting the uncorroborated testimony of witnesses found not to be credible, respondent contended there was no evidence of juror misconduct.

On all counts, respondent is wrong.

A. Petitioner's Response to Respondent's Brief Concerning the Referee's Credibility Determinations

In discussing the referee's credibility findings, respondent predictably endorses the two prosecution witnesses who explain away the substantial evidence supporting petitioner's juror misconduct claim. However, as explained in petitioner's brief on the merits, because the referee did not support her credibility determinations with substantial evidence, they are entitled to little if any weight by this court.

Respondent does not dispute that considerations for evaluating the credibility of a witness are contained in Evidence Code section 780. This court has relied on the criteria contained in section 780 when determining whether the credibility findings of a referee are entitled to "great weight." For example, in *In re Burton* (2006) 40 Cal.4th 205, this court noted that the referee in that case, when faced with conflicts among the factual accounts of the reference hearing witnesses, had articulated the evidence upon which he based his credibility determinations. Where the referee articulated that the witness "did not seem very persuasive" or had the demeanor "of an

advocate," this court found the credibility determinations of the referee supported by substantial evidence and thus entitled to great weight. (*Id.*, at pp. 224-225.) In the instant case, however, the referee did not support her credibility findings with substantial evidence. Thus, when respondent relies on the referee's credibility conclusions, respondent's argument is still unsupported by substantial evidence. (RB 35-36.)

Additionally, not only are the referee's and respondent's credibility determinations unsupported, respondent's own arguments regarding witness credibility are both self-serving and wrong. For example, in vouching for Deputy Dimsdale, respondent asserts the deputy "proved his meticulous concern for the truth" when "on his own initiative" he looked through a box of keepsakes and found he was "wrong" when he stated on earlier occasions that he had received no gift from the jurors. (RB 35.)

Respondent completely ignores the fact that the last-minute production of the greeting card and gift to him from the jury serves to demonstrate Dimsdale's lack of credibility as a witness. On at least two earlier occasions Deputy Dimsdale indicated that he never received a gift from petitioner's trial jury. The first of these occasions was in a declaration signed under penalty of perjury in which Dimsdale indicated the jury did not throw a shower for him and his wife and strongly implies there was no gift given. The other was in a prehearing witness statement to deputy district attorney Micheal[2] O'Connor. (ERT 1341-1342.) Respondent would have this court congratulate the deputy for taking special care to assure that his testimony under oath before the reference court was truthful.

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[2]/ The correct spelling of Mr. O'Connor's first name is "Micheal" rather than the more common "Michael."

Petitioner also notes that this is not the only occasion where the facts run counter to Deputy Dimsdale's recollections, statements and testimony. As noted below, at the reference hearing Dimsdale testified under oath that he formed no conclusion that it was petitioner who was urinating in the stairwell. (Findings 12; ERT 1360.) By contrast, the trial record clearly shows it was Dimsdale who brought the urination incident to the attention of Judge Golde. (Trial RT 3157, 4978-4985.) Petitioner maintains that at the very least, Dimsdale's consistent misremembering of information which is contradicted again and again is substantial evidence that he is not a credible witness.

Respondent contends juror Joe Cruz was not a credible witness. (RB 35-36.) However, as petitioner argued in his brief, Mr. Cruz was a credible witness who took great pains to ensure that every statement he made on the stand was correct. Indeed, nearly all of his testimony was corroborated by retired deputy district attorney Anderson, who the referee and respondent both found credible. The only area of disagreement between Mr. Cruz's and Mr. Anderson's recollection of Mr. Anderson's conversation with the jury concerned when the conversation occurred. Mr. Anderson's testimony that the conversation occurred after the verdict was based on vague recollections of his habit and custom of speaking with jurors. However, Mr. Cruz recalled with specificity that this particular conversation was spurred by a loud noise in the courtroom in mid-trial that startled the jurors and caused them to have concern for their safety. (ERT 1746-1749, 1762-1763; 1427-1433, 1439, 1443-1444, 1452-1453.) Mr. Cruz's more specific recollection is more credible than Mr. Anderson's vague one. Moreover, Mr. Cruz was a disinterested witness who, unlike

Mr. Anderson, had no motive to try to preserve a conviction and capital judgment of which he was so proud that for years thereafter he kept a photograph of petitioner on the trophy wall of his office.

Finally, with regard to the credibility determinations pertaining to both Mr. Anderson and Mr. Dimsdale, petitioner once again notes that both met criteria listed in Evidence Code section 780 indicating a lack of credibility. Both Dimsdale and Anderson expressed "bias, interest, or other motive" within the meaning of Evidence Code section 780, subdivision (f). Deputy Dimsdale's credibility is further suspect under Evidence Code section 780 subdivision (e) ("character for honesty or veracity or their opposites"), subdivision (h) (prior inconsistent statement regarding the gift), and subdivision (k) ("admission of untruthfulness").

Thus, contrary to respondent's contention, the credibility findings regarding these two witnesses are not merely unsupported by substantial evidence, but are actually contradicted by rules of evidence governing the assessment of witness credibility. Those findings should be rejected by this court.

B. Juror Misconduct Occurred When the Fact That Petitioner Had Urinated in the Stairwell Was Conveyed by One or More Bailiffs to the Jurors.

Both respondent and the referee contend that the jurors could have learned that petitioner urinated in the stairwell between the holding facility and the court room during the course of his jury trial and/or from testimony at the trial rather than from a bailiff. (RB 38; Referee's Report 13.) This is simply not so.

Respondent claims that "the jury heard from a defense mental health expert at the penalty phase that petitioner had urinated in a courtroom

well[3] during trial." (RB 38.) However, the transcript pages respondent cites (TRT[4] 5949, 5982-5983) do not support this contention. At TRT 5982-5983, Dr. Pierce was asked by the prosecutor about a 1972 report that showed that as a 14-year-old juvenile petitioner "urinated on the walls of the fitting room in a J.C. Penney Department Store . . . ." This incident obviously had nothing to do with the trial, and petitioner does not understand why respondent would cite it for that proposition. At TRT 5949, Dr. Pierce did testify that he read in the transcripts that after an unspecified court session where "something didn't go [petitioner's] way" [petitioner] went back in the stairwell and urinated," but there is no indication in this testimony that the incident in question occurred during the trial, and the preceding discussion had concerned petitioner's persecutory delusions and psychotic behavior as a juvenile and at the preliminary hearing. (TRT 5946-5948.)

Moreover, there is substantial evidence showing that it was the bailiff who informed the jurors that petitioner had urinated on the stairwell. The trial transcript showed that Dimsdale first reported to the court that petitioner had urinated in the stairwell, and court discussions regarding urine in the stairwell took place in his presence. (ERT 1306, 1332;

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[3]/ In Alameda County's main court building, the Rene C. Davidson Courthouse, jury rooms are on the floors immediately above the courts themselves, and the holding cells are on the top floor. Defendants are brought from the holding cells to the floors where the jury rooms are located, and then brought down to the courtroom through the same stairwell the jury uses to enter the court. At trial the court and the parties all referred to this stairwell as "the well."

[4]/ Petitioner uses the abbreviations "TRT" to indicate the trial reporter's transcript, and "ERT" to reference the evidentiary hearing reporter's transcript.

Referee's Report 13.) At the hearing, Dimsdale acknowledged that he brought the matter of petitioner urinating in the stairwell to the attention of petitioner's trial judge.[5] (TRT 3158.) Dimsdale also admitted that he might have brought the matter of urine in the stairwell to the attention of the jurors. (ERT 1361-1362; TRT 3157, 4978-4985.)

The jurors themselves did not testify they heard about the urination from Dr. Pierce or a defense expert, but rather that they saw urine in the stairwell, smelled urine in the stairwell, or were told, possibly by a bailiff, that petitioner urinated in the stairwell. (ERT 1304-1307, 1332-1333, 1346, 1396-1397, 1421-1422, 1427.) According to Mr. Cruz, a bailiff, perhaps Deputy Dimsdale, told the jury that someone had urinated in the stairwell. Mr. Cruz also testified that someone had speculated that the reason was to "detract" from "his competency." Again, it was "possible" that this comment came from the bailiff. (ERT 1423-1424, 1436, 1439.) Mr. Wells recalled that a bailiff commented that the urine probably came from the prisoners who had been brought down to court before them and one of whom could have been petitioner. (ERT 1351, 1464-1466.)

Finally, as petitioner noted in his brief on the merits, although the referee declined to admit post conviction declarations for the truth of the matter therein, it should be noted that it should be noted that juror Gonzales stated in a declaration under penalty of perjury that it was petitioner who

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[5]/ In view of his hearing testimony to this effect, and particularly in view of a trial record that clearly shows it was Dimsdale who brought the urination incident to the attention of Judge Golde in the first place, Dimsdale's testimony that he formed no conclusion that it was petitioner who was urinating in the stairwell flatly contradicts the record and further undermines the Referee's findings regarding his credibility. (Referee's Report 12; ERT 1360.)

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 1310-1311; Exh. N-1, Tab 24.)

In conclusion, there is substantial evidence 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.

C. Juror Misconduct Occurred When it Was Suggested by One or More Deputies That Witnesses Had Been Threatened.

The referee found that jurors' memories about threats to witnesses were attributable to trial witness Barbara Mabrey's testimony and/or Mr. Anderson's question and answer session with the jury and were not attributable to improper communications. (RB 38; Referee's Report 12.) Petitioner disagrees.

As petitioner argued in his brief on the merits, there is substantial evidence that the communications between Mr. Anderson and petitioner's trial jury occurred during the trial itself, not after it was over. According to juror Joe Cruz the jurors talked among themselves about how witnesses could be harmed by someone associated with petitioner. During trial, a loud noise in the courtroom startled the jurors and prompted a discussion about whether petitioner had the ability to harm witnesses and, potentially, the jurors themselves. 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. (ERT 1429-1430, 1439, 1443-

1444, 1453.)

Mr. Cruz also testified that prosecutor James Anderson came into the jury deliberation room and "explained some things" to the jury after they were startled by the loud noise in the courtroom. According to Mr. Cruz, Mr. Anderson told the jurors "there's nothing to worry about. He's not on that kind of level." (ERT 1425-1428, 1431-1433.)

The declaration of juror Gonzales also corroborates the testimony 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 from which this court should 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. Moreover, the suggestion that the jurors's concerns about threats to their safety were based solely on Barbara Mabrey's trial testimony is pure speculation. Respondent's and the referee's contentions to the contrary elevate speculation above substantial evidence and thus must be rejected by this court.

IV.
RESPONDENT'S CONTENTION THAT TRIAL COUNSEL WERE NOT PREJUDICIALLY INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF SERIOUS CHILD ABUSE CONTRADICTS THE REFEREE'S FINDINGS AND THE EVIDENCE AT THE HEARING AND MUST BE REJECTED.

As respondent did with the jury misconduct issues, respondent divided discussion of the referee's findings regarding the two ineffective assistance of counsel referral questions into one section on the referee's

credibility findings (RB 20-34) and a second section addressing the referee's findings on the referral questions themselves. (RB 39-52.) For ease of reference, petitioner will organize his reply accordingly.

A. Respondent's Discussion of the Referee's Credibility Findings Completely Fails to Discuss Either the Standard of Care That Must Be Applied in Assessing the Adequacy of Trial Counsel's Performance or the Witnesses Who Testified Regarding That Standard; Respondent's Analysis of the Remaining Evidence is Legally and Factually Incorrect.

Like the referee's list of witnesses who testified at the hearing regarding ineffective assistance of counsel issues, respondent's brief inexplicably omits any mention of two critically important witnesses: attorney James Thomson, who edited the edition of the California Death Penalty Defense Manual in force at the time the investigation of petitioner's case should have begun and testified regarding the standard of care in conducting mitigation investigations during the late 1980s; and mitigation specialist Russell Stetler, who also testified regarding the standards of care and practice in penalty phase investigations at the time of petitioner's trial, and who also reviewed the trial attorneys' files and explained that those files indicated no meaningful mitigation investigation had ever been conducted. While respondent purports to list all the witnesses who testified on the second and third referral questions dealing with ineffective assistance of counsel (RB 20-21), respondent's list entirely omits these two witnesses, and only these two witnesses, from the list. Neither witness is mentioned anywhere in respondent's brief.

As petitioner observed in his brief (PBM 48-74), the testimony of these two witnesses was central to petitioner's case regarding the second referral question– i.e., whether counsel adequately investigated evidence of serious child abuse– and the referee's failure to include any discussion of

the testimony of these two witnesses may help to explain in large part why the referee erred in certain respects, such as in crediting Mr. Selvin's appalling testimony that he would not have investigated or interviewed witnesses to an incident the prosecution intended to use in mitigation. Respondent fails to note or address the omission of these witnesses from the referee's findings and also fails to mention their names, confront their testimony, or even address what the relevant standard of care was at the time of petitioner's trial.

However, despite respondent's attempt to avoid the standard of care, these two witnesses will not go away. Respondent cannot sidestep the fact that trial counsel's job at the time of trial was to conduct a thorough investigation of the client's background and social history designed to uncover "all reasonably available mitigating evidence." (ERT 1021-1022, 1034, 1038, 1244, 1243, 1248; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524; *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.) Respondent never even cites *Wiggins*, nor does respondent refer to this standard in any way.

Petitioner summarized the testimony of these two witnesses in some detail in his brief on the merits (PBM 48-74) and will not repeat this material here. However, much of this testimony was critical to an understanding of just how woefully inadequate trial counsel's investigation

actually was. For example, the referee's erroneous conclusion that counsel made adequate efforts to contact petitioner's family was based in part on the referee's failure to understand that the standard of care required some defense team member to go to petitioner's mother's home to interview her rather than to require this low-functioning woman to come to their office to meet with their mental health experts. (See ERT 1225-1226 [mitigation interviews should be conducted on the witness's "turf"].) Similarly, the referee's erroneous conclusion that competent counsel would not have interviewed Glenn Riley was based in part on the referee's failure to understand that counsel has a duty both to investigate *every* incident the prosecution will use in aggravation, including the reports of the MacPherson incident in which Mr. Riley was a witness, and to review social history documents such as probation reports in search of potential social history witnesses. (ERT 1043 [duty to review probation reports], 1059-1062 [duty to thoroughly investigate all incidents in aggravation], 1118-1119 [duty to understand factors in aggravation in capital and non-capital cases].)

The referee's (and respondent's) failure to discuss Mr. Stetler's testimony also explains the referee's inability to grasp just how far below the standard of care counsel actually fell, as well as the referee's erroneous finding that counsel's efforts to interview petitioner's parents were adequate. Mr. Stetler, a post-conviction mitigation specialist, reviewed the trial file in this case and noted the lack of any indication of even the most rudimentary social history investigation. Counsel gathered no records and, indeed, did not even obtain their client's birth certificate or a signed release for records. The only records in the file that could be considered social

history records were probation reports which were given to counsel by the district attorney in discovery in connection with incidents in aggravation (ERT 1206), and petitioner's school records obtained by subpoena only on the day the penalty phase began because Dr. Pierce told counsel he needed them. (ERT 1203-1204.) The file contained no interview reports with any social history or other mitigation witnesses done by trial counsel. (ERT 1204.) The only report in the file of any interview with any family member was one brief report of an interview with petitioner's father, and that interview was done by Harold Adams, the investigator for petitioner's prior counsel Thomas Broome, and was not connected to mitigation. (ERT 1204.) The files contained no interview reports of contacts with petitioner's parents or siblings, uncles, aunts, grandparents, spouse, or children, nor with teachers, school principals, doctors, nurses, other people in the neighborhood, juvenile correctional staff, or other potential social history sources. (ERT 1206.)

The files also do not indicate that counsel ever retained anyone to do penalty phase investigation. Trial counsel's investigator, Brian Olivier, performed only guilt phase work; there was no indication from his billing records that he had done any mitigation investigation at all. (ERT 1205.) Although counsel had some discussions with a former probation officer named Jackie Lesmeister about having her do mitigation work, and Mr. Selvin vaguely thought she had reviewed some probation reports, she was never actually retained or paid, nor did she produce any work product, and no mitigation specialist or other penalty phase investigator was ever hired, or paid, or produced any work product.

Although Mr. Selvin testified that he thought he or his co-counsel

or both had been to the neighborhood on one occasion, Mr. Selvin did not say what he thought had been accomplished or whether the person they sought to contact was home. (ERT 1205.) Even if counsel's vague memory of having gone to the neighborhood was correct, nothing was done. There were no notes in the files of any interviews with anyone. No apparent substantive discussions were ever had with either of petitioner's parents. (ERT 1205.)

Mr. Stetler noted that the trial file did not contain even the most 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 petitioner himself. (ERT 1207.) He noted that petitioner'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 petitioner'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 petitioner grew up. (ERT 1208.) When asked by respondent 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.)

Thus, contrary to the referee's report and respondent's contentions, trial counsel's penalty phase investigation was not adequate in *any* respect. Social history investigation is key to the penalty phase and informs everything else that is done in a capital case– from settlement negotiations, to retaining and preparing mental health experts, to the presentation of the penalty phase itself– and requires a two-track effort consisting of extensive document gathering, on one hand, and extensive witness interviewing, on the other. The trial file demonstrates that counsel failed to take even the most rudimentary steps on either track. As a result, in addition to failing to uncover evidence of serious child abuse, trial counsel had no social history witnesses at all to present and no social history documentary material for their experts to work with other than what the prosecution had provided in discovery until the school records were obtained on the first day of the penalty phase.

In view of the foregoing, respondent's contention that petitioner, his mother, his father, and his sister either did not cooperate or would not have cooperated with counsels' efforts to conduct social history interviews (RB 21) is simply absurd. Mr. Selvin, who understandably has no desire to confess his own incompetence, complained on the stand of his inability to get "the family" to cooperate and vaguely thought he or Mr. Selvin had made some attempt to contact others in the family, but when pressed on this the only the evidence event suggesting a lack of cooperation turned out to be the fact that petitioner's mother did not show up for one and possibly

two meetings at counsel's office. Mr. Selvin thought the others in the family were petitioner's father and "someone else," who he thought might have been an uncle. However, there is absolutely no evidence whatsoever– not one scintilla– to suggest that petitioner's father or his sister, Cathie Diane Welch, or brother, Dwight Welch, were ever contacted by trial counsel at all. Petitioner submits that Mr. Selvin's vague recollection of contacting petitioner's father was based upon his having seen the single report of the interview Mr. Adams did with petitioner's father when Mr. Selvin reviewed the trial file two months before he testified at the evidentiary hearing. Once again, that interview was a guilt-phase interview done when prior counsel, Thomas Broome, was in charge of the case and was not the result of any effort by Mr. Selvin or Mr. Strellis.

Respondent notes that the referee found no evidence that petitioner's brother, Dwight Welch, or his former wife, Terry Yvonne West, would have provided useful information to the defense. Petitioner agrees there was no evidence to this effect, but this is in large part because both potential witnesses are now dead. Both were alive at the time of trial, however, and there is no evidence that trial counsel made any attempt to interview either of them, nor is there any evidence that they would *not* have assisted the defense if they had been asked. At the evidentiary hearing, petitioner presented their death certificates, among others, in order to show that trial counsel had a much larger community of potential social history witnesses from which to draw than post-conviction counsel did, and also in order to underscore the extent of counsel's indolence. However, there is no reason to believe that their testimony would not have been helpful. At a minimum, petitioner's brother could have confirmed the testimony given at

the hearing by his sister regarding the abuse both he and petitioner suffered at their father's hands. However, counsel made no attempt to contact him even though he was in a courtroom across the hall from petitioner during much of petitioner's trial.

The referee found counsel's efforts to interview petitioner's extended family to be inadequate. (Findings 43-45.) Respondent takes exception to this finding, arguing that it is illogical that petitioner's sister would be included within this extended family[6] group when the referee also stated, according to respondent, that she found petitioner's sister "no more likely than her mother to show up for an appointment or cooperate with defense counsel against her brother's wishes." (RB 22.)

First of all, the quoted passage of respondent's brief misstates the referee's findings regarding Ms. Thomas. While the referee in her credibility determinations did state that she was "not convinced Ms. Thomas would have cooperated any more than her mother did" (Findings 22), the referee did *not* find that Ms. Thomas would not have cooperated, nor did the referee make any reference to any evidence suggesting that Ms. Thomas failed to appear or would not have appeared for any appointment. To the contrary, the referee found Ms. Thomas's testimony regarding the abuse petitioner suffered as a child to be credible, and specifically found

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[6]/ The referee apparently included Ms. Thomas within petitioner's "extended" family because the prior section of the findings dealt only with petitioner's parents and found counsel's efforts to contact petitioner's parents to have been adequate. (Findings 42-43.) The following section then referred to family members who were not petitioner's parents and found efforts to contact these people were inadequate. (Findings 43-45.) Although Ms. Thomas was technically part of petitioner's nuclear rather than his extended family, the referee was clearly attempting to distinguish between family members counsel attempted to contact and others they did not.

trial counsel did not meet professional norms when they failed to contact and obtain social history from her. The referee also included Ms. Thomas's testimony in her discussion of what an adequate investigation would have produced. As previously noted, and contrary to respondent's highly editorialized presentation, there was also no evidence apart from Mr. Selvin's vague and unsupported surmise that petitioner made any effort to prevent family members or anyone else from cooperating with counsel,

Respondent also wildly misstates the evidence in suggesting that Ms. Thomas was present for "at least one of the incidents when counsel came to the house and were not admitted." (ERT 22.) There was no substantial evidence that counsel ever came to the house. The first transcript section respondent cites (ERT 464-466) contains Mr. Selvin's testimony vaguely recalling that he and Mr. Strellis went to petitioner's house. (ERT 466.) However, Mr. Selvin quickly added, "you know, I cannot recollect." (*Ibid.*) He also did not recall where petitioner lived, and did not recall the Sobrante Park neighborhood. (ERT 466-467.) At respondent's other cited transcript page supporting this contention, Ms. Thomas was asked whether "anyone" came to the house to speak to her– the implication being that this "anyone" was someone from the defense– 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.) However, in spite of respondent's wishful thinking, there was no evidence that this man was Mr. Selvin. Furthermore, nothing at any point in the record suggests that this man was "not admitted," as respondent claims.

There is simply no substantial evidence that counsel ever went to

petitioner's house. In his testimony, Mr. Selvin stressed that he actually had no independent recollection of having done so. (ERT 466.) As for the inference respondent draws from Ms. Thomas's testimony, not all Caucasian men are Mr. Selvin, and many people connected with the criminal justice system– police officers, attorneys, district attorney's investigators, parole officers, and even defense investigators like Mr. Olivier or prior counsel like James Giller– are Caucasian men who could easily have been interpreted by Ms. Thomas as being "someone" connected with the defense. The man did not speak to her, after all, but only to her mother. Moreover, as petitioner noted in his brief on the merits, Ms. Thomas attended petitioner's trial on several days and knew what defense counsel looked like. If the man who came to the house had actually been Mr. Selvin, she would have been able to identify him as defense counsel, even if not at the time he allegedly came to the house, then at least by the time she testified at the reference hearing. Thus, there is no substantial evidence that either defense counsel actually came to the house, and the inference from Ms. Thomas's testimony is that whoever the Caucasian man recalls seeing was, it was not petitioner's trial counsel.

However, even if assuming *arguendo* that the man who came to the house actually *was* either Mr. Selvin or Mr. Strellis, there is once again absolutely nothing in the file to suggest that anything was accomplished at this supposed meeting. There are no notes, no investigation reports, no interview tape or transcript– nothing to indicate that any meeting took place or, if it did, what was said. More importantly, however, Ms. Thomas testified that if she had been asked by counsel to testify, she would have done so. (ERT 1640.) Accordingly, respondent's attempt to find a fatal

inconsistency in the findings regarding Ms. Thomas must be rejected.

Respondent next argues that "in the 1980s context in which the penalty phase investigation necessarily was set, counsel could only have learned the names and whereabouts of extended family, like an aunt or an uncle, from sources within the immediate family, who were uniformly not cooperating." (RB 22.) As petitioner understands it, respondent appears to be arguing that locating witnesses in the pre-computer era simply could not be done without family cooperation. If that is respondent's contention, the argument is wrong and further emphasizes the problem resulting from respondent's failure to summarize and understand the testimony of Mr. Thomson and Mr. Stetler regarding the way mitigation investigations are conducted.

As both of these witnesses testified, any competent mitigation investigation begins with a record-gathering phase in which counsel or team-members collect vital records, school records, birth and medical records, military and correctional records, and any other documentation about the defendant's life that might be available. These records are summarized and organized into various working documents, such as a social history chronology that provides a quick reference to important events in the client's life. The documents also permit the defense to create a list of addresses where the client has lived at different points in his life, schools he has attended, past brushes with the law as a juvenile and as an adult, and other information such as the names, births and deaths of significant family members and their addresses. (See ERT 1042-1043, 1150, 1179-1181, 1186-1188, 1190, 1240-1241.)

One of the most important purposes such record gathering serves,

however, is in the development of a list of "players" or potential social history witnesses whose names appear in these records. For example, simply obtaining the publicly available vital records of a defendant and his parents will disclose the names, birth dates, places of births, and the parents and grandparents of the defendant. Even in the pre-computer era, cross-referenced vital record microfiche searches on the parents' and grandparents' names in those records often discloses other records relating to those individuals, including the identities of other children of the defendant's parents and grandparents, permitting all of the defendant's siblings, aunts and uncles to be identified and often located before anyone has even begun talking to individual family members. Continuing this cross-referencing process permits the development of a preliminary family tree. Competent counsel will typically conduct a vital record investigation early in the record-gathering phase, regardless of how cooperative family members may be, because memories fade and even facts which family members may believe to be true later turn out to be contradicted by contemporaneous records. Of course, vital records are not the only source of family information. School records often list the names of the defendant's siblings, teachers, principals, school nurses, coaches, and others with whom the defendant interacted as a child. The same is true for military, medical, probation, correctional, and other institutional records that have been developed during the defendant's life. (ERT 1043-1044, 1050, 1186-1190, 1240-1241.)

Petitioner's mother, Minnie Millender, was completely cooperative with petitioner's habeas counsel and was also completely cooperative with prior trial counsel, Thomas Broome, even to the extent of telling Mr.

Broome about the abuse she and petitioner had suffered at the hands of petitioner's father. (ERT 174, 224.) Moreover, while petitioner's father was dead long before the habeas investigation began in 2001, he too cooperated with Mr. Broome and gave an interview to Mr. Broome's investigator, Harold Adams. Indeed, the fact that petitioner's mother cooperated with prior and current counsel, and that his father cooperated with prior counsel, makes Mr. Selvin's self-serving contention that petitioner's parents would not cooperate with him highly implausible.

However, even if petitioner's parents had not been cooperative, there were many different pathways by which petitioner's extended family members could have been located. Petitioner's mother's birth certificate shows that Minnie Millender was born in the town of Natchez in Monroe County, Alabama, on August 7, 1934, that she was the child of Roy Millender Sr. and Jency Millender, and that she was delivered by a midwife named Sarah Millender. (Exh. N-1, Tab 65.) Cross-referenced record searches of these names would have disclosed that Roy and Jency Millender had other children, including a daughter named Sarah and a son named Roy, Jr. Two of these children, Roy Millender Jr. and Sarah Millender Perine, as well as Minnie Millender, were contacted by petitioner's post-conviction counsel, provided declarations that were included with his 2002 petition, and testified at the evidentiary hearing.

Of course, vital records are also not the only pathway by which these witnesses could have been identified. Respondent has apparently either forgotten or not closely reviewed the juvenile probation reports which the prosecution provided to the defense in discovery. These records also disclose the name of Mary Millender, wife of Roy Millender, petitioner's

uncle, with whom he stayed in early 1976 when he was having conflicts with his father. (Exh. N-1, Tab 56, David Esco Welch Juvenile Records, p. 33.) And, of course, these juvenile probation reports also disclose the name of Glenn Riley, a childhood friend of petitioner, who witnessed an act of child abuse referenced in the records. (Exh. N-1, Tab 56, David Esco Welch Juvenile Records, p. 4.) It is through these records that post-conviction counsel first learned of these people, placed their names on a players' list, and went out to interview them. Even in the dark ages of the 1980s, trial counsel could have done the same had they bothered to review the records for that purpose.

In short, contrary to respondent's contention, there were many ways to identify the very witnesses at the evidentiary hearing, including aunts and uncles, even if petitioner's parents had not cooperated. And, of course, the only evidence suggesting lack of cooperation is the vague and self-serving testimony of Mr. Selvin, which is unsupported by anything in the trial file or the record, is contradicted by the testimony of the social history witnesses, and when probed in direct examination turned out to be insubstantial.

Respondent's contends that "it took habeas counsel years to contact Sara (sic) Perine and Roy Millender, even with the belated cooperation of petitioner, his sister, and his mother." (RB 22.) This statement is not merely wrong but flatly contradicts the uncontradicted testimony of Mr. Stetler, which of course respondent has failed to mention anywhere in her brief. Respondent forgets that petitioner's dually appointed state postconviction counsel, George Boisseau, filed an appellate brief but never conducted a habeas corpus investigation or filed a petition. Petitioner's

current counsel was appointed by the federal court on March 21, 2002, received funding for investigation during the last few days of that month, conducted a whirlwind investigation, and filed the petition that stopped the federal AEDPA[7] clock only minutes before the deadline on June 24, 2002. (*Welch v. Woodford*, N.D. Cal. Docket No. 5:00-cv-20242-RMW, Doc. 47, Order of 3/21/02; *In re David Esco Welch*, Cal. Supreme Ct. #S107782, entry of 6/24/02.) Thus, as Mr. Stetler explained in his testimony, post-conviction counsel's investigation was actually conducted in a period of less than 90 days some 13 years after trial had ended. By contrast, 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.) Furthermore, 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.)

Thus, respondent's contention that it took habeas counsel "years" to contact these witnesses is not only incorrect speculation but contradicts the evidence adduced at the hearing and must accordingly be rejected. Respondent's further suggestion that counsel had "the luxury of years to wait out the death of petitioner's father or otherwise wear down the family's

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[7]/ The AEDPA is the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-1323, 110 Stat. 1214. 28 U.S.C. 2244 et seq. In general, the Act imposes a one-year statute of limitations on habeas corpus petitions filed by State prisoner, calculated from the last of several alternative dates. (28 U.S.C. 2244, subd. (d).

resistance" is again unsupported and incorrect speculation that contradicts the evidence at the hearing. Moreover, to the extent respondent suggests that post-conviction counsel intentionally and unethically delayed filing a petition so that inconvenient witnesses would die, respondent's suggestion is insulting. It is not petitioner's fault that his case sat gathering dust for 13 years before he obtained counsel and the funding necessary to investigate and prepare a petition. Far from benefitting from the death of so many witnesses who would have been available to trial counsel, petitioner's efforts to prove gestational and child abuse that occurred decades ago have been greatly hampered by the passage of time.

Respondent next takes exception to the referee's finding that counsel's investigation of other community members was inadequate. (RB 22.) Once again, respondent's argument is based largely upon facts that respondent wishes were true but that are in fact contradicted by a record that repeatedly shows counsel's performance fell far beneath the applicable standard of care. Respondent begins by stating that "counsel explained that they decided to focus on petitioner's mental health, recasting each violent act as a manifestation of petitioner's mental illness." (RB 22-23.) Respondent cites the testimony of Mr. Selvin for this proposition. (ERT 520-521, 537, 541.) Petitioner agrees that trial counsel attempted to show petitioner was mentally ill. However, respondent's presentation avoids any mention of the fact that counsel was forced to rely solely on two mental health experts because they had done no social history investigation at all, and even then threw together their penalty phase at the last minute after the conclusion of the guilt phase.

Respondent then goes on to discuss the juvenile and correctional

records which counsel "obtained and reviewed," ignoring the fact that with one exception all the records they "obtained" had been handed to them by the district attorney in discovery to substantiate the aggravating incidents the prosecution intended to present, and the school records were "obtained" by subpoena on the day the penalty phase began only because Dr. Pierce requested them.[8] Respondent then implies, without any citation to the record, that counsel made a strategic decision to follow up on some records and not others because, in respondent's opinion, some of the records "appear to support the antisocial personality theory of petitioner's behavior." (RB 23.)

This is an extremely puzzling assertion in view of the fact that respondent's own expert never even suggested that petitioner suffers from antisocial personality disorder. Indeed, in his entire testimony, Dr. Martell never once uttered the word "antisocial." (ERT 1827-1855.) If respondent wanted to argue to this court that petitioner's behavior is better explained by antisocial personality disorder than by the considerable evidence in the record of petitioner's "paranoia and delusional thinking, disorganization, easy distractibility," "borderline intellectual functioning" and "cognitive functioning," deficits in frontal lobe functioning, perseveration, and psychotic symptoms such as paranoid delusions and delusions of reference, and "organic brain dysfunction" *to which her own expert testified* (ERT

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[8]/ Respondent's contention that the records show petitioner was of "average intelligence" (RB 23) contradicts not merely the evidence but her own expert's testimony. Petitioner was tested both in grade school and by Dr. Froming and shown both times to have an IQ of 78. As respondent's expert, Dr. Martell, described them, these tests show "borderline intellectual functioning. This is an IQ that's above the level of mental retardation, but below the level that we call low average." (ERT 1840, 1854.)

1838-1845), then respondent should have introduced evidence to that effect at the hearing instead of waiting until now to assert it without any evidentiary basis.

Apart from the problem that there is no evidence to support respondent's suggestion of an "antisocial personality theory," respondent's suggestion that counsel proceeded to the penalty phase on the basis of some sort of carefully considered strategy to avoid an antisocial personality diagnosis is sheer fantasy. As noted, respondent cites nothing to support this theory, and the facts adduced at the hearing completely contradict respondent's unsupported speculation. Indeed, when respondent dangled this theory in front of Mr. Selvin on cross-examination, Mr. Selvin did not take the bait.[9] Far from suggesting that counsel had some tactical basis for

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[9]/ On cross-examination at the reference hearing, respondent asked Mr. Selvin whether he was "concerned" that the facts of the Rosemary Dixon incident that the prosecution presented in aggravation "would support an antisocial personality diagnosis as an alternative to some of the things that the other doctors were putting forth?" Mr. Selvin replied, "I mean, you know, you're asking me a enigmatical opinion, you know?" Respondent asked, "I think I'm only asking was it a concern?" Mr. Selvin replied "Yeah. I mean, that's what – you know, that's what the prosecution probably would argue, right? That, you know, look at this particular crime. Treat everything as a symptom, you know, of mental illness." (ERT 508-509.)

The foregoing exchange does not support respondent's speculative theory that trial counsel pursued a strategy of avoiding presenting facts that could result in an antisocial personality diagnosis. Respondent's question did not ask Mr. Selvin anything about strategy. Indeed, the Rosemary Dixon incident was actually presented by the prosecution in aggravation, and Mr. Selvin knew in advance that it would be; he had no choice with regard to whether or not it would come into evidence, so there was no strategic decision for him to make. Furthermore, Mr. Selvin's "yeah" response regarding whether he was "concerned" that this incident could be used as a basis for an antisocial personality diagnosis may appear from the cold record to be in the affirmative, but was actually expressed in such a tone as if to say "yeah, but that's what they always say," as if to indicate that it was *not* a serious concern. However, even if he had actually expressed genuine concern

not conducting an investigation, the facts instead paint a picture of counsel who had conducted no investigation whatsoever and therefore relied on two mental health experts to slap together a penalty phase presentation at the last minute, making bricks without straw because counsel had given them nothing to work with. (See, e.g., *Strickland v. Washington, supra*, 466 U.S. at pp. 690-691 ["ineffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when [he] has not yet obtained the facts on which such a decision could be made"].)

Dr. Pierce testified that he had had no involvement in the case for nine months when, in June, 1989, he received a call from Mr. Strellis informing him that the guilt phase was complete.[10] (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 any member of the defense team. (ERT 321-322.) Dr. Pierce said that soon after hearing from Mr. Strellis, he and Dr. Benson met with

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that the prosecution would argue antisocial personality disorder on the basis of the Rosemary Dixon incident, there was again no strategy call for him to make. If this cross-examination is the basis for respondent's "strategy" theory, it is no basis at all.

[10]/ The guilt verdict was returned on June 19, 1989. (CT 2473-2492; RT 5648-5656.) The penalty phase began before the same jury on June 26, 1989. (CT 2493; RT 5668.) The prosecution presented its case in aggravation, whereupon the July 4th holiday intervened, and Dr. Pierce and Dr. Benson testified on July 5 and 6, 1989.

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.) As far as Dr. Pierce knew, 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 him were limited to seven years of school records, one year of juvenile correctional records, select prison medical records, adult correctional records, and police reports. (ERT 324.) As noted above, all but the school records had been given to the defense by the prosecution. The trial file shows that petitioner's school records were subpoenaed and received 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, the same day the penalty phase began. (See Exh. N-3, Tab 100 [approximately 20 pages from the end of the exhibit]; CT 2493; RT 5668.)

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 estimated that he had two weeks between the completion of the guilt phase and the beginning of the penalty phase, during which time he cobbled together mitigation themes, reviewed social history records, developed a working diagnosis, and prepared to testify. (ERT 322-330.)

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 contained a listening device–Dr. Benson was able to learn little about Petitioner's social history from him. (ERT 430-431, 437, 440.)

Dr. Benson testified that he requested 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 and found guilty. (ERT 402-403.) 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 even aware of the existence of any of petitioner's family members other than petitioner's mother. (ERT 401.)

Mr. Selvin admitted on the stand that with the exception of the school records, the only social history records he and Mr. Strellis had were provided to them by the district attorney. He described the records as "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.) 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.)

In short, the evidence at the hearing overwhelmingly showed that counsel themselves did nothing to obtain any records until shortly before the penalty phase. The probation and correctional records were handed to them by the prosecutor, and the school records were obtained by subpoena only on the day the penalty phase began. Moreover, while counsel may have had the probation and correctional records for some time prior to the end of the guilt phase, they did not provide them to their two experts until after the guilt phase was complete and the penalty phase was about to begin. (ERT 321-323, 401-402, 409-410, 411.) As previously explained, counsel also interviewed no social history witnesses.

Far from being a "strategy," as respondent suggests, this was patent incompetence. In *Williams v. Taylor* (2000) 529 U.S. 362, the United States Supreme Court found counsel's performance inadequate because

they waited until the week before *trial* to begin preparing for the penalty phase. (*Id.*, at p. 395.) Here counsel conducted no investigation, gathered virtually no records, interviewed no social history witnesses, prepared no social history, and then waited until the week prior to the *penalty phase* to notify their two expert witnesses to prepare something for that phase. If the attorneys in *Williams* performed inadequately, then *a fortiori* Mr. Selvin and Mr. Strellis certainly did so as well. (See also, *In re Lucas*, *supra*, 33 Cal.4th at p. 708, 725-726 [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"]; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524; *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 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.)

Furthermore, as a matter of law neither counsel nor respondent may rely on a talismanic recitation of some supposed strategic purpose when they have not conducted an investigation to begin with. "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. Smith*, *supra*, 539 U.S. at p. 522-523; *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706, 719; *Strickland v. Washington, supra*, 466 U.S. at pp. 690-691 [counsel cannot make a strategic choice against pursuing a certain line of investigation when no investigation has been done].)

Respondent's contentions that "none of these reports even hint at serious child abuse," show such things as hospital visits or broken bones, or produced any witnesses who testified at the hearing (RB 23) are completely wrong, are again contradicted by the record of the evidentiary hearing, and would in any event be completely irrelevant. One would nor ordinarily expect law enforcement and correctional records provided to the defense by the prosecution in support of the prosecution's case in *aggravation* to document evidence of child abuse. Furthermore, the defense cannot simply rely on the state's own investigation but must conduct one of its own. (See, e.g., *Anderson v. Johnson* (5th Cir. 2003) 338 F.3d 382, 392 [failure of defense counsel to interview eyewitness, solely because nothing in the discovery he was provided by prosecution gave an indication the witness would be favorable to the defense, was per se constitutionally deficient performance].) Defense counsel cannot sit back and expect the prosecution to make their case in mitigation.

However, in this case, and contrary to respondent's contention, the records provided by the prosecution actually *do* contain child abuse information and actually *did* produce witnesses at the evidentiary hearing. The report of the MacPherson incident that respondent herself introduced at the evidentiary hearing shows that the shooting at the MacPherson home immediately followed an incident in which the then-teenaged petitioner's father threw a cup of scalding hot coffee on his bare skin. (Exh. N-1, Tab 56, David Esco Welch Juvenile Records, p. 4.) The MacPherson report thus itself *does* disclose an incident of child abuse, and more importantly, as Dr. Kriegler testified at the hearing, the fact that the incident occurred in public suggests that far worse things were happening behind closed doors. (ERT

1716-1717, 1781-1782.)

As for respondent's contention that no evidentiary hearing witnesses were derived from these reports, respondent is again flat wrong. Respondent forgets that the MacPherson incident report respondent introduced contains the name of Glenn Riley, a percipient witness to the MacPherson incident, and discloses the coffee-throwing incident through petitioner's statements. (Exh. N-1, Tab 56, David Esco Welch Juvenile Records, p. 4.) It was precisely through this very report that petitioner's habeas corpus investigation team first saw Mr. Riley's name, placed it on a player's list, included the incident in a social history chronology, and subsequently located, interviewed, and obtained a declaration from Mr. Riley. Mr. Riley, of course, testified as a social history witness at the hearing. The name of petitioner's uncle, Roy Millender, was also first, though indirectly, discovered through these reports. A juvenile probation report of January 19, 1976 disclosed that the department had received a call from petitioner's aunt, Mary Millender, who reported that petitioner had stayed with her and her husband at their home in Berkeley. (Exh. N-1, Tab 56, David Esco Welch Juvenile Records, p. 33.) Petitioner's habeas corpus team reviewed this report, contacted Ms. Millender and her husband, Roy Millender, and interviewed them. Mr. Millender also testified at the hearing. Respondent is once again making an entirely speculative argument that is actually contradicted by the record in respondent's possession.

Respondent's contention that there was no evidence that any of these witnesses would have been available or testified at the time of trial is also contradicted by the record at the evidentiary hearing. None of the social history witnesses who testified at the hearing had ever been contacted

by trial counsel or asked to testify at petitioner's trial, and all six stated they would have testified if asked. (RT 569 [Roy Millender]; RT 617 [Konolus Smith]; RT 1288 [Sarah Perine]; RT 1505 [Glenn Riley]; RT 1581 [Minnie Welch]; RT 1640 [Cathie Diane Thomas].) Respondent is again simply wrong on the facts and contradicting the record.

However, the core of respondent's exceptions to the referee's credibility findings, as well as respondent's later discussion of the findings on the referral questions themselves, consists of the wholly imaginary contention that counsel made some sort of "informed tactical choice" not to pursue mitigating evidence because they feared that such evidence would open the door to aggravating evidence of antisocial behavior. (RB 24-26.) Respondent cites nothing from the record of the hearing to support this fanciful theory, and as petitioner will explain below, the record again actually contradicts it. Moreover, the courts have repeatedly rejected this kind of knee-jerk, "open-the-door" argument whenever the state raises it in post-conviction proceedings. (See, e.g, *Williams v. Taylor, supra*, 529 U.S. at p. 396 [rejecting argument that competent counsel would not have presented juvenile records documenting "nightmarish childhood" because they also showed defendant had been incarcerated as a juvenile three times]; *In re Lucas, supra,* 33 Cal.4th 733 [evidence of child abuse does not open the door to aggravating evidence of subsequent misconduct in later childhood].)

The contention that counsel made some sort of tactical choice flies in the face of the record. Having conducted no investigation, they can hardly have made an "informed tactical choice" not to present evidence the never had in the first place. Furthermore, neither Mr. Selvin nor Mr.

Strellis ever suggested they made a tactical choice not to investigate or present evidence. As for respondent's theory that counsel feared mitigating evidence would open the door to a non-existent prosecution expert's antisocial personality diagnosis, as previously noted Mr. Selvin clearly resisted when respondent attempted to lead him down this particular pathway. (See footnote 9, *supra*; ERT 508-509.) As shown below, petitioner's *Strickland* expert also contradicted respondent's theory and explained that in a case with particularly bad facts, there is virtually no downside to presenting mitigating evidence.

However, the main problem with respondent's theory lies in respondent's misunderstanding of the nature of mitigation. For example, Konolus Smith's testimony about the incident in which petitioner, then in kindergarten, repeatedly attacked the much older and larger Mr. Smith over a torn shirt over a period of three days– evidence that both respondent and the referee misunderstand as showing petitioner "picked fights" as a small boy– is in fact *mitigating*. Indeed, it was presented by *petitioner* through the testimony of Konolus Smith to show that even as early as the age of five petitioner was demonstrating the impulsive and perseverative behavior consistent with frontal lobe brain damage that resulted from the gestational abuse he suffered in utero. This evidence in turn would have helped to mitigate the many aggravating incidents presented by the prosecution, all of which demonstrated the same kind of impulsivity and perseveration consistent with the diagnoses of petitioner's experts at the hearing.

Petitioner strongly disagrees with respondent's contention that competent counsel would not have called Mr. Smith as a witness on the grounds that he would have testified that petitioner "picked fights" in early

childhood. (RB 24, citing Findings 54.) Although petitioner agrees that the referee made a rather vague finding that can be read as respondent reads it, the referee's finding on this point was not supported by any testimony from Mr. Selvin or any expert, but was instead based on respondent's own speculation in respondent's proposed findings. The contention also contradicts the evidence at the hearing and must accordingly be rejected. Respondent makes similar contentions with respect to Glenn Riley, arguing that he would not have been presented as a witness at trial because he too would have testified about petitioner's fighting during elementary school. (RB 24-25.) Respondent is simply wrong.

As petitioner noted in his brief on the merits, it is not clear what the referee intended in her finding with respect to Mr. Smith. She clearly found his testimony to be credible. (Findings 23.) However, she then found it "unlikely" that a competent defense attorney would have called him as a witness. Contrary to respondent's reading, that is not the same thing as a finding that counsel *would not* have called him. With respect to Mr. Riley, the referee found his testimony entirely credible but found that competent counsel would not have even interviewed him because she "credits" Mr. Selvin's shocking testimony that he would not have investigated the MacPherson incident in aggravation on the grounds there were so many other aggravating incidents it would not have done any good. (Findings, at p. 24; ERT 519-521.) In his brief on the merits (see PBM 148-154), petitioner discussed at length the referee's completely erroneous finding regarding Mr. Riley– which *inter alia* makes Mr. Selvin's slothful behavior the very standard by which his performance should be judged– and will therefore only address respondent's additional contentions regarding this

witness in passing.

With regard to Mr. Smith, and in spite of the referee's finding to the contrary, the three incidents to which he testified most certainly *did* constitute serious child abuse, particularly the incident Mr. Smith witnessed in the restaurant and pool hall. Normal fathers do not sneak up on their children from behind in public places, punch or slap them in the head hard enough to knock them down, and then have to be physically pulled away and hustled out of the building by other men. Moreover, the referee either forgot or failed to understand the uncontradicted expert testimony of Dr. Kriegler, petitioner's trauma expert, who testified that the severity of abuse is not determined by the scope or nature of a physical injury but rather by the total impact, physical and psychological, of the abuse on the person who suffers it. (ERT 1704.) Dr. Kriegler testified that the developmental stage in a person's life at which the trauma occurs influences the way it affects a person, and that early protracted trauma is particularly debilitating. (ERT 1702.) Positive factors such a high I.Q., a good education, and positive parental attachment are protective factors in individuals who suffer traumatic experiences and tend to diminish the severity of trauma, while negative factors, such as genetic predisposition for poor medical or mental health, poverty, and lack of education– all of which are present here– are all risk factors which can increase trauma's magnitude. (ERT 1684, 1703, 1721.) It was her opinion, and that of three other mental health experts, that petitioner suffered gestational abuse and protracted early trauma for many years, all of which constituted serious child abuse. (ERT 1709, 1711-1712, 1722-1723; see also 339-343 [Dr. Pierce]; 411 [Dr. Benson]; 718-719 [Dr. Froming].) None of this testimony was ever contradicted or even

challenged, not even by respondent's mental health expert.

More importantly, however, as Dr. Kriegler testified, the three incidents to which Mr. Smith testified also constitute important evidence of abuse because they occurred *in public*. Child abuse is a dirty family secret that is normally kept behind closed doors. When it occurs in public, and particularly when it occurs *repeatedly* in public, it strongly indicates that the perpetrating parent is highly dysregulated and possibly even psychotic. (ERT 1716, 1717.) This is extremely significant because a parent who is so dysregulated as to inflict abuse on his son in public is likely inflicting much worse abuse inside the home. (ERT 1716-1717.) As Cathie Diane Thomas testified, in tears, in testimony the referee found to be credible, much worse abuse was in fact taking place behind closed doors.

The referee, apparently in reliance on respondent's proposed findings, also misunderstood the significance of Mr. Smith's testimony regarding the fact that petitioner "picked fights" as a child. As petitioner explained in more detail in his brief on the merits (PBM 295-296), the fact that petitioner would, as a kindergartner, fight with a larger, older boy over a torn shirt not once but repeatedly over a period of days demonstrated the impulsivity and perseverative behavior that typify frontal lobe brain damage, a condition petitioner probably suffered as a result of gestational abuse. That is why it was petitioner's counsel who inquired about the incident at the hearing, and competent counsel would have done so as well at trial because this behavior, like much of petitioner's behavior as a small child, showed just how badly damaged petitioner already was when he was entering kindergarten. Mr. Smith also 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. This behavior was further explained by petitioner's sister, who testified that petitioner was so obsessive and compulsive that as a child he had to get completely undressed to have a bowel movement. When he did this in school, the other children would ridicule him, peering at him over the top of the stall at school. Because he could not endure this repeated humiliation and teasing, petitioner refused to use the bathrooms at school and instead ran home when he needed to have a bowel movement, incurring the wrath of school officials for tardiness when he returned.

All of this testimony was presented so that the court would have before it eyewitness testimony of a percipient social history witness which the expert, Dr. Kriegler, could then explain as fitting into the picture of a small boy with brain damage. She further explained that this and much of the other social history evidence showed that petitioner's was neurologically damaged from birth, probably as the result of gestational abuse petitioner suffered in utero because when pregnant women are abused by their husbands they experience a surge of cortisol and other stress hormones that are toxic to the fetus. Mr. Smith's testimony also supported testimony that petitioner had an anxiety disorder, a common feature among children with compromised nervous systems and those who are abused.

Respondent's suggestion that competent counsel would not have presented testimony as important as that of Mr. Smith's– testimony the referee found credible– simply because it would show that petitioner

"picked fights" as a small child is therefore absurd. Even if petitioner's "picking fights" as a five-year-old might have had some negative impact on some juror, this downside would have been ludicrously trivial in comparison to the facts of the crime and aggravation circumstances.

While it is appears the referee accepted respondent's speculative argument and apparently did not fully comprehend the significance of Mr. Smith's testimony, it must be noted that her conclusion that competent counsel might not have presented it is also unsupported by any substantial evidence and is merely an uneducated guess on her part, a guess suggested by respondent's equally uneducated proposed finding. No expert or other witness at the hearing, including Mr. Selvin and Mr. Strellis, ever testified that competent counsel would not have presented this evidence, either in direct examination or cross-examination, nor did anyone ever suggest that competent counsel would not have presented the testimony of Mr. Riley on this basis. To the contrary, while there is a complete dearth of any evidence to support respondent's fanciful supposition or the referee's finding that competent counsel might not have presented Mr. Smith's or Mr. Riley's testimony, the testimony of petitioner's *Strickland* expert explained why competent counsel almost certainly *would* have presented mitigating testimony even if that testimony had some minor aggravating impact.

When respondent asked Mr. Thomson about the strategic downside of presenting mitigating evidence that was not entirely positive, Mr. Thomson responded that "[a]s a general principle, having some bad come in into a situation that is already very bad doesn't matter as much." (ERT 1141.) Mr. Thomson continued to explain that "if you have a case that has got considerable amounts of aggravating evidence, one more, if it also tells

a story of mitigation or something about the client, may not be much to worry about." (ERT 1142.) Although respondent did not ask petitioner's *Strickland* expert whether competent counsel would have presented Mr. Smith's or Mr. Riley, the implication of Mr. Thomson's expert testimony was that in a case like this one, where there are six dead bodies, two of them infants, and fourteen incidents in aggravation, no reasonably competent attorney would have hesitated to present evidence of petitioner's abuse, brain damage, and other impairments as an undersized child of five simply because it would have opened the door to evidence that he picked fights as a child. To the contrary, evidence of petitioner's impulsive and perseverative behavior as a child would have gone a long way toward mitigating the crimes and the other aggravating evidence because it would have explained *why* petitioner demonstrated similar behaviors as an adult.

Indeed, even Mr. Selvin himself appeared to reject respondent's fanciful theory that counsel would not have presented evidence in mitigation simply because it might have opened the door to antisocial behavior. When respondent asked specifically if Mr. Selvin was concerned that mitigating evidence of mental health problems might also support an antisocial personality diagnosis, Mr. Selvin responded that the prosecution would probably argue that theory, but that his and Mr. Strellis's position was that petitioner was a mentally ill person and that everything in his background and the facts of the crime itself had to be treated as symptomatic of mental illness. (See ERT 508-509.) Respondent's imaginary contention about counsel's imaginary "informed tactical choice" was thus contradicted by counsel himself, and the contention itself is absurd.

Furthermore, respondent had the opportunity to present expert witnesses to rebut petitioner's case but never put on a single witness to rebut Mr. Thomson's or Mr. Selvin's testimony or to otherwise opine as to what competent counsel would or would not have done, nor did respondent ever present any testimony from her own mental health expert to the effect that petitioner's picking fights with Mr. Smith or anyone else meant that he had antisocial personality disorder. Indeed, respondent never mentions the testimony of either Mr. Thomson or Mr. Stetler. Thus, respondent's theory is not based upon anything in the record but entirely upon her own imaginative powers and uninformed speculation.

With respect to the referee's unclear finding that it is "unlikely" competent counsel would have presented Mr. Smith, petitioner again submits that the referee cannot simply ignore substantial expert opinion testimony such as Mr. Thomson's and come to a contrary conclusion without any factual basis in the record that competent counsel would not have presented this evidence. The referee is an accomplished and respected jurist and was by all accounts a skilled district attorney, but to the best of petitioner's knowledge neither she nor respondent's counsel have ever represented a defendant in the penalty phase of a criminal trial.

However, petitioner's *Strickland* expert in his 32-year career has represented 25 capital clients in a number of different jurisdictions. (RT 1008, 1010.) Nine or ten of those 25 cases went to trial, and seven or eight went through penalty phase proceedings. (RT 1010.) None of those clients ever received the death penalty. (RT 1010.) In short, petitioner's expert knows what he is talking about, and his expert opinion is the only substantial evidence in the record on the question of what competent

counsel would have done in deciding whether to present mitigating evidence which also included potentially negative facts. Accordingly, petitioner respectfully submits that the referee's finding that it is "unlikely" that competent counsel would have presented Mr. Smith's evidence should be disapproved. Neither respondent nor the referee herself can substitute their own opinions for the evidence actually presented at the hearing on what competent counsel would have done, particularly since neither have ever been defense attorneys.

Most of respondent's remaining contentions regarding the referee's findings on credibility issues concern *Strickland's* prejudice prong and respondent's rebuttal witness, Dr. Daniel Martell. Petitioner has previously addressed most of these matters in his brief on the merits and thus will not repeat all this material here. However, a few of respondent's specific contentions merit reply.

Respondent admits that the referee's conclusion that additional evidence of child abuse would have been presented by counsel is supported by the record. (RB 26.) However, respondent endorses the referee's incorrect conclusion that petitioner did not prove he suffered gestational abuse. (Findings 56-57.) As petitioner explained in his brief on the merits, the expert opinion evidence from Dr. Froming and Dr. Kriegler (see ERT 719, 1709) that petitioner's neurological impairments probably resulted from exposure *in utero* to neurotoxic stress hormones such as cortisol was not only uncontradicted but was endorsed by Dr. Pierce and Dr. Benson, both of whom were presented as witnesses of historical fact and not as petitioner's experts. (ERT 339-343 [Dr. Pierce]; 411 [Dr. Benson].) The opinion was also not challenged by respondent's expert, Dr. Martell. There

is therefore considerable substantial expert opinion evidence that petitioner suffered from neurological damage resulting from gestational abuse and there is no substantial evidence at all to the contrary.

Under the circumstances, it is not clear why the referee found the evidence was not "proved." The referee appeared to conclude that Minnie Welch would not have cooperated with the experts at the time of trial, a finding with which petitioner profoundly disagrees, and which is difficult to understand in view of the fact that Mrs. Welch fully cooperated with both Mr. Broome and with postconviction counsel. However, the experts based their opinions regarding gestational abuse not solely on Minnie Welch but also on information obtained from her sister, Sarah Perine, whose testimony the referee found credible, a fact the referee never mentions.

It is true that petitioner could not produce blood samples drawn from Minnie Welch when she was pregnant with petitioner in 1958 to prove the presence of stress hormones in her bloodstream at that time. However, there was ample evidence from multiple sources that she suffered from persistent spousal abuse when she was pregnant with petitioner, and the uncontradicted testimony of multiple experts was that repeated physical abuse to the mother results in neurological damage to the developing fetus through the action of cortisol and other stress hormones.

There is also ample, substantial, and uncontradicted evidence that petitioner was neurologically impaired from birth. 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.) From 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)

He 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 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) He 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.)

Thus, there was ample, uncontradicted evidence that petitioner was neurologically damaged at birth, and the experts' uncontradicted opinion merely explained why this was so. Petitioner's evidence of gestational abuse thus did not rest solely on information from Minnie Welch, as the referee states (Findings 57) but also on such sources as Sarah Perine and the testimony of multiple witnesses showing petitioner was neurologically impaired from birth. When there is evidence of spousal abuse during pregnancy and evidence that the fetus was later born with neurological damage, it is a proper matter for experts to opine that the child's neurological damage likely resulted from the gestational abuse due to the mechanism of cortisol, a known and proven neurotoxin. It is entirely

unreasonable to insist that the proponent of such opinion evidence must also produce blood samples taken from the mother half a century earlier.

More importantly, however, petitioner submits that the proper inquiry is not whether the *referee* found expert opinion evidence of gestational abuse persuasive, but rather whether competent counsel would have presented this expert opinion testimony at trial, and whether it is reasonably likely that at least one juror would have found the evidence persuasive. The third referral question asked the referee to determine "[i]f 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?" (Order, 6/20/07.) Nothing in that question asks the referee to make a determination regarding whether she personally believed an expert's opinion or whether a reasonable juror would have believed it.

This court reserves to itself the ultimate decision on the merits of the claim. (*In re Ross* (1995) 10 Cal.4th 184; *In re Thomas* (2006) 37 Cal.4th, 1249, 1256.) The question this court will decide 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.) The expert opinion testimony regarding the gestational abuse and its connection to petitioner's neurological damage would have been part of "the available mitigating evidence" at trial. Certainly, no trial court would have excluded this testimony. The reference court's primary task is to resolve disputed fact and credibility issues arising within the framework of the reference questions. The ultimate question of

whether petitioner has presented evidence entitling him to relief on a claim of ineffective assistance of counsel is a mixed question of law in fact to be resolved by this court alone. (*Id.,* at pp. 1256-1257.) The referee's finding on whether an expert opinion was "proved" or would have been believed by a juror thus exceeds the scope of her duties under this court's referral question and precedents.

Furthermore, in *Porter v. McCollum* (2009) 558 U.S. 30, 42-43, the United States Supreme Court found that "it was not reasonable" for the Florida Supreme Court "to discount entirely the effect that [a mental health expert's] testimony [on brain abnormality and cognitive deficits] might have had on the jury or the sentencing judge" merely because the state court deemed the prosecution's experts more credible. *Porter* demonstrates that uncertainty about the ultimate persuasive value of the defendant's habeas evidence warrants *granting* habeas relief, not denying it. If a reasonable sentencer might find that the evidence preponderated in favor of the defendant, the task of evaluating the evidence must be consigned to a trier of fact at a new sentencing hearing. Expert opinion evidence should not be excluded solely because the referee was not persuaded by it or found an expert's opinion not "proved."

Petitioner has already explained in detail why the testimony of Dr. Daniel Martell should have been excluded as improper rebuttal and will not repeat all this material here. (See PBM 249-254.) Suffice it to say that respondent may only present a rebuttal witness to rebut petitioner's case-in-chief, and not to rebut witness testimony that merely replies to respondent's own 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 finding that Dr. Martell's evidence would have been available in rebuttal was therefore incorrect.[11]

However, as respondent sought to do in Dr. Martell's testimony and through her proposed findings, respondent uses the discussion of Dr. Martell primarily as an vehicle through which to once again recite the gruesome facts of the killings. Petitioner has previously addressed the extremely limited relevance of the guilt phase facts, but it is worth noting again that respondent's version of the facts is based upon a subjective, prosecutorial view of a trial at which petitioner was represented by defense counsel who failed to independently investigate and present evidence to show that petitioner was barely conscious when these killings occurred, or that the killings and aggravating incidents were all the product of a neurologically impaired and schizophrenic mind rendered even more dysfunctional by the simultaneous ingestion of alcohol, cocaine, and heroin.

Furthermore, while the referee admitted Dr. Martell's testimony over petitioner's strenuous objections, she refused to permit petitioner to at least present the evidence that petitioner's mental state at the time of the offenses was not what Dr. Martell or respondent assumed it was. Respondent's recitation of the facts is also highly colored by respondent's own subjective, unsupported, and incorrect conclusions that he lay in wait (RB 30), acted "strategically and patiently" before resorting to murder (RB 28), and demonstrated intact executive functions. (RB 31.) It is telling that

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[11]/ Petitioner also noted in his Proposed Findings to the Referee that most of Dr. Martell's testimony was not rebuttal evidence for the simple reason that, with one reservation, he completely endorsed the defense experts' findings regarding petitioner's brain damage and psychosis. (ERT 1838-1845; Proposed Findings 138-141.)

during her four-page discussion of the guilt phase evidence on which Dr. Martell would have opined (RB 28-31) respondent includes not a single citation to the trial record.

Respondent's closing discussion in her section on the referee's credibility findings concerns the MacPherson incident. (RB 32-34.) Respondent presents a feverish, *Police Gazette* description of this incident that is embellished by respondent's unsupported assumptions and chock full of lurid language. However, the short answer to respondent's argument is that it contradicts her earlier, equally unsupported argument that trial counsel somehow made an "informed tactical decision" to avoid presenting mitigation because it would have opened the door to evidence that petitioner picked fights as a child. If the MacPherson incident was truly as egregious as respondent portrays it, and if petitioner was really the "monster" she describes (RB 33), there can have been no meaningful downside to presenting *any* mitigating evidence. In particular, competent counsel would certainly have presented the testimony of Glenn Riley, a percipient witness to this incident, to explain that the incident began when petitioner's father locked him out of the house without a shirt on a cold December night and then threw a cup of hot coffee on him, and that this incident was only one in a long line of abusive acts by petitioner's father against his neurologically impaired and schizophrenic son stretching back into childhood, and through the abuse of his pregnant wife, even before petitioner was born. As petitioner noted in his brief on the merits, had counsel even investigated the documents with which they were spoon-fed by the prosecutor, they would have been able not only to make out a powerful case in mitigation about petitioner's history of serious child abuse,

but also to explain and therefore mitigate the MacPherson incident by showing that it was directly connected to petitioner's history of victimization at the hands of his father.

Contrary to respondent's lurid presentation, petitioner is not evil; rather, he is neurologically damaged, schizophrenic, and the victim of protracted early abuse. Although it is not incumbent upon petitioner to prove any connection between the mitigating evidence and the crimes, every one of the factors in aggravation and the crimes themselves were influenced by those mental health deficits and are linked by petitioner's history of serious child abuse.

B. Respondent's Briefing on the Merits Regarding the Referee's Findings on the Referral Questions Misrepresents the Applicable Law and Contradicts the Evidence at the Hearing; Respondent's Prejudice Analysis Is Deeply Flawed.

Respondent's analysis of the referee's findings on the referral questions themselves (RB 39-51) is divided into three sections: a section on the standard of review in cases of penalty phase ineffective assistance, a section comparing respondent's view of the evidence at the hearing to the evidence at trial, and a section addressing *Strickland* prejudice which primarily argues that no prejudice is present. Petitioner will again address respondent's contentions in this order.

1. Respondent's Discussion of Applicable Precedents Omits Any Discussion of the Controlling U.S. Supreme Court Decisions That Compel Relief for Petitioner

With respect to the standard of review, respondent accurately cites a number of cases dealing with the analysis of claims of ineffective assistance generally and in the penalty phase in particular. (RB 39-42.) However, most of the cases cited by respondent are state cases which predate *Williams v. Taylor* (2000) 529 U.S. 362 and the four other United

States Supreme Court cases on penalty phase ineffectiveness decided by the high court in the following decade: *Wiggins v. Smith* (2003) 539 U.S. 510; *Rompilla v. Beard* (2005) 545 U.S. 374; *Porter v. McCollum* (2009) 558 U.S. 30; and *Sears v. Upton*, (2010) 130 S.Ct. 3259, 177 L.Ed.2d 1025. Although these five U.S. Supreme Court decisions control over all lower court authority, nowhere in respondent's entire discussion of the applicable law does respondent ever mention any of these controlling cases. Moreover, as petitioner observed in his discussion of the applicable law in his brief on the merits (PBM 36-48), each of these cases except *Sears* was tried in the 1980s,[12] 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.) Indeed, it appears that the only U.S. Supreme Court authorities referenced in argument anywhere in respondent's brief are *Strickland* itself and *Burger v. Kemp* (1987) 483 U.S. 776, both of which also predate *Williams, Wiggins,* and the other authorities that control the legal analysis of penalty phase ineffectiveness.[13] Respondent's avoidance of any mention of these controlling cases does not improve the credibility of her argument.

Petitioner discussed these cases at length in his brief on the merits and will not repeat this discussion. However, very briefly, the cases set

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[12]/ As petitioner noted in his brief on the merits (PGM 39), 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.

[13]/ Respondent also cites in passing *Welch v. California* (2000) 528 U.S. 1154, the high court's one-line denial of certiorari in this case. (RB 2.)

forth, *inter alia*, the following guiding legal principles, none of which are alluded to anywhere in respondent's brief:

• Trial counsel in a capital case must conduct a thorough investigation into mitigating evidence. The investigation "should comprise efforts to discover *all reasonably available* mitigating evidence . . . ." (*Wiggins v. Smith, supra*, 539 U.S. at p. 524 [emphasis in original], 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.)

• Guides to determining whether counsel performed reasonably are found in the "well-defined norms" of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) and (2003). (*Wiggins v. Smith, supra*, 539 U.S. at p. 524.)

• Counsel must begin this investigation promptly and cannot wait until as late as the week prior to trial to begin preparing the penalty phase. (*Williams v. Taylor, supra*, 529 U.S. at p. 395.)

• In analyzing claims of ineffective assistance of counsel in the penalty phase, the reviewing court's "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*.'" (*Wiggins v. Smith, supra*, 539 U.S. at p. 522, as quoted by this court in *In re Lucas*,

supra, 33 Cal.4th at p. 725 [emphasis in original].)

• Counsel's duty to conduct a mitigation investigation is not excused simply because they encounter resistance from an uncooperative client or his family members. 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*, 588 U.S. at p. 40.)

• 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.)

Petitioner also notes that respondent places substantial reliance on dicta in *People v. Snow* (2003) 30 Cal.4th 43, apparently for the proposition that counsel should obey a client's desire to waive argument. (RB 41-42.) The case has no relevance here. First, *Snow* reached no decision on

ineffective assistance. In *Snow*, appellate counsel argued the trial court erred in failing to appoint new counsel when trial counsel declined to make an argument in the penalty phase. This court observed that the court would only have erred if trial counsel had been ineffective in waiving argument, and thus discussed such matters as whether the client in that case might have directed counsel not to make such an argument. (*Id,* at pp. 109-118.) This court concluded that the assertion that trial counsel rendered ineffective assistance in waiving penalty phase arguments "must properly await resolution on a fully developed factual record in a habeas corpus proceeding . . ." (*Id.*, at p. 118.) Thus, this court's entire discussion of ineffective assistance in *Snow* was dicta.

Furthermore, the case has no application here because petitioner did not direct counsel not to make a closing argument, nor was there any evidence that he ever said anything to counsel directing them to do or not do anything with respect to his penalty phase investigation. Mr. Selvin had a vague "feeling" that petitioner might have persuaded his "family" not to cooperate with them (ERT 465), but when pressed Mr. Selvin admitted that petitioner never made any statement to Mr. Selvin supporting this "belief" and that Mrs. Welch never said anything to him indicating she did not want to cooperate. (ERT 489.) Apart from Mr. Selvin's self-serving attempt to blame petitioner for his own failure to conduct any investigation, there is no evidence in the record that petitioner every interfered with counsel's investigation. While it is clear that petitioner did not want the world to know how profoundly mentally ill he was, the court overruled his objections to presenting the two mental health witnesses and placed no other limitations on the defense penalty phase presentation. Thus, even if *Snow*

had any legal force, it simply has no application here.

2. Respondent Misreads This Court's Opinion in *In re Lucas*, and Respondent's Theory That Counsel Made a Strategic Decision Regarding the Penalty Phase Investigation or Presentation is Contradicted By the Record.

Respondent's contention that "a substantial penalty phase defense was presented" (RB 42) begins with a misunderstanding of the law, a misunderstanding that results both from respondent's studied avoidance of controlling U.S. Supreme Court cases such as *Sears* and respondent's failure to understand the standard of care discussed both in those cases and in the testimony of Mr. Thomson and Mr. Stetler.

Respondent cites *In re Lucas*, *supra*, 33 Cal.4th 682 and notes that counsel in that case presented no evidence in mitigation. Following a selective discussion of the facts of the case, respondent concludes:

> Lucas establishes that, if counsel is aware of potentially powerful child abuse information with a causal connection to the adult behavior, has ready access to those with further information, can substantiate it with contemporary public records, and nevertheless elects not to investigate it because of a mistaken belief that it could not be helpful, then the complete failure to put on a mitigation case is ineffective assistance of counsel.

(RB 44.)

Respondent's reading of *Lucas* not only grossly misinterprets the holding in that case but discloses a complete misunderstanding of federal constitutional law pertaining to ineffective assistance in the penalty phase. A more complete review of *Lucas* shows that the case strongly supports petitioner's case for relief on a number of points.

In *Lucas*, the evidence showed that trial counsel conducted a substantial mitigation investigation, certainly far more than counsel performed here. Trial counsel in that case, James Patterson, interviewed the

defendant, his wife, his mother, and his sister. (*Id.*, 33 Cal.4th at p. 699.) In a telephone interview six days prior to the penalty phase, the defendant's sister told Patterson that the defendant had been in juvenile institutions from the age of six and had been a runaway, and was disciplined by his grandmother for wetting the bed by being kept under the bed for three days. (*Id.*, at p. 699.) Patterson also contacted the defendant's former employer, his pastor, his mail carrier, a court bailiff, a public defender who once represented the defendant, and two acquaintances. (*Id.,* at p. 700.) He also subpoenaed a number of other witnesses. (*Id.*, at p. 704.) He reviewed probation reports and hired three experts: a psychiatrist, a hypnotist, and a forensic psychopharmacologist. (*Ibid.*) The psychiatrist provided a written report that noted several factors in mitigation. (*Id.*, at p. 701.) Patterson intended to put the defendant and his wife on the stand to testify at the penalty phase, but both refused. Patterson then still had many of the other witnesses listed above available, but elected not to put them on the stand because he considered their evidence relatively trivial compared to the magnitude of the crimes. (*Id.*, at pp. 702-703.)

The referee found Patterson's investigation inadequate. Patterson had made no effort to locate records pertaining to the defendant's birth, childhood, or institutionalization or to confirm the lead he had been given by the defendant's sister regarding potential abuse or to follow up on other interviews with the defendant's brother and sister-in-law. (*Id.*, at p. 703-704.) Had Patterson performed an adequate investigation he would have discovered readily available public records showing the defendant was born out of wedlock, given up for adoption, later reclaimed by his birth mother, then placed in five foster homes, and finally returned to the home of his

mother and her new husband. School officials complained that the defendant arrived at school in first grade appearing to have been beaten black and blue. Subsequent records also documented extensive evidence of child abuse, and numerous witnesses also testified to that effect. (*Id.*, at pp. 709-710.) Several mental health experts also testified regarding the sequelae of abuse and the mental and emotional disabilities that the defendant suffered as a result. (*Id.*, at pp. 710-716.)

Like the referee, this court found Patterson's investigation inadequate. Although Patterson had interviewed a number of witnesses and reviewed a number of documents, such as probation reports, this court found he had fallen short of "the established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history." (*Id*, at p. 725.) Counsel had also "fell short of professional norms in his failure to proceed in a timely fashion with his investigation," a failure that left Patterson without recourse when the defendant and his wife refused to testify. (*Ibid.*)

This court rejected Patterson's and respondent's contention that he made a strategic choice not to present mitigating evidence because evidence of abuse would not make a difference or be helpful because it would lead to the admission of evidence that petitioner had begun his criminal career as a small child. (*Id.*, at p. 726.) This court noted that "a tactical decision may be unreasonable if based on inadequate investigation," and found Patterson's investigation of child abuse to be inadequate. This court also rejected Patterson's contention that the mitigating evidence would have done no good due to the severity of the crime, comparing the case to

Williams v. Taylor, *supra*, a case with egregious guilt facts in which counsel presented a penalty phase but failed to discover and present evidence that the defendant had been subjected to abandonment and abuse as a child. (*Id.*, at pp. 727-728.)

This court also specifically rejected respondent's argument that Patterson's inadequacies should be excused due to the defendant's failure to cooperate. The defendant in *Lucas* did not disclose to counsel that he had suffered abuse or abandonment, but this court noted there was no evidence that anyone had asked him, and that it is counsel's job to conduct an investigation into the defendant's background. Moreover, this court noted that the defendant "would not necessarily understand the significance of the information that would be uncovered by such an investigation." (*Id.*, at p. 730.) This court also rejected the contention that the defendant's mother had failed to cooperate or mention that she had abused and abandoned her son. This court observed that she was hardly a likely source of information and that there were other pathways by which the evidence could be obtained. (*Id.*, at p. 730.)

This court then turned to its prejudice analysis and noted that reliable evidence of abuse and abandonment had been readily available. The court then observed as follows:

> Had the jurors been provided with such evidence, 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."

We recognize the aggravated nature of the crimes, namely, the brutal and calculating attack on two frail, helpless elderly neighbors who could not have resisted the burglary and theft committed by petitioner, his flight, and his unsuccessful attempt to excuse himself with claims that he had been in a dream state. The circumstances of the crimes and of petitioner's prior attack on the young babysitter demonstrate deep moral culpability.

In addition, we acknowledge that there was a potential for the admission of powerful rebuttal evidence if testimony concerning petitioner's good character had been introduced, possibly opening the door to the introduction of evidence of petitioner's record of repeated juvenile offenses, poor behavior in juvenile facilities, and "revolving door" incarcerations. Evidence of petitioner's good relationships with various family members and friends, as well as his reputation as a good family man who loved his wife and children, could have been rebutted with evidence that he had struck his wife on two occasions during disputes, that he stole her welfare checks in order to purchase drugs, and that this conduct on his part was consistent with a lifetime pattern of taking what he wanted, lack of conscience, and violence when crossed. Good character evidence also potentially could have led to the discovery of adult robbery and escape convictions of which the prosecution had been unaware. A jury might have relied upon these acts as constituting a basis for deciding that society should be guaranteed protection against petitioner, especially in light of the evidence establishing that from his early childhood on, petitioner habitually ran away from home and escaped from juvenile placements. If petitioner had produced evidence that various juvenile institutions had failed to provide adequate services to him, the prosecution could have countered with evidence that from the time of his early childhood, efforts had been made to provide petitioner with therapy, but that he could not be helped and did not change—indeed, that he suffered from antisocial personality disorder or had been diagnosed as a psychopath at an early age and ultimately was considered untreatable.

Respondent has offered no theory, however, under which

> the compelling and disturbing evidence that petitioner was abandoned in infancy and, after being reclaimed, was beaten and subjected to grotesque abuse by his mother, stepfather, and grandmother in early childhood, legitimately could have opened the door to damaging rebuttal evidence. "[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.

(*Id.*, 33 Cal.4th at pp. 732-733.)

Re-weighing the evidence in aggravation against the totality of available mitigating evidence, this court noted that there was a reasonable probability that the jury would have reached a different verdict had it been aware of the mitigating evidence. (*Id.*, at p. 734-735.) This court found that "[a] significant potential exists that this evidence would produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision. The potential that the evidence would reduce petitioner's moral culpability in the eyes of members of the jury also is significant, even weighed against potential rebuttal evidence." (*Id.*, at p. 735.)

Lucas is instructive on many points and compels relief in this case, but nothing in the case supports respondent's crabbed reading. First of all, contrary to respondent's contention, nothing in *Lucas* suggests that counsel

will be found ineffective only if there is a "complete failure to put on a mitigation case." (RB 43-44.) Indeed, if *Lucas* had held any such thing the case would have been inconsistent with United States Supreme Court law. In *Sears v. Upton* the United States Supreme Court found trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court specifically noted that "[w]e 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.) Thus, respondent's contention that ineffective assistance can be could only when there is a complete failure to present a case in mitigation runs directly counter to Supreme Court precedent.

Lucas also does not say or imply that counsel will only be ineffective for failing to investigate if he was aware of "potentially powerful child abuse information with a causal connection to the adult behavior." (RB 43.) Patterson was informed that the defendant's grandmother had punished him for bedwetting by keeping him under the bed for three days, but while such treatment certainly constitutes abuse, Patterson was not aware of the wealth of other powerful child abuse evidence because he had done no record gathering other than the probation reports. Moreover, nothing in *Lucas* ever suggests that mitigating evidence of abuse must show a "causal connection to the adult behavior." The phrase never appears anywhere in the case, and petitioner can find nothing in the opinion that even suggests such a requirement.[14] To the contrary, this court

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[14]/ As noted *infra*, respondent appears to have found the phrase "causal connection" in this court's opinion in *In re Crew* (2011) 52 Cal.4th 126. As

in *Lucas* found that the evidence of abuse was important because it helped to explain the client's background in order to provide the jury with "some basis for understanding how it was that petitioner became the violent murderer he was shown to be at the guilt phase" (*Id.*, at p. 734.)

While record gathering is clearly a significant part of mitigation investigation, and while records in *Lucas* documented considerable evidence of child abuse, nothing in *Lucas* requires or even suggests that post-conviction counsel must substantiate evidence of child abuse with "contemporary public records." However, respondent forgets, or ignores the fact, that the records the prosecutor handed to trial counsel in fact *do* report an incident of child abuse. The report of the MacPherson incident shows that the incident began when petitioner got angry after his father threw a cup of hot coffee on him, and also provides a lead to a witness, Glenn Riley, who would have told counsel about more abuse, including petitioner's frequent whippings with an extension cord.

In short, *Lucas* actually does not say any of the things respondent wishes it would say. However, *Lucas* does affirm that trial counsel at the time of petitioner's case had a duty to conduct a thorough mitigation investigation.[15] Mr. Patterson, who was found ineffective for failing to

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petitioner will explain during that discussion, respondent's contention that a causal connection must be shown between mitigating evidence and the crimes misreads *Crew* and is flatly contrary to 40 years of U.S. Supreme Court precedent on the scope of mitigating evidence. (See, e.g., *Smith v. Ryan* (2004) 543 U.S. 37, 45 [state rule limiting mitigation to evidence that has a "link" or "nexus" to the capital murder is "unequivocally rejected"].)

[15]/ Neither *In re Lucas* nor the corresponding appellate opinion, *People v. Lucas* (1995) 12 Cal.4th 415, indicate when the trial in that case was held. However, the crimes occurred in October, 1986 (*In re Lucas, supra,* 33 Cal.4th at

conduct an adequate investigation, appears to have actually contacted and interviewed at least a dozen witnesses, obtained some probation records, and retained multiple experts. By contrast, Mr. Selvin and Mr. Strellis conducted no mitigation investigation at all. By Mr. Selvin's admission, the only documents they had were the probation and correctional documents handed to them by the prosecutor in discovery. (ERT 470.) School records obtained on the eve of the penalty phase by subpoena were obtained only because one expert suggested that they obtain them. (ERT 323.) Apart from clinical interviews with petitioner himself that were conducted by their experts, counsel interviewed no one at all. When petitioner's mother did not show up for at least one, and probably two, meetings at their office, they simply gave up, made no further attempt to interview anyone, and blamed petitioner for obstructing their investigation– an accusation for which Mr. Selvin admitted he had no actual evidence and which is contradicted by the testimony of multiple witnesses. (ERT 464-469, 488-489; see also 1582, 1592-1593 [Minnie Welch testimony], 569 [Roy Millender], 1288 [Sarah Perine], 1640 [testimony of Cathie Diane Thomas].) Contrary to Mr. Selvin's testimony, there is no evidence that any attempt was actually made to contact petitioner's father or anyone else who might possibly have been considered a social history witness. However, even if trial counsel had interviewed petitioner's mother, father, and "someone else," as Mr. Selvin

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p. 690), two months prior to those in petitioner's case, and the appellate opinion in that case is dated four years prior to the opinion in appellant's case. Petitioner accordingly assumes that the trial in *Lucas* preceded the 1989 trial in petitioner's case or was at least roughly contemporaneous with it. In any event, the same standards of care applied throughout the state during this period, and the standards applicable to counsel in *Lucas* therefore also apply here.

contended, that by itself would have been a pathetically inadequate investigation under the standard of care prevailing at the time of trial. In short, if Patterson's investigation in *Lucas* was inadequate, then *a fortiori* the "investigation" in this case was so grossly inadequate that it does not even deserve the name.

Lucas is also instructive on many other points relevant to this case. For example, the case holds that neither trial counsel nor respondent may hide behind a claim of the defendant's supposed lack of cooperation as an excuse for failing to conduct a mitigation investigation. (*Id.*, at p. 730.) It is counsel's duty to conduct a mitigation investigation, not the defendant's. The defendant cannot be blamed for failing to disclose to counsel that he suffered abuse as a child because he is unlikely to understand the significance of such evidence in the penalty phase. (*Ibid.*) Moreover, in this case, prior trial counsel, Mr. Broome, actually *was* aware of petitioner's history of abuse because petitioner's mother told him. Thus, if Mr Selvin or Mr. Strellis had bothered to call Mr. Broome to ask if he had conducted any investigation or turned up anything of interest during the year he served as lead counsel on the case, they would have learned this fact. Similarly, if counsel had retained an investigator or mitigation specialist and told them to interview petitioner's mother, she would have disclosed this fact to them. Contrary to respondent's contentions and some of the referee's findings that are based entirely on the vague and unsupported recollections of Mr. Selvin, neither petitioner nor any of his family members can be held responsible for counsel's failure to conduct an investigation.

Lucas also stands for the proposition that evidence of serious child abuse is substantially mitigating because it provides an explanation of how

the defendant came to be the violent murder he was shown to be in the guilt phase. It therefore must be investigated and presented and may by itself be found reasonably likely to result in a more favorable penalty phase verdict even in cases in which the guilt phase facts are particularly egregious, and even if the evidence might open the door to rebuttal. (*Id*, at pp. 732-733.) As petitioner will explain in greater detail at the conclusion of this brief, respondent's contention that the facts of this case are too egregious to be effectively mitigated by evidence of child abuse are incorrect and must be rejected.

Respondent is correct in noting that in *Lucas* there was no penalty phase at all, whereas in this case counsel presented two expert witnesses. (RB 44.) However, respondent's contention that this somehow constituted a "substantial penalty phase defense" or a "substantial mitigation case" is absurd. (RB 42, 44.)

Petitioner agrees that Dr. Pierce and Dr. Benson did the best they could under the circumstances to hurriedly assemble a penalty phase when counsel contacted them after the guilt phase was already over and the penalty phase was about to begin. Given the fact that they had no social history evidence to work with and that counsel had done no record gathering, their diagnoses were also not terribly far from the mark, though as Dr. Benson testified, the additional social history material would have greatly informed and altered his diagnosis in many respects.

However, as petitioner's *Strickland* expert testified, and as even Mr. Selvin acknowledged, presenting only mental health experts without lay witnesses is tactically inadvisable 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.) Mr. Selvin was even more forceful in his recognition of the problems inherent in attempting to construct a penalty phase solely around mental health experts. He testified 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.) Once again, the record contradicts respondent's contention that a competent or substantial penalty phase was presented simply because two mental health experts testified.

Respondent's description of events leading up to the penalty phase in the lengthy paragraph that appears at pages 44 and 45 of her brief on the merits bears no resemblance to the evidence adduced at the hearing, which may explain why the paragraph contains not a single citation to the record. Respondent contends that "[t]he available public records were gathered by counsel and analyzed by the two mental health experts." (RB 44.) As has been repeatedly explained, this is nonsense. Apart from the school records, counsel did not "gather" any records at all. They were handed the probation

reports and correctional records by the prosecutor and obtained the school records by subpoena on the day the penalty phase began only because Dr. Pierce requested them. (ERT 323.) Counsel also did not "seek more information from petitioner and his family," nor did they meet "a brick wall." (RB 44.) Dr. Pierce and Dr. Benson both conducted clinical interviews with petitioner; Dr. Benson himself conducted five. While petitioner was so paranoid he would not permit Dr, Benson to take notes and was convinced that his conversations were being monitored through a drain in the floor, petitioner talked repeatedly with mental health experts and thus at least cooperated to the extent his paranoia and mental illness permitted. (ERT 399, 431, 437.) Despite Mr. Selvin's self-serving testimony, there is no evidence whatsoever that any attempt was made to talk to anyone in the family other than Mrs. Welch, and her failure to appear for two meetings at counsel's office can hardly be considered running into a "brick wall." Moreover, both petitioner's mother and father were interviewed by prior counsel, Thomas Broome, or his investigator, Harold Adams, and it is difficult to understand why both petitioner's parents would cooperate with prior counsel but not with Mr. Selvin and Mr. Strellis.

Respondent again absurdly attributes to counsel a "decision to forego further social history investigation" that was supposedly based on a strategy of "not dredg[ing] up additional evidence that would cement an anti-social personality explanation for petitioner's shocking behavior." (RB 44, see also RB 45.) Respondent clearly likes this theory very much. However, there is absolutely nothing in the record to suggest that counsel made any such "decision to forego further social history investigation." The evidence shows no such investigation ever took place to begin with,

nor is there any other support for respondent's "strategy" fantasy. Respondent cites nothing to support it, either at this point or during her discussion of the credibility findings (RB 26), and Mr. Selvin himself resisted respondent's attempts to lead him down this pathway. (ERT 508-509.) Respondent simply concocts this "strategy" theory out of thin air and ignores the fact that trial counsel himself would not go along with her theory.

As for respondent's contention that "the prosecutor could have called an expert to clarify" that petitioner's behavior was better explained by "antisocial personality disorder" (RB 45), there is again no support in the record for this speculation. Respondent presented an expert at the hearing, but Dr. Martell said nothing of the kind. Furthermore, this argument flies in the face of the witness statement respondent obtained from the prosecutor, James Anderson, and presented to petitioner in discovery prior to Mr. Anderson's testimony at the hearing. That statement shows 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, Memorandum, M. O'Connor, 9/20/10.) In view of this witness statement, the referee's finding that the prosecution would have called Dr. Martell or a similar expert in rebuttal (Findings 61) is not merely wrong on the law as improper rebuttal of respondent's own cross-examination, but wrong on the facts as well. Neither respondent nor the referee ever explain why the prosecutor's own statement about what he would and would not have done is not conclusive on this point.

The remainder of this portion of respondent's brief on the merits is

taken up by citations to cases that discuss the principles for evaluating counsel's strategic decisions or decisions to stop investigating at some point. (RB 45-46.) However, once again respondent points to nothing at all to suggest that counsel made a strategic decision of any kind with respect to penalty phase investigation or presentation. Respondent's theory contradicts the record, and the principles for which respondent cites these cases therefore have no application to this case.

3. Even If This Court Were to Accept the Referee's Findings Verbatim In Spite of the Errors Petitioner Has Identified, the Findings Compel the Conclusion That Petitioner was Prejudiced By Counsel's Ineffectiveness.

Respondent's argument with respect to *Strickland* prejudice begins with a discussion of *In re Andrews* (2002) 28 Cal.4th 1234. (RB 47.) Respondent cites the case for the proposition that this Court has recognized that "[m]ental health expert testimony is often described as a 'double-edged sword'" and for that reason may excuse trial counsel's "strategic decision" not to investigate the defendant's mental health. (RB at p. 47.) Respondent is wrong.

First of all, respondent has misread the case. *Andrews* does not say that mental health evidence is a "double-edged sword." Some of the evidence offered at the *Andrews* reference hearing concerned the defendant's mental health. However, when describing "double-edged sword" evidence, the *Andrews* referee was actually referring not to mental health evidence but to the impact of the defendant's incarceration history, which began at age 16 and which reference hearing experts testified "prevented [the defendant] from adjusting to the free world" and alienated him from conventional society, leading him back to the familiar world of crime. (*Id.*, at p. 1245.)

Later in its *Andrews* opinion, this court cited "one appellate court" as explaining that "a tactical decision not to pursue and present potential mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance." (*Rector v. Johnson* (5th Cir. 1997) 120 F.3d 551, 564.) However, the "potential mitigating evidence" the Fifth Circuit described as "double-edged" in *Rector* also did not include evidence of the defendant's mental illness. (*Ibid.*) Later on in *Andrews* when this court evaluated trial counsel's performance, this Court also adopted referee's "double-edged sword" language, but again only as applied to "prison conditions," not to mental health evidence. (*Id.*, at p. 1258.) This Court went on to explain that the reason for this conclusion was that presentation of prison incarceration mitigation evidence in *Andrews* would necessarily require a parade of unsavory and impeachable prison inmate witnesses. (*Ibid.*) Thus, respondent is simply wrong in citing *Andrews* for the proposition that mental health evidence is a "double-edged sword." The case does not say that.

The case also has no application on its facts. The issue in *Andrews* was whether trial counsel acted reasonably in deciding, after conducting an extensive investigation into mitigating evidence, not to further pursue or present evidence about the defendant's incarceration history, which would have shown that he stabbed other inmates. This court found that trial counsel pursued this potential mitigation evidence sufficiently to reasonably determine that no further investigation was necessary. By contrast, petitioner's counsel conducted no investigation at all, gathered no records prior to the commencement of the penalty phase, and made no attempt to

interview any witnesses apart from two attempts to have petitioner's mother appear at their offices. Having conducted no investigation, counsel for petitioner were not in a position to determine that no further investigation into one particular area of mitigation was necessary.

While *Andrews* does not say that presenting mental health evidence is a double-edged sword, petitioner has previously noted that the evidence at the reference hearing showed that presenting *only* mental health experts without supporting testimony from social history witnesses is a very bad idea. 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 agreed with this assessment. (ERT 505-506, 531-532.) This evidence seriously undermines both respondent's contention that counsel presented a substantial case in mitigation, and the contention that any failing by counsel was not prejudicial. (RB 48-49.)

Respondent next turns to a discussion of *In re Crew* (2011) 52 Cal.4th 126. In the first part of *Crew*, this court found that trial counsel could not reasonably have discovered alleged abuse of the defendant by his mother. (*Id.*, at p. 152.) While both this court and respondent characterized this holding as a finding of "no prejudice" (see *In re Crew, supra*, 52 Cal.4th at p. 152; RB 47-48), this was in reality a finding that the defendant had failed to carry his burden of proof on *Strickland's* competence prong– obviously, if counsel could not have discovered the alleged abuse, counsel's investigation was not inadequate. Thus, while characterized as a ruling on prejudice, this portion of *Crew* did not involve a prejudice analysis at all;

there was no need for this court to reach the *Strickland* prejudice prong regarding this evidence because the defendant had failed to demonstrate that counsel had fallen below the standard of reasonable competence.

Later in *Crew*, this court did find that other evidence of the defendant's family background presented at the reference hearing failed to satisfy the prejudice prong of *Strickland*. That evidence was described as follows:

> Petitioner presented evidence that his mother was cold and aloof; that petitioner, his father, and his older brother had substance abuse problems; that petitioner, his mother, and his father suffered from depression; that petitioner's grandfather exposed him to an "oversexualized environment" and encouraged sexual activities; and that petitioner's older brother and friends of his brother exposed him to drinking, drugs, and sexual activities. But no evidence was presented that petitioner suffered the deprivations of an impoverished upbringing or that he was ever subjected to violence or physical abuse.

(*Id.*, 52 Cal.4th at p. 153.)

This court then reweighed the aggravating and mitigating evidence and determined that the mitigating evidence was not so significant as to undermine confidence in the outcome of the penalty phase. (*Id.*, at pp. 153-154.) This court explained its prejudice analysis as follows:

> The mitigating evidence petitioner presented at the reference hearing of his dysfunctional family might have elicited some jury sympathy for [the petitioner] at the penalty phase of his capital trial. But petitioner showed no causal connection between his family environment and his cold-blooded and calculated decision to brutally murder his wife, Nancy, a few months after they were married, for the sole purpose of obtaining her money and possessions. Even if petitioner's upbringing was not ideal, it was not so horrible as to leave him incapable of functioning as a law-abiding member of society. Penalty phase evidence presented by the defense showed that he had had good relationships with women, and that he had served in the military without incident and had been honorably discharged. Petitioner was not an immature youth when he

> killed his wife; he was in his late 20's. For these reasons, we find no reasonable probability that, but for trial counsel's alleged failings, the result of the penalty phase would have been different.

(*Id.*, at p. 153.)

Respondent seizes on this court's reference to a "causal connection" in the foregoing passage and argues from this language that prejudice can only be established if the petitioner can show that the evidence of abuse presented at the reference hearing proves that abuse *caused* the crimes. (RB 48-49; see also RB 43.) Petitioner agrees that this court found no causal connection between the family background evidence and the murder in *Crew*, but petitioner does not understand this language as requirement that a causal connection must be established between mitigating evidence and the crime in order to show prejudice from *Strickland* error in the penalty phase.

Indeed, for a state court to demand that mitigation have a "causal connection" to the capital murder in order to establish *Strickland* prejudice would constitute clear Eighth Amendment error. (*Smith v. Ryan* (2004) 543 U.S. 37, 45 [state rule limiting mitigation to evidence that has a "link" or "nexus" to the capital murder is "unequivocally rejected"]; *Tennard v. Dretke* (2004) 542 U.S. 274, 287 [capital defendant need not show nexus between her diminished mental capacity and the crime]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [jury must be permitted to consider and give effect to any aspect of the defendant's character and record in mitigation]; *Payne v. Tennessee* (1991) 501 U.S. 808, 822 ["a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death"]; *Boyde v.*

California (1990) 494 U.S. 370, 377-378 ["The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner"]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [state statute may not preclude sentencer from considering any mitigating factor, nor may sentencer refuse to consider any relevant mitigating evidence].)

The purpose of mitigating evidence is not to show why the crime happened but to permit "the sentencer to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh, supra*, 492 U.S. 302, 319.

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "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."

(*Ibid.*, quoting *California v. Brown* (1987) 479 U.S. 538, 545 (O'Connor, J., concurring).)

Mitigating evidence need not be related to evidence of the crimes in any way. In *Hodge v. Kentucky*, (2012) ___ U.S. ___, 133 S.Ct. 506, Justice Sotomayor recently dissented from the United States Supreme Court's denial of certiorari in a capital case alleging, *inter alia*, ineffective assistance in the penalty phase. Justice Sotomayor noted that the Kentucky Supreme Court erred in its *Strickland* prejudice analysis in that case when it "reasoned that the defendant's evidence in mitigation might have altered the jury's recommendation only if it 'explained' or provided some 'rationale' for his conduct." (*Id.*, at p. 509 (Sotomayor, J., dissenting).)

> We have made clear for over 30 years, however, that mitigation does not play so limited a role. In *Lockett v.*

> *Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), we held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "any aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(*Ibid.*)

Accordingly, respondent's contention that a "causal connection" must be shown between mitigating evidence and the crime itself contradicts a consistent line of United States Supreme Court precedents dating back to the beginning of the post-*Furman* era and must be rejected.

Respondent's efforts to trivialize the evidence of the abuse petitioner suffered at the hands of his father also fail. (RB 49.) Respondent again cites nothing in support of her claim that the evidence was "less than compelling," and again the contention contradicts the record. Quite to the contrary, the evidence that this court found missing in *Crew*, i.e., "evidence . . . that petitioner suffered the deprivations of an impoverished upbringing or that he was ever subjected to violence or physical abuse," is abundantly present here. Petitioner has summarized some this evidence in his brief on the merits (PBM 154-174) and will not repeat it all again here. However, when this court reweighs the evidence in aggravation against the totality of evidence in mitigation, this court will find that the evidence from the hearing presents a compelling narrative picture that was entirely missing from petitioner's trial. Petitioner has argued elsewhere that the referee's findings excluding certain evidence from consideration were clearly in error. However, even if the referee's findings were to be adopted verbatim, the new evidence nevertheless compels reversal.

The two mental health experts who testified at petitioner's trial

could not and did not present a narrative of petitioner's life. However, a rich and extremely sympathetic social history narrative was available and could have been presented had counsel done even the most perfunctory investigation. That narrative would have showed that petitioner was born to a mother raised in the segregated south in conditions of extreme poverty and educated in a two-room school from which she did not graduate. It would have shown that petitioner's father was a severe alcoholic who beat his wife while she was pregnant with petitioner. It would have shown that petitioner was born with neurological damage and a compromised brain, as well as genetic predispositions for schizophrenia and alcoholism. It would have shown that he was raised first in a substandard unit in a building so rife with safety and other code violations that it was soon condemned and torn down, and later in a neighborhood in which drugs, violence, and death were ever-present.

The social history evidence also would have shown that petitioner was undersized, uncoordinated, could not run normally or without falling down, could not tie his shoes until kindergarten, and suffered from a speech impediment that made it impossible for his parents even to understand him until he reached school age and was treated by a speech therapist. The evidence would have shown that petitioner was academically impaired, placed in special classes that were reserved for students with mental and emotional problems, and that even in late childhood and early adolescence his friends questioned whether he was able to read billboards.

The evidence would also have shown that his father brutally beat him, slapping and hitting him even as a very small child, administering frequent whippings with an extension cord that left visible loop-shaped

welts on his back, shutting him in a closet as punishment for minor sins. Unlike his brother, Dwight, petitioner never cried out during these whippings, a fact which Dr. Kriegler said indicated that petitioner was likely dissociating during these experiences, entering an altered state of consciousness as an instinctive method of self-protection. Petitioner's father even assaulted him in public on multiple occasions, a fact Dr. Kriegler found particularly remarkable and unusual because it indicated that petitioner's father was highly dysregulated and suggests that abuse far worse than the public incidents was likely taking place behind closed doors when there were no witnesses to restrain him.

The evidence would have shown that petitioner was so obsessive and compulsive as a small child that he had to disrobe entirely to take a bowel movement, and when the other children in school ridiculed and humiliated him for this, he refused to use the bathrooms at school thereafter and ran home when he needed to use the toilet even though this resulted in further discipline at school for truancy. As petitioner's experts testified, obsessive-compulsive disorder is an anxiety disorder, a further indication of this neurologically compromised boy's reaction to the abuse he suffered at the hands of his father.

The narrative social history evidence also would have shown that petitioner was surrounded by death and violence, and that many of his friends died as children and adolescents. It would have shown that petitioner began drinking alcohol as a small child, even prior to puberty, a fact which Dr. Benson said nearly always indicates that the child is self-medicating organic brain disease.

Even the foregoing, highly condensed, two-page version of the

narrative of petitioner's early life is far more compelling than the presentation at petitioner's trial; indeed, the jury was given no narrative at all. No one who actually knew petitioner or his background first-hand ever testified, and none of their evidence was even gathered or interpreted by a social historian or similar expert. The jury therefore knew *nothing* about petitioner's "background and character," the presentation of which is, after all, the whole purpose of a penalty phase. The jury needed to hear the narrative social history evidence in order to understand that petitioner was neurologically impaired and mentally ill, and not simply evil, as the prosecutor and respondent insist.

Without any of this evidence to support their conclusions, the mental health experts had only their own "hired gun" opinions to offer, and while their diagnoses of mental illness and organic personality syndrome were not far off, these diagnoses were not persuasive to the jury because they were entirely unsupported by any social history and presented solely by experts who had been paid for their opinions. The foregoing narrative would have demonstrated in a real-world, common-sense manner just how severely impaired petitioner actually was a quarter century before the crimes in this case took place. Thus, the language this court used in *Lucas* is equally applicable here: "[h]ad the jurors been provided with such evidence, 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." (*In re Lucas, supra*, 33 Cal.4th at p. 732.)

Petitioner has previously addressed respondent's repeated contentions that the mitigation evidence does not reduce petitioner's moral

culpability because the offenses in this case constituted "the worst mass murder" in Alameda County in 25 years. (RB 51.) However, to the extent that respondent implies that the facts of the crime are so aggravated that no jury would have voted for life, respondent is simply wrong.

Courts have often found trial counsel's failure to present mitigating evidence to be prejudicial even in cases with extremely aggravated guilt facts. The United States Supreme Court has frequently granted or affirmed relief in such circumstances. The victim in *Wiggins* was a 77-year old woman drowned in a bathtub during a home invasion. (*Wiggins*, 539 U.S. at 514.) The victim in *Rompilla* was stabbed repeatedly and set on fire, and the defendant had previously been convicted of rape. (*Rompilla*, 545 U.S. at 377, 383.) The defendant in *Williams* beat a man to death with a mattock during a robbery and had a startling history of violence. Aggravating factors included armed robbery, burglary and grand larceny; two auto thefts, two separate violent assaults on elderly victims; an arson; and another "brutal assault" on an elderly woman, resulting in the victim being left in a vegetative state; and an arson in jail while awaiting trial. (*Williams*, 529 U.S. at 367-68.)

In *Earp v. Stokes* (9th Cir. 2005) 423 F.3d 1024, the Ninth Circuit found that the district court abused its discretion in denying an evidentiary hearing on the petitioner's ineffective assistance of counsel claims on the ground that "any omitted mitigation evidence would not have made a difference to even a single reasonable juror because the nature of [petitioner]'s crime was so egregious." (*Id.*, 431 F.3d at 1180.) The Circuit explained:

> The aggravating circumstances of this case [rape and murder of an 18 month old child] are indeed heinous.

> However, as we have previously noted, the Supreme Court has made clear that counsel's failure to present mitigating evidence can be prejudicial even when the defendant's actions are egregious.

(*Ibid.*, internal quotations and citations omitted).)

Many other cases in the Ninth Circuit and other circuits have resulted in relief in highly aggravated circumstances. (See, e.g., *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 828 [prejudice found even though Silva stood convicted of a gruesome abduction of two college students, the robbery and murder of a man who Silva and his accomplices chained to a tree while they repeatedly sexually assaulted his girlfriend, and who they then killed and dismembered with an axe]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 929 ["Even in the face of this strong aggravating evidence," a death sentence is rendered unreliable "if we cannot conclude with confidence that the jury would unanimously have sentenced . . . [the defendant] to death if . . . [counsel] had presented and explained all of the available mitigating evidence"]; *Lambright v. Stewart* (9th Cir. 2001) 241 F.3d 1201, 1208 ["Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case"]; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1036 [argument that heinous crimes make mitigating evidence irrelevant was rejected; the court noted that "the factfinder in California has broad latitude to weigh the worth of the defendant's life"]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614 [finding *Strickland* prejudice where defendant was convicted of murdering 13 people].)

Many state and federal capital cases involving multiple victims, and even more than in this case, have resulted in appellate reversal or life sentences at the trial level. For example, in *Anderson v. Sirmons* (10th Cir. 2007) 476

F.3d 1131, the United States Court of Appeals for the Tenth Circuit reversed an Oklahoma death sentence due to prejudicial ineffective assistance of counsel even though the defendant was convicted of killing three people. In *Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, the Tenth Circuit reversed another Oklahoma death sentence due to prejudicial ineffective assistance of counsel even though the defendant had been convicted of killing *five* people, including three children. In *Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, the Sixth Circuit reversed an Ohio death sentence on ineffective assistance of counsel during sentencing grounds in a case where, similar to this, the defendant had been convicted of two counts of aggravated murder and one count of attempted murder. As noted above, in *Mak v. Blodgett*, *supra*, 970 F.2d 614, the Ninth Circuit affirmed a federal district court's reversal of a Washington State death sentence where the defendant was convicted of *thirteen* first degree murders.

Strickland prejudice has similarly been found in cases where the defendant was found guilty of killing children. (See, e.g., *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1091 [defendant killed two teenage girls; "The gruesome nature of the killing did not necessarily mean the death penalty was unavoidable"]; *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1114 [court concluded remand for hearing necessary even though Wallace pled guilty to killing three people and the circumstances of the crime were "brutal and undisputed." Wallace struck his girlfriend's sixteen-year old daughter repeatedly with a baseball bat and, as she lay on the floor, he forced the broken bat through her throat until it hit the floor. He then struck his girlfriend's twelve-year old son repeatedly with a pipe wrench, fracturing his skull and leaving brain matter on the floor]; *Smith v.*

Stewart (9th Cir. 1999) 189 F.3d 1004, 1013 [defendant killed two teenage girls; "[T]he horrific nature of the crimes involved here does not cause us to find an absence of prejudice"]; *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1257-58 [the omission of mitigating evidence was prejudicial even though Caro killed two teenage cousins and the factors in mitigation included evidence that Caro stalked one victim before killing him, lured two other victims to come near so that he could shoot them at close rage, attempted an alibi, and had previously kidnaped and sexually assaulted other victims. "Because it has been established that Caro suffers from brain damage, the delicate balance between his moral culpability and the value of his life would certainly teeter toward life."].)

California juries have often voted for life in cases with multiple homicide victims and egregious facts. A jury sentenced Angelo Buono, the "Hillside Strangler" who terrorized the Los Angeles community and killed nine young women, to less than death. *See* Linda Deutsch, *Life Term Given in 'Strangler' Case*, PHILADELPHIA INQUIRER (Nov. 19, 1983). A California jury also sentenced another serial killer, Brandon Tholmer, who was found guilty of murdering four elderly women while committing rape, sodomy, arson, and burglary, to less than death. Terry Pristin, *Jury Votes to Spare Life of Killer of 4 Women*, LOS ANGELES TIMES (Aug. 9, 1986). Serial killer Dorothea Puente was also sentenced to less than death when a California jury deadlocked on whether to impose death for killing three people. Wayne Wilson, *Jurors Deadlock; Puente to Get Life*, SACRAMENTO BEE (Oct. 14, 1993). Also in California, a jury sentenced Dennis Boyd Miller to less than death for three execution style homicides, Nick Welsh, *Build It So They Won't Come*, SANTA BARBARA INDEPENDENT (Feb. 14,

2008). Another jury sentenced Toufic Naddi to less than death for murdering his wife and four other relatives. *Jurors Recommend Life Without Parole for Naddi*, LOS ANGELES TIMES (July 10, 1990).

California cases also show that juries have rejected death sentences in cases in which children have been among the victims. (See, *People v. Demirdjian* (2006) 144 Cal. App. 4th 10 [defendant killed in a particularly brutal way two boys aged thirteen and fourteen; death sentence rejected]; *People v. Noriega* (2008) 2008 WL 5206708 (unpublished) [defendant killed his girlfriend, her two-year-old daughter, and her eight-month old fetus; death sentence rejected]; *People v. Rapoza* (2007) 2007 WL 2285939 (unpublished) [defendant killed his wife, her unborn fetus, and their four-year old child; death sentence rejected]; *People v. Singh* (2003) 2003 WL 264698 (unpublished) [defendant killed his girlfriend, her six-month old child, and her unborn fetus; death sentence rejected]; *People v. Abrams* (2003) 2003 WL1795626 (unpublished) [defendant killed two toddlers and seriously injured several others; death sentence rejected].)

Petitioner completely disagrees with respondent's contention that the crime was too aggravated to be mitigated, and believes that a jury would have found the social history evidence and the expert evidence explaining its significant both sympathetic and persuasive. Had this evidence been presented, the jury would have recognized that petitioner's profound impairments are very real and not simply the unsupported paid opinion of an expert, would have understood that such a person is less morally culpable than someone without these impairments, and would have voted for life.

However, it is not necessary for this court to resolve this dispute between respondent and petitioner. Habeas corpus relief is compelled if it is reasonably likely– a likelihood less than a preponderance of the evidence– that at least one juror would have voted for life on the basis of the totality of the new and pre-existing mitigating evidence. (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694; *Wiggins v. Smith, supra*, 539 U.S. at 534; *In re Lucas, supra,* 33 Ca1.4th at pp. 690, 733.) The question is not for an appellate court "to imagine what the effect of certain testimony would have been upon us personally," but rather 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).) By that standard, there can be no doubt that petitioner is entitled to relief.

Before closing, petitioner notes that this court's referral questions did not permit him to fully investigate and present the penalty phase that should have been presented at trial. Because the referral questions limited petitioner to issues pertaining to serious child abuse, many other themes, such as institutional failure and other matters, could not be explored or presented. Petitioner also was not permitted by the referral questions to investigate and confront all of the aggravating circumstances presented by the prosecution. Petitioner believes the record in this matter is more than adequate to establish prejudice, but in order to ensure preservation of all his claims of ineffective assistance in the penalty phase, respectfully objects on due process grounds that the restrictions of the referral questions did not permit him to fully demonstrate all the inadequacies of counsel's investigation or the prejudice from those inadequacies on penalty phase issues other than serious child abuse.

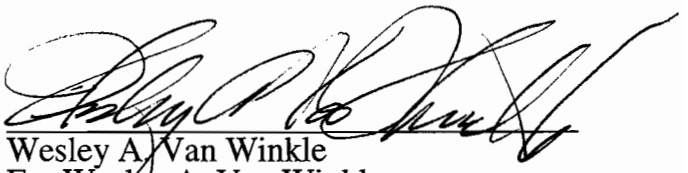
However, given the complete absence of any social history presentation at trial or any hint of serious child abuse, neurological impairment from birth, family history of poverty and deprivation, or any of the other matters discussed herein, counsel's complete failure to conduct a mitigation investigation must be found prejudicial even if this court were to adopt the referee's findings verbatim. Under these circumstances, this court must grant habeas corpus relief.

CONCLUSION

For the reasons set forth herein, this court should grant habeas corpus relief to petitioner on both his juror misconduct claim and his claim of ineffective assistance of counsel in the penalty phase.

Dated: October 3, 2013

Respectfully submitted,



Wesley A. Van Winkle
For Wesley A. Van Winkle
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Counsel for Petitioner
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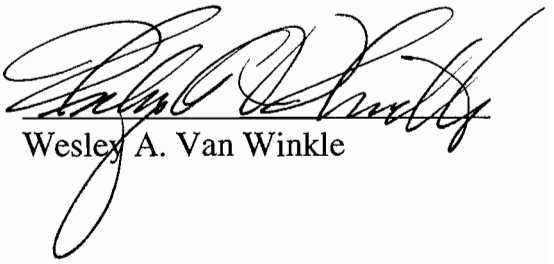
CERTIFICATE OF WORD COUNT

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 REPLY TO RESPONDENT'S EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS**. 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 27,501 words.

Executed this 3rd day of October, 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 REPLY TO RESPONDENT'S EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE REFEREE AND BRIEF ON THE MERITS** 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 October 4, 2013.

Carol Friedman