SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re ROBERT LEWIS, JR.,	) CAPITAL CASE
	)
On Habeas Corpus.	) Case No. S117235
	)
	) (Los Angeles Superior Court
	) Case No. A027897)
	)
	)

REPLY/TRAVERSE TO RETURN TO

PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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	)	
On Habeas Corpus.	)	Case No.S117235
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	)	**REPLY/TRAVERSE TO**
	)	**RETURN TO PETITION**
	)	**FOR WRIT OF HABEAS**
	)	**CORPUS**

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

PETITIONER, Robert Lewis, Jr., through his counsel, hereby files this Reply/Traverse in response to the Return to Petition for Writ of Habeas Corpus. Petitioner hereby incorporates by reference each and every material fact alleged in the Petition for Writ of Habeas Corpus, Exhibits 1-64 filed in support of the Petition for Writ of Habeas Corpus, Informal Reply to Informal Response to Petition for Writ of Habeas Corpus, and Exhibits 65-69 filed in support of Informal Reply to Informal Response to Petition for Writ of Habeas Corpus. Petitioner denies each and every allegation and argument set forth in the Return including each allegation indirectly averred through various incorporations by reference, except that which is hereafter expressly admitted.

I.

Petitioner admits that he is currently held in custody by the California Department of Corrections at the California State Prison, San Quentin, where he is an inmate on death row.

II.

Petitioner denies committing the offenses of murder with special circumstances, robbery and use of a gun. He denies that on October 27, 1983, he went to the home of Milton Estell, bound and gagged Mr. Estell, and stabbed him in the chest and shot him in the back. He admits that Mr. Estell died from his wounds but denies that he inflicted the wounds. He admits that he was apprehended in Mr. Estell's Cadillac five days later. He denies that he possessed a forged bill of sale. He denies he told investigating officers that he purchased the car several days before the killing with money he won in Las Vegas.

Petitioner admits that his previous petition for writ of habeas corpus, filed on April 29, 1988, was denied. He admits that his convictions and death sentence were affirmed in part and vacated and remanded in part with directions in the first appeal. (*People v. Lewis* (1990) 50 Cal.3d 262.) He admits that his convictions and death sentence was affirmed in the second appeal. (*People v. Lewis* (2004) 33 Cal.4th 214.) However, Petitioner denies that the judgment against him is lawful.

Petitioner admits that he filed the instant petition on July 2, 2004, that Respondent filed an informal response on November 7, 2003 and that he filed an informal reply on

April 16, 2004. He admits that this Court issued an order directing the Director of the Department of Corrections and Rehabilitation to show cause why relief should not be granted as to Claims XIV, XV, XVI and XVIII.

III.

Petitioner denies that he was lawfully and constitutionally convicted of the charged charges and that his judgment and sentence of death were lawfully and constitutionally imposed. The return is required to allege facts tending to establish the legality of Petitioner's detention. (*People v. Duvall* (1995) 9 Cal.4th 464, 476; *In re Sixto* (1989) 48 Cal.3d 1247,1252; *People v. Romero* (1989) 8 Cal.4th 728, 738.) "Those facts are not simply the existence of a judgment of conviction and sentence . . .. The factual allegations of a return must also respond to the allegations of the petition that form the basis of the Petitioner's claim that the confinement is unlawful." (*People v. Duvall*, *supra*, 9 Cal.4th at 476.)

Claim XIV: Ineffective Assistance of Counsel: Failure to Introduce Mitigating Evidence

Petitioner's counsel at trial utterly failed to defend Petitioner at the penalty phase of his trial. The penalty phase in this case lasted for one hour and thirty-six minutes including the arguments of counsel and the instructions by the judge. Had trial counsel conducted an effective mitigation investigation he would have found a wealth of mitigation evidence to present at the penalty phase. The mitigation evidence available to

trial counsel included the facts that: (1) Petitioner suffered from mental retardation and/or organic brain damage and scored in the mentally retarded range in 1968 on the SRA – a student intelligence test measuring aptitude for scholastic achievement and career; (2) his father was a perverse role model who was convicted of raping Petitioner's sister and fathered a child with her; (3) his mother was an alcoholic involved in criminal activity who utterly failed to supervise Petitioner; and (4) he spent most of his adolescence incarcerated in the California Youth Authority and other institutions that failed to diagnose and address his mental impairments. Trial counsel failed to conduct a comprehensive mitigation investigation and failed to effectively present mitigation evidence during the penalty phase.

1. Petitioner Suffered from a Lifetime of Trauma, Mental Retardation and Learning Disabilities

Petitioner denies that none of Petitioner's family members told his trial counsel that he suffered physical, emotional or sexual abuse. However, to the extent that Petitioner's family did not voluntarily provide the full details of the abuse Petitioner endured to his trial counsel, it was because trial counsel failed to adequately investigate whether abuse had occurred. As set forth in the petition, and incorporated by reference above, no competent capital defense lawyer would expect the defendant's family to discuss evidence of sexual abuse, abandonment, alcoholism, incest, or a family history of mental illness during a brief interview. The standard practice of lawyers representing

defendants in death penalty cases, for decades, has been to do thorough investigation of mitigating circumstances in order to uncover this type of sensitive information. The United States Supreme Court, in *Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2538, held that *Strickland* requires more than the kind of cursory investigation conducted by Ron Slick and that "tactical" decisions that are based on such investigations are not justified.

Respondent claims that, in essence, the Petition asserts that trial counsel should have vilified Petitioner's mother and father in the penalty phase of Petitioner's trial. (Return, page 7.) The issue isn't whether trial counsel should have vilified Petitioner's parents. It is whether trial counsel effectively investigated Petitioner's history, including his family history, and whether trial counsel effectively presented mitigation evidence during the penalty phase. Trial counsel conducted a superficial investigation that made it impossible for him to effectively present mitigating evidence of Petitioner's history at trial. At the same time, the decision not to put on evidence regarding Petitioner's parents cannot be viewed as tactical because trial counsel was not in a position to make informed tactical decisions based on his deficient investigation.

Had trial counsel conducted a complete investigation, he would have learned, among other mitigating facts, that Petitioner's mother was a chronic alcoholic, who suffered from cirrhosis of the liver. (Petition, page 111-112.) She ran a gambling house, conducted a series of casual relationships with men, and left Petitioner unsupervised and alone. (Petition, page 105.) An adequate investigation would have uncovered a family

history of sexual abuse and incest, the details of Petitioner's father's criminal history, and Petitioner's problems adjusting to Youth Authority and prison, and the complete failure of those institutions (particularly CYA) to diagnose his impairments and psychological problems, and provide appropriate treatment and vocational training. (Exhibits 16, 24-30, 32-59 to the Petition.) Instead of using this information to vilify Petitioner's parents, it should have been used at the penalty phase to put Petitioner's life and his alleged crime in context.

Petitioner denies that the prior habeas petition filed by appointed counsel in 1988 did not allege or document that Petitioner suffered abuse. In fact, the prior petition, incorporated below by reference, alleged that Petitioner suffered from poverty and parental neglect. (Petition in Case No. SOO5412, page 32.)

Respondent, in essence, argues that trial counsel's paltry penalty phase presentation was intended to prevent the prosecutor from putting on evidence regarding the details of Petitioner's four prior robbery convictions. (Return, page 7.) Petitioner denies that this was a tactical decision. First, because he did not conduct an adequate mitigation investigation, trial counsel was not in a position to determine whether the potential benefits of introducing evidence in mitigation would be outweighed by the potential risks of allowing the prosecutor to introduce additional evidence in aggravation. Second, it is by no means clear that presenting evidence about Petitioner's impairments and/or his abusive and impoverished upbringing would have given the prosecutor a right

to introduce evidence of misconduct in rebuttal. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193 (evidence of misconduct was not proper rebuttal to mitigating evidence concerning adverse childhood circumstances).) Third, even if did, had trial counsel conducted an adequate mitigation investigation, he could have used the information he developed not only to put Petitioner's current crime in context but also to put his prior convictions in context. For example, Respondent asserts that the details of Petitioner's prior convictions would have allowed the prosecutor to argue that Petitioner was a sophisticated criminal who presented a danger to society at large and other inmates. (Return, page 8.) However, this line of argument could have been effectively countered by evidence that Petitioner was mentally retarded and that the institutions he was placed in following his arrests utterly failed to address his deficits; further, there was in fact nothing sophisticated, criminally or otherwise, about the conduct underlying Petitioner's prior robbery convictions. Fourth, prior habeas counsel asked Mr. Slick whether his decision to severely limit the evidence in mitigation was based on a fear that it would allow the prosecution to offer evidence in rebuttal and Mr. Slick said it was not. (Exhibit 14 to Petition, ¶ 41.)

Respondent asserts that trial counsel's failure to present Petitioner's father's criminal history at trial was excusable given the nature of the criminal history and the timing of the offenses. (Return, page 9.) In particular, Respondent attempts to minimize the significance of the fact that Petitioner's father was convicted of engaging in lewd

conduct with his own daughter, Ramona, in violation of Penal Code § 288 by arguing that Petitioner was incarcerated during the offense and that the offense occurred after Petitioner had already committed his first juvenile offense. This argument misses the point. Trial counsel's entire argument regarding Petitioner's father's criminal history was merely to say that "he has been to jail." (RTSA 841.) The fact that, when Petitioner was 16 years-old and incarcerated, his father was raping his half-sister and eventually had a child as a result of that relationship, was powerful mitigation evidence that any competent capital defense lawyer would have investigated and made use of at the penalty phase. Respondent's argument fails to consider the overall impact of the available mitigation evidence. Petitioner was a mentally impaired young man, raised by an alcoholic mother and largely absent, criminal father. Trial counsel failed to develop and present evidence of how these factors hindered Petitioner's development.

Respondent claims that no evidence that Petitioner's suffered from mental retardation, organic brain damage or learning disabilities existed in 1984. (Return, page 9.) Respondent asserts that any existing evidence of mental retardation and organic brain damage would have been discovered by the experts retained by trial counsel. (Return, page 9.) However, as set forth in the Petition, trial counsel failed to provide the experts with the necessary materials to properly assess Petitioner. The experts were provided with only with the Information, the police report, the preliminary hearing transcript, and the probation reports in Petitioner's three previous cases. (Exhibits 60 and 61.) Trial

counsel did not provide the experts with school records and other institutional records. Dr. Sharma may have had some of Petitioner's prison records. (Exhibit G to Return.) These records demonstrated that Petitioner was mentally retarded, having scored in the mentally retarded range on a student intelligence test in 1968. (Exhibit 59 to Petition.) In addition, one of trial counsel's experts scored Petitioner's full scale IQ at 73 which is within the margin of error for mental retardation,[1] and is certainly indicative of intellectual impairment. Trial counsel was also aware that petitioner never attended high school (Return, Exhibit A, p. 3), which, in combination with Petitioner's reported IQ of 73 would have alerted reasonable counsel to the need to further explore the potential mitigating significance of Petitioner's cognitive impairment and learning disabilities.

2. Trial Counsel Failed to Investigate and Introduce Evidence of Petitioner's Good Character

Trial counsel's perfunctory mitigation investigation prevented him from making a legitimate tactical decision not to present good character evidence. If trial counsel had conducted an investigation, he would have had ample evidence that Petitioner was mentally impaired and suffered from neglect and abuse as a child. This information would have put his loving and generous behavior toward his family and friends in context and made it more powerful as mitigating evidence. By the same token, any prior criminal

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[1]It is a standard of practice in psychology to rule out the possibility of mental retardation in a person who scores so low on the test. (Exhibit 13 to Petition, ¶ 84.)

conduct evidence offered in rebuttal would have been more understandable and less aggravating.

3. Trial Counsel Failed to Investigate and Introduce Evidence Regarding the Impact of Incarceration

Petitioner denies that evidence regarding Petitioner's prior convictions demonstrated that he was a "sophisticated criminal." If anything, the details of Petitioner's prior offenses demonstrate his futility as a criminal and his lack of sophistication. Petitioner's statements that he engaged in armed robberies as a "business" and "did not mind serving time in prison" reflect his mental retardation, the general poverty of his life and experience, and his lack of any employable skills.

Respondent does not claim that trial counsel acted tactically when he failed to introduce mitigating evidence regarding the impact of incarceration on Petitioner's life. Trial counsel was not in a position to make a tactical decision because he did not conduct an investigation regarding Petitioner's prior periods of incarceration. The lack of mitigating evidence regarding incarceration left the jury with the impression that Petitioner had simply learned nothing from his prior convictions and incarcerations and then committed the present crime. Evidence of institutional failure and mental impairment would have mitigated what appeared to be Petitioner's refusal to learn from his prior experiences.

Claim XV: Ineffective Assistance of Counsel: Mental Retardation and Brain Damage

Petitioner denies that trial counsel retained the services of qualified experts who adequately and competently examined and evaluated Petitioner prior to his trial. The experts were not provided with Petitioner's school records, institutional records and prior testing, including an educational test administered in 1968, which demonstrated Petitioner's IQ fell squarely within the mentally retarded range. Instead, they were provided with only the Information, the police report, the preliminary hearing transcript, and the probation reports in Petitioner's three previous cases. (Exhibits 60 and 61 to Petition. Dr. Sharma may have been provided with some of the prison documents. (Exhibit G to Return.) Nor did counsel provide the experts with a social history. Without the records and an adequate social history, the experts were not in a position to adequately and competently examine and evaluate Petitioner.

Petitioner denies Respondent's claim that Dr. Terry Kupers failed to diagnose Petitioner as suffering from any mental disorder or condition that would qualify as mitigation evidence. (Return, page 13.) First, Dr. Kupers is an expert on the effects of institutional conditions and their impact on prisoners. There is no indication he was retained to conduct neuropsychological testing. Instead, he provided his opinion that Petitioner's childhood deprivations and the effects of being incarcerated had a material effect of Petitioner's personality and behavior. Second, Dr. Kupers did find mental

impairment. He states, in his declaration, that "[w]hile there are no simple causal formulas to apply in this context, there is a significant psychiatric component to Mr. Lewis' life which was never explained during the penalty phase." (Exhibit I to the Return.) That he did not follow up on the psychiatric component is explained by the fact that he was not retained to conduct neuropsychological testing. Third, Dr. Kupers, like Drs. Sharma and Maloney, was not provided with the necessary materials to adequately and competently evaluate Petitioner. He was not given Petitioner's school records, prior test results or the results of the testing done by Dr. Maloney. Dr. Kuper's efforts were limited by the lack of investigative funding available to prior habeas counsel. (See Petition, pages 43-44.)

Petitioner denies that the absence of evidence of the nature presently set forth in the Petition did not prejudice Petitioner.

1. Mental Retardation

Petitioner admits that Penal Code § 1376 defines "mentally retarded" as "the condition of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." Petitioner admits that whether a person is mentally retarded is a question of fact under *In re Hawthorne* (2005) 35 Cal.4th 40, 49.

2. Petitioner Denies that Trial Counsel Retained Qualified Psychological Experts Who Competently and Reliably Identified No Mental Defenses or Mitigation

As set forth above, Petitioner denies that Dr. Sharma and Dr. Maloney adequately and competently examined and evaluated Petitioner prior to his trial. Petitioner also denies that neither expert informed trial counsel that Petitioner was mentally retarded or suffered from a mental disorder, brain damage, or learning disabilities that would qualify as mitigating circumstances. Dr. Maloney reported an IQ score of 73, which is a very low score and is consistent with mental retardation. This information should have alerted trial counsel, who already knew that Petitioner did not attend high school (Exhibit A to the Return), to the need to further explore possible intellectual deficit mitigation.

Dr. Sharma's opinion that Petitioner was not suffering from brain damage is undermined by the fact that Dr. Sharma did not conduct neuropsychological testing and was not provided with records of neuropsychological testing. He did not even have Dr. Maloney's IQ test result showing that Petitioner's IQ score was consistent with being mentally retarded, which would have suggested the need for neuropsychological testing.

3. Petitioner's Claim of Mental Retardation and Brain Damage Is Not Contradicted by Other Evidence

Petitioner denies that the evidence listed by Respondent is inconsistent with the claim that Petitioner suffers from mental retardation and/or organic brain damage. As set

forth above, Petitioner denies that Dr. Kupers did not diagnose Petitioner as suffering from any mental disorder or condition that would serve as mitigation. Dr. Kupers does mention a "significant psychiatric component" that was never explained during the penalty phase and offers his opinion that Petitioner's childhood deprivations and the effects of being incarcerated had a material effect of Petitioner's personality and behavior. (Exhibit I to the Return.) That Dr. Kupers did not diagnose Petitioner with a specific disorder or condition is explained by the fact that he was not hired to conduct a neuropsychological evaluation.

Petitioner denies that individuals working on his behalf at his trial who personally interacted with him observed he was articulate, was capable of volitionally controlling his behavior and fulling understood the consequences of his actions. Mental retardation cannot be diagnosed by lay people based on observation and conversation.

Petitioner denies that the statement by defense investigator Kristina Kleinbauer that he was "a very pleasant man who was quite articulate" is inconsistent with his suffering from mental retardation and/or organic brain damage. Respondent has taken the quoted language out of context. This statement was made in the context of trial counsel having told Ms. Kleinbauer, prior to her first meeting with Petitioner, that Petitioner "always had a gun" and was "not a pleasant man." (Exhibit 12 to the Petition, ¶ 6.) When she met him with the expectation created by trial counsel that she would be meeting a stereotypical gun-toting thug, Ms. Kleinbauer found him to be surprisingly

pleasant and articulate. In other words, her statements meant that she did not find Petitioner to be the monster described by trial counsel. In addition, people suffering from mental retardation are often capable of masking their impairment. It is not possible to diagnose someone as suffering from mental retardation based on casual conversation. This statement is in no way evidence that Petitioner is not mentally impaired.

Petitioner denies that his family members provided information contradicting a claim that he suffered from deficits in functional adaptive skills prior to his trial. Statements by his family that he wrote letters to his nieces and nephews do not contradict Petitioner's claim that he is mentally impaired.

Petitioner denies that his behavior in court further failed to alert trial counsel to any cognitive deficiencies constituting mitigation. Trial counsel was aware that Petitioner did not attend high school and that he had a full scale IQ score of 73. This by itself should have caused trial counsel to pursue further neuropsychological testing. The fact that Petitioner was able to participate in a colloquy with the court regarding a waiver of his rights does not contradict the claim that he is mentally impaired. People suffering from mental impairment commonly mask their condition by simply agreeing when they are asked a question.

Petitioner denies that his inmate appeals demonstrate that he was capable of understanding and expressing complex legal concepts. Petitioner disputes that the documents attached as Exhibit C to the Return were written by Petitioner. To the extent

that any of the documents were written by Petitioner, Petitioner denies that they were written without assistance from others.

Petitioner denies that the experts retained by trial counsel reviewed the relevant portions of his CDC file. Respondent does not provide any evidence that Dr. Maloney received the files or that Dr. Sharma actually reviewed the files.

4. Petitioner Suffers from Organic Brain Damage/Learning Disabilities

Petitioner denies that the available evidence contradicts Dr. Khazanov's opinion that the deficiencies observed in 2003 were present both at the time of the 1984 trial and during Petitioner's minority. Petitioner denies that a 1970 self-report that he participated in sports contradicts Dr. Khazanov's opinion. First, the recorded self-report should be viewed skeptically because it is unlikely that Petitioner actually participated in organized athletic activities such as basketball, track and football given his poor attendance at school during the relatively brief periods of time he was not incarcerated. Second, without any detail as to the extent of the alleged participation in sports, there is nothing inconsistent about a mentally impaired person stating that he participated in sports.

Petitioner denies that participating in the building and refurbishing of bicycles for sale contradicts Dr. Khazanov's opinion. Without any detail as to the specific tasks Petitioner engaged in and whether he received assistance, this information does not contradict the claim that he is impaired. Petitioner denies that evidence that he regularly wrote to his nieces and nephews to urge them to be good and obey their parents

contradicts Dr. Khazanov's opinion. Without any detail as to the content of those letters and whether he received assistance in writing them, this information does not contradict the claim that he is impaired. Petitioner denies that assisting with household chores and errands contradicts Dr. Khazanov's opinion. Mentally impaired people are often capable of accomplishing basic tasks. Petitioner denies that going to the store to purchase the ingredients for his favorite pudding so that his sister could make him pudding as compensation for his assistance contradicts Dr. Khazanov's opinion. If anything, the fact that his sister lists buying pudding ingredients as one of her brother's achievements is entirely consistent with mental impairment.

Claim XVI: Ineffective Assistance of Counsel: Psychological Impact of Incarceration

Petitioner denies that he was not prejudiced by the absence of the psychological impact of incarceration at the penalty phase of his trial. With adequate investigation, trial counsel could have put on a compelling mitigation case based on institutional failure, and in particular, the failure of the system to recognize and treat Petitioner's mental retardation and/or organic brain damage. As set forth in the declaration of Dr. Davis, the institutional failure evidence available to trial counsel included the failure to accurately identify the contribution of Petitioner's dysfunctional family environment to his delinquent attitude and behavior; failure to adequately diagnose him; failure to identify the seriousness of his cognitive dysfunction; failure to include the expertise of different

health care professionals to evaluate his needs; failure to provide the appropriate initial treatment setting to address his emotional needs; failure to ensure his protection from more sophisticated and dangerous minors; failure to prepare him educationally and vocationally once he re-entered the community. (Exhibit 15 to the Petition, ¶ 11.)

Given that Petitioner spent the bulk of his formative years incarcerated, reasonably competent trial counsel would have investigated Petitioner's history of incarceration. Trial counsel has long had an "obligation to conduct a thorough investigation of the defendant's background. [See 1 ABA Standards for Criminal Justice 4-4.1, commentary, page 4-55 (2d ed.1980)." (*Williams v. Taylor* (2000) 529 U.S. 362, 396.) It is impossible to do a social history or to explain the factors affecting Petitioner's development without considering the role of those who shepherded his growth from childhood into chronological adulthood. Petitioner was first incarcerated at age 13 and spent the majority of his teen and young adult years incarcerated. (Exhibit B to the Return.) Between November of 1965 and February of 1971, when Petitioner was between the ages of 13 and 19, he was incarcerated in the California Youth Authority for approximately 3 years, 8 months and out of custody for approximately of 1 year, 7 months. (Exhibit B to the Return.) He was sentenced to prison three times as an adult. (Exhibit B to the Return.) Given Petitioner's extensive history of incarceration, it would have been impossible to conduct an adequate investigation of his background without including an investigation of his institutional history.

Petitioner denies that trial counsel's reliance upon Dr. Sharma and Dr. Maloney's failure to advise him that Petitioner's prior incarcerations and, more specifically, the lack of mental health diagnoses and treatment, while incarcerated, qualified as mitigating circumstances was effective assistance. Effective trial counsel would have conducted a comprehensive investigation into Petitioner's social history and then presented that information to the experts so that they were in a position to adequately evaluate Petitioner. In addition, Petitioner denies that Dr. Maloney was provided with Petitioner's CDC records and denies that Dr. Maloney reviewed the relevant CDC records.

Petitioner denies that his claim of ineffective assistance of counsel is rebutted by documentation evidencing that Petitioner received mental health and educational assessments while incarcerated as a juvenile and as an adult and that the consistent conclusions produced from these observations were that his academic and vocational deficiencies were the result of volitional behavior. Petitioner denies that the consistent conclusion of the documents cited by Respondent is that his academic and vocational deficiencies were the result of volitional behavior. The documentation provide ample evidence that Petitioner suffers from mental impairment and that the institutions have failed to diagnose and treat that impairment. For example, the documents acknowledge that Petitioner came from a broken home situation which occurred when he was 3 years-old. (Exhibit 28 to Petition.) The documents demonstrate that Petitioner's mother had a rather severe drinking problem and had been hospitalized with cirrhosis of the liver on at

least one occasion. (Exhibit 29 to Petition.) The records show that Petitioner's childhood was "chaotic" and "spent most of his formative years in some form of incarceration." (Exhibit 30 to Petition.) The records show that Petitioner's mother was "ineffectual in terms of her ability to establish adequate behavioral controls for him and that he is able to operate as he pleased in the home." (Exhibit 32 to Petition.)

Petitioner denies that he "personally acknowledged" the volitional nature of his problems. The statements quoted by Respondent do not constitute an acknowledgment of the volitional nature of his problems. The statements that Petitioner admitted he did not like school, learned very little, was truant a great deal, associated with the delinquent, nonconforming element during his formative years, and had been involved in gang activity are entirely consistent with suffering from undiagnosed and untreated mental impairment. In addition, Petitioner is too impaired to appreciate the nature or source of his difficulties.

Petitioner denies that presenting mitigation evidence would have portrayed Petitioner as a hardened and incorrigible criminal who posed a danger to prison inmates as well as the community at large and, therefore, deserved the death penalty. First, trial counsel was not in a position to make this tactical call because he failed to investigate this issue and the related issues of mental impairment and childhood trauma. Second, the readily available evidence was that Petitioner was not properly diagnosed and treated in the various institutions in which he was incarcerated. The fact that he had trouble at those

institutions would not rebut that evidence, but rather would in large part be explained by it.

Claim XVIII: Cruel and/or Unusual Punishment - Mental Retardation

Respondent concedes that Petitioner has made a threshold showing of mental retardation under *Atkins v. Virginia* (2002) 536 U.S. 304 and *In re Hawthorne* (2005) 35 Cal.4th 40 and that an evidentiary hearing should be held in compliance with *Hawthorne*. Petitioner admits that an evidentiary hearing is required under *Hawthorne*.

1. Mental Retardation Criteria

The declarations of Dr. Natasha Khazanov, a psychologist, stating her opinion that Petitioner is mentally retarded satisfies Petitioner's burden to obtain an evidentiary hearing under *Hawthorne*. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47.) In *Hawthorne*, this Court held:

> Upon the submission of an appropriate declaration "by a qualified expert" (§ 1376, subd. (b)(1)), this court will-as a general rule-then issue an order to show cause returnable in the superior court in which the original trial was held, with directions to hold a hearing on the question of the petitioner's mental retardation. (CITATIONS.) In addition to maintaining parity with the statutory scheme, the order for an evidentiary hearing reflects the consensus that mental retardation is a question of fact. (CITATIONS.) It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence. (CITATIONS.)

(*Id.* at 49.)

2. Application of Mental Retardation Criteria to Petitioner

Petitioner denies that Dr. Khazanov's opinion is disputed by facts readily available from the judicial record before this Court.

a. Factor (1): Intellectual Functioning

Petitioner denies that Dr. Khazanov failed to account for Petitioner's socio-cultural background or literacy level in selecting her testing methods or interpreting the test results. As will be set forth at the evidentiary hearing, Dr. Khazanov was aware of Petitioner's socio-cultural background and literacy level and considered those factors in selecting her testing methods and interpreting the test results. Respondent fails to identify any examples of purported flaws in Dr. Khazanov's testing methods based on the alleged failure to consider socio-cultural background and literacy level. Respondent fails to state the socio-cultural factors that would purported nullify the test results. Petitioner's first language is English and he is not an immigrant. Petitioner is an African-American who attended some school in California. None of this suggests that his socio-cultural background affected Dr. Khazanov's testing.

b. Factor (2): Adaptive Skills

Dr. Khazanov's declarations establish that Petitioner has met the burden of demonstrating that he has significant deficits in two or more categories of adaptive behavior skills such as "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work,

leisure, health, and safety." (*Atkins v. Virginia* (2002) 536 U.S. 304, 309.) He suffers from deficits in several of areas of adaptive functioning, including functional academics, daily living skills (self-care) and social skills. (Petition, page 182-183.)

Petitioner denies that Dr. Khazanov's assessment of Petitioner's adaptive functioning skills fails to appropriately consider and account for his current "community setting," meaning death row. Respondent fails to explain how Petitioner's being on death row would account for deficiencies in his adaptive functioning. Petitioner denies that any of Petitioner's deficiencies in adaptive skills are the product of malingering and prevarication. Dr. Khazanov "saw no indications of any effort to malinger or intentionally perform poorly" and stated that "his test results confirmed this." (Exhibit 13 to Petition, ¶ 119.) Petitioner denies that Petitioner's deficiencies are a product of his current incarceration rather than a product of an innate cognitive condition. Respondent fails to explain how the deficiencies noted by Dr. Khazanov could be a product of his current incarceration. This unsupported assertion is contradicted by Petitioner's documented long-standing academic difficulties.

Dr. Khazanov did not utilize the Vineland Adaptive Behavior Scale and the American Association on Mental Retardation Adaptive Behavior Scale because Petitioner had limited funds to pay the experts who assisted with the Petition. Utilizing those instruments would have required Dr. Khazanov to interview Petitioner's family members. Petitioner was not in a position to devote more of his limited funds for experts to paying a

psychologist to interview his family members prior to the filing of the Petition. Petitioner intends to seek additional funds to prepare for the evidentiary hearing and intends to request that Dr. Khazanov utilize one of the instruments prior to the hearing.

Petitioner denies that Petitioner's familial history provided by his sisters contradicts a finding he lacked social/interpersonal adaptive skills. Petitioner denies that evidence that he had appropriate relationships with his sisters, performed household chores, performed services for neighbors, played with his sisters and their children, and provided advice to his nieces and nephews contradicts the claim that he has adaptive deficiencies. Petitioner denies that having a common law relationship with Frances Mae Lang for five years when not incarcerated and paying half the rent when he was employed contradicts his claim that he has adaptive deficiencies. Petitioner denies that a self-report that he used the library twice a week while incarcerated contradicts his claim that he has adaptive deficiencies. People suffering from mental impairment have different strengths and weaknesses and are often capable of performing basic tasks. Respondent has not set forth authority for the proposition that having relationships with family or being able to accomplish basic tasks contradicts Petitioner's claim of mental impairment.

Petitioner denies that deficits in his adaptive functioning are explained by his history of repeated and lengthy incarcerations and/or malingering rather than mental retardation. Dr. Khazanov "saw no indications of any effort to malinger or intentionally perform poorly" and stated that "his test results confirmed this." (Exhibit 13 to Petition, ¶

119.) Petitioner denies that Petitioner's deficiencies are a product of his current incarceration rather than a product of an innate cognitive condition

Petitioner denies that Dr. Khazanov's statement that Petitioner "appeared in prison-issued clothing that was neat and clean" contradicts her assessment that Petitioner suffers from a deficit in adaptive functioning in the area of self-care. The fact that Petitioner was wearing clothing provided to him by the prison and that the clothing was neat and clean has little bearing on Petitioner's self-care. In prison, Petitioner is not responsible for choosing or laundering his clothing. Respondent does not provide any authority for the proposition that people suffering from deficits in adaptive functioning related to self-care would be incapable of wearing neat and clean clothing that was provided to them by a prison.

Petitioner denies that the statements of Dernessa Walker contradict his claim that he has adaptive deficiencies. Petitioner denies that statements by his sisters that he performed chores and assisted with washing his mother's feet and hair contradict his claim that he has adaptive deficiencies. Mentally impaired people have different strengths and weaknesses. The fact that a person is able to have relationships with people and accomplish certain basic tasks does not rule out impairment.

Petitioner denies that the alleged deficiencies concerning employment are the product of Petitioner's repeated incarcerations. Petitioner denies that his academic achievement history is reflective of his failure to regularly attend school and lack of

motivated self-effort rather than evidence of mental retardation or organic brain damage. Petitioner's documented history of sub-average intelligence and academic failure undermine Respondent's claim that his deficiencies concerning employment are the product of Petitioner's incarcerations.

Petitioner denies that Petitioner's extensive prison disciplinary record demonstrates numerous instances in which he has articulated complex concepts in written form. Petitioner disputes that the documents attached as Exhibit C to the Return were written by Petitioner. To the extent that any of the documents were written by Petitioner, Petitioner denies that they were written without assistance from others.

Petitioner denies that his sister's statement that he wrote letters to his nieces and nephews that instructed them to obey their parents contradicts his claim of adaptive deficits. Without any detail as to the content of those letters and whether he received assistance in writing them, this information does not contradict the claim that he is impaired. Mentally impaired people are often capable of accomplishing basic tasks.

Petitioner denies that his clumsy attempt to use the name "Sherman Davis" when initialing a Miranda waiver contradicts his claim of adaptive deficits. Petitioner denies that his purported explanation for how he came into possession of the Cadillac is complex and articulate or that it contradicts his claim of adaptive deficits.

c. Factor (3): Manifestation of Mental Retardation Before Age 18

Petitioner denies that he has not demonstrated that his alleged mental retardation

occurred before age 18. Petitioner denies that Dr. Michael Maloney and Dr. Kaushal Sharma would have discovered and reported Petitioner's mental retardation to trial counsel. As set forth in the Petition, Dr. Maloney's test results did show that Petitioner's IQ was within the range of mental retardation. Trial counsel should have ordered follow up evaluation in response to that result. Dr. Maloney's results were not shared with Dr. Sharma. The fact that Dr. Maloney and Dr. Sharma did not conduct neuropsychological testing, whether it was based on trial counsel's failure to direct them to do so or other factors, does not contradict Petitioner's claim.

Petitioner admits that he inadvertently stated his Linguistic Score of 68 on a 1968 SRA IQ test as 58. However, the score of 68 is consistent with being mentally retarded. Petitioner denies that his component "Q Score" of 61 is not an accurate measure of his intelligence. Petitioner denies that these scores present "significant scatter" or "marked discrepancy across verbal and performance scores" or that they are inconsistent with being mentally retarded. Petitioner denies that testing reflected Petitioner's lack of educational motivation and his socio-cultural background rather than deficiencies in intelligence and academic performance.

Petitioner denies that the absence of additional information regarding Dr. Maloney's tests contradicts his claim of mental retardation. Petitioner denies that Dr. John Geiger's 1985 evaluation of Petitioner contradicts his claim that he is mentally retarded. Petitioner denies that Dr. Kupers 1986 evaluation of Petitioner contradicts his

claim that he is mentally retarded or that his findings tend to contradict Dr. Khazanov's findings that he suffered deficits in adaptive functional skills prior to the age of 18.

IV.

In addition to the Petition, Informal Reply and Exhibits to the Petition, Petitioner hereby incorporates by this reference all the records, documents, transcripts, pleadings, exhibits and papers on file with this Court in *People v. Lewis*, Crim. No. S020670 and *People v. Lewis*, Crim. No. 24135 (the first appeal). Petitioner also incorporates by this reference, as if set forth in full at this point, all of the records, documents, transcripts, pleadings, exhibits and papers on file with this Court in *In re Robert Lewis, Jr.*, S005412 (the first habeas). Furthermore, Petitioner repleads and incorporates by this reference all of the claims and supporting materials therefor set forth in said first habeas as if set forth in full at this point.

V.

Petitioner denies that Petitioner's prior habeas petition includes the same contentions and allegations as recited in Claim XIV and Claim XVI with the exception of the incorporation of allegations Petitioner suffers from mental retardation and organic brain damage. Allegations and evidence of mental retardation and organic brain damage that trial counsel should have but didn't present in mitigation of sentence, of course, dramatically enhance any claim of penalty phase ineffective assistance of counsel. In particular, Claims XIV and XVI also add allegations and supporting evidence that

regarding trial counsel's failure to investigate and utilize Petitioner's history of institutionalization. Petitioner accordingly denies that the Petition fails to identify with specificity any new facts "discovered" since the filing of the first habeas petitioner relevant to Claims XIV, XV, XVI and XVIII.

VI-VIII.

Respondent concedes that the Court has jurisdiction to consider and decide the Petition. Respondent concedes that the Petitioner is presumptively timely. Petitioner admits that his automatic appeal was previously decided by this Court. Respondent concedes that habeas appears to be an appropriate vehicle to resolve Claims XIV, XV, XVI and XVIII.

IX.

Petitioner admits that he should be held to proving the allegations of the claims as stated in the Petition at an evidentiary hearing. However, Petitioner denies that materials, documents, and persons relevant to the proof or refutation of Claims XIV, XV, XVI, and XVIII are uniquely within the control of Petitioner.

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WHEREFORE, Petitioner requests that this Court:

1. Order and conduct a single evidentiary hearing on all of the claims addressed in the Order to Show Cause[2] at which Petitioner will offer further proof in support of the allegations herein;

2. Grant Petitioner the authority to obtain subpoenas for witnesses and documents and the right to conduct discovery;

3. After full consideration of the issues raised in the Petition, vacate the judgement of death in Los Angeles County Superior Court Case No. A027897; and

4. Grant Petitioner such other and further relief as the Court may deem just and proper.

Dated: July 25, 2008

Respectfully Submitted,

SANGER & SWYSEN

By _____
Robert M. Sanger, Counsel
For Petitioner, Robert Lewis Jr.

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[2]Respondent suggests that this Court should order two separate hearings before different triers of fact, one on the ineffective assistance of counsel claims (Claims XIV, XV, XVI), and one on the *Atkins* claim (Claim XVIII). (Return, page 39.) But this would make little sense. Evidence of Petitioner's mental impairments, adaptive functioning and social history would be directly relevant at both such hearings, and it would be far more efficient to present that evidence only once.

CERTIFICATE OF WORD COUNT

California Rules of Court, Rule 14 (c)(1)

I have run the "word count" function in WordPerfect Office 2002 and hereby certify that this brief contains 7,446 words, including footnotes.

Dated: July 25, 2008

Respectfully submitted,

SANGER & SWYSEN

By: ROBERT SANGER SCD

Robert M. Sanger

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On July 25, 2008, I served the foregoing document entitled: **REPLY/TRAVERSE TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** on the interested parties in this action by depositing a true copy thereof as follows:

See Attached Service List

X **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

__ **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at:

__ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address above.

X **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed July 25, 2008, at Santa Barbara, California.

Jessica E. Kraft

Jessica E. Kraft

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