IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re:	CAPITAL CASE
	Case No. S117235
ROBERT LEWIS, JR.,	
	Related Automatic Appeal
	Case No. S020670
On Habeas Corpus	Los Angeles Superior Court
	Case No. A0227897

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

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

Pursuant to the Court's order, Petitioner, Robert Lewis, Jr., submits this Exceptions to the Referee's Report and Brief on the Merits in further support of the Petition for Writ of Habeas Corpus.

INTRODUCTION

The Court should adopt the Referee's finding that Petitioner's intellectual disability renders him ineligible for execution. The Referee captures in detail in his report the factual record developed at the reference

hearing. The record shows that Petitioner has significant subaverage general intellectual functioning which was manifested before age 18 and that he clearly exhibited significant adaptive behavior deficits before the age of 18. Therefore, Petitioner is not eligible for execution under *Atkins v. Virginia* (2002) 536 U.S. 304 and *In re Hawthorne* (2005) 35 Cal.4th 40.

On the other hand, the Court should reject the Referee's finding that Ron Slick, Petitioner's trial counsel, performed adequately in a manner expected of a reasonably competent counsel at the time and was not constitutionally ineffective. Petitioner objects to the failure of the Referee to complete his analysis of the record. Petitioner takes exceptions to the Referee's findings and conclusions on the ineffective assistance of counsel issue. The factual record developed at the reference hearing shows that Ron Slick failed to investigate mitigation and failed to address Petitioner's intellectual disability issues. Mr. Slick put on a grossly inadequate penalty phase. With arguments and instruction, the entire penalty phase lasted one hour and 36 minutes. There was only five minutes of testimony.

Petitioner exhibited symptoms of both intellectual disability and learning disorders that Mr. Slick did not investigate or address. Petitioner struggled in school and repeated first grade. (RH Ex. 23, p. 11.) Petitioner's mother was an alcoholic her entire life and was hospitalized in 1965 for

cirrhosis of the liver. Yet, Mr. Slick did not obtain her medical records or investigate whether Petitioner could have suffered from fetal alcohol syndrome. (8 RHT 1424.)

It is well documented that trauma in a person's life affects brain functioning. There is copious evidence to establish that Petitioner was exposed to repeated periods of trauma during his childhood. (3 RHT 513-517.)

Petitioner's father, Robert Lewis, Sr., was a sexual predator who abandoned the family when Petitioner was only three-years-old. (1 RHT 185, 208-209.) He alternately abused and abandoned Petitioner. He preyed on Petitioner's generous nature by bilking Petitioner out of money to cover his gambling debts and support his addiction to cocaine. (1 RHT 153, 157, 186, 196-197, 211; 3 RHT 505-506.) Petitioner acted out in order to make his father come home. (*Id.*)

In addition to his father being a dangerous and perverse role model, Petitioner also suffered from neglect and physical abuse at the hands of his mother. (1 RHT 152,168-173, 188-190, 204-205.)

Moreover, Petitioner's institutionalization from a very young age was an additional source of trauma that Mr. Slick did not investigate or present to the jury as a mitigating factor. While Petitioner was at the California Youth Authority (CYA) he was exposed to constant abuse, violence and delinquent

role models. (1 RHT 35-46.) Petitioner was confined and released right back into the environment that created him with no rehabilitation. (1 RHT 51-56.)

As a child, Petitioner lacked any meaningful relationships with adults. He was profoundly affected by his father's absence and tried to take his place by providing for the family. (1 RHT 191-192.) As a result, Petitioner's manhood, his sense of self and his identity were perverted. Petitioner lived in a constant state of deprivation and during his childhood he learned that the only way to get what he needed was to steal. He did not steal for the thrill of it, but instead to meet his financial obligations. (3 RHT 367; 7 RHT 1219-1220.) Petitioner grew up in a depressed area and began to associate early on with delinquents because they were the only people available to him. (7 RHT 1248-1249.)

Petitioner had numerous friends and family members who were never interviewed. Some of them, who are still alive and still live in the Long Beach area 27 years after Petitioner's trial, testified at the hearing. Mr. Slick was presented with an abundance of mitigating evidence and witnesses who would have been able to paint a picture of Petitioner as a human being. He chose to ignore them.

Mr. Slick exerted little effort in trying this case. Whenever possible, he took the easy way out. He just went through the motions and lacked both the

compassion and necessary advocacy expected in a case with such grave consequences.

As a result, Petitioner was deprived his constitutional rights to effective assistance of counsel, due process of law, fair trial, equal protection, privileges and immunities, heightened reliability and his right against cruel and unusual punishment in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 13, 15, 16, 17, 24 and 31 of the California Constitution.

STATEMENT OF THE CASE

Petitioner was convicted of murder with special circumstances, robbery and use of a gun; four prior convictions were found to be true. He was represented, such as it was, by Ron Slick.

The guilt phase commenced on August 15, 1984. The evidentiary portion of the guilt phase lasted only one and a half days. (1CST 322, 323, 324, 325 and 389.)

The penalty phase commenced on August 28, 1984, at 10:12 a.m.. The entire penalty phase, including evidence, jury instruction and argument, lasted one hour and 36 minutes. (1CT 408; 4RST 807:6-8.) Mr. Slick called a single witness, Rose Davidson, one of Petitioner's sisters for five minutes of testimony. (5 RHT 852-853.) Her testimony covers only two pages in the trial

transcript. (4RST 811-812.) Mr. Slick asked her a series of leading questions in response to which she testified that their brother Ellis Williams was serving a sentence in state prison, their father had been in prison a "number of times," their mother died in 1967 and that she loved Petitioner and did not want any harm to come to him. (RH Ex. 13, pp. 811-812.)

The jury retired to commence deliberations at 11:48 a.m. The jury returned a death verdict. Petitioner was sentenced to death on November 1, 1984.

In 1990, this Court affirmed the conviction but reversed the sentence of death because the trial court read Petitioner's probation report before ruling on the application to modify the death verdict pursuant to Penal Code § 190.4(e). (*People v. Lewis* (1990) 50 Cal.3d 262, 287.)

On remand, the motion to modify the verdict was heard and denied by another judge on March 20, 1991, which had the practical effect of reinstating the judgment of death.

The case came back to this Court on direct appeal. In 2004 the convictions and death sentence were upheld on appeal. (*People v. Lewis,* (2004) 33 Cal.4th 214.)

The pending Petition for Writ of Habeas Corpus was filed on July 2, 2003. On December 10, 2008, this Court ordered the Presiding Judge of the

Los Angeles Superior Court to appoint a referee to take evidence and make findings of fact on six questions pertaining to the Petition for Writ.

The questions address two general contentions raised by Petitioner. Question 1 relates to the claim that Petitioner is intellectually disabled[1] within the meanings of *Atkins v. Virginia* (2002) 536 U.S. 304, 309 and *In re Hawthorne* (2005) 35 Cal.4th 40.) Questions 2 through 6 relate to the claim that the jury's verdict of death must be vacated because Ron Slick, Petitioner's trial counsel, was constitutionally inadequate for failing to reasonably investigate and present mitigating evidence at the penalty phase of the trial.

On December 23, 2008, the Honorable Judge Robert J. Perry was appointed as Referee. Testimony began on January 4, 2011 and occurred periodically ending on February 1, 2012.

On March 23, 2012, the Referee issued his findings to this Court. The Referee found that Petitioner was intellectually disabled and, therefore, ineligible for execution. On the other hand, the Referee also found that Ron Slick performed in a manner expected of a reasonably competent attorney acting as a diligent advocate.

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[1] This court has recognized the more current terminology of "intellectual disability" as a proper substitute for "mental retardation." (*People v. Barrett* (2012) 54 Cal.4th 1081, 1088 fn 2.) Hereafter, except when quoting the words of others, this brief will use the term "intellectual disability" instead of "mental retardation."

MENTAL RETARDATION QUESTION

Question 1: Is petitioner mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304 and *In re Hawthorne* (2005) 25 Cal.4th 40?

The Referee correctly found that Petitioner is mentally retarded within the meaning of *Atkins v. Virginia* and *In re Hawthorne*. (Referee's Report, pp. 3-28.) Petitioner supports this finding for the reasons set forth below.

A. Legal Standard

The United States Supreme Court held in *Atkins v. Virginia*, *supra*, that the execution of the intellectually disabled constitutes cruel and unusual punishment. The execution of intellectually disabled defendants is excessive and "the Constitution 'places a substantive restriction on the State's power to take the life of a mentally retarded offender.'" (*Id.* at 350, citing *Ford v. Wainwright* (1986) 477 U.S. 399, 405.) Intellectually disabled offenders "by definition [ ] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Id.* at 2250.) Petitioner is intellectually disabled and his execution would constitute cruel and unusual punishment.

In *Atkins*, the Court held "evolving standards of decency that mark the

progress of a maturing society" had persuaded it that the execution of intellectually disabled persons was cruel and unusual and thus barred by the Eighth Amendment to the United States Constitution. (*Id.* at pp. 304, 306, 311-312 and 321.) *Atkins* left the definition of "mental retardation" to the discretion of the States but cited two "clinical definitions" by the American Association of Mental Retardation[2] (AAMR) and the American Psychiatric Association. (*Id.* at 317-318.)

California's definition of intellectual disability is set out in Penal Code § 1376. It states that "intellectual disability" is defined as "the condition of significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." In addition to defining intellectual disability, states were also mandated by *Atkins* to develop ways to enforce this new restriction on execution. California set out its procedure in *In re Hawthorne* (2005) 35 Cal. 4th 40. Intellectual disability claims are raised by petition for writ of habeas corpus and following a prima

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In 2007, the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). Judge Perry found that the AAIDD's 2010 Intellectual Disability Definition (the 11th edition "Green Book") was the most current authority. However, the "Green Book" and the 2002 AAMR manual (the "Red Book") were used interchangeably by the expert witnesses. In addition, despite the fact that the AAIDD's definition of intellectual disability in the 10th and 11th editions differed from the 9th edition cited by *Atkins*, the parties agreed and Judge Perry accepted that all 3 editions were authoritative.

facie showing, the matter is referred to a referee for hearing. In addition, intellectual disability is not measured according to a fixed IQ score or specific adaptive deficiency, but rather constitutes an assessment of a defendant's overall capacity based on all relevant evidence. (*Id.* at 49.)

Petitioner is intellectually disabled, within the meaning of *Atkins* based on his significantly subaverage intellectual functioning, related limitations in adaptive skill areas and the manifestation of his intellectual disability before age 18.

> Under the AAMR, intellectual disability is defined as: Substantial limitations in present functioning. It is characterized by: (1) Significantly subaverage intellectual functioning; existing concurrently with (2) Related limitations in two or more of the following applicable adaptive skill areas; self-care, communication, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, work; (3) Mental retardation manifests before age 18.

(*Atkins v. Virginia*, 536 U.S. at 2250 fn. 3, citing Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992).)

As set forth below, Petitioner has demonstrated significantly subaverage intellectual functioning. In addition, Petitioner's adaptive skills are severely limited and render Petitioner so impaired as to fall within the range of intellectually disabled. Petitioner's subaverage intellectual functioning exists concurrently with his developmental limitations. Petitioner displayed

numerous symptoms of intellectual disability before he reached the age of 18.

B. The Experts' Testimony

Four experts testified regarding Petitioner's mental status. Dr. Natasha Khazanov, who was the only expert to have any contact with Petitioner since 1984, testified on behalf of Petitioner. Drs. Michael Maloney, Charles Hinkin and Kaushal Sharma were called by Respondent.

Dr. Khazanov is an assistant clinical professor at the University of California at San Francisco and maintains a private practice in San Francisco. (RH Ex. 22.) She earned her PhD at the Bekhterev Psychoneurological Institute in Russia in 1988. (Ex. 22.) Her work at the Institute included norming the Wechsler Adult Intelligence Scale (WAIS) test for the Russian population. (8 RHT 1276.) The norms are critical in ensuring the test is valid and reliable. In addition, Dr. Khazanov has worked on 48 post conviction habeas cases over the past 15 years. Two out of the 48 were life without parole (LWOP) and 46 were inmates who had already received a death sentence. Dr. Khazanov evaluated all 48 defendants for intellectual disabilities and found only three who were intellectually disabled. (8 RHT 1282-1283; 1414.) Petitioner was one of them.

Dr. Maloney earned a PhD in clinical psychology from the University of Colorado in 1969. (RH Ex. KK) He is the Mental Health Clinical District

Chief for the Los Angeles County Department of Mental Health and he is also responsible for the Jail Mental Evaluation Team. (10 RHT 1657.) Dr. Maloney has authored two significant books in his field, Psychological Assessment: A Conceptual Approach, published in 1976 and Mental Retardation in Modern Society, published in 1979. (10 RHT 1659.) Dr. Maloney estimated that over the course of his career he had evaluated more than a thousand people for cognitive functioning. (10 RHT 1660.) Dr. Maloney was hired by Ron Slick, Petitioner's trial counsel, to evaluate Petitioner in 1984. (10 RHT 1669-1671.)

Dr. Hinkin obtained a PhD in clinical psychology from the University of Arizona in 1991. (RH Ex. I, HINK0083.) He is the Director of Neuropsychological Services at the West Los Angeles VA Medical Center and a professor in the Department of Psychiatry and Biobehavioral Sciences at the UCLA School of Medicine. (RH Ex. I, HINK0084.) While Dr. Khazanov and Dr. Maloney both had extensive, rich backgrounds in intellectual disability, Dr. Hinkin does not. In contrast, Dr. Hinkin worked as an aide in graduate school, but had not done any intellectual disability counseling because his primary work was done in the area of HIV patients. (12 RHT 1970-1972.) In fact, Dr. Hinkin's experience in intellectual disability primarily consisted of being called by Respondent to testify in five cases and did not intersect the field of intellectual disability in the profound ways that Dr. Maloney and Dr.

Khazanov's careers did. (12 RHT 1967-1969.) Dr. Hinkin did not examine Petitioner - the subject about whom he was rendering an opinion. (12 RHT 1985.) According to the American Psychological Association (APA), "Ethical Principles of Psychologists and Code of Conduct," § 901(b):

> ...psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document efforts they made and the results of those efforts, clarify the probable impact on their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations.

Dr. Hinkin made no efforts to examine Petitioner. As such, Dr. Hinkin did not meet the ethical requirements of the APA. However, even if Dr. Hinkin could ethically do an evaluation and testify without examining the subject of the opinion, his credibility is substantially less than the other two doctors who did see Petitioner and conducted their own independent testing.[3] (12 RHT

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[3] Dr. Hinkin was paid an inordinate amount of money to sit and watch other witnesses and to testify himself. Dr. Hinkin spent 100 hours reviewing the record at a cost of $28,462.50 and he was in court for an entire week observing the testimony of Drs. Khazanov and Maloney. Dr. Hinkin testified he charges $375 per hour for work outside of court and $2,500 per half day in court. (12 RHT 2074.) Dr. Hinkin will receive $64,375 from Respondent for his work on Petitioner's case. This budget for one unqualified witness is obscene. The entire amount of money allotted by the

2083-2084.) The Referee correctly found that Dr. Hinkin's testimony is entitled to lesser weight than that offered by the other experts because he is the only expert who did not interview Petitioner. (*Bell v. Mason* (2011) 194 Cal.App.4th 1103, 1113.)

Dr. Sharma obtained his medical degree in India and received psychiatric training in Detroit and England. (RH Ex. SS.) He is board certified in psychiatry and forensic psychology by the American Board of Psychiatry & Neurology. He is also board certified in forensic psychiatry by the American Board of Forensic Psychiatry. (RH Ex. SS.) Dr. Sharma was hired by Ron Slick on May 8, 1984 to evaluate Petitioner's competency to stand trial and sanity at the time of the offense. In addition, Slick requested that Dr. Sharma answer six questions relating to a possible penalty phase. (RH Ex. B, p. 182-184; 299-302.)

Dr. Khazanov examined Petitioner at San Quentin State Prison on June 10, 2003 and again on August 18 and 20, 2003. (RH Ex. B, p. 133-134.) She was the only expert to have any contact with Petitioner since 1984. After administering a battery of tests to Petitioner and reviewing his file, Dr.

California Supreme Court to the defense for experts and investigation for allowances on habeas was a total of $25,000 prior to the granting of the reference hearing. Dr. Hinkin testified, "I've been thinking about my kids' tuition as I've been sitting through this." (12 RHT 2075.)

Khazanov formed the opinion that Petitioner met the criteria for intellectual disability as set forth by the American Psychiatric Association (APA) and the American Association for Intellectual and Developmental Disabilities (AAIDD). (8 RHT 1284.) The APA's definition of intellectual disability is a significantly subaverage intellectual functioning, IQ of approximately 75 or below on an individually administered IQ test and onset must occur before the age of 18. (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).) In order to diagnose intellectual disability under the DSM-IV, three prongs must be satisfied; they are: 1.) an IQ based on individually administered test of approximately 70 or below; 2.) a deficit in adaptive functioning - that is, how people actually behave and live their everyday lives; and 3.) the symptoms must manifest before the age of 18. (8 RHT 1291-1292.) These three criteria are consistent with the definition of intellectual disability in Penal Code § 1376.

Dr. Khazanov emphasized the importance of a test that is individually administered because they are more reliable in that they do not allow test takers to cheat. Group administered tests also run the risk of either a false positive or a false negative score for intellectual disability and it is too difficult to gauge effort level unless the test is administered individually. Group tests are not considered the standard of practice in the job of assessing people with

intellectual disability. (8 RHT 1294, 1336-1337.)

In addition, Dr. Khazanov testified that the WAIS test is considered the gold standard because of the way it is normed. Norming is critically important because an evaluator needs to have accurate comparisons. Dr. Khazanov had a significant amount of experience norming the WAIS test in Russia. She stated that the WAIS is well normed because it is administered to a large group of people and the sample was created using the census data at the time the test was created. Additionally, a valid test will be regularly re-normed and the WAIS is published about every 10 years. (8 RHT 1339.)

Dr. Maloney met with Petitioner twice at the jail and his assistant, Dr. Nancy Kaser-Boyd, administered psychological tests to Petitioner. (RH Ex. R, p. 2436.) Dr. Maloney also reviewed case materials, met with Slick and acted as a trial consultant to evaluate five witnesses on their potential testimony. (RH Ex. R, p. 2436.) Dr. Maloney felt that his opinions would not be helpful to Petitioner's case and therefore, he did not write a report. (10 RHT 1679.)

The Referee found that Dr. Maloney could not say today whether Petitioner is intellectually disabled but by present day standards it's a "closer case." (11 RHT 1802, 1945.) However, despite the fact that Dr. Maloney was not tasked with specifically testing for intellectual disability, he testified that "today I would have explored that [intellectual disability] in more detail for

sure." (11 RHT 1802.) Dr. Maloney testified that his notes indicated Petitioner told him that he completed school through the seventh grade but Petitioner omitted the fact that he repeated the first grade. Dr. Maloney stated that had he known this information, it would have been something he would have been interested in for an intellectual disability evaluation. (11 RHT 1923.)

Dr. Kaser-Boyd and Dr. Maloney administered the WAIS-R test to Petitioner. Dr. Maloney stated that the results on the tests he administered in 1984 were consistent with the IQ scores on Dr. Khazanov's tests from 2003 and also consistent with the WISC test administered when Petitioner was 10-years-old. (11 RHT 1892.) In addition, Dr. Maloney testified that the pattern of internal consistencies in the 1984 and 2003 tests was similar and most critically in the full scale IQ scores where Dr. Khazanov scored 71 and Dr. Kaser-Boyd scored 73. Dr. Maloney stated that these scores were well within the reliability of both of these tests. (11 RHT 1890.)

Dr. Sharma interviewed Petitioner for four hours and spent six hours reviewing documents. (13 RHT 2197.) Dr. Sharma did not administer any tests to Petitioner. (13 RHT 2196.) Dr. Sharma was not tasked with evaluating Petitioner for intellectual disabilities. (13 RHT 2206.) His office was in the same building as Dr. Maloney's office and they often consulted with each other and worked together on cases. (13 RHT 2184.) As such, Dr. Sharma testified

that Dr. Maloney had "better tools" to access Petitioner's intellectual functioning and Dr. Sharma would have depended upon Maloney to determine the types of tests which were most appropriate if Dr. Maloney saw any signs or symptoms of intellectual disability. (13 RHT 2210.)

Dr. Sharma's report concluded that Petitioner was competent to stand trial and was legally sane at the time of the offense. (RH Ex. B., p. 303.) Dr. Sharma found no evidence of psychosis, organic brain disorder, depression or any other major disorder and agreed with a previous diagnosis that Petitioner had an Anti-social Personality Disorder starting at an early age. (RH Ex. B., p. 305.)

Dr. Hinkin criticized the work of the other experts. (12 RHT 1982, 1990, 1992, 2009-2013, 2029, 2076-2077, 2089, 2100-2101.) Dr. Hinkin was the only expert witness who never personally evaluated Petitioner. Despite this, Dr. Hinkin acknowledged the importance of personally interacting with a subject of an examination. (12 RHT 2077.) He reviewed medical and legal records in addition to spending four days watching Drs. Maloney and Khazanov testify. (RH Ex. I, p. 3; 12 RHT 1960.) However, ultimately Dr. Hinkin had to agree with Dr. Maloney that it was a close call and people could see it either way. (12 RHT 2027.) Dr. Hinkin testified that we know something is wrong with Petitioner. (12 RHT 1995.) Dr. Hinkin stated that Petitioner was

"certainly" an individual with "mental health issues," and was "functionally illiterate." (12 RHT 2157, 1997.) However, Dr. Hinkin stated he believed Petitioner did not meet the adaptive behavior prong and did not have intellectual disabilities. (12 RHT 2161.)

Dr. Hinkin stated that neuropsychologists look for a coalescence of data, that is - a replication of results and seeing similar results over and over which gives greater weight to the results. (12 RHT 1985.) This conclusion supports the testimony of Drs. Khazanov and Maloney and the similarity of their testing which were administered nearly 20 years apart are strong evidence of a coalescence of data.

C. The Referee Correctly Found Evidence of Significant Subaverage General Intellectual Functioning

The Referee found significant evidence that Petitioner's general intellectual functioning is subaverage. In particular, he found that Petitioner's WISC score of 70 in 1963 is the most reliable assessment of Petitioner's then existing IQ. (Referee's Report, p. 16.) Dr. Khazanov testified that the score was a true measure of his intellectual functioning at age 10. (8 RHT 1344.) Dr. Maloney agreed that the WISC was probably the most reliable of the tests given to Petitioner before age 18. (11 RHT 1892.) The Referee noted that the score of 70 was consistent with his later scores on the Wechsler Adult

Intelligence Scale - Revised (WAIS-R) in 1984 and the Wechsler Adult Intelligence Scale-III (WAIS-III) in 2003. (Referee's Report, p. 16.) Furthermore, all of these scores fall well within the cutoff score under *Atkins* of 75 for intellectual disability. He pointed out that even Dr. Hinkin had to concede that "if you focus just on the better tests, which are the WAIS tests, then...it would not be unreasonable to conclude that it [Petitioner's IQ scores] meets that [first] prong, if you just focus on the tests." (12 RHT 2027.)

Drs. Maloney and Khazanov acknowledged that not only the WISC and WAIS scores were remarkably similar in Full Scale IQ but that the congruence between the scores on the individual tests scales in 1984 and 2003 were remarkably consistent. Dr. Maloney and Dr. Khazanov both noted that it would have been extremely difficult, if not impossible, for anyone to fake such similarities. (8 RHT 1371-1372; 11 RHT 1890.)

The Referee's finding that there is no evidence of malingering by Petitioner is correct. (Referee's Report, p. 18) He stated that "Petitioner's scores on the WAIS-R and WAIS-III subtests are very similar and present a consistent profile which appears to be reliable." (Referee's Report, p. 18, citing Dr. Khazanov's testimony that the consistent profile reflected in the tests was "incredibly reliable." (8 RHT 1371).) In addition, he points to the consistency in Petitioner's scores on the Wechsler tests over 41 years as

supporting the view that his low WAIS-III score of 67 in 2003 is not the result of dementia. (Referee's Report, p. 18.)

The Referee noted that the experts differed as to what effect, if any, socioeconomic factors played in Petitioner's IQ scores. He found that the evidence was speculative regarding whether adjustments should be made to Petitioner's IQ scores. This finding is bolstered by the AAIDD's recent pronouncement that adjustment of IQ scores for these factors should not be made. (Referee's Report, p. 19.)

D. The Referee Correctly Found Significant Deficits in Adaptive Behavior

The evidence presented at the Reference Hearing established that Petitioner is illiterate, was frequently in trouble in school and lived life on the street without much insight. Dr. Khazanov testified that Petitioner's most profound deficiency was his inability to read and write and use his language. Dr. Khazanov found that Petitioner is "basically illiterate" and observed that he was "the only person actually at San Quentin I met who didn't know how to read and write." (8 RHT 1307, 1309.) Petitioner repeated the first grade and he attended school for 180 days. In Dr. Khazanov's opinion, Petitioner attended school long enough to be able to learn to read if he could. Intellectual disability and a low IQ would account for a person's failure to acquire a skill

that normally people acquire. (8 RHT 1347-1348.)

The definition of adaptive behavior is "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." (2010 Intellectual Disability Definition, p. 45.) According to the AAIDD these adaptive behavior skills are broken down into subsets, also known as "domains" and grouped by category:

> Conceptual skills: language, reading and writing, money, time and number concepts
>
> Social skills: interpersonal skills, social responsibility, self-esteem, gullibility, naivete, follows rules/obeys laws, avoids being victimized, and social problem solving
>
> Practical skills: activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone

(*Id.*, p. 44; Ex. 23, p.6 (citing AAMR 10th edition).)

In order to satisfy this prong, the subject must exhibit evidence of significant limitations in one of the three domains. (8 RHT 1302.) Dr. Khazanov explained that is was not necessary to exhibit deficits in every single category because strengths and weaknesses always coexist. (8 RHT 1308.) Dr. Khazanov further clarified this by stating that deficits in only one subscale under the umbrella of the domain would not be enough. There must be significant limitations in more that just one subscale. (8 RHT 1303.) For

example, she stated that Petitioner has severe deficits in conceptual skills which include limitations involving language, reading, writing, money concepts and self-direction. Therefore, these significant limitations coupled with Petitioner's subaverage IQ are evidence that Petitioner meets the adaptive functioning prong. (8 RHT 1302-1303.)

Dr. Khazanov testified that Petitioner had deficits in adaptive functioning that were remarkably similar throughout his life. (8 RHT 1307-1309.) While there could be environmental factors in his reading and writing, it appeared that he simply could not learn. Larry Cleveland who went to the same school with Petitioner and eventually skipped classes together with him, learned to read and write. Petitioner was present in school long enough and repeated the first grade. Petitioner attended school fairly regularly well through the fourth grade. Petitioner had ample opportunity to learn. Petitioner continued in school in the various institutions and eventually tried to learn to read and write in prison, and yet he still never made it past the third grade level. (8 RHT 1347-1348.)

Larry Cleveland knew Petitioner his whole life. Mr. Cleveland's testimony revealed important pieces of evidence demonstrating adaptive functioning deficits. For example, Petitioner was unable to drive unless Mr. Cleveland was in the car because Petitioner could not read the street signs. (3

RHT 522, 526.) Despite the fact that Petitioner knew how to drive a car, he could never pass the driver's test because he could not read. In addition, Petitioner could never master throwing dice because his dexterity was impaired. The deficiency in dexterity was confirmed by Dr. Khazanov's tests for fine motor coordination where Petitioner scored poorly. (8 RHT 1323-1324.) Dr. Khazanov testified that Petitioner performed far below his peers in the neuropsych battery which measured fine motor coordination. Petitioner could not do rapid alternating movements (also known as reciprocal coordination). Dr. Khazanov stated, "he could not do many things that I asked him to do. He was very slow." (8 RHT 1324.)

Petitioner did not want to take the tests if Dr. Khazanov was going to find him "crazy." (8 RHT 1332-1334.) That Petitioner would resist being diagnosed with a condition that could spare him execution is consistent with being intellectually disabled. As part of her education and training, Dr. Khazanov was tasked with evaluating conscripts into the Russian army. Dr. Khazanov administered the same WAIS test that is used in the United States. Many conscripts attempted to avoid military service by having themselves declared intellectually disabled or borderline intellectual functioning. (8 RHT 1271-1283.) Dr. Khazanov's evaluations showed that only the people who were not intellectually disabled attempted to underperform. Conversely, the

people who truly did have deficiencies really tried very hard and attempted to mask their symptoms. They were upset when she told them they had a problem. Dr. Khazanov noted that the WAIS tests were extremely difficult to fake and there are strict procedures of administering the test to guard against malingering. (8 RHT 1271-1283.) Dr. Khazanov felt Petitioner was attempting to please her and she was impressed by the way Petitioner continued sticking with the test despite the fact that he scored poorly. (8 RHT 1332.)

Petitioner had other deficits in adaptive functioning. Petitioner was not able to do simple things, like shoot craps and play pool well. (3 RHT 570-571.) Petitioner had difficulties with his manual dexterity on the street and when tested in prison. Petitioner was gullible. He believed that he could be the father figure in his household, bringing money to his mother and sisters. He washed his mother's feet and combed her hair. When Robert Lewis, Sr. would call (the man who had 18 children, one of whom with his own daughter) Petitioner would go out and commit a robbery in order to bring back his father a bag of money for his drug habit. Petitioner attached himself to one person, Larry Cleveland and tried to get by on the streets. (8 RHT 1322-1327; 11 RHT 1849-1851.)

Petitioner could get by to a certain extent. He eventually had a wife and children, including Little Robert who had Down syndrome. Petitioner robbed

with his friend Mr. Cleveland and participated in Mr. Cleveland's winnings at pool and craps.(3 RHT 507, 511) Petitioner did not function at the level of some people who are intellectually disabled and who maintain jobs and go to work every day. (3 RHT 570-571; 8 RHT 1432-1433.) Petitioner was in and out of first the juvenile justice system and then the criminal justice system and he was not learning from his experiences. (8 RHT 1433.) But as Dr. Maloney stated so clearly both in court and in his 1979 book, Mental Retardation and Modern Society, in the description of mild mental intellectual disability, people can go through life without even being identified unless somebody else really started looking at them and asking questions. Such people might not be good at it, but they could certainly do it. Some of them work, live on their own, are very independent and they are not recognizable. (11 RHT 1954.)

The Referee correctly rejected the argument that, because Petitioner was able to survive on the streets, he did not suffer adaptive behavior deficits. (Referee's Report, p. 25.) He cited to numerous points in the record to support his findings. He said that "[a]n ability to survive on the street does not necessarily refute adaptive behavior deficits." (*Id.*) He pointed out that the "evidence does not suggest that petitioner was a *successful* street hustler" given that he was arrested and convicted numerous times. (*Id.*) The fact that he was unable to learn from these experiences provides support that he is

intellectually disabled. (*Id.*) There was additional evidence to support this. For instance, the Referee finds that "Petitioner's adamant assertion of such easily disprovable lies" when he was interviewed by police detectives "displays unclear thinking and an obvious lack of cunning." (*Id.*)

Dr. Khazanov's testimony refuted Respondent's assertion by explaining that within an individual there are limitations that coexist with strengths. There is a very common misconception that if people have strengths they cannot be intellectually disabled. Dr. Khazanov testified that frequently intellectually disabled people try very hard to compensate for their deficiencies and engage in "masking behavior." (8 RHT 1296-1298.) Specifically when looking at adaptive behavior it is common for a subject to score both low and high in adaptive skills. Dr. Khazanov emphasized the importance of analyzing adaptive behaviors on a case-by-case basis because it is not unusual for one adaptive skill to be higher in order to compensate for the deficiency in another. In the case of Petitioner, he manifests severe deficits in conceptual adaptive skills which include language, reading, writing, money concepts and self direction. (8 RHT 1296-1301, 1323, 1334.) Evidence of Petitioner engaging in masking behavior was demonstrated by the way he latched on to Mr. Cleveland. Dr. Khazanov testified that it is common for people who do not know how to read or write to attach themselves to someone who does in order

to compensate for their own deficiency. (8 RHT 1327.) This testimony was further substantiated by Dr. Maloney who testified that an individual with intellectual disabilities could be characterized as gullible or naive and could tend to latch on to another higher functioning person as a way of getting by in life. (11 RHT 1849-1850.)

Dr. Maloney testified regarding a notation Dr. Kaser-Boyd had made on a report about Petitioner that said "some aphasia." Dr. Maloney defined aphasia as an expressive language difficulty that could be associated with intellectual disabilities. (11 RHT 1861.) Dr. Kaser-Boyd was administering the WAIS-R which measures aptitude with similarities. The results indicated that Petitioner had difficulty distinguishing the concept. In addition, Dr. Kaser-Boyd wrote in her report that Petitioner's "talk comes out all confused" when dealing with the section on comprehension. (Ex. B, p. 190.) Dr. Maloney testified that this could be an indication of potential intellectual disabilities. (11 RHT 1866.)

Even Dr. Hinkin had to concede that everyone agreed Petitioner was "functionally illiterate," that the "reading and writing piece" of the adaptive behavior deficit "is clearly there." (12 RHT 1997, 2052.) Dr. Hinkin also conceded that Petitioner was not malingering. (12 RHT 2030.) Despite all this, Dr. Hinkin's opinion was that the record was insufficient to demonstrate

adaptive behavior. (12 RHT 2073.)

Petitioner's childhood friend, Steven Harris, testified that Petitioner "wasn't as quick as the rest of us" and not as smart as Harris or Mr. Cleveland but he did not think Petitioner was "retarded." (7 RHT 1217, 1229.) Mr. Harris could not remember Petitioner ever reading anything. (7 RHT 1217.) Petitioner's cousin, Tommie McGlothin testified that Petitioner spent his childhood "in and out of the juvenile facilities." (7 RHT 1157.) Mr. McGlothin was asked if he thought Petitioner was "mentally slow or retarded in some way," Mr. McGlothin stated that he believed that something was wrong with Petitioner and that he had a problem. (7 RHT 1166.) Mr. McGlothin testified that Petitioner's problem was that he "kept getting in trouble by going out and doing the same thing." (7 RHT 1166.) The failure to learn from mistakes and to continue getting in the same situations over and over again is another indicia of intellectual disability.

The Referee correctly found that Petitioner clearly exhibited significant adaptive behavior deficits. Petitioner was perceived by his friends and family as mentally "slow." Petitioner was unable to read and write and to effectively understand and communicate and remains so to this day. (Referee's Report, p. 25.)

E. The Referee Correctly Found that Petitioner's Subaverage Intellectual Functioning and Adaptive Deficits Manifested Before Age 18

There is an abundance of evidence that Petitioner's intellectual disability existed before age 18. Petitioner was held back in the first grade and repeatedly given IQ tests by school officials. The Referee, based on the totality of the circumstances as set forth in more detail in the Referee's Report, supports the referee's finding that Petitioner, by a preponderance of the evidence established that he is intellectually disabled.

Petitioner was first administered an IQ test at the age of six. Thereafter, he was subjected to numerous IQ tests by school authorities. (Referee's Report, Table 1, p. 12.) A consensus was reached by all of the experts regarding the volume of tests administered to Petitioner to test his IQ so often at a young age. (8 RHT 1341; 11 RHT 1895; 12 RHT 1995.) Dr. Khazanov testified that Petitioner was tested for IQ levels 11 times and he did not have a neurotic, doting mother who was haranguing school officials to test her son. Dr. Khazanov stated that the reason Petitioner was tested so often was that there was something fundamentally wrong with him from an early age when he was failing school. (8 RHT 1341.) She stated that she didn't know many people who repeat the first grade, but Petitioner did. Dr. Khazanov's opinion was that

people were likely trying to diagnose him and that explains the disproportionate number of times his IQ was tested. (8 RHT 1341.)

Dr. Maloney echoed Dr. Khazanov's opinion that the reason Petitioner was given so many tests as a child was that he was probably singled out as being a child who needed to be looked at for some reason. (11 RHT 1895.)

Even Dr. Hinkin agreed that there was something wrong with Petitioner. He stated, "I think Dr. Khazanov was probably dead on in thinking that something about this kid got the attention of the school teachers and authorities. They're not giving IQ tests [to] every single kid, you know, 6,8,10 times throughout their school [years] ... So there was something about him that made him stand out and they gave these IQ test to. (12 RHT 1989.)

Petitioner's adaptive deficits were apparent to those who observed him as a child. Petitioner's childhood friends and cousin testified to his deficits while growing up. Larry Cleveland described him as "slow" and unable to learn. (3 RHT 570, 571.) Steven Harris said that Petitioner "just wasn't as quick as the rest of us." (7 RHT 1217, 1229.) Tommie McGlothin agreed that Petitioner was "mentally slow or retarded in some way" and pointed to his inability to learn from his mistakes. (7 RHT 1166.)

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F. This Court Should Adopt the Referee's Finding that Petitioner is Intellectually Disabled and Grant Relief Pursuant to *Atkins* and *Hawthorne*

The Referee's finding that Petitioner is intellectually disabled within the meaning of *Atkins* and *Hawthorne* is correct. (Referee's Report, pp. 26-28) He cited to numerous points in the record to support his finding that Petitioner's general intellectual functioning is subaverage and was manifest before age 18. He noted that Petitioner had difficulties in school and repeated first grade. He stated that the fact that Petitioner "was tested so frequently in his early years is strong evidence that school authorities perceived there to be 'something wrong' with him." (Referee's Report, p. 26.) He said that "[t]he reliable Wechsler intelligence tests administered to petitioner at age 10, 32, and 51 were remarkably consistent in measuring his IQ between 67 and 71, scores well within the accepted range for marginal mental retardation." (Referee's Report, p. 26.)

The Referee cited to evidence in the record that Petitioner suffered substantial adaptive behavior deficits which were manifest before age 18. He pointed to the well established and uncontested evidence that Petitioner is illiterate. (Referee's Report, p. 27.) He said that "Petitioner's difficulties in understanding were documented in 1984 by Dr. Nancy Kaser-Boyd, and

observed in 2003 by Dr. Khazanov." (Referee's Report, p. 27.) He stated that this evidence provides "strong corroboration for the description of petitioner as mentally 'slow' offered by childhood friends Larry Cleveland and Steven Harris, and his cousin Tommie McGlothin." (Referee's Report, p. 27.)

The totality of the evidence demonstrates, by a preponderance of the evidence, that Petitioner's actual brain development, was and is in the intellectually disabled range. The range of tests Petitioner was given in childhood, by Dr. Kaser-Boyd in 1984 and the range of tests given by Dr. Khazanov in 2003 show a consistent pattern of subaverage intellectual functioning. Petitioner cannot process information well. Petitioner cannot think abstractly. Petitioner cannot function within two standard deviations of the norm. In addition, Petitioner has demonstrated significant deficits in adaptive functioning dating back to childhood. Petitioner meets the criteria for intellectual disability under the *Atkins* test because he demonstrates subaverage intellectual functioning and significant limitations in adaptive skills, such as communication, self-care, and self-direction that became manifest before the age of 18.

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TRIAL COUNSEL'S COMPETENCY QUESTIONS

The Referee essentially answered only Question 2 (Referee's Report, pp. 28-38) and did not address the remaining questions. (Referee's Report, pp. 38-42). The Referee stated as to Question 3, "The question is mooted by the finding in response to Question 2." As to Questions 5 and 6 he said "See the Response to Question 2." (Referee's Report, pp. 38 and 39) As to Question 6, he responded with a brief discussion of why a "short" penalty phase was appropriate. (Referee's Report, pp. 39-42)

The answer of the Referee to Question 2 recounts in detail what time was put into the case by Ron Slick, investigator Kleinbauer, Dr. Maloney and Dr. Sharma. The retelling of their story, even though through their own testimony and somewhat self-serving billing statements, bears scrutiny, which the Referee fails to give it. Their records display a minimal and perfunctory approach to a serious and complex case. A dispassionate review of what they claimed to have done, particularly Ron Slick and Kristina Kleinbauer, shows an investigation that is inadequate on its face under the standards for investigation and preparation of a capital penalty phase trial. (See *Wiggins* v. *Smith* (2003) 539 U.S. 510.)

The Referee's findings of competence in Question 2 also fail as a matter of law. It would be a departure from all present cases of this Honorable Court and of the United States Supreme Court to evaluate the competence of counsel on the basis of the

number of hours the defense lawyer or the investigator put in. Each case is unique and must be evaluated on the basis of what a competent lawyer (assisted by a competent investigator) would have had to do to actually investigate and prepare the case. Thus, aside from the fact that these hours here are paltry compared to a real penalty phase defense, the Court has to evaluate what a competent lawyer and investigator would have done.

Therefore, it is not possible for the Referee or this Court to assert that the inquiry is moot once the billing statements of the lawyer, investigator, psychologist and psychiatrist have been evaluated. The additional questions posed by this Court, Questions 3 though 6, go to the essence of why this minimal investigation and one hour and 36 minute penalty phase trial were inadequate. The Referee should have, but did not, answer Questions 3 through 6 with the same rigor as Question 1, pertaining to the Petitioner's ineligibility for execution due to intellectual disability under *Atkins*.

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Question 2: What actions did petitioner's trial counsel, Ron Slick, take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's trial? What were the results of that be expected of investigation? Was that investigation conducted in a manner to be expected of reasonably competent attorneys acting as diligent advocates? If not, in what respects was it inadequate?

The Referee addressed the first two subparts of this question, which he labeled A and B, (Referee's Report, pp. 28-35) and then answered the part of the question, "Was Slick's investigation conducted in a manner to be expected of reasonably competent attorneys acting as diligent advocates?" with a finding of "Yes." (Referee's Report, p. 36) This was followed by subpart C. The Referee did not address inadequacies, just as he did not address the questions following, 3 through 6. To the extent that the Referee cited to the record in subparts A through C of Question 2, the conclusions drawn from that record, the existence of other facts not referenced and the failure to examine what should have been done by competent counsel undermine the Referee's ultimate conclusion.

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2A. Slick's Actions to Investigate Potential Evidence of Mitigation

1. The Referee's reliance on Slick's billing of 190 hours for trial preparation was not supported by the record.

The Referee placed weight on the claim that Ron Slick spent 190 hours preparing for this entire death penalty case. (Referee's Report, p. 30.) This is a paltry number of hours to prepare for a complex capital case. However, the number itself is misleading.

First, if the recorded hours are at all reflective of time trial counsel spent on the case, he rounded up to the hour.[4] (5 RHT 802). Even if this is a proper billing practice, it clearly distorts the amount of actual time dedicated to proaration.

Second, a good deal of the time he billed for was questionable. On April 28, 1984, Mr. Slick billed the county 5.0 hours for reviewing the State Public Defender's four-volume manual on death penalty. (RH Ex. 10; 5 RHT 819.) This is questionable, particularly since he did not follow the principles of thorough preparation espoused in the manual even though he said he knew about them. (5 RHT 759.)

Third, also questionable was the 5.0 hours he claimed he spent on January 9, 1984 reviewing the District Attorney's files on three of Petitioner's prior convictions. (RH Ex. 10). The files are noted to be 60 pages, 25 pages and 70 pages respectively.

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[4] Slick was asked if he rounded up to the half hour and he said, "It looks like it is rounded off to the hour to me." (5 RHT 802.)

He also claimed he spent 14.0 hours on May 23, 24 and 25 reviewing 331 pages of California Department of Corrections (CDC) records. (RH Ex. 10)

Fourth, part of the time he billed on July 25, 1984, was documented as: "interviewed Michael Maloney in Pasadena and attempted to interview client at the L.A. Co. Jail." This was a total of 4.0 hours which apparently involved traveling and going to the jail without being able to see the client. (RH Ex. 10.) This is not to be critical of the billing practice of charging portal to portal, if that is the norm. However, it means that the Referee was giving him credit for preparation time that had nothing to do with preparation.

Fifth, Dr. Maloney testified that he told Ron Slick he could not be of any help to him and therefore did not write a report. (10 RHT 1679.) Mr. Slick's last contact with Dr. Maloney was on July 31, 1984. He claimed that as of August 1, 1984 he decided that there were no good penalty phase witnesses. We also know that he did not call Dr. Maloney as a witness nor is there any evidence he intended to. Yet, he billed for 4.0 hours on August 2, 1984, stating he "outlined Maloney's testimony." (RH Ex. 10)

Sixth, of the 190 hours, 48 of those hours were not trial preparation at all but were post verdict. This means that there were only 148 hours billed, rounded up to

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the hour, and many are questionable on their face.[5] This is an outrageously small amount of time to spend on the preparation of a death penalty case. Far from giving this Court assurance that trial counsel provided competent representation, any examination of these time records requires a conclusion to the contrary.

However, no mater what the time records show, they cannot answer the question of ineffective assistance of counsel. That requires answering the Court's Questions 3 through 6 as well and the Referee chose not to do so.

2. Slick's Responsibility

The lawyer is responsible for the investigation and preparation of the case. It is ineffective assistance of counsel to fail to prepare thoroughly for a capital case. *Wiggins v. Smith* (2003) 539 U.S. 510 Ron Slick admitted that he understood that he was the "captain of the ship." (5 RHT 903-904.) In *Wiggins v. Smith*, the Supreme Court found defense counsel ineffective based on the failure to conduct an adequate investigation into the client's background. After conviction by the trial court, Wiggins chose to be sentenced by a jury. During this phase of the proceedings, his attorney did

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[5]Parenthetically, these post verdict hours included going to proportionality hearings with other lawyers for Livesay hearings. (RH Ex. 10) At the time of Petitioner's trial, Curt Livesay was the assistant District Attorney and he alone made the decision as to whether or not the government would seek the death penalty. It was the custom and practice at the time for defense attorneys to put together a packet of information known as a "Livesay submission" in advance of trial for the purpose of persuading the state not to seek death. Slick testified that he did not make a "Livesay submission" in advance of Petitioner's case, but that he had in the past made these submissions for other cases. (5 RHT 899-900.)

not present any evidence of his history. A number of mitigating factors were present, including his abusive and neglectful upbringing by his mother, abuse while in foster care, his life on the street and return to foster care, and abuse suffered in a job training program.

As will be shown below, however many hours Mr. Slick did or did not spend on this case, he did not meet the burden of a lawyer who takes on the life of a client in a capital case. Counting the number of hours, even if they were reliable and even if they were substantial, which these were not, cannot answer the question of competence. In fact, here the opposite conclusion should be drawn.

2B. The Results of Slick's Investigation of Potential Evidence of Mitigation

1. Kristina Kleinbauer's Investigation

The Referee noted that from May 22, 1984 through July 20, 1984, Ms. Kleinbauer spent 85 hours investigating and writing reports. However, when Ms. Kleinbauer finally began to "work", 12 weeks before trial, she attempted to see Petitioner at the jail. She did not get in. Eventually she spoke with Petitioner's sisters (Rose Davis and Gladys Spillman), girlfriend (Dee Walker), wife (Janiroe Lewis) and father[6] (Robert Lewis, Sr.). (RH Ex. 7.) All of these witnesses came to court. She tried to find Petitioner's childhood friend, Larry Cleveland, but was unable to locate him.

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[6]Petitioner will ask leave to refer to Lewis family witnesses by their first names.

(4 RHT 731.) This was an odd development because at the time of Petitioner's trial, Larry Cleveland was in State Prison having been sentenced to four years by the Los Angeles Superior Court. (3 RHT 501.) There is no evidence that Ms. Kleinbauer looked through County records. There was no evidence that she searched for other witnesses or made any effort to expand her investigation beyond these initial family interviews.

The Referee noted that Ms. Kleinbauer testified that she felt Ron Slick's instructions were clear and that he asked her the right questions. (4 RHT 715.) However, Ms. Kleinbauer had no discussions with Mr. Slick regarding the penalty phase or the strategy of the case. She stated, "it wasn't really collaborative. I mean, he was the lawyer and I was the investigator." (4 RHT 715, 726.) The Referee also noted that Ms. Kleinbauer felt that Mr. Slick did not seem out of the ordinary in comparison with the other defense attorneys she interacted with as an investigator at the time. (4 RHT 715.) However, Ms. Kleinbauer testified that she spent only spent 110.5 hours on the entire case. She said that it was not typical because she was accustomed to spending more time on the investigation and more time in contact with the attorney[7]. (4 RHT 680, 720.) In addition, Ms. Kleinbauer testified that Mr. Slick did not make a strong effort to connect with his clients. She testified that he "seemed not as - not as

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[7]Q: How much time would you usually spend?
Kleinbauer: More time and more - more contact with the attorney as - as the case was going along. (4 RHT 720.)

interested in the clients as other attorneys that I worked for." (4 RHT 715.) Ron Slick, himself, had very little recollection of Petitioner.[8]

The Referee noted that Ms. Kleinbauer felt she "did a good job" investigating Petitioner's case. (4 RHT 716.) However, Ms Kleinbauer testified that her investigation was incomplete. She stated, "In my reports, I believe that I had indicated things that I thought that should be done, witnesses that maybe we hadn't gotten - that I hadn't been able to contact and that there were other things that could have been done." (4 RHT 726.)

It is respectfully submitted that the record, even as documented by the Referee, does not support the conclusion that there was anything like a competent effort to investigate or present a penalty phase. The Referee quotes Ms. Kleinbauer as feeling that she "did a good job." (Referee's Report, p. 31; 4 RHT 716.) Her opinion of her work as directed by Ron Slick is contradicted by the facts. Looking, again, at how and

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[8] Referee: Did you perceive him to be mentally slow in some way?
Slick: No. Nothing comes to mind. What does come to mind, probably the only thing that comes to mind, that he was a pleasant sort of a guy to talk to, and that's the only thing that I can remember with him. (5 RHT 893.)
Referee: Did you ever perceive that he couldn't read or write?
Slick: No.
Referee: Did you ever ask him to read anything to you?
Slick: No. I don't think so.
Referee: Did you ever give him any reports to review and ask for his opinion?
Slick: I don't remember. [...] He sat next to me during the whole thing and we chatted. Just a pleasant guy.
(8 RHT 893-894.)

when the time was spent in this brief "investigation" shows how incompetent it was and how incompetently managed it was by trial counsel.

Ron Slick was appointed on November 18, 1983 to represent Petitioner. (RH Ex. 9, p. 1.) The preliminary hearing in this capital case was on December 15, 1983. He did not retain an investigator prior to the hearing. There was no investigator on the case prior to the hearing. It was not until January 1984, that Mr. Slick applied for funds pursuant to Penal Code § 987.9 to pay for Lawrence Investigation Services, forensic psychologist Dr. Michael Maloney, forensic psychiatrist Dr. Kaushal Sharma and miscellaneous expenses. (5 RHT 769, RH Ex. P, pp. 13-16.) He did not request funds for law clerks or a second investigator. (5 RHT 773-774.) He was aware of the fact that he could have requested a second lawyer (*Keenan* counsel[9]) but he chose not to. (5 RHT 774.)

According to the 987.9 application, Ron Slick sought funds to retain the services of experienced investigation firm, Lawrence Investigations. Instead, he used the money to retained the services of Kristina Kleinbauer. (5 RHT 766, RH Ex. P, pp. 13-16.) The Referee found that Ms. Kleinbauer was an experienced licensed investigator who had previously worked on "five or six" capital cases. (1 RHT 218-

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[9]*Keenan v. Superior Court* (1982) 30 Cal.3d 750 held that a defendant's right to effective counsel includes the right to ancillary services necessary in preparation of a defense. In addition, if a showing of genuine need is made, the presumption arises that a second attorney is required for an indigent defendant charged with a capital offense.

220.) However, Ms. Kleinbauer testified that she had no formal investigation classes and no formal training. Instead, she worked for an investigator, Charles "Chops" Lawrence and then took an exam which she passed. (4 RHT 586.) The reality was that Ms. Kleinbauer had relatively limited experience to be the lead and sole investigator in a capital case.

On January 23, 1984. Ron Slick submitted a memo to Ms. Kleinbauer to retain her as the investigator on this capital case. He gave Ms. Kleinbauer 52 pages of police reports and the preliminary hearing transcript. (RH Ex. R, p. 2639.)

Mr. Sick gave no guidance to Ms. Kleinbauer other than a brief memo. The memo contained fairly generic instructions. The guidance, even for a truly experienced investigator, was minimal. (RH Ex. R, p. 2645.) It contained a list of obvious investigative areas of interest in a capital case but nothing focused.

Ms. Kleinbauer did not start working on the investigation until May 22, 1984. (4 RHT 625-626) There is no evidence that Ron Slick spoke with Ms. Kleinbauer between January and May. He did nothing to determine how the investigation was going.

Ron Slick had this case a total of nine months from the date he was appointed, November 18, 1983, until he started jury selection, August 15, 1984. (RHT 787, RH Ex. 10). During the first six months of that "representation" no investigation was conducted at all. (4 RHT 625-626) It was not until the seventh month, on June 14,

1984, that Ms. Kleinbauer attempted to locate and interview witnesses. (RH Ex. 7.) Ms. Kleinbauer's very first interview of any witness (guilt or penalty phase) was conducted on July 3, 1984; her last interview pertaining to penalty phase was conducted on July 20, 1984. (RH Ex.7.) Therefore, Ms. Kleinbauer's entire penalty phase investigation took place in a span of 17 days in the middle of the eighth month of representation, just one month before trial.

Ms. Kleinbauer submitted her reports on July 24, 1984. (4 RHT 635.) The only contact Ron Slick had with his investigator on this capital case other than to give the perfunctory assignment was to receive the reports and have a brief conversation with Ms. Kleinbauer on that date. Ms. Kleinbauer turned over her interviews and trial counsel did not request any further investigation regarding the penalty phase. Ron Slick testified that after Ms. Kleinbauer turned in her final report on July 24, 1984, he did not request any further mitigation investigation[10]. (Ex. J, 5 RHT 874-879.)

2. Dr. Michael Maloney's "Investigation"

The Referee found that part of Ron Slick's mitigation investigation involved hiring Drs. Maloney and Sharma. Mr. Slick had hired both of them in previous cases. In this case, once again, he gave them identical perfunctory instructions that appeared to be photocopied from other cases. On May 8, 1984, Mr. Slick sent similar letters to

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[10]Mr. Slick did request that Ms. Kleinbauer track down the jewelry receipt and hotel registration card, however these were guilt phase issues and had nothing to do with mitigation. (RH Ex. 7.)

Dr. Maloney and Dr. Sharma with the same enclosures. He requested they answer five questions relating to Petitioner's sanity at the time of the offense, competency to cooperate with counsel and ability to represent himself. Six questions relating to possible sentencing issues in a penalty phase. (RH Ex. B, pp. 182-184, 299-302.) The six questions relating to a possible penalty phase were: 1. What is the defendant's present mental and physical condition? 2. Whether or not the offenses were committed while the defendant was under the influence of extreme mental or emotional disturbance? 3. Whether or not the offenses were committed while the defendant was under the influence of any mental or emotional disturbances? 4. Whether or not he acted under extreme duress or any duress? 5. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the affects of intoxication? 6. Why did the defendant commit the acts that he is accused of doing? (RH Ex. B, p. 301; Ex. R, p. 2356.)

Ron Slick testified that he included an engagement letter in the packet of information he mailed to both Dr. Sharma and Dr. Maloney. He stated that the letters contained the same, standard six questions he used when he asked experts to look into a death penalty case. (5 RHT 912.) By his own admission, there was no attempt made to distinguish Petitioner's case from any other case he had previously tried. Mr. Slick used cookie cutter form letters and questions for his experts to prepare for the penalty

phase mitigation.

Dr. Maloney, with the assistance of Dr. Kaser-Boyd, interviewed Petitioner and administered psychological testing. (RH Ex. R, p. 2449.) Dr. Maloney spent two hours reviewing case materials and met with Ron Slick for 1.5 hours. (RH Ex. R, p. 2449.) Dr. Maloney did not believe his evaluation would be helpful to Petitioner and, therefore, did not prepare a report. (10 RHT 1679.)

Oddly, on July 31, 1984 Ron Slick had a consultation with Dr. Maloney wherein Dr. Maloney was apparently not in the role of a psychologist, but instead in the role of trial consultant. He was asked to interview and discuss the advisability of calling the same five relatives who had been coming to court had finally been interviewed by Kristina Kleinbauer. (10 RHT 1710; RH Ex. R, p. 2449) Ron Slick testified that on July 31, 1984 he and Dr. Maloney met with Dee Walker, Robert Lewis, Sr., Janiroe Lewis and Rose Davis and billed the county five hours for these interviews. (RH Ex. 10; 6 RHT 948-949.)

While it is interesting that Ron Slick used a psychologist to help him decide if the same family members coming to court would also make good witnesses, it is not a part of a real investigation. These people were already interviewed. A real investigation would have involved finding other people and exploring other subjects to develop the client's background or to otherwise develop mitigation. To the extent that he properly had something to do with the investigation of witnesses, Dr. Maloney

told Ron Slick that these relatives were not adequate witnesses. This should have led trial counsel to giving further instructions to his investigator. Instead, Mr. Slick purportedly wrote a self-serving memo and then ceased investigating the penalty phase entirely.

Dr. Maloney's actual contribution to a penalty phase investigation was as an expert. In fact, he was an expert in intellectual disability having written a book and a chapter in another book on "mental retardation." (10 RHT 1659). He had testing done by Dr. Kaser-Boyd that indicated that Petitioner was approximately two standard deviations below the norm in intelligence.

Even though *Atkins* had not been decided, it was well known that mental health issues are a mainline subject of mitigation. Ron Slick, himself, must have know this, since he posed mental health issues in his list to both Dr. Maloney and Dr. Sharma. He specifically listed the second set of questions, comprised of six mental health questions, under the heading of 190.3. (RH Ex. B, p. 301; RH Ex. R, p. 2356.) Yet, when Dr. Maloney obtained some information about these mental health issues, Mr. Slick ignored them.

Dr. Maloney's own notes of his "witness interviews" record several themes that could have been expanded on for mitigation purposes if trial counsel had ordered additional investigation. Petitioner's father spoke of a broken home and irregular contact with his son. Petitioner's father also mentioned that Petitioner had a half-

sibling by another man. Therefore, Robert Lewis, Sr.'s interview provided two prospective additional mitigation witnesses who were never interviewed. In addition, Petitioner's wife indicated that Petitioner had a child with Down syndrome and charges against her were brought in Children's Court. These were additional mitigation factors that could have potentially been helpful but were never explored. Despite this new information, Slick did not request additional investigation.(5 RHT 873-874.)

3. Dr. Kaushal Sharma's "Investigation"

The Referee relies on Dr. Sharma's conclusion that he had nothing to suggest any mitigating circumstances for the defendant as support for trial counsel not doing further penalty phase mitigation.(Referee's Report, pp. 33-34.)

Dr. Sharma spent six hours reviewing documents and four hours interviewing Petitioner. (13 RHT 2197.) On July 25, 1984, Dr. Sharma wrote a report stating that Petitioner was competent to stand trial and legally sane at the time of the offense. (RH Ex. B, p. 303.) The Referee noted that Dr. Sharma concluded he had nothing to suggest any mitigating circumstances and Petitioner's long prison record, antisocial behavior at an early age, lack of mental illness, lack of duress and lack of intoxication may suggest that no mitigating factors exist in this case. (RH Ex. B, p. 303.) However, Dr. Sharma's report also states that Petitioner has "served time at Tracy, San Quintin [sic], and Folsom State prisons on two occasions each. His rap sheet indicates that the Petitioner started to commit antisocial activities at a very early age. He was repeatedly

detained at Juvenile Hall." (RH Ex. B, p. 304.)

Dr. Sharma's report explicitly states that Petitioner has a long history of institutionalization. This was a mitigation theme that was never explored. Mr. Slick never ordered additional investigation or evaluation of the long term affects of institutionalization.

In addition, Dr. Sharma's report also states that Petitioner "has a seventh grade education only because of his repeated detainment in Juvenile Hall." (RH Ex. B, p. 304.) Dr. Sharma's report highlights the fact that Petitioner was not educated. There was no attempt to explore this idea any further. Petitioner's lack of education was taken at face value and simply blamed on his history of institutionalization. Slick did not request any additional investigation or evaluation to determine if Petitioner was intellectually disabled. Furthermore, Dr. Sharma did not have even the benefit of Ms. Kleinbauer's five interviews with family members who showed up in court. How could he know of the circumstances of Petitioner's childhood or of what life was like for this intellectually challenged young man? He probably did not even know of the testing by Dr. Kaiser-Boyd or the findings of Dr. Maloney.

Of course, a psychiatrist is not an investigator nor a mitigation expert. His opinion carries weight only within his area of expertise and competence. It is up to the lawyer to explore all aspects of mitigation. Perfunctorily covering bases by hiring a psychologist and a psychiatrist is not competent representation.

4. Slick's Involvement in the Investigation of Potential Mitigating Evidence.

The Referee cited Ron Slick's own interviews with the same five family members as being evidence of his adequate preparation of the penalty phase investigation. The Referee quoted Slick as saying that he interviewed the people, he had his investigator interview them and had Maloney do so as well. (Referee's Report, p. 34)

First, interviewing the same five people – not to mention missing so many others as described elsewhere in this brief – is simply not competence of counsel in a capital case. That might be a start but that is not where competent counsel would finish.

Second, and most tellingly, Slick quit the day after interviewing the five relatives without having even one further discussion with his investigator about whether she might be able to find other witnesses. Slick, himself, provided proof of the fact that he quit.

Slick claimed that he wrote a self-serving memo on August 1, 1984 to the file saying why the five witnesses were not appropriate.[11] Slick testified that he wrote up the memo of his own impressions of these witnesses and a copy of that memo is dated

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[11]The question of whether or not this memo was actually in the file was raised. Ron Slick claimed he did not remember but it was not provided in the first production of documents to counsel. (6 RHT 957-964; 14 RHT 2355.)

the day after the interviews. (Ex. 10, 5 RHT 951.)

If the memo was indeed prepared on August 1, it is damning. It demonstrates that Slick immediately abandoned the penalty phase investigation. The memo states that Petitioner's father should not be used as a witness because he accepts no responsibility, believes his son is not guilty and cannot say anything good about him. The memo also states Petitioner's wife should not be used because she is not stable, she has five prostitution arrests and she knows Petitioner used guns in robberies and cannot say anything good about him. The memo goes on to state that Petitioner's girlfriend lied to police about seeing the car to protect herself and this destroys her credibility, although she makes a good appearance. Finally, the memo states that Petitioner's sister, Rose, can testify about Petitioner's background and that he was always in trouble. Moreover, she loves her brother and she does not know anything regarding Petitioner's criminal history. Mr. Slick's memo states that Rose's credibility is no good or she is stupid and Robert not capable of killing. (RH Ex. A, 2637.)

This memo was purportedly placed in the file 14 days before trial and only 11 days after Ms. Kleinbauer conducted her only penalty phase interviews.

There was no request for a continuance despite the fact that Ron Slick testified he knew it would be easy to get in a capital case. He testified "There was just no way I would be denied it. I would get the continuance. Absolutely. Serious case, it's silly to think I wouldn't get a continuance." (5 RHT 837.)

There was no further request for additional investigation. Ron Slick did not ask Ms. Kleinbauer to do any additional investigation or reports with respect to these witnesses. (5 RHT 873-874.) The penalty phase proceeded three weeks later with an inadequate and incomplete investigation. Rose Davis was the only witness Mr. Slick called to testify during the penalty phase. Her testimony lasted five minutes.

The Referee noted that Ron Slick read all the materials he was provided and personally interviewed or had his investigator interview the 5 witnesses. (6 RHT 1009-1010; 1059-1060.) Additionally, the Referee noted that Mr. Slick also had Dr. Maloney interview the witnesses and still, he did not like what he was hearing from the witnesses, "it just ... didn't look mitigating to me." (5 RHT 860-868.) However, as mentioned above, Ms. Kleinbauer, Dr. Maloney and Dr. Sharma all provided trial counsel with additional sources of potential mitigation evidence, none of which were explored.

Ron Slick failed to order any additional investigation or evaluation of Petitioner. He gave minimal instructions to Kristina Kleinbauer and accepted her perfunctory investigation with no follow-up or further instructions. He gave minimal instructions to Drs. Maloney and Sharma. He reused the same set of questions he had prepared for countless other cases. There was no attempt made to customize Petitioner's evaluation. The materials Slick sent Drs. Maloney and Sharma were simply form letters.

2C. Slick's Investigation Was Not Adequate

The Referee found that Ron Slick's investigation was adequate. Petitioner respectfully disagrees and asks the Court to find that Ron Slick's investigation did not rise to the level of competency when weighed against an objective standard of reasonableness under the prevailing norms of practice at the time of the representation. (*In re Alvarez* (1992) 2 Cal.4th 924, 937.)

The Referee found that prior to 1984, Ron Slick had experience having tried 6 capital cases. (6 RHT 941.) Of those, on two occasions, juries had returned penalty phase verdicts of life without parole. (RH Ex. 14.) However, in those cases, Ron Slick put on half a dozen family members during the penalty phase in one case and had a penalty phase that lasted three days in the other case (unlike Petitioner's penalty phase which lasted one hour and 36 minutes.) Mr. Slick testified that in 1981, in his first death penalty case, *People v. Leonard Brown* (Case No. A020840), the jury returned a life verdict after he put on half a dozen members of the defendant's family members as mitigation witnesses during the penalty phase and no psychiatric testimony. He explained that the nature of the family members' testimony was character evidence and what the defendant was like when he was growing up. (5 RHT 775-776, 783.) In June of 1983, Mr. Slick represented Vicente Arcega (Case No. A018871) in a death penalty case. The penalty phase that lasted three days and resulted in a life without parole sentence. (5 RHT 846.)

In addition, Mr. Slick did not remember how many death penalty cases he had

tried prior to Petitioner's. (5 RHT 754.) He testified that in order to prepare for trying death penalty cases he took classes but he did not recall which organization sponsored the classes. (5 RHT 755-756.)

The Referee found that Ron Slick, as a result of his experience and training, understood the importance of humanizing a capital defendant. (5 RHT 812, 828; Ex. 8.) Ron Slick stated that in 1983 he was aware of the importance of putting on mitigation evidence in order to humanize the defendant for the jury.[12] (5 RHT 783-784,

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[12] Referee: Did you have an opinion as to how you should handle family witness evidence at the penalty phase?

Slick: I think character evidence is important. I think – and wholly admissible. I think mental stability, those kinds of things are relevant and important.

Referee: Did you feel it would be useful to have evidence of abuse if such abuse existed?

Slick: Sure. [...] On the other hand, I mean, I do think it's important, but that's not the only factors. I don't think you can say it's important and that means it must be admitted.

Referee: Did you feel it was important to find people who loved your client?

Slick: Sure.

Referee: Give them an opportunity to tell the jury why they love your client?

Slick: Yes.

Referee: And did you feel that that would be something you's want to represent to the jury?

Slick: That's something I would want to consider presenting, yes.

Referee: If a client's father was a child molester, would you think that would be helpful to the jury to know such a thing?

Slick: Yeah. Probably would.

Referee: So in terms of family and friends, you wanted good and bad information to present to the jury. The good would be the fact that people loved your client. The bad would be the deprivation and other problems that your client experienced in growing up; is that correct?

Slick: Yes.

(5 RHT 822-824.)

812, 828.) Nevertheless, although there were numerous opportunities to investigation and take advantage of mitigation witnesses, time after time trial counsel Slick failed to do so.

The Referee found that Ron Slick hired an experienced investigator, Kristina Kleinbauer. However, Ms. Kleinbauer did not take investigation classes or have specialized instruction.

Additionally, the Referee found that the six questions asked of Drs. Sharma and Maloney regarding possible penalty phase issues were adequate. As stated above, these were form questions trial counsel reused from old cases. He did nothing to individualize the questions for Petitioner's case. He failed to order additional follow-up or additional evaluations despite the fact that both Maloney and Sharma provided new information that could have been used for mitigation.

The Referee found that Ron Slick's efforts to develop mitigating evidence proved fruitless and that Ms. Kleinbauer, despite her best efforts, found no "startling evidence helpful to Petitioner. (4 RHT 650, 717.) However, Mr. Slick's efforts to develop mitigating evidence were less than perfunctory. He accepted Ms. Kleinbauer's reports at face value and never requested any follow up. He never gave Ms. Kleinbauer any further instructions. Despite new information gleaned from witness interviews with Dr. Maloney, he never requested any further evaluation or follow-up. He never instructed Ms. Kleinbauer to find new witnesses. Dr. Sharma's report detailed

information regarding a life of institutionalization and a lack of education. Mr. Slick never requested any follow-up on this issue. The ultimate conclusion from the totality of the evidence is that this was a complete failure of counsel. Petitioner never had a chance. He was deprived of the right to counsel.

Question 3: If trial counsel's investigation was inadequate, what additional information would an adequate investigation have disclosed? How credible was this evidence? What investigative steps would have led to this additional evidence?

The Referee said without further discussion that Question 3 is mooted by the finding in response to Question 2. We respectfully submit that the answer is incorrect because the answer to Question 2 is incorrect. As documented above, the record only establishes an illusion of adequacy and that only if not looked at closely. In fact, the raw data related to billing, the calendar of events (and non-events) and the total lack of meaningful results demonstrate the abject inadequacy of Ron Slick's representation. It is respectfully submitted that the record goes on to answer this Court's Question 3. There was, and 27 years later, still is a wealth of credible information that adequate investigation would have disclosed. Minimal steps would have discovered this information and more.

3A. Additional Information an Adequate Investigation Would Have Disclosed

Petitioner presented the testimony of six witnesses at the evidentiary hearing: Georgia Agras, Deborah Helms, Larry Cleveland, Tommie McGlothin, Steven Harris and John Williams. Petitioner's investigators found and interviewed these witnesses 27 years after the trial took place. Most of them were still living in the Long Beach area. It is a testament to the results which can be achieved by an adequate investigation. These witnesses were both acquaintances or family members of Petitioner. They give a unique glimpse into Petitioner's life and help to humanize him. They were the types of witnesses and the evidence that should have been presented to the jury at the penalty phase.

Georgia Agras dated Petitioner's father for five years until Petitioner's father married her daughter, Deborah Helms whom he thereafter got hooked on drugs. (1 RHT 152.) Ms. Agras also knew Petitioner's mother well. Ms. Agras became a mother figure for Petitioner. She provided a place for him to go when his mother, Maggie Lewis, threw him out. She testified that Petitioner called her "mom" and told her she was more of a mother to him than Maggie Lewis. (1 RHT 167.) Ms. Agras testified that Maggie Lewis always had a poker game going and had a lot of people over at her house. Maggie Lewis treated Petitioner more like a friend than a son. Petitioner would show up at Ms. Agras' house and say that his mother had handed him a $10 or $20 and told him to go find something to eat and then she would push him out of the house. Ms. Agras testified that she had observed Maggie Lewis with a large bullwhip and that

Petitioner arrived at her house with welts on his back. (1 RHT 147-149.) Maggie Lewis would discipline Petitioner with anything she could get her hands on, including beating him with a chair. Ms. Agras also witnessed Maggie Lewis beating Petitioner with a smaller whip. She recalled an incident when they were out in the street and Petitioner was trying to run away. (1 RHT 168-173.)

Ms. Agras was also in the position to observe Petitioner's interactions with his father on a close, personal basis. Ms. Agras had accurate, first-hand knowledge of the dynamic between father and son that would have been useful information to the jury at the penalty phase. Ms. Agras testified that Petitioner's father would whip him in the back yard until Petitioner ran away. Petitioner was constantly trying to please his father but his father would always respond that Petitioner was not any good. (1 RHT 153, 157.)

Georgia Agras' daughter, Deborah Helms, was another witness who would have been able to offer credible testimony regarding the dynamic between Petitioner and his parents, particularly his father. Ms. Helms married Petitioner's father and had 2 children with him, Tara and Josephine. Just as Petitioner's father treated his daughter, Ramona, so too did he treat Tara and Josephine. Ms. Helms testified that Petitioner's father got the girls hooked on drugs at an early age and thereafter, he began to molest both of them. (1 RHT 185, 208-209.)

Ms. Helms testified that Petitioner had a "lunch bag" with a gun and money.

She stated that Petitioner's father encouraged Petitioner to steal and would call Petitioner and tell him he needed money. When the father called, Petitioner would show up at the house with his lunch bag containing a gun and money he just robbed from a liquor store. (1 RHT 186, 196-197, 211.)

Ms. Helms testified that Petitioner had strange quirks and ideas. For example, she stated that Petitioner would start to laugh and you didn't know if he was getting mad or if he was laughing because it was funny; Petitioner had some strange ideas about what was funny. (1 RHT 211.) In addition to being married to Petitioner's father, Ms. Helms was also well acquainted with Maggie Lewis, Petitioner's mother. Like Ms. Agras, Ms. Helms also saw Maggie threaten Petitioner with a bullwhip. Ms. Helms stated that Maggie had a harsh way of talking to people and she would say "oh boy get out of here" and she would "hit him up side the head" and say "if you don't do like I said, I'm gonna get the bullwhip on you." Ms. Helms witnessed Maggie hitting Petitioner on the side of the head and heard her threaten him with a bullwhip. (1 RHT 188-190, 204-205.)

Ms. Helms also testified that when Petitioner was working, Petitioner gave his mother one half of his paycheck. Ms. Helms stated that Petitioner also had a close relationship with his two sisters, Gladys Spillman and Rose Davis. (1 RHT 191-192.) Ms. Helms testified that she had never seen Petitioner read or write anything. (1 RHT 194.) Ms. Helms stated that she smoked marijuana and did cocaine with Petitioner's

father but, to her knowledge, Petitioner never engaged in any drug use. (1 RHT 152, 187, 210.)

Deborah Helms' testimony would have been credible because she lived with Petitioner's father and witnessed his abuse first-hand. (1 RHT 185-186) In addition, she had a friendly, cordial relationship with Petitioner's mother and sisters. (1 RHT 184.) This information would have been helpful to the jury and shed more light on the type of human being Petitioner was and that he was close to and loyal to his family members, even to the point of being willing to steal for his father. (1 RHT 197.)

Perhaps one of the more interesting things about Deborah Helms was her availability to Slick and Ms. Kleinbauer. Ms. Helms accompanied Petitioner's father to his interview which was conducted by Ms. Kleinbauer. Ms. Kleinbauer even mentions in her report that Petitioner's father showed up with "his present wife, Debbie" (4 RHT 669.) However, Ms. Kleinbauer neglected to interview Ms. Helms or even ask about the relationship she had with Petitioner's father or why she had accompanied him to the interview. This was an opportunity missed by Ms. Kleinbauer to interview a witness that would have been able to tell the jury valuable information during the penalty phase of the trial. (1 RHT 669.)

Larry Charles Cleveland was Petitioner's best friend and would he have been able to testify to Petitioner as a person. He could have also testified to how much Petitioner loved his disabled son. (3 RHT 523-526.) Mr. Cleveland knew Petitioner

from the age of 4 to 6-years-old. Mr. Cleveland described Petitioner as not only his best friend, but "my only friend." Mr. Cleveland stated that he and Petitioner "hung out every day." (3 RHT 500, 511, 519.) Mr. Cleveland testified that he was not privy to the conversations between Petitioner and his father, but Petitioner would leave the house with Mr. Cleveland and they would go out and commit a robbery or gamble and Petitioner would come back and share the money with his father. (3 RHT 506.) Mr. Cleveland stated that these events took place during the time period when Petitioner's father was using crack cocaine. Mr. Cleveland also stated that Petitioner did not use drugs and otherwise frowned on those who did. (3 RHT 505-506.)

Mr. Cleveland testified that Petitioner's mother, Maggie ran a gambling operation out of her home and whipped Petitioner with switches, extension cords and slapped him upside the head. (3 RHT 513.) Beatings from his parents were not the only beatings Petitioner suffered. Mr. Cleveland stated that a charismatic Christian woman named Mrs. Grace lived down the alley from Maggie's house and she would "whoop the devil out of [Petitioner.]" Mr. Cleveland testified that he had seen welts on Petitioner's back and arms many times. (3 RHT 514-517.)

Mr. Cleveland stated that Petitioner could not read and the two of them often skipped school. (3 RHT 520-521.) Mr. Cleveland testified that he would read things to Petitioner. Petitioner would ask Mr. Cleveland what a sign said if they were driving in the car and Mr. Cleveland would read the sign to him. (3 RHT 576.) Mr. Cleveland

testified that he was with Petitioner every single day and he was sure that Petitioner could not read. Mr. Cleveland stated that if words were written down on a piece of paper, then Petitioner could follow it but Petitioner was unable to spell words on his own. (3 RHT 520-522, 526.)

Mr. Cleveland testified that Petitioner had a disabled son named Little Robert that Petitioner loved very much. (3 RHT 526.) Mr. Cleveland stated that Petitioner was always first to go to the boy and pick him up. Mr. Cleveland stated, "Robert loved that boy...plus he was a handicap. Robert never hit or beat his own children." With respect to Janiroe's children, Mr. Cleveland stated, "he treated them well just like his own kids because before he had kids with Janiroe, he loved those kids." (3 RHT 523-525.) Mr. Cleveland testified that Petitioner was a good father who would go out and borrow money for food if he had to in order to support Janiroe and the children. (3 RHT 567.)

This evidence would have been extremely useful evidence of adaptive deficits that bolster the theory of mental intellectual disability. Evidence of intellectual disability and learning disorders would have been important mitigation evidence. Mr. Cleveland testified about additional adaptive behavior deficiencies he observed in Petitioner. Mr. Cleveland stated that Petitioner could not pick up the game of pool; Petitioner had no mobility for throwing dice in gambling games; Petitioner was unable to grow facial hair and Petitioner wore slip-on shoes. (3 RHT 571-572) In addition, Mr. Cleveland stated that Petitioner was unable to pass his driver's license test because

he was unable to read the road signs. Mr. Cleveland described the Petitioner as "slow" and said that Petitioner could not "pick things up." (3 RHT 505, 535.)

When they were growing up, Mr. Cleveland stated that he lived very close to Petitioner. Mr. Cleveland lived four houses down the alley and saw Petitioner "every day all day." Petitioner and Mr. Cleveland were "always together" and walked to school together.(3 RHT 507.) At one point, Mr. Cleveland's family moved across the main street, which was Anaheim, just on the next street over. From there, Mr. Cleveland's family moved 2 blocks down on the same street. Mr. Cleveland testified that he always lived within a block radius of Petitioner. (3 RHT 507-508, 524.)

Immediately surrounding the block where Mr. Cleveland and Petitioner lived was the area of Long Beach where hookers and pimps cruised the streets. Mr. Cleveland testified that in order for them to get to school, they had to cross the street where the hookers were cruising and looking for work. Mr. Cleveland stated that in their young minds, the pimps and the club owners dressed well and these two young boys looked up to that and they wanted to dress well also. (3 RHT 560.)

Mr. Cleveland testified that he was a skilled gambler and his relationship with Petitioner was so close that when Mr. Cleveland had a successful night gambling, he would share his winnings with Petitioner. Mr. Cleveland stated that he gave Petitioner $11,000 from a gambling deal in which Mr. Cleveland won $15,000 in a casino on the northeast side of Las Vegas. Mr. Cleveland testified that he and Petitioner went to Las

Vegas together in a car that Mr. Cleveland had arranged to borrow from an acquaintance. Mr. Cleveland stated that when they returned from Las Vegas they were stopped in Long Beach and the Long Beach Police Department seized the money. (3 RHT 538.)

Mr. Cleveland testified that between the ages of 12 and 25-years-old, he and Petitioner committed approximately 9 robberies together and in between they "hustled" for money shooting pool or dice. Mr. Cleveland stated that Petitioner did not learn how to shoot pool as well as Mr. Cleveland and he just did not pick up the game with the same skill level. Mr. Cleveland testified that early on, he learned to shoot two pair of dice in one hand but Petitioner was never able to master that skill. Mr. Cleveland testified that he learned how to win. Petitioner played purely for luck and there was a difference. (3 RHT 571.) Petitioner's inability to master basic dexterity movements would seem to further indicate some adaptive behavior deficits that point to intellectual disability. Mr. Cleveland stated that he and Petitioner wore slip-on shoes, so tying shoelaces was not something they did. Moreover, Petitioner was not able to grow hair on his face and Mr. Cleveland never observed him using a razor. (3 RHT 572-573.)

When Mr. Cleveland was asked if Petitioner could take care of himself on the streets, Mr. Cleveland stated that the two of them were out on the streets together and if there was something that Petitioner did not understand, Mr. Cleveland would explain it to him. This is classic behavior for someone with intellectual disability. They seek

out a dominant person they can glom on to and in whose presence they feel safe. (3 RHT 573.) Mr. Cleveland was asked if he knew what retarded meant. He replied, "In some areas [Petitioner] was slow...he didn't pick up these certain things that we done every single day like I done...he wasn't a good dice player...and talking to women was another thing he didn't tend - acquire that good...I don't think it was exactly shyness. I would think maybe he was just not skilled in that communication." (3 RHT 575-576.)

Mr. Cleveland stated that despite the fact that Petitioner did not have a drivers license, he would still occasionally drive a car. If Petitioner were driving, Mr. Cleveland stated that he would have to make sure Petitioner made the correct turns on to the correct streets, because if he did not, Petitioner would drive right by the street they wanted to take because Petitioner could not read the street signs. (3 RHT 576.)

Tommie McGlothin is Petitioner's first cousin and he lived in Maggie's house shortly after he moved to California while Petitioner was incarcerated. Mr. McGlothin stated that he thought Petitioner had a problem and that he believed Petitioner was mentally slow or retarded. Mr. McGlothin was familiar with and knew Larry Cleveland but he was never contacted by Kristina Kleinbauer. Mr. McGlothin stated that he regularly interacted with Maggie and Petitioner's father and Mr. McGlothin could have provided contact information if an investigator would have contacted him at the time of the trial. (7 RHT 1156, 1165, 1172-1175.) When asked about Petitioner's parents, Mr. McGlothin stated that Maggie was constantly hosting card games and domino

games and Petitioner's father was in and out of prison and always getting in trouble. Mr. McGlothin stated that if anyone "misabused" [sic] Petitioner, it was Petitioner's father. (7 RHT 1159, 1163, 1169.)

Tommie McGlothin was yet another missed opportunity for Mr. Slick and Ms. Kleinbauer. Mr. McGlothin lived in the family house with Maggie and he would have been able to describe the family dynamic, relationships and he would also have been able to comment on Petitioner's limited mental functioning.

Steven "Fateen" Harris was Petitioner's childhood friend and they have known each other since the age of nine or ten. Mr. Harris described Petitioner as a loner who was not smart and who would "drift" from topic to topic. Mr. Harris testified that Petitioner would not participate in discussions about history or current events and that Petitioner did not have many friends but Mr. Harris just happened to be one of them. (7 RHT 1213.)

Mr. Harris described Larry Cleveland as Petitioner's best friend. Mr. Harris stated that he and Petitioner spent every Tuesday night together because they attended "Play Night" at the Recreation Center. (7 RHT 1209-1216.) Mr. Harris stated that Petitioner was very pleasant and he liked to laugh and smile and he often said things that did not make any sense but Petitioner liked to "crack himself up." Mr. Harris also stated that he never had an intellectual conversation with Petitioner. (7 RHT 1216-1218.) Mr. Harris's testimony regarding Petitioner's family life was consistent with the

testimony of the other witnesses. Mr. Harris stated that Petitioner had no strong parental guidance growing up and "he wasn't as quick as the rest of us." (7 RHT 1222, 1229.)

Mr. Harris testified that he, Petitioner, and Larry Cleveland all grew up in poverty and they all saw clothes and bicycles they wanted but could not have. Growing up, people were classified according to their possessions and people stole to get things so that they could have a sense of belonging and acceptance. (7 RHT 1217-1219.) Mr. Harris stated that his family and Larry Cleveland's family did not have a lot and it was always a challenge of competing and having school clothes and getting new bicycles. Mr. Harris went on to testify that, "It was a thing in school did you bring your lunch or eat in the cafeteria. I brung [sic] my lunch...I don't know if they had the money or not and I know [Petitioner] didn't get it." (7 RHT 1219-1220.) Mr. Harris is just the another in the long list of missed opportunities for Mr. Slick and Ms. Kleinbauer. As for availability, Mr. Harris's mother has never moved from where she was living at the time of the trial. (7 RHT 1223-1224, 1233.) Mr. Harris was never interviewed by Ms. Kleinbauer, but if he had been, Mr. Harris would have been able to provide the contact information for additional mitigation witnesses that could have been important resources for the penalty phase. Mr. Harris had at least weekly contact with Petitioner because they socialized together every Tuesday night.(7 RHT 1210.)

John "Egga" Williams is Petitioner's cousin and they have known each other

since Petitioner was between the ages of six and seven and Mr. Williams was 10 or 11. Mr. Williams lived 2 blocks away from Petitioner but was never contacted or interviewed by Ms. Kleinbauer. (7 RHT 1245-1247.) Mr. Williams testified that Petitioner did not have a good upbringing and that if Petitioner could not read or write, that would have been something that Petitioner would have tried to hide or conceal. Mr. Williams stated, "when you can't read or write, that's something that you would hide. You wouldn't want anyone to know about it." (7 RHT 1247-1250.)

Mr. Williams testified that the Long Beach community was thuggish and growing up there, the kids were surrounded by gambling, whoring, pimping, pool halls, the shipyard and sailors on leave, prostitutes and a lot of crime. Mr. Williams stated that Petitioner grew up in poverty. Mr. Williams said that growing up some kids had a lunch pail, some had a lunch sack and some went without lunch altogether. Mr. Williams testified that he had a lunch pail but Petitioner had no lunch. (7 RHT 1248-1249.) Mr. Williams stated that pimps and prostitutes were models for kids because they had gold, diamonds and Cadillacs and the kids looked up to that and wanted those things. (7 RHT 1257.) Mr. Williams testified that he had a mother and a step-father in the home with him. Both of his parents worked and his step-father regularly took him to ball games. Mr. Williams stated that Petitioner had neither. Despite the fact that Mr. Williams, Petitioner, Larry Cleveland and Steven Harris all grew up in the same environment, Mr. Williams was the only one who graduated from high school and

went on to study music in college. Mr. Williams credits his stable home life as the difference between his life and Petitioner's life. (7 RHT 1251-1253.)

Tragically, several important witnesses are now dead. Petitioner's sister, Rose Davis; Petitioner's stepmother, Lavergne Lewis; Petitioner's father, Robert Lewis, Sr.; Petitioner's girlfriend, Dernessa "Dee" Walker; Petitioner's wife, Janiroe Lewis; and Petitioner's niece Shineaka Spillman are all deceased.

After the trial, a post conviction lawyer videotaped interviews on October 8, 1987, of Gladys, Shineaka and Rose. (RH Exs. 19-21A.) On the videotape, Rose breaks down crying when considering the death of her brother. The emotional impact of this testimony is powerful and would have had the capacity to sway the jury. Rose was the sole witness called by Slick in the penalty phase and she was asked a series of perfunctory, leading questions and was never given the opportunity to express the kind of emotion that comes through on the videotape and she was never given the opportunity to describe Petitioner's tragic upbringing and chaotic home life.

Petitioner's niece, Shineaka is also on the videotape. (RH Exs. 19-21A.) Shineaka's articulate sentiments regarding her uncle demonstrate genuine emotion and caring. Petitioner counseled her on the telephone after his arrest, to be good to her mother and siblings and he admonished her not to talk back or get an attitude toward her mother. Shineaka was an intelligent and articulate 13-year-old at the time this video was made. Shineaka's statements would have corroborated her mother, Gladys'

statements that Petitioner was a good uncle to her children are warm and moving. (RH Exs. 19-21A.) Her testimony would have demonstrated to the jury that Petitioner was a human being who, with all his flaws, was capable of love for his family and he was loved by them in return.

These witnesses would have been able to corroborate the testimony of the six other witnesses who testified at the reference hearing. These family members on the videotape would have been able to explain to the jury that Petitioner lived in a constant state of deprivation and as a child, Petitioner learned very early on that the only way to get what he needed, was to steal. Petitioner stole as a way to meet his financial obligations and to maintain the head of household position that was thrust on him when his father walked out on Petitioner, his mother and his two sisters. During this period when Petitioner was trying to financially support his mother and sisters, his father was actively using crack cocaine. Petitioner's father would frequently call Petitioner and encourage him to commit a robbery so that Petitioner could bring the money to him and it would enable the father to buy more drugs. Petitioner was desperate for a relationship with his father. As a child, Petitioner learned to purposely misbehave with the misguided thinking that this would result in his father coming home to discipline him. It is tragic that Petitioner was willing to take any form of attention he could get as long as it meant that he could be with his father.

3B. The Credibility of the Evidence

The witnesses presented at the Reference Hearing were not only credible but they painted a multi-faceted picture of Petitioner. In addition, the deceased or unavailable witnesses particularly those on video tapes were articulate and credible.

Larry Cleveland may not have been as credible a witness as he was 27 years later. We have no idea how credible Mr. Cleveland would have been since he was not contacted. Although younger, he might have been more or less credible but at least he would have been a witness. Further, probably countless other witnesses either dead or not located by post conviction counsel who might have been more credible.

This is not a case where 20 witnesses were actually called at trial and post conviction counsel found Larry Cleveland who only incrementally added to the testimony. This is a case where no evidence was put on. There was nothing done. Petitioner's post conviction counsel was found six witnesses to testify and identified numerous other witnesses who were either unavailable or dead but who could have been called. Larry Cleveland was one of them and he would have bolstered the testimony.

3C. Investigative StepsThat Would have Led to this Additional Evidence

So few steps were actually taken by the investigator that the answer to this question is simply, "additional steps." There were no steps that needed to be taken to interview Deborah Helms because she was in the room when Ms. Kleinbauer interviewed Robert Sr., on July 14, 1984. (RH Ex. 7; 4 RHT 669.)

There was no effort to go out into the community and interview neighbors, teachers or additional relatives. Most of the witnesses that testified at the reference hearing were still living in Long Beach. Larry Cleveland was in state prison at the time of Petitioner's trial. (3 RHT 500-501.) If Ms. Kleinbauer had made more of an effort to track him down, she could have found him in the custody of the Department of Corrections.

Re-interviewing witnesses, following leads, combing available documents for additional materials - all would have led to this additional evidence. These are the steps taken by post conviction counsel even though the trail was cold and some witnesses were dead or no longer available. Ms. Kleinbauer could have gone out into the community to interview. It appears that Ms. Kleinbauer simply obtained the names of witnesses who were coming to court and talked to them. She records no time for going out into the community to do investigation. (RH Ex. 7.)

Stephen Harris is another example. He was an excellent witness who lived in the same neighborhood where Petitioner grew up. The next step would be to find witnesses like Mr. Harris. In addition, Mr. Harris would have helped lead to other witnesses. Mr. Slick should also have had his investigator follow up to obtain more information regarding Petitioner's mother and father. (7 RHT 1223-1224, 1233.)

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Question 4: **Did trial counsel's penalty phase investigation include investigation into petitioner's mental retardation and learning abilities, the negative effects of petitioner's institutionalization, petitioner's family, history and his good character?**

4A. Ron Slick's Penalty Phase Investigation Did Not Include Investigation into Petitioner's Intellectual Disabilities and Learning Abilities

The Referee found that Ron Slick investigated Petitioner's mental condition but did not specifically investigate whether Petitioner was mentally retarded or suffered from a learning disability. (Referee's Report p. 38.)

Petitioner takes exception to the Referee's finding that Ron Slick adequately investigated Petitioner's mental condition. Mr. Slick sent out preprinted addendums to the letters that were sent to Drs. Maloney and Sharma.(RH Ex. B, p. 182-184, 299-302; RH Ex. R, p. 2356.) Most of the questions concerned Petitioner's sanity, competency to stand trial and ability to represent himself. They did not relate to penalty phase issues. The six questions that related to penalty phase issues were generic.

Furthermore, the requests to these two doctors resulted in one report, that of Dr. Sharma, which was unhelpful. Dr. Mahoney had valuable information on intellectual

disability, learning disorders and other psychological issues but he did not write a report.

Petitioner's obvious difficulties in school were well documented in the records Mr. Slick spent five hours reviewing on January 9, 1984. (RH Ex. 10; RH Ex. Z, p.5-6.) Petitioner missed a lot of days from school. Petitioner was failing school so badly he had to repeat the first grade. Mr. Slick had in his possession a substantial amount of materials documenting signs that Petitioner was suffering from intellectual and learning disabilities. Mr. Slick did not investigate these issues for potential evidence of mitigation.

Dr. Maloney's testing revealed that Petitioner had low IQ test scores. (Referee's report, Table 1, p. 12.) Dr. Kaser-Boyd made a notation on her report to Dr. Maloney that, as she was administering the test on comprehension, Petitioner's "talk comes out all confused" and that she suspected Petitioner had some "aphasia." (RH Ex. B, p. 190.) Dr. Maloney testified that aphasia is an expressive language difficulty that could be associated with intellectual disabilities. (11 RHT 1861.) In addition, Dr. Khazanov testified that Petitioner's past probation reports had observed that Petitioner didn't "make sense." (8 RHT 1322.) However, Mr. Slick did not inquire further. (5 RHT 873-874.)

It is true that *Atkins* was not the law at the time of Petitioner's trial. Petitioner is not claiming that trial counsel should have anticipated *Atkins*. However, the penalty

phase evidence referred to above that post conviction counsel was able to amass demonstrates that Petitioner was intellectually disabled, illiterate, learning disabled and a follower.

4B. Mr. Slick's Penalty Phase Investigation Did Not Include Investigation into the Negative Effects of Institutionalization

The Court asked the Referee to make findings of fact as to whether "trial counsel's penalty phase investigation include[d] investigation into ... the negative effects of petitioner's institutionalization". The Referee did not make any finding of facts in response to that reference question.

The record shows that Mr. Slick's penalty phase investigation did not include an investigation into the negative effects of Petitioner's institutionalization. Mr. Slick testified that prior to trial, he received Petitioner's records indicating that Petitioner had been incarcerated in the CYA. and in juvenile facilities. Mr. Slick also stated that he was aware of the institutional effects that a person would experience as a result of spending formative years in the custody of institutions. Yet despite this knowledge, Mr. Slick did not ask his investigator to explore the effects of institutionalization nor did he apply for funds to hire an expert witness who could have provided testimony regarding the effects of institutionalization. (RH Ex. A, 5 RHT 904-907.)

Dr. Adrienne Davis was called as a witness for Petitioner at the Reference Hearing. She is a board certified forensic psychologist who specializes in juveniles and

the effects of institutionalization. She is now a state forensic evaluator in Atlanta, Georgia. From 1984 through 1987, Dr. Davis worked at the California Youth Authority at the southern reception center clinic in Norwalk. (1 RHT 23.) Dr. Davis was tasked with reviewing Petitioner's records and evaluating the extent to which various institutions that Petitioner had been involved with had addressed his psychological function and treatment issues. (1 RHT 28.)

Dr. Davis testified that Petitioner was first arrested and sent to a youth camp at age 12 and following that, Petitioner was sent to CYA at age 13 which was far too young. Dr. Davis explained that CYA was historically reserved for more serious offenders and it had a damaging effect for someone as young and small as Petitioner to be exposed to older and more sophisticated minors and adults. (1 RHT 35-44.)

Dr. Davis testified that Petitioner's father was in and out of prison during a good portion of his early developmental years, so Petitioner was exposed to criminal behavior. In addition, Petitioner's mother had problems with alcohol and there were problems with supervision. Petitioner had numerous absences during elementary school and it is Dr. Davis' opinion that these kinds of factors in developmental years scream out that there were some problems going on in the family that were not identified. The institutions had Petitioner's probation reports and attendance records which documented social chaos, dysfunction and neglect and the institutions failed to address it. They had the information but they did not do anything about it. (1 RHT 46.)

Dr. Davis stated that the institutions and their environments failed Petitioner and that he would have been more appropriately treated in a group home environment like the Dorothy Kirby Center.

Dr. Davis testified that the role of the juvenile justice system is to address as many factors as possible during a child's life because it is designed to be oriented toward rehabilitation and not solely toward punishment. Dr. Davis stated that once Petitioner was in a correctional facility, Petitioner's psychological condition was not appropriately identified and the proper treatment was not implemented. (1 RHT 51-52.)

Dr. Davis made the point that the institutions where Petitioner was incarcerated, let him down and the jury could have heard some of this humanizing evidence to make Petitioner seem more sympathetic. The only diagnosis Petitioner was ever given was anti-social personality which was incorrect because that diagnosis may not be given until the subject reaches the age of 18. Moreover, a person cannot be given the diagnosis of antisocial personality without first having been given the diagnosis of conduct disorder before the age of 15. It was thus incorrect to label Petitioner as antisocial personality at such a young age. Therefore, the institutions did not really dig deeper into Petitioner's problems and history to determine if another diagnosis, such as depression, would have been more appropriate. (1 RHT 54-56.) Dr. Davis' opinion was that Petitioner was failed by the educational system, the juvenile

system, the social services system and the penal system.

Ron Slick made no effort to include investigation into the negative effects of Petitioner's institutionalization. Therefore, he failed to investigate or present this evidence at the penalty phase.

4C. Mr. Slick's Penalty Phase Investigation Did Not Include Investigation into Petitioner's History and His Good Character

The Referee found that Ron Slick investigated Petitioner's family, history and his good character. Petitioner respectfully disagrees. The record shows his penalty phase investigation was perfunctory and incompetent.

Ron Slick did not recall that Petitioner had a son with Down syndrome but stated that this was information he would seriously consider presenting to a jury. (5 RHT 825.) The fact that Petitioner had a child with Down syndrome is detailed in Ms. Kleinbauer's investigation report which Mr. Slick received on July 24, 1984. (RH Ex. B, p. 222-232.)

He did not recall that Petitioner's father had molested Petitioner's half sister and had a child by her. He stated that this startling fact was "beyond belief." (5 RHT 874.) Yet, the record establishes that, in 1968, Petitioner's father had intercourse with his 13-year-old daughter, Ramona Lewis, whose mother, Lavergne Lewis, was Petitioner's stepmother. Ramona gave birth to a son, Deon Lewis, who was both Petitioner's stepbrother and nephew. Following that, Lavergne kicked out Petitioner's father and

he thereafter took up with Georgia Agras and then he moved on to Georgia's 17-year-old daughter, Deborah Helms. Petitioner's father had two daughters with Deborah Helms, whom he also got hooked on drugs and molested. (1 RHT 185, 208-209.)

Ron Slick and Kristina Kleinbauer separately interviewed Petitioner's father and neither of them uncovered this information. (RH Ex. 10; RH Ex. B, p. 222-232.) More incredibly, Deborah Helms was present when Ms. Kleinbauer interviewed Petitioner's father as she recorded in her report, "Mr. Lewis' present wife Debbie was also present for the interview." Yet Ms. Kleinbauer, failed to interview Ms. Helms as a mitigation witness. (RH Ex. B, p. 222-232.) Had she done so, she would have discovered a wealth of mitigation evidence. Ms. Helms had witnessed Petitioner's mother abusing him and hitting him on the side of his head. (1 RHT 188-190, 204-205.) Ms. Helms was living with Petitioner's father and knew Petitioner's mother and sisters. She would have been able to provide valuable insight into the family dynamic. (1 RHT 191-192.)

Deborah Helms' mother, Georgia Agras, was not interviewed by Mr. Slick or Ms. Kleinbauer. Ms. Agras was the former girlfriend of Petitioner's father. (1 RHT 152.) Petitioner considered Ms. Agras as a second mother. He would run away to her house when his mother, Maggie Lewis, abused him or kicked him out of the house. (1 RHT 167.) Ms. Agras would have been able to give first hand knowledge regarding the relationships within Petitioner's family. Ms. Agras had been a victim of the sexual

predatory nature of Petitioner's father when Robert Lewis, Sr. seduced her daughter and left Ms. Agras to marry her daughter. (1 RHT 152.) This type of dysfunction would have been invaluable as mitigation evidence during the penalty phase.

Ron Slick and KristinaKleinbauer did not interview Larry Cleveland. On July 16, 1984 Ms. Kleinbauer's billing records state that she spent .5 hours attempting to contact Mr. Cleveland and Janiroe Lewis. Ms. Kleinbauer's billing records do not indicate any other attempt to contact Mr. Cleveland. (RH Ex. 7.) Ms. Kleinbauer did not try very hard to contact Mr. Cleveland because he was incarcerated in state prison at the time of Petitioner's trial. (3 RHT 500-501.) Had Mr. Cleveland been interviewed, he too would have been able to offer information about life within Petitioner's family. Mr. Cleveland was Petitioner's best friend and grew up four houses down the alley from Petitioner's house. (3 RHT 507-508, 524.) Mr. Cleveland spent "every day all day" with Petitioner and he had observed Petitioner's intellectual disabilities on numerous occasions. (3 RHT 505 -507, 520-522, 526.) Mr. Cleveland had witnessed Petitioner's mother beating him and Petitioner's father inducing Petitioner to commit crimes to support the father's drug habit. (3 RHT 505-506; 513.)

According to their billing records, Mr. Slick and Ms. Kleinbauer never attempted to contact Tommie McGlothin. (RH Ex. 7; RH Ex. 10.) Petitioner's cousin, Tommie McGlothin lived with Petitioner's mother when he first moved to Long Beach in 1965. (7 RHT 1156.) He continued to live in the area and knew several of

Petitioner's family members and friends. Mr. McGlothin testified that if he had been contacted in 1984, he would have been able to provide "a lot of information" including names and contact information for potential penalty phase witnesses. (7 RHT 1173-1174.)

Steven Harris is another missed opportunity. Mr. Harris and Petitioner were friends since the age of nine or ten. Mr. Harris knew Larry Cleveland and spent every Tuesday night with Petitioner at the Recreation Center. (7 RHT 1209-1216.) If interviewed, Mr. Harris would have been able to provide names and contact information for members of Petitioner's family and friends. Mr. Harris's mother is still living in the same house in Long Beach where she was living in 1984. (7 RHT 1223-1224, 1233.)

John "Egga" Williams, another cousin of Petitioner, was never contacted or interviewed. Mr. Williams grew up in Long Beach and had he been contacted would have been able to testify about the thuggish neighborhood where Petitioner grew up. (7 RHT 1248-1249.) Mr. Williams knew that Petitioner had a tragic upbringing and that he could not read or write. (7 RHT 1247-1250.) Mr. Williams was another valuable witness who got away.

Tragically, Petitioner's cousin Shineaka Spillman and his stepmother Lavergne Lewis are both dead. Neither was ever interviewed. (RH Ex. 7; RH Ex. 10.) Shineaka was interviewed on videotape after Petitioner's conviction. She provides a warm,

affectionate portrait of Petitioner. (RH Exs. 19-21A.) She would have been an excellent witness. Like Georgia Agras, Lavergne Lewis was a victim of Petitioner's father's sexual predatory behavior. She was married to Petitioner's father until he seduced their daughter and got her pregnant. (2 RHT 320-323) This perverted role model was the same man that Petitioner was so anxious to please. These witnesses would have been able to corroborate the testimony of the six new witnesses Petitioner's post conviction counsel developed.

Trial counsel's cursory investigation of Petitioner's family, history or his good character was inadequate and fell below the standards for reasonably competent counsel.

Question 5: What, if any, social history information did petitioner's trial counsel provide to defense psychiatrist Kaushal Sharma and defense psychologist Michael Maloney? When was that information provided?

The referee did not answer this question directly. However, the record does provide the requested information.

On May 8, 1984, Mr. Slick sent a letter to Dr. Maloney asking him to answer five questions regarding Petitioner's sanity, competency to stand trial and his ability to represent himself. He also included six questions regarding possible sentencing issues in a penalty phase. (RH Ex. B, pp. 182-184, 299-302.) Included in the letter was a packet of information. The information included: the three-page information; a 52-page police report; 29-page preliminary hearing transcript; and three probation reports from earlier cases involving Petitioner. (RH Ex. B, pp. 184, 302.)

Mr. Slick sent a similar letter to Dr. Sharma on the same date with the same

enclosures. On May 31, 1984 Mr. Slick also sent Dr. Sharma 331pages of records from the Department of Corrections (CDC) regarding the Petitioner. (RH Ex. R, p. 2353.) Mr. Slick also included his own outlines of Petitioner's past criminal history and personal history summarized from the CDC records. (RH Ex.R, pp. 2341-2350.)

It does not appear that Dr. Sharma received Ms. Kleinbauer's investigation reports or that Mr. Slick communicated with Dr. Sharma regarding the contents of Ms. Kleinbauer's investigation. Ms. Kleinbauer turned over her perfunctory reports to Mr. Slick on July 24, 1984. (4 RHT 635.) Dr. Sharma's report is dated July 25, 1984. Dr. Sharma's report is dated the day after Ms. Kleinbauer submitted any of her investigation reports to Mr. Slick. Dr. Sharma's report makes no reference to Ms. Kleinbauer's investigation.(RH Ex. B, p. 303-304.) There is no evidence that Mr. Slick forwarded Ms. Kleinbauer's reports to Dr. Sharma.

Dr. Maloney met with Mr. Slick on July 31, 1984. Dr. Maloney does not reference Ms. Kleinbauer's reports. Ms. Kleinbauer interviewed the same five relatives that were interviewed by Dr. Maloney and her reports were possibly available to him before he conducted the interviews.[13]

Question 6: After conducting an adequate investigation of the circumstances in mitigation of penalty, would reasonably competent attorneys acting as diligent advocates have introduced evidence in mitigation at the penalty phase of trial? What rebuttal evidence reasonably would have been available to the prosecution?

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Some portions of Ms. Kleinbauer's reports were found in Dr. Maloney's file. It is probable that Ron Slick gave Dr. Mahoney these at the meeting they had with the same five witnesses.

6A. Reasonably Competent Attorneys Would Have Introduced Evidence in Mitigation at the Penalty Phase

A reasonable, competent attorney would have introduced evidence in mitigation at the penalty phase. Petitioner was learning disabled, illiterate and a follower. (3 RHT 576.) Petitioner had an extremely abusive father who encouraged Petitioner to commit crimes. (1 RHT 186, 196-197, 211.) The jury should have been able to see a more complete picture of his poverty stricken, abusive childhood from various witnesses who were available at the time of the trial but are now dead. (1 RHT 147-149,168-173.) The jury should have heard from the six witnesses called to testify at the Reference Hearing and from others like them. The jury should have heard more thoroughly developed testimony of Rose Davis, the only witness to testify at the penalty phase. (2 RHT 301.) The jury should have heard about the institutional effects of being housed at a young age in the California Youth Authority (CYA). The jury should have heard about Petitioner's intellectual disabilities and his learning disabilities. They should have heard about his love for his son, "Little Robert" who had Down syndrome.

Michael Adelson, an experienced career public defender testified as a *Strictland* expert. Mr. Adelson started trying capital cases in the 1960's and continued throughout the 1980's. Mr. Adelson testified about the capital case standards that were in place at the time of Petitioner's trial. Mr. Adelson testified that when cases have awful facts, it is up to the defense to give the jury "something to hang their hat on." Mr. Adelson stated that in his experience, jurors are forgiving people and it is not a big leap to go from death to life without parole, but in order to get there, it is critical to give the jury a good reason. (3 RHT 483.)

Mr. Adelson stated for instance, that Petitioner's older sister related a story about Petitioner staying out all night as a young child at around six years of age. The next morning Petitioner was found in the backyard crying and when asked why he

stayed out all night, Petitioner responded that he had to behave badly so that his father would be forced to come home to discipline him. Petitioner was terribly concerned and upset that his father had left and was involved with another family and raising other children. Petitioner did not understand why his father could not come home to raise him. Mr. Adelson stated that this was the kind of evidence that stays with a jury and resonates with them. (2 RHT 261.)

Mr. Adelson testified about the importance of the defense developing a "theme" for the mitigation evidence. For example, Mr. Adelson cited Petitioner's desperate longing for attention from his father and the lengths Petitioner would go to in order to get that attention, to include stealing so that he could curry favor with his father. (2 RHT 292.) Mr. Adelson also felt that Georgia Agras was a very important witness and she could have been extremely effective in the penalty phase because Petitioner came to know her as someone who would protect him when he was constantly escaping from his mother's home and seeking refuge with Georgia Agras. (2 RHT 278.)

Mr. Adelson testified that Petitioner's sister, Gladys Spillman was a perfect example of what could have been done that was not done at the time. Gladys made a tremendous impression on the video (see RH Exs. 19-21A) and would likely have made a tremendous presence to the jury. She was articulate and also tearful. It was evident that she held a great deal of love for Petitioner and the things he did for her and the interaction she observed between Petitioner and the rest of the family. Mr. Adelson stated that this was the type of evidence the jury needed to hear and the kind of evidence they did not have. (2 RHT 300.)

For the same reasons, Mr. Adelson testified that Rose Davis should have been able to testify about more anecdotal evidence as opposed to restricting her testimony to a handful of clumsily designed leading questions. Rose would have been able to provide an anecdotal history of the Petitioner and a basis for the love between them. (2 RHT 301.)

Mr. Adelson stated that Larry Cleveland should have been interviewed and mined for information both to be heard by the jury and to provide evidence for experts. (2 RHT 303, 305.) Tommie McGlothin lived in the family home and could have testified about his relationship with Petitioner and Petitioner's relationship with his mother. (2 RHT 307.) Mr. Adelson testified that Steven "Fateen" Harris, a childhood friend, was the type of person who would have routinely been interviewed. Steven Harris have been also should have been cultivated for what he knew about Petitioner and what secrets they shared and how those secrets may or may not have been relevant to the jury's consideration. (2 RHT 312.)

Mr. Adelson testified that John "Egga" Williams would have been able to testify that Petitioner's mother was illiterate and that would have been important information for the jury to know. Moreover, one of the most important things Mr. Williams had to say was that he considered himself fortunate to have been raised by a strong, authoritative father figure who was able to guide him. Mr. Williams attributed his father figure was in large part the difference between what he considered his own successful upbringing and that of Petitioner. (2 RHT 313.)

Mr. Adelson stated that Petitioner's wife, Janiroe Lewis, was interviewed by Slick but was not called to testify. Mr. Adelson went on to add that in his experience, when the wife of a defendant testifies, it lends insight for a jury to know what the defendant was thinking about what he was doing and why he was doing it. Additionally, Janiroe would have known of the connections between Petitioner and the various members of his family, particularly in the case of Petitioner's father who was constantly contacting Petitioner for money. (2 RHT 315.)

Mr. Adelson testified that Petitioner's stepmother, Lavergne Lewis would have presented an opportunity for the jury to look at her life and experiences with Petitioner's father. In Mr. Adelson's experience, a witness like Lavergne Lewis makes a jury look at the factors affecting Petitioner's life and ask themselves how they would

react under similar circumstances. This gives the jury an opportunity to feel empathy with the Petitioner. (2 RHT 320.) Petitioner's father was prosecuted for molesting and impregnating Petitioner's half-sister. Mr. Adelson stated that it would have been important for the jury to know that this was the father that Petitioner tried to have a relationship with. It was information that was available to Slick in the probation reports he received, and the type of information that Slick chose not to use. (2 RHT 321-323.) It would also have been critical for the jury to understand that Petitioner's father was establishing a relationship with his son in order to obtain money from him. The jury should know what an awful person Petitioner's father was. This is who Petitioner, with his limited intellectual abilities was looking up to, endeavoring to please and emulating. (2 RHT 324.)

Mr. Adelson stated that the need to put on humanizing evidence in this case was obvious. It was his view that no reasonably competent counsel would have done without it because without the mitigation evidence, the facts of the case itself were so horrible that no jury would have given Petitioner life without parole without being given some reason to hang their hat on. That reason would consist of humanizing evidence.[14] (2 RHT 483.) Mr. Adelson testified that always believed, that in a capital case, the defense always had a shot in the penalty phase and what the attorney does with the penalty phase makes all the difference. No matter how bad the evidence might be in the guilt phase, there was always a chance in the penalty phase if the defense put together a team with particular emphasis on mitigation and worked the case up to present the most humanizing view possible.[15]

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Adelson: So the answer to you, Mr. Kelberg, is that no reasonable competent counsel would fail to put on this evidence. (3 RHT 483.)

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Adelson: In fact, in a penalty phase by and large I would prefer to have a

Twenty seven years later, Petitioner was able to introduce six witnesses who were available at the time of trial. Petitioner submits that all of the witnesses would have been helpful during the penalty phase. The witnesses would have been able to humanize Petitioner for the jury. In addition, Slick could have more fully developed the cursory testimony of Rose Davis. We do not know what the impact most of the additional family members would have had because they are all dead. There was no effort made to find other witnesses so, again, we cannot know the impact due to the investigation and the incompetence of Mr. Slick.

If mitigation testimony had been presented the jury would have been able to hear about the effects of a lifetime of institutionalization from an expert like Dr. Adrienne Davis. The jury would have heard that Petitioner was first sent to CYA at age 12. The jury would have heard about the damaging effects for such a young person to be housed in an institution designed for older and more delinquent youth and adults. (1 RHT 35-44.) The jury had no opportunity to hear about how an institution designed for rehabilitation as well as imposing punitive measures completely failed Petitioner. Petitioner's well-documented psychological condition and learning disabilities were not properly identified and Petitioner never received the appropriate treatment and therapy that he desperately needed. (1 RHT 51-52.)

Petitioner was improperly labeled as being anti-social before he was 15-years-old. Anti-social Personality Disorder can only be diagnosed after age 18. Dr. Davis opined that this label was so stigmatizing that the institutions were not compelled to do a more thorough assessment or evaluation to determine the reason behind Petitioner's repeated incarcerations.

The social chaos Petitioner was experiencing, as a result of living with an

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dead-bang guilt phase and a lot to talk about in penalty. That, to me, is the perfect death penalty case. (3 RHT 484-485.)

alcoholic mother and a father who was in and out of prison, was well documented in the probation reports. The probation reports were in the possession of the institutions where Petitioner was incarcerated. The jury never heard that the institutions failed to address the dysfunction and neglect Petitioner was experiencing at home. (1 RHT 46.) They had the information but did nothing about it. The jury never got to hear that Petitioner was likely suffering from depression and his condition was never identified or diagnosed and he did not receive the proper treatment. (1 RHT 35-44.)

The jury never had the opportunity to hear how Petitioner was also failed by the education system. Despite the fact that from the age of six, Petitioner was repeatedly administered IQ tests, his learning disabilities and intellectual disabilities were not diagnosed or addressed in an appropriate fashion. (Referee's Report, Table 1, p.12; RH Ex. 23 p. 10-12 and RH Ex. NN.) Despite the fact that Petitioner was absent an inordinate amount time during elementary school (47 days in kindergarten and 41 days in the 4th grade) school official officials failed to identify issues that were going on in Petitioner's home and contributing to his difficulties in school. The jury never got to hear that Petitioner was failing so badly in school at such an early age, he had to repeat the first grade. (RH Ex. Z, p. 5.)

6B. Rebuttal Evidence Reasonably Available to the Prosecution

Mr. Slick testified that he does not remember the case. (5 RHT 831.) Nevertheless, he made the self-serving statement that his decisions were tactical. (5 RHT 838.) He wanted the Referee and this Court to believe he did a one hour 36 minute penalty phase to help limit rebuttal. This Court cannot take any comfort in this. Mr. Slick's purported tactical decision is belied by the fact that Mr. Slick gave up on any further penalty phase investigation immediately upon getting Ms. Kleinbauer's reports on the five relatives who came to court to see Petitioner. (5 RHT 873-874.)

The Referee makes the argument that details of the robberies could have come out. This is true. Evidence of the robberies could have come out. However, leaving the

jury with evidence of crimes they knew Petitioner committed did not make the situation any better. The jury was left to speculate about the details of those crimes. Petitioner had nothing to lose. He faced a jury that convicted him of a robbery homicide and were told he was successfully prosecuted on four others.

Anything put in front of the jury to humanize Petitioner and explain the circumstances would have been better than nothing at all. Mr. Adelson testified that failure to put on mitigation evidence was simply not an option because the defense had nothing to lose. It was his experience that mitigation evidence is precisely the sort of information the jury wants to hear. Jurors were naturally curious about how the defendant got to the point he did where he would commit the terrible acts for which he was on trial. (2 RHT 265.)

In analyzing Petitioner's case, Mr. Adelson stated that not only were the facts of the case bad, but by stipulating to the four prior robberies, the jury was left to speculate about how they occurred and without introducing any humanizing factors, Petitioner did not have a chance. (2 RHT 385.)

CONCLUSION

This Court should adopt the Referee's finding that Petitioner's intellectual disability renders him ineligible for execution. This Court should also find that Petitioner was denied the effective assistance of counsel in the investigation and presentation of the penalty phase trial.

Dated: April 29, 2013

Respectfully Submitted,

SANGER SWYSEN & DUNKLE

By: /s/
Robert M. Sanger, Attorney for
Petitioner Robert Lewis, Jr.

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 a citizen of the United States. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On April 30, 2013, I served the foregoing document entitled: **EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS** 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 April 30, 2013, at Santa Barbara, California.

Jessica Dzamba

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