COPY
SUPREME COURT COPY

In the Supreme Court of the State of California

In re **ROBERT LEWIS, JR.,** **On Habeas Corpus.**	**CAPITAL CASE** Case No. S117235

SUPREME COURT
FILED
APR 30 2013
Frank A. McGuire Clerk
Deputy

Los Angeles County Superior Court Case No. A027897
The Honorable Richard F. Charvat, Judge

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

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General
MARGARET E. MAXWELL
Supervising Deputy Attorney General
State Bar No. 169830
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2282
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

Page

Preliminary Statement....1

Summary Of Evidence Presented At The Reference Hearing Relevant To Questions 1, 2, 4, 5, And 6....5

I. Petitioner's Case In Chief....5

A. The Trial Defense Team And Investigation....5

1. Ronald Slick – Trial Counsel....5

2. Kristina Kleinbauer – Investigator....12

B. Family Friends And Acquaintances....16

1. Georgia Agras....16

2. Deborah Helms....17

3. Larry Charles Cleveland....18

4. Stephen Fateen Harris....21

5. John Williams....22

6. Tommie Mcglothin....22

C. Post-Conviction Mental Retardation Expert – Dr. Natasha Khazanov, Ph.D....23

II. Respondent's Evidence....47

A. Defense Trial Investigation....47

1. Dr. Kaushal K. Sharma -- Forensic Psychiatrist....47

2. Dr. Michael Maloney, Ph.D – Forensic Psychologist....51

A. Dr. Maloney's Interview Of Petitioner....53

B. Family Interviews....57

C. Psychological Testing Conducted In 1984....59

D. Other Circumstances Impacting Petitioner's Test Scores....64

TABLE OF CONTENTS
(continued)

Page

E. Dr. Maloney's Assessment Of Possible Penalty Mitigation 66

F. Interpretation And Impact Of Petitioner's Pre-18 Test Scores 69

B. Post-Conviction Mental Retardation Expert – Dr. Charles Hinkin, Ph.D 71

1. Significantly Subaverage General Intellectual Functioning 73

A. The Intelligence Testing 73

B. The Impact Of Literacy On Petitioner's Test Scores 75

C. Absence Of Evidence Of Brain Damage Or Dysfunction To Explain The Test Scores 77

D. Petitioner's Illiteracy (Not Mental Retardation) Explained His Scores...80

2. Dr. Khazanov's Deficient Methodology 83

3. Adaptive Behavior 84

Argument..90

I. Respondent Takes Exception To The Referee's Findings In Support Of His Conclusion That Petitioner Is Mentally Retarded Within The Meaning Of *Atkins V. Virginia* (2002) 536 U.S. 304 And *In Re Hawthorne* (2005) 35 Cal.4th 40 (Question One)..................................90

A. Applicable Law 91

1. Standard Of Review Following Reference Hearing 91

2. Law Applicable To The Referee's Findings On Mental Retardation 92

TABLE OF CONTENTS
(continued)

Page

B. The Referee's Repeated Comments Denigrating The Mental Retardation Inquiry Should Temper Any Deference Afforded To His Findings On Mental Retardation 94

C. The Referee Selected A Legal Standard For "Adaptive Behavior" Not Endorsed By Either *Atkins* Or *Hawthorne* 96

D. Allocation Of "Lesser Weight" To Dr. Hinkin's Testimony 99

E. Findings On Significant Subaverage General Intellectual Functioning 103

1. The Referee's Wholesale Rejection Of All Tests Other Than The WISC And WAIS Is Not Supported By Substantial Evidence 103

2. Findings Rejecting Possible Lack Of Motivation And The Impact Of "Socioeconomic Bias" Are Not Supported By Substantial Evidence 109

A. Lack Of Motivation 109

B. Socioeconomic Factors (Including Literacy) 111

3. The Referee Failed To Make The Fundamental Factual Finding Whether Petitioner Suffered Brain Damage Or Dysfunction That Created Mental Retardation 115

F. The Referee's Factual Findings On Adaptive Behavior Deficits Are Not Supported By Substantial Evidence 119

1. Inability To Effectively Understand And Communicate 120

TABLE OF CONTENTS
(continued)

Page

2. The Police Interview Conducted November 21, 1983 126

3. Findings About Petitioner's "Success" As A "Hustler" Or Criminal 128

II. Contrary To The Referee's Finding, Petitioner Did Not Establish By A Preponderance Of The Evidence That He Is Mentally Retarded So That Imposing The Death Penalty Would Constitute Cruel And Unusual Punishment 130

A. Petitioner Has Not Met His Burden To Prove Significantly Subaverage General Intellectual Functioning Before Age 18 131

B. Petitioner Has Not Met His Burden To Prove Significant Deficits In Adaptive Behavior Prior To Age 18 140

III. Petitioner Is Not Entitled To Habeas Relief Due To Ineffective Assistance Of Counsel Resulting From Failure To Investigate And Present Additional Mitigation Evidence At The Penalty Phase 148

A. Respondent Takes Exception To The Referee's Findings For Question 2 Only To The Extent The Referee Appears To Find Kleinbauer Spent Only 85 Hours Investigating Petitioner's Case 149

B. Applicable Legal Principles 150

C. Petitioner Fails To Meet His Burden To Demonstrate Deficient Performance Concerning The Adequacy Of Slick's Investigation Of Evidence Of Petitioner's Family, History, Good Character Or His Reasonable Tactical Decision To Limit The Penalty Presentation (Claim XIV) 151

1. Slick Conducted A Constitutionally Adequate Investigation Of Potential Mitigation 151

TABLE OF CONTENTS
(continued)

Page

2. Slick's Decision To Present Limited Mitigation Evidence Was A Reasonable And Informed Tactical Decision 160

D. Petitioner Fails To Meet His Burden To Demonstrate Deficient Performance Concerning The Investigation And Presentation Of Evidence Of Petitioner's Mental Retardation, Brain Damage, Or Learning Disabilities (Claim XV/Claim XIV) 163

E. Petitioner Fails To Meet His Burden To Demonstrate Deficient Performance Concerning The Investigation And Presentation Of Evidence Of "Negative Impact" Of Petitioner's Juvenile Incarceration (Claim XVI/Claim XIV)..... 170

Conclusion 173

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia
(2002) 536 U.S. 304 .... passim

Cullen v. Pinholster
(2011) 131 S. Ct. 1388 .... 150, 159

Harrington v. Richter
(2011) 131 S.Ct. 770 159

Hendricks v. Calderon
(9th Cir. 1995) 70 F.3d 1032 .... 168, 172

In re Andrews
(2002) 28 Cal.4th 1234 158

In re Cox
(2003) 30 Cal.4th 974 150

In re Hardy
(2007) 41 Cal.4th 977 151

In re Hawthorne
(2005) 35 Cal.4th 40 .... passim

In re Johnson
(1998) 18 Cal.4th 447 91

In re Thomas
(2006) 37 Cal.4th 1249 91

Larry P. by Lucille P. v. Riles
(9th Cir. 1984) 793 F.2d 969 .... 38, 114

Murtishaw v. Woodford
(9th Cir. 2001) 255 F.3d 926 .... 168, 172

People v. Lewis
(1990) 50 Cal.3d 262 1

TABLE OF AUTHORITIES
(continued)

Page

People v. Lewis
(2004) 33 Cal.4th 214 2

People v. Samayoa
(1993) 15 Cal.4th 795 168

People v. Superior Court (*Vidal*)
(2007) 40 Cal.4th 999 .... 91, 98

People v. Williams
(1998) 44 Cal.3d 883 151

People v. Williams
(2010) 49 Cal.4th 405 150

People v. Wright
(1990) 52 Cal.3d 367 150

People v. Zapien
(1993) 4 Cal.4th 929 151

Strickland v. Washington
(1984) 466 U.S. 668 .... 150, 158, 160

Summerlin v. Stewart
(9th Cir. 2001) 267 F.2d 926 .... 168, 172

Walls v. Bowersox
(8th Cir. 1998) 151 F.3d 827 .... 168, 172

STATUTES

Evid. Code
§ 722 99
§ 780 99

Pen. Code
§ 190.3 8
§ 190.4 1
§ 1376 .... passim

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Cal. Const., Article I, § 15 150

U.S. Const.,
- 6th Amend. 150
- 8th Amend. 92, 130

OTHER AUTHORITIES

CALCRIM No. 775 98

PRELIMINARY STATEMENT

Over 28 years ago, on August 24, 1984, a jury convicted Lewis of the robbery and first degree murder of Milton Estell, found true the allegations that petitioner personally used a firearm and that petitioner personally used a deadly and dangerous weapon during the commission of the murder and robbery, and found true the special circumstance, under the 1978 death penalty law, that the murder was committed during the commission or attempted commission of a robbery. (CT 7-15, 42.)[1] The same day, on August 24, 1984, following a penalty trial, the jury fixed Lewis' sentence at death. (CT 16-30, 42.) On November 1, 1984, the trial court (Hon. Elsworth M. Beam) sentenced petitioner to death in accordance with the jury's verdict. (CT 42-43.)

Petitioner filed his opening brief in his automatic appeal on May 4, 1987 (case no. S004653). On April 29, 1988, he filed a petition for writ of habeas corpus (case no. S005412). After requesting informal briefing, this Court denied the petition on the merits on September 7, 1989. On March 1, 1990, this Court affirmed petitioner's convictions but reversed the judgment of death and remanded for a new hearing pursuant to Penal Code section 190.4, subdivision (e). (*People v. Lewis* (1990) 50 Cal.3d 262.)

On March 20, 1991, the trial court (Hon. Richard F. Charvat) heard and denied petitioner's motion for modification of the verdict. (CT 225.) petitioner was sentenced to death on count I in accordance with the jury's verdict. (CT 226-232.)

---

[1] "CT" refers to the Clerk's Transcript filed in California Supreme Court case number S020670. "RT" refers to the reporter's transcript in S020670. "RHT" refers to the reference hearing transcripts. The exhibit designations correspond to those used by the referee in the Report ("Ex."); Petitioner's exhibits bear numerical designations, and respondent's exhibits bear alphabetical designations.

Petitioner filed his opening brief in his second automatic appeal on April 16, 2002. On July 2, 2003, petitioner filed the instant petition for writ of habeas corpus. On June 24, 2004, this Court affirmed petitioner's sentence and judgment of death. (*People v. Lewis* (2004) 33 Cal.4th 214.) On October 31, 2007, following informal briefing from the parties, this Court issued an order to show cause why relief should not be granted as to *Claims XIV, XV, XVI, and XVIII.* Respondent filed a Return with supporting exhibits on January 29, 2008. Petitioner filed a Reply on July 28, 2008.

On December 10, 2008, this Court ordered that a referee be appointed to take evidence and make findings of fact on six questions. On January 14, 2009, this Court appointed the Honorable Robert J. Perry, Judge of the Los Angeles County Superior Court, to sit as referee and to "take evidence and make findings of facts on the following questions":

> 1. Is petitioner mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304 and *In re Hawthorne* (2005) 35 Cal. 4th 40?
>
> 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 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?
>
> 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?
>
> 4. Did trial counsel's penalty phase investigation include investigation into petitioner's mental retardation and learning disabilities, the negative effects of petitioner's institutionalization, petitioner's family, history, and his good character?

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?

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?

The reference hearing commenced on January 4, 2011, and concluded on February 1, 2012. The 42-page report of the referee was filed with this Court on April 3, 2012.

In answering the first reference question, the referee found that petitioner was mentally retarded within the meaning of *Atkins v. Virginia* and *Hawthorne*. (Report, pp. 3-28.) Regarding Question 2, the referee found that trial counsel, Ronald Slick, conducted an adequate investigation into potential mitigating evidence. (Report, pp. 28-38.) The referee concluded that Question 3 was "mooted" by the findings as to Question 2 and, therefore, did not answer it with the exception of the finding expressed in footnote 71. (Report, pp. 38, 42 & fn. 71.) Regarding Question 4, the referee concluded that Slick investigated petitioner's family, history, his good character and mental condition but did not specifically investigate whether petitioner was mentally retarded or suffered from a learning disability and referred to its answer to Question 2. (Report, p. 38.) Regarding Question 5, the referee refered to its answer to Question 2. (Report, p. 39.) Regarding Question 6, the referee concluded that after conducting an adequate penalty investigation that uncovered "a great deal of negative information about petitioner, and no significant positive information," Slick made a reasonable strategic decision to limit the penalty presentation and avoid the risk of the jury learning the negative details

about petitioner's four prior robbery convictions, and his "decision to opt for a short penalty trial was eminently reasonable under the circumstances of this case." (Report, pp. 39-42.)

Thereafter, this Court invited the parties to file exceptions to the report of the referee and briefs on the merits.

Respondent takes exception to nearly all of the referee's factual findings pertaining to Question 1. Respondent concurs with virtually all the referee's findings as to Question 2 and Question 5. Given the referee's findings on Questions 2 and 6, respondent concurs in the referee's decision it was unnecessary to make further factual findings as to Question 3. Respondent concurs in the referee's stated finding as to Question 4. Finally, as to Question 6, respondent does not take exception to the referee's findings that Slick's mitigation investigation was adequate and that Slick's decisions to call petitioner's sister, Rose Davidson, and circumscribe her examination and to rely on the guilt phase testimony of petitioner's father and sister Gladys Spillman were premised upon "eminently reasonable" tactical decisions given the circumstances of petitioner's case.

SUMMARY OF EVIDENCE PRESENTED AT THE REFERENCE HEARING RELEVANT TO QUESTIONS 1, 2, 4, 5, AND 6[2]

I. PETITIONER'S CASE IN CHIEF

A. The Trial Defense Team and Investigation

1. Ronald Slick – Trial Counsel

Slick graduated from Pepperdine Law School and took the bar in the summer of 1972. (5RHT 751-752.) He then began a private practice of primarily criminal cases based principally in Long Beach. (5RHT 752-753.) Slick served on the juvenile appointment panel and the misdemeanor panel for five years. He moved onto the felony panel in approximately 1976. (5RHT 753-754.) He obtained certification from the State Bar as a specialist in criminal law on March 21, 1979. (5RHT 763; Ex. P at 14.)

Slick had tried a minimum of 20 to 30 felony cases prior to his first death penalty trial. (5RHT 754-755.) In preparation for his death penalty cases, Slick attended a multiple-day seminar in Monterey offered by a defense attorney organization and attempted to educate himself. He possibly attended a program offered by the State Public Defender. (5RHT 755-756.) In appointed cases, Slick kept track of his time and submitted a bill to the court for an hourly rate. (5RHT 760.) In death penalty cases, in camera hearings with the "money judge" were held to obtain defense funding. (5RHT 760-761.)

Slick tried 13 death penalty cases; five resulted in sentences of life without the possibility of parole, and eight ended with the death penalty.

---

[2] Iin light of the referee's finding that Reference Question 3 was "moot" (Report, p. 38), respondent omits summaries of testimony offered by expert witnesses Adrienne Davis, Ph.D. (1RHT 22-143) and Michael Adelson (2RT 228-447; 3RHT 456-497) and limits the summary of witnesses Georgia Agras, Deborah Helms, Larry Cleveland, Stephen Harris, and John Williams to testimony relevant to the remaining questions.

(5RHT 778.) Slick kept a list of his felony jury trials. (6RHT 925-926; Ex. 14 [case list].) Two of the cases in which he obtained a life sentence occurred prior to petitioner's trial. (5RHT 848.) Petitioner's case was Slick's seventh death penalty case. (6RHT 940-941 [item 70].) He tried his first death penalty case in April 1981, which resulted in a jury verdict of life without the possibility of parole plus 58 years. (5RHT 774-777, 780; 6RHT 929-930, 939; Ex. 14 [item 38].) His second death penalty trial, finalized in June 1983, resulted in a verdict of life without the possibility of parole. (5RHT 784, 846; 6RHT 930-931, 939, 979-982; Ex. 14 [item 56].) All six cases were tried in Long Beach. The vast majority of his noncapital cases were also tried in Long Beach. (6RHT 983-984.) Slick felt that he had a good sense of Long Beach juries' attitude about capital punishment and toward the Long Beach Police Department. (6RHT 984.) Slick felt that juries in Long Beach were fairly pro-prosecution in orientation. (7RHT 1144.)

After his appointment to petitioner's case, Slick tried 10 other criminal cases as reflected in his case log. (6RHT 941-943; Ex. 14.) In 1984, Slick only worked criminal cases. (6RHT 944.) He did not engage in a criminal jury trial case during the three months prior to petitioner's trial. (6RHT 1001; Ex. 14.)

Slick no longer had a present recollection of his investigation of petitioner's case. (7RHT 1148.) Slick maintained his case files for death penalty cases in the attic of his home. (5RHT 750; 6RHT 963.)[3]

---

[3] Slick had provided copies of his file to Don Specter, Mr. Sanger, and to the court in response to a subpoena. (5RHT 749-750; 6RHT 953, 955-957; 1001-1002; Ex. R at 2581 [letter to Specter dated July 2, 1985]; Ex. 17 [cover letter to Swysen].) At the hearing, Mr. Sanger represented that the documents contained in Petitioner's Exhibit 3 consisted of the documents received by his firm. (6RHT 957.) In response to a subpoena,

(continued...)

The referee took judicial notice of the billing records contained in the appellate file. (5RHT 805.) The records demonstrate that, on January 5, 1984, Slick applied for funds and requested $1,000 for miscellaneous expenses, $2,000 for investigation, $2,000 for Dr. Maloney, and $2,000 for Dr. Sharma. (5RHT 763, 765-769; Ex. P at 13-28.) Slick had worked with Lawrence Investigations in other cases. (5RHT 766.) Slick represented that he wanted Dr. Maloney to evaluate petitioner's mental condition, including mental retardation and disabilities, as potential mitigation. (5RHT 770.) In the request for funding, Slick represented that Dr. Maloney would provide a psychological profile of petitioner for the jury and would interview petitioner's family members. (5RHT 771-772.) In August 1984, Slick submitted a second application for funds which provided an accounting of the funds spent from the original $7,000 allotment and requested additional money. (5RHT 785-786, 789-791; Ex. P at 29-31.) After the case concluded, Slick submitted a final accounting and wrote a check for the balance of unspent funds. (5RHT 791-792; Ex. P at 39-40.)

Slick had previously worked with Dr. Sharma and knew that he was knowledgeable about death penalty proceedings. He sent Dr. Sharma a letter dated May 8, 1984, with 11 standard questions that he asked in his death penalty cases and enclosed documents for Dr. Sharma to review. (5RHT 909-915; Ex. B at 299-302.) Another letter to Dr. Sharma dated May 31, 1984, transmitted 331 pages of records obtained from the

---

(...continued)
Mr. Slick deposited the documents submitted as Respondent's Exhibit Q in court. The file was released to the District Attorney's Office for copying and numbering; a numbered copy is submitted as Respondent's Exhibit R. (6RHT 959-960.) Slick prepared an affidavit signed March 16, 2009. (6RHT 958; Ex. R at 1.)

California Department of Corrections. (5RHT 922; 6RHT 1067-1068; Ex. R at 2353.) Dr. Sharma provided a report. (5RHT 915; Ex. D.)

Slick also sent a letter dated May 8, 1984, to Dr. Maloney. He included the same questions as provided to Dr. Sharma. (5RHT 919, 920-921; Ex. R at 2354-2357.)[4] He also asked Dr. Maloney to administer psychological tests and prepare a complete psychological profile to present to a jury and asked to meet with Dr. Maloney personally after Dr. Maloney met with petitioner. (Ex. R at 2354.) Slick did not remember if Dr. Maloney sent him a report. (6RHT 946-947.)

Slick submitted billing records to the court. (5RHT 798, 800-801; Ex. 10 [billing records].) Slick billed for 42 hours of court appearances and 190 hours of preparation. (6RHT 983.) Slick did not have an independent recollection of the information listed in the billing records. (5RHT 803-804.) The billing records reflect Slick prepared instructions to Lawrence Investigations (Ex. 10 at 5) and his file contained a memo dated January 23, 1984. (5RHT 808-809; Ex. R at 2645, 2639.) His letter asked investigator Kristina Kleinbauer to develop character witnesses – including friends, family and guards – and background information. (5RHT 811-812.) Slick sent out Kleinbauer to conduct an investigation. She provided a report, which Slick would have read and considered whether further investigation was necessary. (5RHT 883-884; 6RHT 1016-1017.) Slick would have considered asking Kleinbauer to further pursue the information she originally provided to him. (7RHT 1132.) Slick agreed that in 1984 a thorough investigation of family and friends was required. (7RHT 1133.)

---

[4] A copy of the letter included elsewhere in the hearing record was missing the page listing questions related to Penal Code section 190.3. (6RHT 945-946; Ex. B at 182-184; 6RHT 1017-1018.)

The billing records for petitioner's case reflect that on April 28, 1984, Slick reviewed the State Public Defender Death Penalty Manual and prepared a checklist. (5RHT 819; Ex. 10 at 5.) In handling his death penalty cases, Slick believed that character evidence was important, as well as evidence of the defendant's mental state and evidence of abuse. The love of family members was important to present. (5RHT 822-823.) Slick believed the fact that a defendant's father was a child molester would be helpful to present to the jury. (5RHT 823-824.)

As part of his trial preparation, Slick reviewed and summarized petitioner's criminal history records. (6RHT 1064-1067; Ex. A at 2737-2746; Ex. 10.) His notes indicate that Slick possessed police reports for the prior offenses. (6RHT 1073-1074; Ex. A at 2742-2743.)

Back in 1984, Slick expected that he could announce ready for trial so that the trial would then be set a month or so later. If necessary, he could still request more time. (5RHT 835-836.) Based upon his custom and practice, when he went to trial, Slick perceived that he was ready for trial. (5RHT 837, 838-839; 7RHT 1105.)

Prior to trial, Slick visited petitioner at the jail. (5RHT 893.) Slick remembered meeting with petitioner on numerous occasions. They talked about the case and petitioner's childhood. (6RHT 1009-1010.) Slick did not recall giving petitioner anything to review. (5RHT 893.) Slick "doubted" that he asked petitioner to write anything. Slick talked with petitioner during the trial. Slick did not have a sense that petitioner needed to be examined for psychiatric conditions. (5RHT 894.)

The billing records reflect Slick had multiple meetings with petitioner apart from court appearances (1/18/84, 2/1/84, 2/27/84, 5/18/84, 5/31/84, 7/24/84, 7/31/84) and with Dee Walker (12/22/83, 2/24/84, 7/31/84, 8/6/84), who was arrested with petitioner on November 1, 1983. (6RHT 1007-1008; Ex. 10 at 6-8.) From the records, Slick met with petitioner's

wife and sister Gladys on May 29, 1984, Slick and Kleinbauer interviewed them on July 24, 1984; Slick and Dr. Maloney interviewed petitioner's father, his wife, his girlfriend, and his sister Rose on July 31, 1984. Slick obtained and reviewed records from the Department of Corrections. (7RHT 1148; Ex. 10 at 6-7.) Slick interviewed the people he thought should be interviewed. (7RHT 1151.)

Slick's billing records reflect a meeting with Dr. Maloney, petitioner's father (Robert Sr.), petitioner's wife (Janiroe Lewis), Dee Walker, and Rose Davidson (his sister) on July 31, 1984. (6RHT 951; Ex. B at 7.) Slick wrote a note dated August 1, 1984, indicating that he did not think any of them would be good witnesses. (6RHT 947-953, 970; Ex. R at 2620; Ex. A at 2637.) He did not manufacture the August 1, 1984, note. (6RHT 964-965.) The note reflected what he believed at the time. (6RHT 967; 7RHT 1102-1104.) He wrote the note on the date reflected on the note. (7RHT 1136-1138.)[5]

Although Slick did not remember specific details, as a gross impression, he did not like what the potential penalty phase witnesses were saying or how they presented themselves. He could not, however, currently recall how he reached that conclusion. (5RHT 859-860, 868.) What they said did not seem mitigating to him. (5RHT 868.) Slick did not recall having any evidence that petitioner had suffered abuse at the hands of his mother or anyone else. (5RHT 870.) A note in Slick's handwriting summarized information obtained from Gladys Spillman, including that petitioner's schooling ended after the sixth or seventh grade. (6RHT 1019-1021; Ex. A at 2635.) Slick would have considered information about

[5] At the hearing, Petitioner's counsel represented that his firm received the note in 1996. (6RHT 1038-1039; see also Ex. V at 1.) The original of the August 1, 1984 note is contained in Exhibit Q. (6RHT 1040.)

schooling and education. (6RHT 1022.) A note in Slick's handwriting summarized information from Janiroe Lewis. He would not have considered information that petitioner made his money "pimping" to have been helpful to the case. (6RHT 1022-1023; Ex. A at 2636.)

Slick originally intended to use Dr. Maloney to paint a picture of petitioner's background. (5RHT 860-861.) Slick recalled wanting to have Dr. Maloney's assistance in evaluating the possible penalty phase witnesses, but he did not recall whether Dr. Maloney observed interviews of every witness. (7RHT 1095-1097.) Slick did not recall using Dr. Maloney to evaluate witnesses in any other case. He believed that he used Dr. Maloney because he knew the decision not to call witnesses was a serious one and he wanted to make sure his decision not to call them was correct. (7RHT 1134-1135.) He talked to witnesses himself and did not simply trust Dr. Maloney to do it. (5RHT 884.) Slick would not have written the note about evaluating the witnesses without having personally observed the interviews. (7RHT 1097; see Ex. R at 2620.) Other notes of interviews of Dee Walker and others were not in Slick's handwriting. (7RHT 1095, 1098; Ex. B at 233-236.)

At trial, when the prosecutor offered the stipulation about petitioner's prior convictions, Slick thought that the stipulation would weaken the prosecution case, especially because the stipulation omitted bad details about the prior crimes. He decided not to risk the presentation of additional aggravating evidence by presenting more from petitioner's family members and making it worse for petitioner. (5RHT 861-864; 6RHT 1030, 1042.) Slick was pleased with the stipulation because he had been concerned about dealing with the facts of the prior crimes. (6RHT 1043.) Slick possessed documents, including state prison records, that discussed petitioner's prior incarcerations. (5RHT 904-907; 6RHT 1030, 1041.) The stipulation was not conditioned on petitioner not presenting such evidence. (5RHT 863.)

Nor did the stipulation include an agreement that the prosecution would not present additional evidence of the prior bad acts in rebuttal. (6RHT 1041-1042.) Slick believed that it was to his advantage to have a short penalty phase. (5RHT 866-867.) He made a strategic decision. (5RHT 868.) Slick asked the three family members leading questions in order to keep them focused on exactly what he wanted to elicit. (5RHT 871-872.) His choices were deliberate. (5RHT 872.) He did not call Dr. Maloney as a witness due to his concern of drawing out additional aggravating evidence. (5RHT 896.) Although there were not many cases defining the rules of mitigation evidence at that time, Slick observed that "I think pretty much then you could do anything you want[ed]." (6RHT 977-978.)

2. Kristina Kleinbauer – Investigator

Kristina Kleinbauer received a bachelor's degree in History and Political Science from Stanford in 1963 and a Master of Arts degree in education in 1971. She began working as a private investigator in California in 1977 and became licensed in 1982. (1RHT 215-218; 4RHT 587-588.) Between 1982 and 1984, Kleinbauer attended meetings held by the local chapter of the California Association of Licensed Investigators. (4RHT 588-589.) Prior to 1984, Kleinbauer attended a death penalty seminar and received a thick, three-ring binder of materials. (4RHT 590-592.) At some point, she saw lengthy manual published by the California Attorneys for Criminal Justice. (4RHT 594.)

Before 1984, Kleinbauer understood a death penalty mitigation investigation included a search for anecdotal information from family members in order to humanize the defendant and provide a fuller story of the events that led to the crime. (4RHT 595-596.) While investigating guilt-phase issues for death penalty cases, Kleinbauer spoke with family members and ascertained who might be an effective witness for the

defendant. (4RHT 598-599.) She understood her job to include the development of a group of potential witnesses. (4RHT 678.)

Kleinbauer worked for Slick while working for Lawrence. (1RHT 218-219.) She performed work on five or six capital cases, primarily for Slick. (1RHT 219-220.) She had performed investigation in at least two death penalty cases prior to petitioner's trial. (4RHT 600, 676, 4RHT 685-686.)

Slick contacted her about petitioner's case in January 1984. (1RHT 219; 4RHT 599-600.) Slick provided a letter with instructions. (4RHT 602-603.) A memo-letter dated January 23, 1984, from Slick to Kleinbauer asked Kleinbauer to interview petitioner and investigate his involvement with crime and to obtain background information. (4RHT 611-612, 623; Ex. R at 2639, 2645.) Those instructions specified, "2. Background history (grew-up, school, friends, & family), 3. Character witnesses (friends, family, guards), take a statement from family & friends for character testimony." (Ex. R at 2645.) Slick informed Kleinbauer that she would be paid $30 per hour, not to exceed $1,000 – and he enclosed $500. (4RHT 616, 624.) Kleinbauer recalled speaking with Slick by phone and going to his office. (4RHT 612.) Slick gave her a copy of the 52-page police report and the 29-page preliminary hearing transcript. (4RHT 615-616.) She did not recall if she met with Slick in person or simply picked up materials. (4RHT 629.) Kleinbauer felt that Slick asked her the right questions and was clear in his directions. (4RHT 714-715.) She was against the death penalty and did everything in her power to gather evidence helpful to petitioner. (4RHT 717.)

Kleinbauer submitted a bill dated July 23, 1984, charging $2,620. (4RHT 600-602, 618; Ex. 7 [billing records].) A second billing statement on Kleinbauer's letterhead was dated September 3, 1984. (4RHT 617; Ex.

R at 2446.) Her two bills totaled 110.5 hours. (4RHT 680; Ex. 7; Ex. R at 2446, 2450.)

According to her billing records, Kleinbauer began the assignment on May 22, 1984. The initial budget was for reviewing documents and locating witnesses for both guilt and penalty phases. (4RHT 624; Ex. 7 at 2.) Kleinbauer anticipated that she could ask for more money if necessary, as was normally done. (4RHT 625.) She billed three and one-half hours for reading the documents. (4RHT 626; Ex. 7 at 2.) Kleinbauer went to visit petitioner at the County Jail; she did not get to see him but billed one hour for waiting. She saw him the next day. Her billing included travel time. (4RHT 627; Ex. 7 at 2.) In May and June 1984, Kleinbauer made phone calls, interviewed petitioner twice, and made efforts to locate witnesses. (4RHT 631-632; Ex. 7 at 2.) Kleinbauer billed for time spent meeting or speaking with counsel. (4RHT 634-635.) When interviewing witnesses, Kleinbauer took handwritten notes to later reduce to report form. (4RHT 638-639.)

Her second bill dated September 3, 1984, billed for 25.5 hours. (4RHT 635; Ex. R at 2446-2448.) She billed one hour on July 24, 1984, to turn in reports and meet with Slick. (4RHT 635-636; Ex. R at 2446.) In her billing, Kleinbauer distinguished attempts to contact from interviews. (4RHT 641-642.) On July 19, she billed eight hours for writing reports. (4RHT 636; Ex. R at 2453; Ex. 7 at 3.) In 1984, Kleinbauer utilized an outside typing service to prepare her reports. Her invoice reflected that the service typed 20 pages of reports, and she included $70 in her bill to reimburse her for the service. (4RHT 617-618; Ex. 7 at 1; Ex. R at 2454.)

Kleinbauer's records indicated that on July 6, 1984, she attempted to interview Gladys Spillman. (4RHT 644-645; Ex. R at 2452.) She interviewed "Mary Nowell" on July 9 and petitioner's sisters on July 10. (4RHT 644-645; Ex. R at 2452.) She attempted to contact Robert Sr. and

other witnesses. She interviewed "Alma Wilen" on July 13. Her billing reflected attempts to locate Mr. Livingstone, Mr. Thomas, Clarence Pitts, and Larry Cleveland. During this period, Kleinbauer met with petitioner at the County Jail. (4RHT 645-646.) She interviewed Janiroe Lewis on July 20, 1984, and wrote an additional report. (4RHT 646-647, 652; Ex. R at 2453; Ex. 7 at 4.) Between May 22 and July 20, 1984, Kleinbauer interviewed approximately 10 witnesses. (4RHT 649-650.) She did not recall developing any "startling" evidence. (4RHT 650.) She did not recall what efforts she made to locate Cleveland or why she stopped looking for him. (4RHT 728, 731.) In 1984, it would have been her custom and practice to call the jail and state prison when attempting to locate a witness. (4RHT 728-729, 731-732.)

Kleinbauer recognized pages from her 22-page report in this case. (4RHT 658-659, 661; Ex. B at 222-232.) The first page of the report, which was missing, would have included a description of its contents. (4RHT 662.) Two pages documented Kleinbauer's interviews of petitioner's sisters. (4RHT 663-664; Ex. B at 222-223.) Four pages documented Kleinbauer's interview of Dee Walker. (4RHT 668; Ex. B at 224-227.) Three pages documented Kleinbauer's interview of Robert, Sr. conducted in the presence of Deborah Helms Lewis. (4RHT 669; Ex. B at 228-230.) Two pages documented Kleinbauer's interview of Janiroe Lewis. (4RHT 671-673, 691-692; Ex. B at 231-232.) This report stated both that Janiroe and petitioner had three children together and that one suffered from Down Syndrome. (4RHT 694, 773; Ex. B at 231.)

Her billing records reflected time spent interviewing petitioner on May 24, June 6, June 13, July 5, July 11, and July 17, 1984. (4RHT 696-697, 704; Ex. R at 2447, 2451-2452.) Kleinbauer remembered talking with petitioner. His attitude was not as she expected from Slick's description. Petitioner sometimes had difficulty with her questions and she rephrased

them. But, as indicated in her 1988 declaration, she perceived petitioner to be "quite articulate" and able to respond to her questions with responsive, intelligible sentences. (4RHT 698-701; see Petn. Ex. 12 at 2.)

Kleinbauer thrice attempted to visit Cheryl Humphries. (4RHT 704-705; Ex. R at 2447.) A note in Slick's handwriting refreshed Kleinbauer's recollection that Humphries told her that she did not see the Cadillac while she was staying at the motel with petitioner. She gave Slick this information by phone. (4RHT 705-707; Ex. A at 2632.)

B. Family Friends and Acquaintances

1. Georgia Agras

Georgia Agras had a five-year romantic relationship with petitioner's father and had lived with him. (1RHT 144-146.) During their relationship, she met petitioner's mother, Maggie Lewis. (1RHT 147.) Agras gave conflicting testimony concerning when she met and encountered petitioner: she may have met petitioner when he was 12 or 13 years old after he was released from juvenile hall (1RHT 179-180) or when petitioner was 17 years old (1RHT 163-164; see also Ex. J [LASC case no. A410539 for Robert Lewis, Sr.].) She testified that petitioner stayed at her house after school and when his mother was busy. (1RHT 144, 146.) Agras previously used the name Georgia Bondsmanson. (1RHT 161.) Her memory was "much better" in 2003, when she signed a declaration submitted with the habeas petition. In it, she said that she never met petitioner when he was "growing up." (1RHT 161-163, 165, 167; Ex. 5 [declaration]; 1RHT 178.) She believed that petitioner was incarcerated when she met petitioner's father. (1RHT 166.) While she lived with Robert Sr., petitioner called his father, who visited him in custody. (1RHT 165, 167.)

During the five years that Agras lived with petitioner's father, she never saw petitioner read anything. She never saw petitioner write his

name but never asked him to write it. Petitioner never told her whether or not he could read or write. (1RHT 155-156.) She maintained contact with petitioner even after she separated from petitioner's father and until he committed the current offenses. (1RHT 146, 158.) Agras knew that petitioner had been arrested but did not realize the serious nature until petitioner wrote her a letter after the trial. (1RHT 159-160.) After petitioner was initially sent to state prison, Agras stayed in touch with him through letters. (1RHT 174-175.) Agras observed, "he does write beautiful letters now." (1RHT 156.) Agras could read the letters petitioner wrote. One letter was one page in length and several were two pages long. Agras still possessed them. (1RHT 160.) Indeed, Agras testified petitioner "still writes me today." (1RHT 159.)

2. Deborah Helms

Deborah Helms, the daughter of Georgia Agras, was born in 1953. She met Robert Sr. when he lived with her mother. At the time, Helms was 15 or 16 years old and lived with an aunt. (1RHT 183.) During her last year of high school, Helms moved into the home with her mother and Robert Sr. (1RHT 187-188.) She first personally saw petitioner in approximately 1970 or 1971. (1RHT 183.)

Helms knew petitioner after he became an adult. He was able to take care of himself and was properly clothed. (1RHT 207.) Petitioner knew the streets and survived on them. He sometimes had a car and drove it. (1RHT 212.) Petitioner worked for his father performing masonry work. (1RHT 201, 206.) Petitioner told Helms that he gave his mother half of his paycheck. (1RHT 191.) Helms saw no violence between petitioner and his father. (1RHT 186.) Petitioner was close with his sisters. (1RHT 192.) She described him as "a pretty decent person" apart from the fact that he did not see anything wrong with robbing liquor stores. His father encouraged that behavior. (1RHT 210-211.) Robert Sr. sometimes called

petitioner and told petitioner that he needed money. On more than 10 or 20 occasions, petitioner would later arrive with what petitioner and his father called petitioner's "lunch bag" – a brown paper bag that petitioner said contained a gun and money purportedly taken during a robbery. Helms saw petitioner reach into the bag and hand money to his father. (1RHT 186-187, 196-198.)

Helms assumed that petitioner could read and write because he currently sent letters to her. (1RHT 194.)

3. Larry Charles Cleveland

Larry Cleveland was currently in custody facing criminal charges. He was born in October 1954. He was younger than Petitioner. (3RHT 499.) Cleveland estimated that he met petitioner in 1961 or 1962 and that Cleveland was between four and six years old at the time. (3RHT 499-500.) They attended the same school but not the same grade. (3RHT 500, 507.)

Cleveland and petitioner were "very close friends" growing up. (3RHT 502.) Petitioner was Cleveland's only friend, and they spent a lot of time together. (3RHT 511-512.) Cleveland lived four houses away from petitioner. They played together after school. (3RHT 507.) Petitioner and Cleveland frequently "ditched" school after recess. (3RHT 520, 550.) Cleveland never had to provide an excuse for missing school. (3RHT 550.) Petitioner participated in sports. (3RHT 548.) Petitioner was physically fit. (3RHT 549.)

Prior to 1965, petitioner and Cleveland did not commit robberies together. (3RHT 547.) As teenagers, Cleveland and petitioner committed robberies together. (3RHT 503, 505-506, 507.) Usually they used weapons, and Cleveland had committed robberies with a gun. (3RHT 508.) Cleveland committed his first robbery with petitioner in approximately 1968. They robbed a sailor in Long Beach, but Cleveland was caught and

was sent to the Youth Authority. (3RHT 507-508, 510.) Cleveland estimated that they committed nine robberies together for which neither was incarcerated. (3RHT 509, 561-562.) They used a gun in two of those robberies. Usually, petitioner did not carry a gun. (3RHT 509.) According to Cleveland, neither of them commonly carried a gun. (3RHT 553.)

Cleveland told an investigator in 2010 that, while growing up, he and petitioner "hustled" by gambling with others shooting pool. (3RHT 555-556.) They hustled to have nice clothing and shoes and earn respect. (3RHT 556-561.)

Petitioner could not read more than simple words. Cleveland read things for him. (3RHT 520-521.) As an example, sometimes they would be out driving and petitioner would ask what a sign said. (3RHT 522, 575.) Petitioner had good penmanship. He could write what he saw but could not spell words of his own accord. (3RHT 526.) When they were together, "it wasn't no need to have to do any writing for anything. You know, we shot pool. We shot dice. You didn't need to do no writing to do any of those things." (3RHT 569.) Cleveland believed that petitioner never obtained a driver license because he could not read the driving test. (3RHT 577.)

Petitioner could dress himself. (3RHT 571-572.) Petitioner was able to order food at a restaurant. (3RHT 572-573.) Cleveland never noticed that petitioner had trouble with monetary denominations. (3RHT 574.) Petitioner was "slow" in some areas, such as playing dice and pool. (3RHT 575.) Cleveland opined that he was a better gambler at craps than petitioner and that petitioner did not pick up gambling as quickly as Cleveland. (3RHT 570-571.) Petitioner did not possess the mobility to use two pair of dice in one hand. (3RHT 571.) Petitioner was in jail for most of junior high and high school. (3RHT 568.)

Petitioner occasionally worked for his father building fences. Sometimes Cleveland went along while petitioner worked. (3RHT 510.)

To his knowledge, petitioner did not sell or use drugs. Petitioner did not work as a "pimp" although he attracted women who were prostitutes. (3RHT 505.) Petitioner committed robberies. (3RHT 505-506.) Petitioner's only employment known to Cleveland was working with his father laying brick. (3RHT 525.)

Petitioner married Janiroe, a friend of his sister Gladys, when Cleveland was around 24 years old. (3RHT 519-520, 523.) Petitioner and Janiroe had three children together, and she had an additional two children. (3RHT 522, 566.) Petitioner and his wife seemed able to care for their kids. Petitioner lent money to Cleveland and borrowed money from him. He was able to drive a car. (3RHT 537-538.)

Robert Sr. began using crack cocaine during the 1970's when Cleveland and petitioner were in their twenties. (3RHT 504-505, 550.) After Robert Sr. began using crack cocaine, Cleveland saw him ask petitioner for money. Then Cleveland and petitioner would leave and gamble or commit a robbery. When they returned, petitioner gave Robert Sr. money. (3RHT 506, 552-553.)

Cleveland and petitioner went to Las Vegas together and won money. (3RHT 538.) Petitioner sometimes won large sums of money gambling. (3RHT 533.) Cleveland never questioned petitioner about how he obtained money. (3RHT 534.) The two men exchanged money "all the time." Neither man had a bank account. (3RHT 536.) In 1982 or 1983, Cleveland obtained $11,000 gambling with a companion in Las Vegas. Cleveland gave the money to petitioner. (3RHT 531-533, 538.) In 1983 before Cleveland was arrested, he gave petitioner approximately $1,000 to $1,500 to purchase a Lincoln Continental. Cleveland's share derived from drug transactions. They shared the car. (3RHT 529-531.)

Since 1983, Cleveland had written petitioner a few letters, and petitioner had sent Cleveland a card. (3RHT 568-569.)

4. Stephen Fateen Harris

Stephen Harris (born 1951) met petitioner when Harris was close to 10 years old. (7RHT 1209.) He probably met petitioner at the community recreation center where children from the neighborhood gathered on Tuesday nights. (7RHT 1210.) At the recreation center, they broad jumped and played touch football. (7RHT 1215.) Because Harris and petitioner lived on opposite sides of Pacific Coast Highway, they attended different schools. (7RHT 1210-1211.) Neither ever went to the other's home. They saw each other on the street or at the recreation center. (7RHT 1218.) Harris never met petitioner's father. (7RHT 1221.)

Between 1961 and 1983, petitioner was in and out of custody. They socialized when petitioner was out of jail. (7RHT 1212-1213.) Petitioner's best friend was Larry Charles Cleveland. (7RHT 1213-1214.) Petitioner and Cleveland hung out together when they were not in jail. They were often in trouble. Harris considered himself to be petitioner's friend. (7RHT 1214.) Cleveland and petitioner were constantly in juvenile hall. (7RHT 1220.)

Harris considered himself to be a good pool player. Petitioner played pool but was not in Harris' league. Harris considered Larry Cleveland to be a good pool player, but Harris was better. (7RHT 1215-1216.)

Harris described petitioner as a "loner-typer." (7RHT 1216.) Harris did not consider petitioner to be intellectually smart. Harris and petitioner talked about simple things, but never had an intellectual conversation. (7RHT 1216-1217.) Harris did not know if petitioner could read or write. (7RHT 1217.) Harris did not believe that petitioner was mentally retarded, but he did not think that petitioner was as "smart" as he was or as Cleveland was. (7RHT 1217, 1229.) Harris considered petitioner to be a thief. (7RHT 1227.) Harris had seen petitioner in possession of a gun.

(7RHT 1236-1237.) Petitioner was a good-looking, "very pleasant" person who liked to laugh and smile. (7RHT 1217.)

Harris last saw petitioner in 1983. (7RHT 1212.) Petitioner would not have known where Harris lived in 1984. In 1984, Harris lived on the streets and used crack cocaine, cocaine, and alcohol. He used cocaine daily if he could get it. (7RHT 1225-1226.)

5. John Williams

John "Egga" Williams (born 1948) lived in Long Beach, California. He believed that he was related to petitioner through their mothers. They met when petitioner was a small child. (7RHT 1244-1246.) Williams saw petitioner when he accompanied his mother on visits to the home of petitioner's mother. (7RHT 1245-1246.) Williams lived about two blocks from petitioner's home and occasionally saw petitioner in the neighborhood. (7RHT 1247.)

Williams never had an opportunity to see petitioner read or write. There was a lot of crime in the neighborhood where Williams and petitioner lived. (7RHT 1249.) Children needed guidance and encouragement to want to learn to read and write. (7RHT 1250.) Williams never saw petitioner commit a crime. (7RHT 1253.) Williams did not perceive petitioner to be mentally retarded or to behave in a way that stood out significantly. (7RHT 1254.) He did not perceive petitioner to be "slow at getting along" such as being unable to "understand things quickly." (7RHT 1256.) Williams graduated from high school. He studied music for several college semesters. Williams worked at the Long Beach Navy Shipyard performing physical labor and construction. (7RHT 1251.)

6. Tommie McGlothin

Tommie McGlothin (born 1942) was the son of petitioner's maternal aunt. (7RHT 1155-1156.) He moved from Alabama to California in 1965.

He frequently visited the home of petitioner's mother. (7RHT 1156-1157.) He only knew petitioner "a little" because petitioner was frequently incarcerated and was approximately 10 years younger than McGlothin. (7RHT 1157-1158.) McGlothin perceived that petitioner "had a problem" because he stole bicycles and was in and out of jail. (7RHT 1165.) He did not know if petitioner could read or write. (7RHT 1166.) He did not have conversations with petitioner. (7RHT 1166-1167.)

C. Post-Conviction Mental Retardation Expert – Natasha Khazanov, Ph.D

Dr. Natasha Khazanov, a psychologist currently in private practice, obtained a Bachelor of Arts degree in psychology in 1975 and a Master's Degree in clinical psychology in 1977 from Leningrad State University in St. Petersburg, Russia. (8RHT 1270.) In 1988, she obtained a Ph.D in clinical psychology from Bekhterev Psychoneurological Institute ("Bekhterev") in St. Petersburg, Russia. (8RHT 1270-1271, 1275.) Russia did not license psychologists. (8RHT 1278.)

From 1977 until 1980, Dr. Khazanov worked as a staff psychologist at a hospital in St. Petersburg. Her duties included performing intellectual screening for young men drafted into the Soviet Army to exclude candidates with intellectual disabilities or mental retardation. She used the first edition of the Weschler Adult Intelligence Scale ("WAIS") test, which had been translated into Russian but was not normed for the Russian population. (8RHT 1271-1272, 1276-1277.) Because service in the Soviet Army was not considered desirable, many candidates attempted to malinger. In her opinion, truly mentally retarded candidates tried hard to do well on the tests while malingerers underperformed. (8RHT 1272-1274, 1314-1315.)

From 1981 until 1991, Dr. Khazanov worked at Bekhterev serving first as a staff psychologist and later as an assistant clinical professor of

psychology. She taught "testing research design" to post-graduate level psychologists and psychiatrists. She utilized the WAIS and MMPI tests. (8RHT 1275-1276.) Dr. Khazanov was "involved" in developing Russian norms for the WAIS test as translated into Russian. (8RHT 1276-1278.)

Dr. Khazanov immigrated to the United States in 1991. (8RHT 1279.) To obtain licensing in the United States, she served as an extern at California Pacific Medical Center in San Francisco for six months. Then from 1993 until 1995, she worked as an assistant to Dr. Rosemarie Bowler and Dr. Karen Froming to obtain the hours of supervised experience needed for licensure. (8RHT 1279-1280; Ex. 22 at 2.) Dr. Froming introduced Dr. Khazanov to the field of forensic psychology. (8RHT 1280.) She was licensed in the United States as a psychologist in 1996. (8RHT 1280-1281.) Until 2002, she worked as a staff psychologist and clinical instructor for the University of California, San Francisco, in the Division of General Internal Medicine. (8RHT 1281; Ex. 22 at 1.)

Since 1996, Dr. Khazanov had worked on 48 post-conviction habeas cases involving the death penalty, two involving LWOP sentences, and six or seven trial-level cases involving the death penalty on behalf of the defense. She had evaluated these defendants for mental retardation because intelligence testing was part of the neurological testing. Of the 50 defendants, she concluded three were mentally retarded. (8RHT 1281-1283, 1414.)

Dr. Khazanov considered herself to be a "neuropsychologist." (8RHT 1287.) Dr. Khazanov was not board certified in neuropsychology by "choice" and had "never looked into what is specifically required." (8RHT 1434-1435.) She had not taken a formalized post-doctoral forensic psychology program. Dr. Khazanov did "these cases very part time." (8RHT 1437.)

Dr. Khazanov evaluated petitioner and opined that he met the criteria for mental retardation set by the American Psychiatric Association ("APA") and American Association for Intellectual and Developmental Disabilities ("AAIDD"). (8RHT 1284.) She felt "it was a pretty straightforward case of mental retardation." (8RHT 1285.)

In the psychological community, there are several "accepted" definitions of "mental retardation." (8RHT 1290.)[6] The 11th edition of the AAIDD Manual used the term "intellectual disability" to refer to "mental retardation." (8RHT 1289.) The APA Diagnostic Statistical Manual IV ("DSM-IV-TR") was used by the psychological community for purposes of consistent diagnosis and defined mental retardation in three parts: (1) significantly subaverage intellectual functioning, an IQ (intelligence quotient) of approximately 70 or below on an individually administered IQ test, (2) with concurrent deficits in present adaptive functioning (that is, the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work,

---

[6] The resource materials referenced in the reference hearing record include: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text revision 2000) ("DSM-IV-TR"); American Association on Mental Retardation, *Mental Retardation Definition, Classification, and Systems of Support* (10th Ed. 2002) ("Red Book" and "2002 AAMR Manual"); and American Association on Intellectual and Development Disabilities, *Intellectual Disability Definition, Classification, and Systems of Support* (11th Ed. 2010) ("Green Book" and "2010 AAIDD Manual").

Dr. Khazanov repeatedly and mistakenly referred to the 11th edition "Green Book" as published in 2009 during her testimony and in her demonstrative power point presentation (Ex. 23). Respondent's summary corrects the errors.

leisure, health, and safety; and (3) the onset of the condition prior to age 18. (8RHT 1290-1292; Ex. 23 at 3.)

"Adaptive behavior" consists of the skills people develop in order to live their daily lives. (8RHT 1291, 1301.) Dr. Khazanov considered the DSM-IV definition to be "lagging behind." (8RHT 1312, 1318.) Dr. Khazanov used "adaptive functioning" as defined by the AAIDD in 2002 and 2010. The AAIDD Manual divides "adaptive functioning" into three "skill domains": conceptual, social, and practical. (8RHT 1301-1302, 1311; Ex. 23 at 6; 2010 AAIDD Manual p. 42.) Significant deficits in one domain meet the requirement. (8RHT 1302.) However, "significant limitations in more than just one subscale" are required. (8RHT 1303.) Five assumptions are "essential" in diagnosing mental retardation because those assumptions make the diagnosis "more reliable." The assumptions include that "limitations in present functioning must be considered within the context of community environments typical of the individual's age, peers, and culture." (8RHT 1296; Ex. 23 at 4.) In her view, the "communication" and "functional academic skills" areas listed in the APA (DSM-IV) fall within the "conceptual domain" under the AAIDD definition. (8RHT 1310-1311.)

These criteria are designed to provide treatment and assistance to people with intellectual disabilities. (8RHT 1318-1319.) The inclusion of "gullibility, naïveté, and social aspects" in the AAIDD definition was based upon the research of Steven Greenspan, who believed individuals with an IQ of up to 85 can be mentally retarded "if their adaptive functioning is not in keeping with their I.Q." Dr. Khazanov endorsed this view: "to me it makes a lot of sense because sometimes people are okay when they're testing cognitively, but you see how they don't make good decisions, how they lack practical sense, how they just don't adapt to the challenges." (8RHT 1312.) However, Dr. Greenspan had postulated that IQ testing

should not be the focus of evaluating mental retardation for individuals in the criminal justice system; rather the focus should be on whether the person is a naïve offender, a naïve confessor, and a naïve defendant. (9RHT 1618.)

In the United States, the mean IQ score is 100 with a standard deviation of 15 points. (8RHT 1338.) A score of 70 (two deviations below the mean) is considered the "cutoff" for mental retardation. (8RHT 1338.) About 2.2 percent of the population scores an IQ below 70. (8RHT 1313, 1338.) If the test is not properly "normed," then the score is meaningless. (8RHT 1339.) The 2010 AAIDD Manual suggests that an IQ score of 75 is the cutoff for "significant limitations in intellectual functioning." (8RHT 1295; Ex. 23 at 4.)

The majority of individuals experiencing mild mental retardation do not have physical manifestations. They may "come across as people who are very high functioning." (8RHT 1297.) Some individuals with mental retardation engage in "masking behavior" or "cloaking behavior" that is, behavior designed to conceal their intellectual disability. A book published by UCLA Professor Robert Edgerton entitled *The Cloak of Competence* describes this behavior as exhibited by a group of subjects over a three-decade period. (8RHT 1298.) Individuals suffering from mental retardation "can actually function pretty successfully." The rough analogy of chronological age for mild mental retardation would be between age 8 and 12. (8RHT 1299.) The majority can read to the sixth grade level. (8RHT 1299-1300.)

In Dr. Khazanov's opinion, using the AAIDD definition, petitioner has severe deficits in the conceptual domain, consisting of language, reading and writing, money concepts, and self-direction. (8RHT 1302-1303.) However, a deficit in the social domain or practical skill domain "needs to be measured using the standardized test." Commonly used

adaptive behavior instruments are the B.A.S.K. and Vineland, which are questionnaires provided to people who know the person well. The questionnaires are then scored. Dr. Khazanov did not use these instruments, "because on my testing he did have very severe deficits in reading, writing, and language and money concepts, I didn't have to go that far because by the virtue of having these significant deficits . . . he met the requirement." (8RHT 1303.) Indeed, assuming an IQ test result of 70 which was valid and reliable, Dr. Khazanov opined that a person would be mentally retarded *even in the absence of evidence of adaptive behavior deficits* because "I've never seen a person who had I.Q. of 70 who never had deficits in adaptive functioning." (8RHT 1313.) Still, Dr. Khazanov reviewed testimony from prior hearings and declarations to conclude there was "enough evidence" to say petitioner had "deficits in many areas of functioning." (8RHT 1308-1309.)

Dr. Khazanov looked at the early testing to determine whether petitioner's "very low" IQ of 67 on the WAIS-III administered by her 2003 was properly classified as resulting from "dementia" rather than mental retardation. (8RHT 1322-1323.) In the materials, Dr. Khazanov saw a "very consistent story that people were telling about him, like it was a repeated sentence." Probation reports stated that "he doesn't make sense, that he's not learning from his experiences, that he's very impulsive, that he's [un]inhibited." (8RHT 1322.)

Dr. Khazanov viewed Cleveland's testimony as significant because they spent a lot of time together. (8RHT 1323.) "[I]n his testimony there are many really important pieces of evidence. One is about Robert Jr. not being able to drive without him being present or Larry being present in the car. So he couldn't read the street signs. So even though he knew how to drive, he could never pass the test because he could not read." (8RHT 1323-1324.) In Harris' testimony, Harris described petitioner as "shy" and

having difficulty talking with women, which Dr. Khazanov interpreted as indicative of a lack of self-esteem. (8RHT 1327.)

Petitioner turned 18 in 1970. (9RHT 1483.) Dr. Khazanov opined that the numerous intelligence tests conducted at an early age demonstrated "[t]here was something fundamentally wrong with him from early age. And to me, this is the strongest evidence I can provide for the deficits of adaptive functioning." (8RHT 1309-1310.) Petitioner performed intelligence testing multiple times prior to age 18. (8RHT 1338.) "It is very unusual for a person to be tested so many times. So even though the tests are not necessarily reliable and valid because they were group tests, they were given to him for a reason and the reason, in my opinion, was he was failing school. He repeated the first grade. He did. So this is something that is important to remember. People try to diagnose him. People tried, probably, to help him, but, unfortunately, it didn't happen." (8RHT 1341.) She hypothesized that the multiple tests were performed due to some concern about his intelligence. (9RHT 1479-1480.)

Different intelligence tests are not equivalent. (8RHT 1335.) The standardized tests recommended by AAIDD and APA include the WISC (for children between the ages of 3 and 16) and the WAIS (for adults), and the Stanford-Binet. The WISC/WAIS and Stanford-Binet are individually administered tests. (8RHT 1336.) Personal observation and clinical judgment are "really important" when testing subjects. (8RHT 1337.) The WAIS is considered the "gold standard" because it is "really well normed" with a large sample created using census data and is re-normed approximately every 10 years. (8RHT 1339-1340.) The scientific community held the view that group administered tests did not demonstrate sufficient validity to be considered. (8RHT 1336-1337.) The "Red Book" and "Green Book" state that an individually administered test is required, but neither authority requires a specific test be given. (9RHT 1481.) The

2002 "Red Book" does not instruct that evaluators discard relevant information obtained from group tests administered in a group setting. (9RHT 1482.)

Dr. Khazanov did not know anything about the validity of petitioner's group tests but followed the current standard of practice, which was to use individually administered tests to assess mental retardation. (9RHT 1475-1476.) Dr. Khazanov "looked up all the tests." The Kuhlman-Anderson test was published in 1940 and "what I read about it is it is very poorly correlated with other tests, and I sort of correlated with Stanford Achievement Test." She was "not clear on what it is measuring." (8RHT 1341-1342.) Dr. Khazanov agreed that petitioner's Kuhlmann-Anderson test result of 89 at age 6 was relevant information, but she was not familiar with the test and did not know how it worked or what it meant. (9RHT 1474, 1482.) The Lorge Thorndike was a group test with "very low reliability." (8RHT 1343.)

The Stanford-Binet Form L was an individually administered test, and Dr. Khazanov agreed that a score of 83 was not consistent with mental retardation. (9RHT 1483-1484.) She was not familiar with the administration of the Stanford-Binet test. (9RHT 1485.) Dr. Khazanov did not have any knowledge about how the Stanford-Binet test was structured for purposes of testing intelligence in a young child. (9RHT 1505.)

At age 10, petitioner scored a 70 on the WISC, the cutoff score for mental retardation. (8RHT 1341.) Petitioner's school records reflected that the test was administered in May 1963, just 10 days short of his eleventh birthday. (9RHT 1489; Ex. Z.) Dr. Khazanov did not have the supporting documentation for the WISCadministered to petitioner. (8RHT 1377.) Petitioner had told her that he stopped attending school at age 10 or 11. (9RHT 1489.) Dr. Khazanov did not know petitioner's level of motivation when taking that test. (9RHT 1489-1490.) Dr. Khazanov agreed that

motivation played a role in the validity of the test, and she did not know his motivation in taking the test. (9RHT 1495.)

Dr. Khazanov opined that the WISC score of 70 at age 11 was "the first really reliable finding that we can trust" and "probably was the true measurement of his level of functioning, intellectual function at age ten." (8RHT 1344.) The WISC is considered to have a standard error of measurement ("SEM") five points over or under a given score. The current standard of practice provides giving a "confidence interval" rather than one number. Current testing uses a 95 percent confidence interval. (8RHT 1345.)

After age 18, petitioner completed four intelligence tests: the Revised Beta (a group test), the WAIS-R, the Quick Test, and the WAIS-III. (8RHT 1351.) The Revised Beta – on which petitioner scored an 80 at age 20 – is a group test "considered to have low reliability" and "was normed on white people." (8RHT 1352.) Dr. Maloney administered the "Quick Test," an individually administered test, and petitioner scored a 75, which was fairly consistent with the WAIS-R test results. (8RHT 1352-1353.) Dr. Khazanov testified, "The validity of the quick test is questionable from what I read." (8RHT 1353.)

In 2003, Dr. Khazanov spent 12 hours testing petitioner. (8RHT 1324.) A copy of Dr. Khazanov's file was presented as part of Exhibit B. (9RHT 1486; Ex. B at 48-162.) Dr. Khazanov interviewed petitioner twice at San Quentin. (8RHT 1307.) In her notes of the interview conducted June 9, 2003, she wrote that he "never liked school, except math and spelling. Kindergarten failed. Difficult to be separated from mother. Joker in school. Got swats, detention. Missed lots of school. Would sleep in class. Had problems reading. Became embarrassed when couldn't read aloud in class. Learned to read and write in prison per Robert, age 16 or

older. Age 10 to 11 stopped going to school." (9RHT 1486-1487; Ex. B at 56.)

When Dr. Khazanov visited petitioner, she brought along her psychological assistant, Carolyn Hollnagel. (8RHT 1320.) The WAIS-III testing takes about two hours to administer and involves 14 subtests that measure different areas of competence. (8RHT 1337.) Hollnagel performed the testing in Dr. Khazanov's presence "after I realized that he was not really understanding me" so as to eliminate any difficulty created by Dr. Khazanov's accent. (8RHT 1320.) Petitioner told Dr. Khazanov that he did not want her to find him "crazy." (8RHT 1334.)

Petitioner's WAIS-III (unadjusted) full scale IQ score of 67 placed him in the first percentile, meaning that 99 percent of the population his age in the United States scored better than he did. (8RHT 1383-1384.) Petitioner's performance IQ score of 75 placed him in the lowest 5 percent of the U.S. population. (8RHT 1384.) In her experience, similar scores were accompanied by deficits in adaptive functioning. (8RHT 1384-1385.)

Regarding the abilities "to communicate, to abstract from mistakes," it took longer for Dr. Khazanov to explain the instructions to him than it did for "the average person" and when petitioner made a mistake "he was kind of getting stuck on it." (8RHT 1331.) Dr. Khazanov "had to repeat the instructions to the test many, many times." For one test, the test of mental flexibility, "he had extreme difficulty understanding what I wanted from him." Dr. Khazanov and Hollnagel had to "teach him for a period of time so that we knew that he knew what we were asking from him. Same with some subtests on the WAIS. I had to explain to him in detail. So not only I would read the instructions the way the manual says, but then I had to teach him something that normally I don't do people who are not mentally retarded." (8RHT 1332.)

Dr. Khazanov did not believe petitioner was malingering based upon her personal observations. (8RHT 1332-1333, 1372-1373, 1387, 1419-1420.) Dr. Khazanov administered the Test of Memory/Malingering ("TOMM") to the majority of her clients on death row, but she did not administer it to petitioner because she ran out of time. (9RHT 1520, 1522-1523.) The TOMM is an objective measure of effort. (9RHT 1526.) She had used the TOMM in cases in which she was testing for mental retardation. (9RHT 1524-1525, 1527.) She had no doubt about whether petitioner was malingering given the consistency in the test results. (9RHT 1523-1524.)

Dr. Khazanov opined that the human brain and intelligence developed over time. She opined that "at about ten and eleven, our brain functioning changes very dramatically." (8RHT 1340.) "[A]t age 11, our left hemisphere becomes responsible for the language and speech and right hemisphere facilitates more like spatial relations, music. So there is – it is called functional asymmetry that is formed at about that age. That's why the majority of people who have mental retardation would be likely diagnosed and the measure will be more reliable at about this age." (8RHT 1340-1341.) The Revised Beta IQ test was the only the test administered after petitioner turned eleven years old and prior to age 18. (8RHT 1340.)

Approximately 14 percent of the American population is illiterate. However, individuals who attended school usually do not have difficulty learning to read unless they have a learning disability or mental retardation. (8RHT 1347-1348.) Regarding petitioner's school attendance, Dr. Khazanov opined that petitioner attended enough school despite his poor attendance record to learn to read if he were able to do so. (8RHT 1346; Ex. 23 at 11.) "[T]he reason he couldn't learn [to read], in my opinion, is because there was very specific part of his brain that was miswired probably from birth." (8RHT 1348.)

Dr. Khazanov "discovered" petitioner's brain dysfunction by administering the Halstead-Reitan ("H-R") Battery in 2003, "a really good test to screen brain dysfunction." (8RHT 1349.) Petitioner had difficulty in six of the seven subtests. (8RHT 1349-1350.) One subtest, "speech sounds perception," tests discrimination of sounds by having the subject listen to a recording of nonsense words and choose one among four written choices that reflects the sound or word heard. Petitioner made 29 mistakes. Eight mistakes are considered the "cutoff" for brain damage. (8RHT 1349, 1468-1469.) Dr. Khazanov opined that petitioner suffered "an auditory processing deficit which is the result of the damage to the specific area of his brain that is responsible for it." (8RHT 1349.) Dr. Khazanov calculated petitioner's "impairment index" as 0.9 out of 1. Petitioner scored as "very impaired" on the Category Test; he repeatedly made mistakes but could not learn from them and correct his behavior. (8RHT 1350.) The H-R Battery tested for brain dysfunction rather than brain damage. The deficits "usually" could not be verified by a physical examination of the brain. (8RHT 1388.)

Other tests showed that petitioner's fine motor coordination was "pretty bad" and was "much below than his peers." (8RHT 1324.) He did not perform the Finger Tapping Test (tapping one index finger for 10 seconds) very well, could not perform rapid alternating movements (opening one hand while closing the other), and was very slow. (8RHT 1324-1325.) People with no brain damage have no difficulty with the rapid alternating movements test. (8RHT 1325.) For a test that measures frontal lobe function (with eyes closed, the tester moves the subject's finger up or down and has the subject orally state the direction of the movement), petitioner said "up" when the finger lifted and "out" when down. (8RHT 1326.)

Dr. Khazanov administered the "Memory Assessment Scales," which she described as a standard and reliable test, to petitioner. The subtests measure verbal memory, visual memory, and a combination of both. (8RHT 1388.) Petitioner performed very poorly on all measures of the verbal subtest (he scored 70, two standard deviations below the mean) and performed much better on the visual subtest (he scored 95, in the 37 percentile). (8RHT 1388-1389.) The test results demonstrated that petitioner's visual memory was better than his verbal memory. His Memory Assessment Scales results were consistent with the pattern of verbal and performance results on the WAIS. Dr. Khazanov saw the results as evidencing left hemisphere brain dysfunction. (8RHT 1390.)

The WAIS-R includes three measures: verbal IQ measuring speech and language, performance IQ measuring nonverbal skills, and the full-scale (composite) measure. In 1984, petitioner (age 32) scored a verbal IQ of 72, a performance IQ of 76, and a full-scale IQ of 73. (8RHT 1353.) In examining the WAIS-R test results, Dr. Khazanov "discovered several problems with scoring and I went ahead and rescored it." (8RHT 1351.) Two subtests were not scored according to the testing manual. On the Information subtest, petitioner marked four correct answers but the test was scored as five correct answers. (8RHT 1362, 1365; see Ex. B at 189.) Dr. Khazanov reduced the score on the Comprehension subtest from six to five because, in her view, the answer to the question "Why do some people prefer to borrow money from a bank rather than from a friend?" should have been scored as a zero rather than a 2 because petitioner did not explain his answer (recorded as "hate to ask a friend. Don't like friends to know"). (8RHT 1365-1367; see Ex. B at 190.)

For demonstrative purposes, Dr. Khazanov took the 1984 WAIS-R scoring and added her 2003 WAIS-III scoring (red/black dots) onto the document. (8RHT 1354-1355; Ex. 24 [rescored WAIS-R]; Ex. B at 188

[original scoring].) The dots reflect petitioner's results at age 51. (8RHT 1356.) Dr. Khazanov's rescoring was based upon the testing she performed in 2003 using the norms in existence in 2003. Dr. Khazanov's "rescoring" was reflected in the lower right corner in the circle. (8RHT 1357.)

The 1984 WAIS-R results did not include scores to two subtests, Vocabulary and Object Assembly. (8RHT 1358-1360.) The scores included in the WAIS-R results were "prorated" using a table in the test manual. (8RHT 1361.) Dr. Khazanov opined that prorating was not acceptable when mental retardation is at issue. (8RHT 1361-1362.) Dr. Maloney did not include the Object Assembly and prorated it as a 5; Dr. Khazanov maintained the score of 5 based upon petitioner's 2003 score on the WAIS-III. (8RHT 1368-1369.) Dr. Khazanov inserted a 2 for the Vocabulary scaled score (rather than the prorated default of 5) using the 2003 WAIS-III results. The total rescoring reduced the Information scaled score from 4 to 3, inserted a vocabulary scaled score of 2 (rather than the default of 5), and reduced the scaled score on Comprehension from 6 to 5. The total rescored scaled verbal score was 25; using the manual's table, Dr. Khazanov calculated petitioner's verbal IQ as 68. (8RHT 1369-1370.) Dr. Khazanov retained the performance IQ score of 76 and calculated the full scale IQ as 71. (8RHT 1370.) Dr. Khazanov opined that her 2003 WAIS-III full scale IQ of 67 was "very consistent" with those of the WAIS-R (original 73 full scale), rescored full scale of 71. (8RHT 1376.)

Dr. Khazanov considered the 1984 WAIS-R results and her 2003 WAIS-III results to be "incredibly similar. This shows how wonderful this test is because this is, quote, test/retest reliability. So this test is incredibly reliable because we give the same test to a person 19 years apart and the scoring we are getting is very similar." (8RHT 1370-1371, 1372-1373.) The original WAIS-R record form included comments and questions by the test administrator. (8RHT 1373-1374.) The notation that petitioner "might

have a hearing problem" was consistent with Dr. Khazanov's observation that petitioner "doesn't understand what is being said to him." (8RHT 1375; see Ex. B at 188.) Also, on the Comprehension subtest page, a notation stated "his talk comes out all confused." (8RHT 1375; see Ex. B at 190.)

The Flynn Effect is recognized in the literature and by the psychiatric profession and is based upon the observation that over time the population of various countries produced increasingly higher scores on the same test. The scores increased three points every 10 years. (8RHT 1377-1378.) It is currently the standard of practice to add Flynn Effect to the outdated norms. The calculation is performed by subtracting .3 points for each year after the test is normed (e.g., 1.5 for every five years). (8RHT 1379.) To correct for the Flynn Effect, the critical issue is the date the particular test was normed. (8RHT 1379-1380.) Petitioner's 2003 WAIS-III (published in 1997) full scale IQ score, adjusted for the Flynn Effect (1.8 for six years), was 65.2. (8RHT 1381.) Adjusting the rescored WAIS-R for the Flynn Effect (.9 for the three years after its 1981 publication) produced a full scale IQ of 70.1. (8RHT 1382.)

To diagnose mental retardation, onset must be before age 18. Thus, Dr. Khazanov opined it was important to rule out other degenerative diseases. (8RHT 1390-1391.) Dr. Khazanov opined that petitioner's "stable pattern of performance" on the three tests upon which she focused (WISC, WAIS-R, WAIS-III) supported her conclusion that petitioner's results were not the product of a progressive brain disorder. (8RHT 1391-1392.) Petitioner's slightly improved performance on the Similarities subtest of the WAIS-III "rules out progressive brain lesion." (8RHT 1391.)

Dr. Khazanov had reviewed Dr. Hinkin's criticisms of her work. (8RHT 1392.) She "respectfully disagree[d] with Dr. Hinkin's opinions on several issues." Dr. Khazanov disagreed with Dr. Hinkin that the test

scores should be adjusted for race bias. (8RHT 1393.) She opined that adjustment for race bias is an "outdated concept" that has been "rejected by the scientific community." (8RHT 1394-1395.) Even if Dr. Khazanov adjusted petitioner's scores for race bias, she would still opine that petitioner was mentally retarded. (8RHT 1393-1394.) In Khazanov's view, "there is no such thing as adjustment for the race because I use the norms that were created utilizing the data, census data." (8RHT 1394.) "With all the clinical experience I had, my professional judgment being used here, I clearly saw the signs of mental retardation in Mr. Lewis, and I believe that he is mentally retarded." (8RHT 1394.)

The concept of racial adjustment for test scores began with a 1979 court ruling[7] that prohibited California schools from utilizing standardized tests for the purpose of placing students into educational mentally retarded classes. The case involved African-American children being disproportionally placed into these classes based upon their standardized test scores. (8RHT 1397-1398.) Thirty years ago, African-American children scored 10 to 15 points lower than European children. (8RHT 1405.) The gap had since closed, and the testing had become more sophisticated. (8RHT 1405-1406.) Since 1979, the WAIS test had been revised and renormed approximately every 10 years. (8RHT 1406-1407.)

The AAIDD supports using standardized tests regardless of the subject's race. (8RHT 1399.) The 11th Edition of the AAIDD Manual also supported use of standardized tests without adjustments. (8RHT 1402.) Dr. Khazanov opined that the AAIDD Manual was "the highest authority." (8RHT 1402-1403.) An article published at a recent APA symposium discussed the findings of a task force that examined the issue of race and

---

[7] The federal district court ruling was affirmed in *Larry P. by Lucille P. v. Riles* (9th Cir. 1984) 793 F.2d 969.

culture and ethnically adjusted norms. (8RHT 1399-1400.) The task force discussed that the issue was not truly race but socioeconomic status. Heaton (the publisher of the WAIS) developed demographically adjusted norms. However, Heaton opined that it was not appropriate to use demographic adjustments in capital punishment cases. (8RHT 1401.) According to Dr. Khazanov, the consensus in the scientific community was that IQ tests were reliable, should be used for different ethnicities, and should not be adjusted for race. (8RHT 1411.)

Risk factors associated with mental retardation include genetics as well as social, psychological, biological, and other factors. (8RHT 1423-1424.) Dr. Khazanov believed that the materials she reviewed demonstrated that petitioner's mother "was drinking pretty heavily when she was pregnant, and this is one of the best research factors in mental retardation[,] in utero alcohol exposure." (8RHT 1424.) Fetal alcohol exposure syndrome is not as profound as fetal alcohol syndrome and does not produce visible signs. Dr. Khazanov opined "it was possible that Maggie herself had mental retardation, so maybe there is genetic loading for mental retardation in Robert Lewis." (8RHT 1424.) Malnutrition is another risk factor, and on lay witness (Georgia Agras) claimed that petitioner came to her house and was "starving." (8RHT 1424.) Concerning psychological factors, "[w]e know that Maggie was abusive to Robert. We know that she was whipping him and hitting him with chairs. Again, I read the testimony about it." Abuse is a contributing factor to brain miswiring. Social risk factors included lack of support and low socioeconomic status. All of these factors were present for petitioner. Dr. Khazanov viewed these risk factors as consistent with her diagnosis. (8RHT 1425.)

Using her own strong accent as an example, Dr. Khazanov opined that the human brain changes around age 11 and, at that point, functional

asymmetry forms, the left hemisphere takes over, and the brain loses the ability to recognize sounds of different languages. The brain develops gradually. Full maturation occurs between age 21 and 25. (8RHT 1426-1427.) The front lobes are the last portions to mature. (8RHT 1427.)

In her testing of petitioner, Dr. Khazanov viewed petitioner's failure to obey her testing instructions to stop the finger tapping test, his perseverance and repetition, and the patterns in his memory testing (false memory – including words on the word list that were not present) as consistent with frontal lobe damage. (8RHT 1428-1429.) His extreme difficulty in performing the tactile performance subtest of the H-R Battery, particularly his inability to improve as the test progressed, suggested damage to the corpus callosum. (8RHT 1429.)

Dr. Khazanov opined that petitioner was mentally retarded and that a diagnosis of mental retardation explained his failure in school, his repeated incarceration in the juvenile justice and criminal justice system, and his willingness to please his father by committing robberies for him. (8RHT 1432-1433.) Dr. Khazanov opined that petitioner "has a widening history of cognitive and psychological deficits. He also has strengths which is consistent with what we know about mental retardation. He also has severe I.Q. He has severe deficits in adaptive functioning specifically in the functional academics area or the conceptual area, and he has a genetic loading for low I.Q., was exposed to alcohol in utero. He suffered from severe physical abuse and also malnutrition when his brain was developing. He never received remedial services at early age, and all this created an exacerbated brain dysfunction that produced mental retardation in Robert Lewis." (8RHT 1433.) Dr. Khazanov characterized her certainty of the diagnosis as "pretty convinced" and "as certain as it can be." (8RHT 1433-1434.)

Dr. Khazanov had been told that petitioner "writes letters to people." She speculated, "in my opinion because his writing is very impaired, he uses his memory to copy something that people give to him." (8RHT 1390.)

During cross examination, Dr. Khazanov explained that her tests suggested a "typical" pattern of brain dysfunction in people who have diffused and localized brain damage in the frontal and parietal lobes of the brain. (8RHT 1444.) A sensitive functional MRI would detect the type of findings she made. (8RHT 1444-1446.) Dr. Khazanov did not believe that any functional MRI or other neuroimaging studies were performed on petitioner but did not ask petitioner's counsel. (8RHT 1447.)

Dr. Khazanov's assistant, Hollnagel, was present during the psychological testing. (8RHT 1452.) Dr. Khazanov personally administered the Wide Range Achievement Test (WRAT-III), the Halstead-Reitan Battery, and the Memory Assessment Scale. Caroline administered the "base" test and read the spelling words for the WRAT-III. (8RHT 1460-1461.) The WRAT results are in petitioner's handwriting unassisted by a dictionary or other source from which to copy. (9RHT 1647; Pet Exh. 25 [WRAT-III].)

Dr. Khazanov met with petitioner four times with Hollnagel. (8RHT 1461-1462.) They both conducted the adaptive behavior questioning. (8RHT 1462.) Dr. Khazanov saw no evidence that petitioner had been evaluated by a specialist to ascertain if he had a hearing impairment. (8RHT 1462-1464.) She believed that petitioner had an understanding problem, not a hearing problem. (8RHT 1466.) Although there are tests that are designed to ascertain a person's language comprehension, she did not use them. (8RHT 1468.)

Dr. Khazanov opined that Cleveland's description of petitioner's reading abilities was consistent with illiteracy. (9RHT 1501.) It would not

be unexpected for an illiterate subject given the WISC or WAIS to score poorly on the verbal portion of the applicable test. Parts of the WISC are affected by education and others are not. (9RHT 1504.) Dr. Khazanov agreed that the verbal IQ score for an illiterate person would be significantly lower than a true reflection of intelligence because the inability to read will have prevented learning the information necessary to test well on the verbal portion of the WAIS. (9RHT 1506.)

Learning disabilities are different from mental retardation. (9RHT 1506.) A disparity of at least 1.5 standard deviations between IQ and aptitude or achievement in a particular area (e.g., an IQ of 100 and reading level of 70) is diagnosed as a learning disability. Without the discrepancy, a low achievement test score (e.g., WRAT) and low IQ scores are diagnosed as mental retardation. (9RHT 1506-1507.) Dr. Khazanov administered the WRAT-III to petitioner. The WRAT-III is well normed and is the most commonly used test. The WRAT is used for basic screening; more sophisticated tests exist for more complex cases of learning disability. (9RHT 1507.) If petitioner had a learning disability and received no assistance at school or home, a WRAT reading level of first or second grade would not be surprising. (9RHT 1508.)

Dr. Khazanov disagreed that the scientific literature spoke about using the non-verbal or performance portion of the WAIS as a more accurate indicator when a wide discrepancy existed between performance and verbal abilities. (9RHT 1512.) Prison records reflected that petitioner was administered the SRA IQ test on September 3, 1968 and produced an L score of 68, a Q score of 61 and verbal total of 67 and a nonverbal total of 99. (9RHT 1544-1545; Ex. G.) The SRA test reflected a 32-point difference between verbal and nonverbal performance. (9RHT 1547.)

The WAIS also included embedded indicators, such as the reliable digit span test. (9RHT 1526-1527.) Petitioner's result fell within the zone

consistent with malingering. (9RHT 1527, 1531.) Another embedded indicator was inconclusive for malingering. (9RHT 1533.) Dr. Khazanov did not use these indicators because she believed "they're not very helpful really." (9RHT 1533.) Dr. Khazanov agreed that, given the mixed results on the embedded indicators, there was a basis to give a more complete test of malingering, such as the TOMM. However, she did not score the reliable digit span subtest until after she was home and, therefore, did not know the results of the embedded indicators at the time of the evaluation (after she chose to "sacrifice" the TOMM). (9RHT 1534-1535.) She acknowledged that research had repeatedly shown that experienced experts were inaccurate in identifying valid versus invalid ability performances from mere observation of behavior or test scores. (9RHT 1540.)

Dr. Khazanov administered the Seashore Rhythm test, a nonverbal sound test, and petitioner's performance was "excellent," suggesting that he does not suffer hearing loss. (9RHT 1524.)

In Dr. Maloney's testing, petitioner's performance score of 76 was outside the range of mental retardation. (9RHT 1548.) Dr. Khazanov had never published any articles on any subject, including mental retardation. She did not perform research. (9RHT 1542.)

After reviewing the Red Book at the hearing, which reflected that the SEM for the WAIS-III administered to petitioner was 2.47 for the verbal IQ score, 3.54 for the performance scale, and 2.23 for the full scale score, Dr. Khazanov corrected her prior testimony that the SEM was 5. (9RHT 1557.) Dr. Khazanov was not an expert in the field of psychometrics. (9RHT 1558.) Her testimony using the number "5" referred to the confidence interval (the approximate total of the plus and minus SEM). (9RHT 1558.) Dr. Khazanov relied upon computerized scoring. (9RHT 1558.) Dr. Khazanov's computerized scoring reflected a verbal score of 66 and a confidence interval of 62 to 72. (9RHT 1558-1559, 1564; see Ex. B at 72

[tables and graphs for WAIS-III].) The confidence interval was not symmetrical; Dr. Khazanov was not familiar with the asymmetrical nature of the 95 percent confidence interval. (9RHT 1559.)

Dr. Khazanov agreed that one question that could be asked is whether IQ testing could reliably and validly determine IQ in people from lower socioeconomic status and who are not acculturated into the mainstream White culture on which the tests were developed. Petitioner was African-American from a lower socioeconomic status. (9RHT 1573.) She agreed that the community context included the criminal element in his childhood community. (9RHT 1574.) She agreed that his community was outside the mainstream of Caucasian Anglo-Saxon middle-class America. (9RHT 1574-1575.)

The WAIS was normed using census data. (9RHT 1575.) Dr. Khazanov did not look into the individuals composing the sample population for the WAIS-R or WAIS-III. (9RHT 1581.)

Concerning her "slide" about racial bias, Dr. Khazanov explained when she said that the "gap has narrowed by 5 or 6 IQ points between 1972 and 2002," she referred to a 1993 study that found that using an IQ cutoff score of 75 meant that 18.4 percent of African-American children would qualify as mentally retarded while only 2.62 percent of White children would qualify. (9RHT 1582-1584; see Ex. 23 at 18.) To Dr. Khazanov, the testing results that produced a range of mental retardation in African-American children that was six times greater than Caucasian children did not call the reliability or validity of the test into question. (9RHT 1586.) According to Dr. Khazanov, "With the President in the house, how can we even suspect that we cannot measure one's IQ reliably? [¶] This is something I really don't understand, how the skin color can determine whether we can or cannot measure one's IQ." (9 RHT 1586.)

When Dr. Khazanov signed her original declaration on June 27, 2003, she had not yet performed an adaptive behavior assessment. (9RHT 1590.) She intended to visit petitioner again and administer the Vineland or Adaptive Behavior Assessment Scale (ABAS). (9RHT 1591-1592.) Dr. Khazanov prepared a list of questions that she intended to use with petitioner and created a test of her own that had not been validated by any published scientific research. (9RHT 1592-1594; see Ex. B at 83-84; Ex. JJ at 329-330.) Some of petitioner's answers are provided in her notes. (9RHT 1597; Ex. JJ at 331-334.)

When Dr. Khazanov asked petitioner to recite the alphabet, he omitted the letters "R" and "U." However, when reading petitioner recognized the alphabet. (9RHT 1595; compare Ex. HH at ¶ 94 with Ex. II at ¶ 24.) When she stated in her declaration that petitioner did not know the alphabet, she meant that he could not recite the alphabet correctly. (9RHT 1595, 1598.)

When Dr. Khazanov opined that petitioner was "unable to provide sensible verbal instructions," she had asked petitioner a series of "what if" questions and her assistant wrote down the answers. (9RHT 1598-1599.) When asked what he would do if he experienced severe chest pain at home, petitioner said he would lie down and see if it went away. When then asked what he would do if it were a heart problem, petitioner answered that he would call a family member. If he could not drive, he would call 911. Dr. Khazanov admitted that was an appropriate answer. (9RHT 1601-1602.) For her opinion that petitioner made poor decisions about basic street crossing, petitioner said he would walk to the corner, wait until the light changed to green, look both ways, then cross. He said that if he were in a hurry, he would jaywalk. Dr. Khazanov admitted his answers were responsive to her question. (9RHT 1602-1603; Ex. JJ at 331.) Dr. Khazanov did not conduct additional testing due to lack of funds and the unavailability of third party informants. Additionally, she believed that

petitioner's illiteracy, which fell into the conceptual domain of adaptive functioning, was "so apparent" that "the decision was made that we have enough proof at this point." (9RHT 1604, 1651.)

Dr. Khazanov opined, "the deficits in his academic skill, his illiteracy is the strong enough indicator of the deficits in adaptive functioning." Those deficits allowed her to conclude that he had mental retardation. Dr. Khazanov noted that petitioner attended the same school as his sisters and Cleveland; he did not learn to read and write while Gladys and Rose, Cleveland, John Williams, and Stephen Harris did learn how to read and write. (9RHT 1606-1609.)

The WRAT provided evidence that petitioner could not read or write. (9RHT 1607.) Dr. Khazanov agreed that adaptive functioning should be measured against the community. She acknowledged that Cleveland testified that there was no need in their community to read or write. (9RHT 1608.)

According to Dr. Khazanov, "the deficit in adaptive functioning that in my opinion is the most profound is lack of literacy. He never learned how to read and write because he had the problem, dysfunction in the particular area of the brain that I was able to identify using other tests that disallowed him to learn how to read and write." Petitioner's brain dysfunction differentiated him from his sisters, who lived in the same family and went to the same school. (9RHT 1610.) Petitioner's academic skills were at the second grade level for reading and spelling and the third for math while normally people with mild mental retardation could acquire skills up to the sixth grade level. (9RHT 1620-1621.)

Regarding "money concepts," Dr. Khazanov had relied on the fact that petitioner did not have a checking account and could not answer a verbal question inquiring how much money would remain if he started with $300 and spent "x" amount. (9RHT 1615.) She acknowledged that most

inner city teenagers would be unlikely to have a checking account. (9RHT 1616.) Dr. Khazanov would not put "much" weight on his inability to balance a checkbook given his circumstances. (9RHT 1629-1630.)

Dr. Khazanov also relied upon testimony that petitioner had difficulty relating to women. (9RHT 1616-1617.) She acknowledged that, at the time of his arrest, petitioner was married and had several girlfriends. (9RHT 1617.)

When asked whether petitioner's ability to rob people required a certain level of planning and self-direction, Dr. Khazanov responded that his numerous arrests since age 12 demonstrated he was not robbing people competently. (9RHT 1622.) Her conclusion that petitioner could not tell time accurately was based upon his "mild difficulty" in accurately drawing the hands on a clock. (9RHT 1624-1627; Ex. II at ¶ 24.) Her conclusion that petitioner posed a safety risk to himself was based upon his answer to a question to explain what steps he would take if he suffered a heart attack. (9RHT 1628-1629.)

Dr. Khazanov disagreed with a diagnosis of antisocial personality disorder because petitioner was described as kind and caring to his children. (9RHT 1649.)

II. RESPONDENT'S EVIDENCE

A. Defense Trial Investigation

1. Dr. Kaushal K. Sharma – Forensic Psychiatrist

Dr. Kaushal Sharma, a medical doctor licensed to practice medicine in California, had specialized in forensic psychiatry since 1977. (13RHT 2172.) A curriculum vitae from the period 1983 to 1984 documented his experience at that period and bears his handwriting. (13RHT 2176, 2179-

2180; Ex. R at 2320-2323.) Dr. Sharma was board certified in psychiatry in 1981 and forensic psychiatry in 1984. (13RHT 2177-2178, 2191.)

Dr. Sharma was court-appointed to work on several cases handled by attorney Slick, including petitioner's case. (13RHT 2174.) Dr. Sharma worked with Dr. Michael Maloney on several cases handled by Slick. (13RHT 2183-2184.) In 1984, Dr. Sharma and Dr. Maloney had offices in the same building. In serious cases, such as a capital case, Dr. Sharma and Dr. Maloney talked with and consulted with each other face-to-face. (13RHT 2184.)

Dr. Sharma did not have an independent recollection of petitioner's case until his memory was refreshed in part by reviewing his report. (13RHT 2175-2176.) A letter on Slick's letterhead bore Dr. Sharma's address. (13RHT 2186; Ex. B at 299-302.) Dr. Sharma viewed the letter, including the second page of questions posed, as asking him to look for evidence that could be used in mitigation at the penalty phase. (13RHT 2186-2187, 2203-2206; Ex. B at 300-301.) Dr. Sharma was not specifically asked to evaluate petitioner for mental retardation. (13RHT 2206-2207.) Dr. Sharma interpreted the question inquiring about petitioner's present mental and physical condition to include mental retardation. (13RHT 2207.) Mental retardation was included among the things that Dr. Sharma would be looking for. (13RHT 2208.)

In 1984, Dr. Sharma's custom and practice in a capital case was to see the defendant at least twice absent refusal by the defendant. He would first see the defendant without having reviewed all documents, and then he would see the defendant at least a second time. (13RHT 2190.) Before he talked with petitioner, Dr. Sharma had likely spoken with Slick. (13RHT 2197.) Dr. Sharma billed for four hours to examine petitioner on two occasions. (13RHT 2189; Ex. R-1 at 2441.) Dr. Sharma did not bill for travel time or time spent waiting at the jail. (13RHT 2218-2219.)

Dr. Sharma would have reviewed all the documents provided by Slick. (13RHT 2191-2192, 2248; Ex. R at 2341-2350, 2353.) An invoice that Dr. Sharma submitted to Slick reflected that he devoted six hours to review of records. (13RHT 2191; Ex. R-1 at 2441.) His report also listed the documents that he reviewed. (13RHT 2210; Ex. B at 303-304.) Dr. Sharma did not believe that he possessed school records of any kind. (13RHT 2211.)

In evaluating petitioner, Dr. Sharma would attempt to assess whether he suffered from brain damage, mental retardation, and learning disabilities. (13RHT 2192.) Dr. Sharma did not administer any tests to petitioner. (13RHT 2196, 2226.)

Although Dr. Sharma was trained to detect the possibility of mental retardation, psychological testing would be performed by a psychologist. If Dr. Sharma had suspected that petitioner suffered from significant subaverage intellectual functioning, he would have made a notation in his report, directed Dr. Maloney (as the appointed psychologist) to conduct IQ testing, and would have alerted the defense attorney. His report did not reflect such concerns. (13RHT 2198.)

Dr. Sharma viewed Dr. Maloney's role as a psychologist to be focusing more on intellectual functioning than his role. Dr. Sharma focused on mental illness and behavioral problems that might be of assistance to the defense while Dr. Maloney looked more specifically into overlapping areas of personality and intellectual functioning. (13RHT 2209.) Dr. Sharma had no recollection in this case whether Dr. Maloney shared any test results with him. (13RHT 2209-2210, 2226.) His custom and practice at the time was to talk with Dr. Maloney multiple times before preparing a report. (13RHT 2210.)

After interviewing petitioner twice and reviewing records, Dr. Sharma prepared a report dated July 25, 1984. (13RHT 2175, 2197; Ex. B at 303-

305.) The report contained Dr. Sharma's conclusions and opinions. (13RHT 2197-2198.) Dr. Sharma wrote that petitioner "presents himself as a charming, manipulative young man who is willing to make any statement as long as it suits his needs." Petitioner complained "about the weak evidence the state had against him and his opinion that his attorney was not doing enough to get him out of jail." Petitioner dismissed the evidence against him as erroneous. Dr. Sharma noted, "His speech was goal directed, coherent and logical." (Ex. B at 304; 13RHT 2193.)

The assessment of petitioner as charming and manipulative and complaining about the weak evidence against him was indirectly relevant to an assessment of his intelligence. (13RHT 2194-2195.) It required intact mental functioning in order to be able to be charming and to dismiss evidence that may be presented. Dr. Sharma's description indicated to that petitioner had at least reasonable intact functioning during the interview. Dr. Sharma was able to infer that he did not notice any evidence of subnormal intellectual functioning. (13RHT 2195.) The sentence reflecting that petitioner's speech was goal oriented, coherent and logical reflected that, in Dr. Sharma's opinion, petitioner understood his questions, responded to questions, and gave relevant and direct answers despite his denials of the crime. (13RHT 2196.)

Because his report did not mention a communication deficit, he inferred that he did not find evidence of one. (13RHT 2199.) Dr. Sharma's report indicated that he questioned petitioner about his schooling; he did not recall if he asked petitioner whether he could read or write. (13RHT 2200.) His report did not indicate a possibility of mental retardation. (13RHT 2229.)

In his report, Dr. Sharma stated, "[n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations. The defendant in the past has been given a diagnosis of

Anti-social Personality Disorder starting at an early age. I agree with that diagnosis." (13RHT 2200; Ex. B at 305.) Dr. Sharma diagnosed petitioner as suffering Anti-social Personality Disorder based most importantly on his history predating age 18 and his personal interviews. "This is the person who doesn't give a darn about anything else." (13RHT 2239; see 13RHT 2249-2250.) Petitioner's denials demonstrated foundational knowledge above the level for significant mental retardation. (13RHT 2240-2241.)

In 1984, Dr. Sharma's statement that he saw no evidence of "organic brain disorder" was intended to convey that petitioner did not have speech pathology, mental confusion, disorientation, tremors, memory loss or other indicators of brain dysfunction. (13RHT 2200; Ex. B at 305.)

2. Dr. Michael Maloney, Ph.D –Forensic Psychologist

Dr. Michael Maloney, Ph.D became a licensed psychologist in California in 1970. Dr. Maloney became board certified in forensic psychology in 1985. (10RHT 1655-1657; 11RHT 1759-1760; Ex. KK [curriculum vitae].) He had served as a clinical professor at the USC School of Medicine as well as for psychology programs at UCLA and USC. (10RHT 1658; Ex. KK at 2.) He was a member of the Los Angeles County Superior Court panel for forensic psychologists and psychiatrists from the 1970s until he joined the Department of Mental Health in approximately 1997; he had recently rejoined the panel. (10RHT 1658-1659.) He had remained on the panel for dependency court. (10RHT 1659.) He currently served as the Mental Health Clinical District Chief for the Los Angeles County Jail System and managed the inmate reception center that screens 500 to 600 incoming men every day, seven days a week, for mental health issues. He also supervised the mental evaluation team that responds to emergencies in the jail's general population, conducted hiring, and performed administrative work. (10RHT 1657.)

In 1976, Dr. Maloney authored a book, *Psychological Assessment, a Conceptual Approach* and in 1979 he authored *Mental Retardation in Modern Society.* He had also published research articles on psychological testing. He continued to be involved in the field of intelligence assessment by training interns and postdoctoral fellows. (10RHT 1659.) He had evaluated more than 1,000 people for the purpose of assessing cognitive functioning. (10RHT 1660.) He worked on the standardization of the WAIS and other testing devices. (10RHT 1660-1661.) Over several decades, he had evaluated people for the specific purpose of ascertaining whether they were mentally retarded. He had performed such an evaluation as recently as three weeks prior to the hearing in this case. He had been retained to evaluate persons charged with capital offenses since the 1970s. (10RHT 1661-1662.) He had testified many times as an expert in the state and federal courts. (10RHT 1662.) Although he did not identify himself as a neuropsychologist, Dr. Maloney was familiar with the Halstead-Reitan Battery and other neuropsychological tests. (10RHT 1663.)

In the early to mid 1980s, Dr. Maloney worked on eight or 10 cases in which Slick was the trial attorney. (10RHT 1663-1664.) Dr. Maloney and Dr. Sharma worked together on some of Slick's cases and on cases handled by other attorneys. In the 1980s, both Dr. Maloney and Dr. Sharma had offices in the same building. (10RHT 1664-1665.) They frequently met to discuss the cases on which they worked together. (10RHT 1665.)

Dr. Maloney had briefly reviewed some of the materials provided about petitioner's case. (10RHT 1665; Ex. B at 182-297.) Dr. Maloney had no independent recollection of evaluating petitioner. (10RHT 1665-1666.) His memory had been somewhat refreshed by looking at the materials, including his own notes and the psychological testing. (10RHT 1666.)

Dr. Maloney believed that he received a letter from Slick dated May 8, 1984. (10RHT 1669; Ex. B at 182-184, 239; 11RHT 1832, 1917-1918.) The instructions in the letter asked him to "administer the necessary psychological tests and prepare a complete psychological profile." (10RHT 1670.) Dr. Maloney did not use the letter as a checklist. Dr. Maloney's practice was to perform an initial evaluation of the client, get some initial impressions and then consult with the attorney. (10RHT 1671, 1682; 11RHT 1920.)

An invoice documented dates on which Dr. Maloney performed services in petitioner's case. (10RHT 1672-1674; Ex. R at 2436, 2449.) It was not his custom and practice to bill for time spent speaking informally with Dr. Sharma unless it was a significant amount of time. The same was true about to speaking with trial counsel. (10RHT 1674.) The invoice billed for the following services: two hours for Dr. Maloney evaluating petitioner at the County Jail on May 20, 1984; one and a half hours for conducting further evaluation on June 16, 1984; two hours for his registered psychological assistant, Nancy Kaser-Boyd, to conduct psychological testing on July 15, 1984; two hours to review case materials on July 24, 1984; 1.5 hours to met with Slick on July 25, 1984; and three hours and 15 minutes to conduct family member interviews on July 31, 1984. He would likely have spent less time with petitioner than the three and one-half hours he personally billed. (10RHT 1674-1676; 11RHT 1830-1835; Ex. R at 2436.)

a. Dr. Maloney's Interview of Petitioner

Dr. Maloney took notes of his interview with petitioner on June 16, 1984. (10RHT 1682-1684; Ex. B at 203-208.) Petitioner provided details concerning his activities on the day of his arrest. He said that he had come from Lynwood and had taken his wife to the store, and had gone to "Dee's" house and argued with her about her cooking. Petitioner said that he lived

with three or four different women off and on. He had promised to take Dee to his sister's house. Petitioner was on parole and noticed the police were following him. He had never reported to parole. (10RHT 1684-1685; 11RHT 1924; see Ex. B at 203.) Petitioner turned right from Hill onto California, the police activated their lights, and petitioner pulled over. The police took his car and said it had been used in a crime. The police placed him in a separate car from Dee. Petitioner saw a Black police officer that he knew as "Big Mike." Petitioner told the police that he bought the car, a brown 1980 LD El Dorado, four or five days earlier. Petitioner explained he got the $11,000 to pay for the car from Las Vegas, prostitutes and dope. (10RHT 1685; Ex. B at 203.)

Petitioner told Dr. Maloney that two "big white" homicide detectives interviewed him the next day. They showed him a picture of a man and asked petitioner if he bought the car from the man. Petitioner answered in the affirmative, and the detectives told him that the man was dead. (10RHT 1686; Ex. B at 204.) Petitioner told them that he saw the car as he drove down Atlantic and New York. It had a "for sale" sign in its window, and petitioner called the number on the sign. (10RHT 1686-1687.)

In his notes, Dr. Maloney included the remarks, "speaks well" and "at least average intelligence." (10RHT 1687; Ex. B at 204.) By the notation "speaks well," Dr. Maloney meant that petitioner tracked the question, his "response latencies are fairly short," petitioner put his words together, and engaged in a smooth conversation. (10RHT 1688.) The remark, "at least average intelligence" reflected Dr. Maloney's assessment of petitioner's verbal response, memory insofar as petitioner provided information about streets and names and descriptions of officers, and in presenting a narrative in a "flowing fashion." (10RHT 1689.) These observations contributed to a clinical evaluation "[b]ut if you get into talking about formal intelligence, tested I.Q. is really a different thing." (10RHT 1690.)

Continuing petitioner's recitation, petitioner saw the seller the next day after work, and described how the seller showed him the car. The seller wanted $12,500 and he offered $11,000 cash. The seller came out of the house with a plastic folder and a pink slip. Petitioner wanted the car put under his wife's maiden name. (10RHT 1690; Ex. B at 204.) He wanted the registration in his wife's name because he had a "want on drugs." He took the pink slip to his wife, whom he described as a prostitute. He then went to Lynwood and got a motel room. He stayed with Dee and "another broad." (10RHT 1690; Ex. B at 205.) Petitioner said that he kept moving around because the police were looking for him. (10RHT 1690-1691.) Petitioner claimed that he got the car on the 24th and the man died on the 27th. (10RHT 1691.) Petitioner claimed to have "filled out card at motel on the 24th. Maybe one of my broads filled it out. Motel has a Japanese name." Petitioner described the location. He provided the name and phone number of his wife. (10RHT 1690-1691.) On the 27th (identified as the day the man died), petitioner took Dee to the hospital and looked for "special stuff" for hair. (10RHT 1691.)

For purposes of assessing intelligence, petitioner's description was detailed and, presuming it was accurate, suggested short term memory functions were intact. (10RHT 1691.) Dr. Maloney asked clients open-ended questions and asked enough questions to keep them talking; he wanted to listen to the thought process and how the client put thoughts together. (10RHT 1692.)

At the reference hearing, Dr. Maloney observed that the level of detail in petitioner's story (whether true or false) demonstrated "he had the ability to remember it well, to keep the chronology of it going forth and so on. So it argues to me that there is some mental competency here beyond what I would normally see in a person from his background." (11RHT 1926.)

Dr. Maloney next asked petitioner direct questions and elicited family and personal history information. Petitioner claimed to have attended school until the seventh grade. His first arrest was for burglary or robbery at age 13 and was sent to Camp Scott. (10RHT 1692-1693; Ex. B at 206.) Petitioner then relayed his criminal history and incarceration background. Dr. Maloney's notes included the reasons petitioner gave for his incarcerations. The notes reflected that petitioner claimed he began committing robberies to pay his financial obligations. Petitioner then described his various transfers within the state prison system and his assessment of the facilities. (10RHT 1693-1696; Ex. B at 206.) Dr. Maloney then asked petitioner about his health and history of psychological treatment. Petitioner claimed no prior psychological treatment, and no alcohol or drug use although he admitted selling drugs. (10RHT 1696-1697; Ex. B at 207.)

Petitioner said that his mother died after suffering leukemia and provided a phone number for his father. When asked about discipline at home, petitioner said, "got my ass whipped" with a switch or a belt. Petitioner was married to his wife for eight years and had three children and described their ages but he did not know the name of his two-year-old child. (10RHT 1697-1698; Ex. B at 208.) The type of discipline petitioner described was unremarkable at that time. Dr. Maloney also asked about sexual abuse; given the absence of any notation, the answer must have been negative. (11RHT 1760-1761; Ex. B at 208.)

Based upon his present review of his interview notes, Dr. Maloney considered the significant information to be that petitioner's memory functions appeared to be intact, he was able to communicate in a reasonable fashion, was cooperative in answering questions, he had goal-oriented thinking, and no delusional or deviant thoughts. (10RHT 1698-1699.)

Communication was an aspect of adaptive behavior functioning. petitioner's oral communication "seemed pretty good." (10RHT 1699-1701.) However, "it really breaks down in terms of written verbal communication." (10RHT 1699.) Petitioner was given a wide range achievement test and read at around the third grade level. Lack of literacy was a communication deficit. (10RHT 1700.) Petitioner's ability to carry on a conversation with Dr. Maloney fell within the communication and social domains of the Red Book evaluation of mental retardation. (10RHT 1700-1701.) Regarding the concept of language, petitioner was able to carry on a conversation and use language appropriate to the situation and questions asked. (10RHT 1701.)

Dr. Maloney's handwritten notes of petitioner's recollection about negotiating the purchase of the victim's car "would seem to" reflect an ability to deal with money concepts. (11RHT 1820-1821.)

b. Family Interviews

According to Dr. Maloney, "especially in those years, there was very little provided in terms of background information other than legal reports, you know, probation/prison records, that kind of stuff. [¶] But in terms of family background, so forth, fairly little information was available. If I felt that to complete an evaluation I needed to do all that, I'd certainly say that." (10RHT 1672.) Counsel stipulated that certain reports authored by Kristina Kleinbauer were contained in Dr. Maloney's file. (11RHT 1819; see Ex. B at 222-232.) Dr. Maloney read everything Slick gave him. (11RHT 1819-1820.)

When Dr. Maloney spoke with immediate family members, he "ask[ed] them fairly directly whether they had information they felt would help" in a penalty phase. (10RHT 1707-1708.) Dr. Maloney's notes were "very summary oriented" and would not have included everything that the

family witnesses said. (10RHT 1709.) His notes for his interview with petitioner were different because he would want more specific information for his evaluation of petitioner. (10RHT 1709-1710.)

Dr. Maloney recalled that Slick set up appointments with family members, including petitioner's father, petitioner's wife, and two other women who were possibly petitioner's sisters. The purpose of the interviews was to determine whether the witnesses might be helpful if the case went to a penalty phase. (10RHT 1676; 11RHT 1840.) The purpose of the family member interviews was to assess whether they would make good witnesses. (10RHT 1710.) He recalled that the interviews occurred in Slick's office. (10RHT 1678-1679.) This was the only case in which Slick had Dr. Maloney meet personally with family members. (10RHT 1679, 1708.) Dr. Maloney met with family members in some cases handled by other attorneys. (10RHT 1708-1709; 11RHT 1839.)

Dr. Maloney's handwritten notes documented an interview with petitioner's father conducted on July 31, 1984. (10RHT 1702-1704; Ex. B at 234-236; Ex. R at 2436.) Dr. Maloney wrote that petitioner's mother was on welfare and petitioner's father paid approximately $75 to $80 each month. The family grew up in East Long Beach. His parents broke up when petitioner was about two years old, and his father saw petitioner on an irregular basis approximately three times each month. Petitioner had two siblings by the same father and a step-sibling. (10RHT 1705-1706; Ex. B at 236.) Petitioner's father described him when "a little kid" as "playful, good-hearted, and smart." Petitioner's father recalled that petitioner first got into trouble at age 12. His father attributed the "trouble" to not having a father around and the rest to petitioner's associates. His father had advised petitioner to get with new friends. He reported having "lots of letters at home." He described petitioner's peers as "a real rough bunch. All they wanted was something for nothing and to see what they could get

away with." The father felt petitioner was in a gang but did not know the name. Dr. Maloney wrote that the father did "had nothing to say about possible penalty plea." (10RHT 1706; Ex. B at 236.)

Dr. Maloney's notes of an interview with Janiroe Lewis indicated that she had three children, the oldest with Down Syndrome, that she admitted five or six prostitution arrests and had a petition filed against her in family court to remove her children from the home. (10RHT 1708; Ex. B at 234.) Dr. Maloney's notes of the interview of Denessa Walker included the notations "bright" "but streeter-fighter type"; "seems angry – background is negative," which would have referred to a significant illegal background' and "secondary to burglary, prostitution, and assault with a deadly weapon." (10RHT 1710; Ex. B at 233.)

Dr. Maloney's notes indicated the witnesses were of "negative quality," and he was certain he conveyed his assessment to Slick. (10RHT 1712; 11RHT 1840-1841.)

c. Psychological Testing Conducted in 1984

Two pages of handwritten notes were in the handwriting of his assistant, Dr. Nancy Kaser-Boyd, and were the performance part of the Rorschach Inkblot testing, which was used more in 1984 than today. He and Dr. Kaser-Boyd had authored a book on the Rorschach. It was not standardized as a test but did provide "fairly good interview material." Petitioner's responses reflected the commonly seen concepts in the images. (10RHT 1712-1713; Ex. B at 200-201.) The images were significant as part of the clinical assessment because they required subjects to use their own resources to respond. He used the Rorschach to test petitioner's reality perception, cognitive functioning, and ability to conceptualize amorphous material in a common manner. The Rorschach had peripheral relevance to assessing the conceptual domain of adaptive functioning. (10RHT 1714.) The results were not inconsistent with his other findings. (10RHT 1716.)

Dr. Maloney's file included cards from the Bender Visual Motor Gestalt Test, a test consisting of nine geometric designs, which was a gross screening device for organic impairment or brain dysfunction. Petitioner made the drawings and, in Dr. Maloney's opinion, they were "well done and they're organized." They indicated that petitioner's perceptual motor integration functions were pretty intact. An average child can make the drawings at nine and one-half years of age without much error. (10RHT 1716-1717; Ex. B at 202.)

Dr. Maloney personally administered the Ammons Picture Vocabulary Quick Test ("Quick Test") to petitioner. The Quick Test is a picture vocabulary test in which four images are depicted on a card. The test administrator reads a word (e.g., "adding") and the test subject points to the picture that best fits the word. Petitioner scored near 80. (10RHT 1754-1755; Ex. B at 195-196; 11RHT 1911-1915.) Petitioner's Quick Test did not indicate intelligence at a level of mental retardation and his results were consistent with petitioner's other test results. (10RHT 1755.) The Quick Test was normed on white adults and "[c]ertainly doesn't represent persons from [petitioner's] background." (11RHT 1916; see Ex. B at 196 [norming scales].) In other words, "It should underestimate him." (11RHT 1916.) Dr. Maloney characterized the Quick Test as a "very gross screening device." (11RHT 1912.)

Dr. Maloney would have asked Dr. Kaser-Boyd to administer the WAIS-R in order to get a sense of petitioner's level of intellectual and cognitive functioning. (10RHT 1726-1727.) His invoice indicated the WAIS-R was administered to petitioner on July 5, 1984. (10RHT 1717-1718; Ex. B at 188-193.) The handwriting on it belonged to Dr. Kaser-Boyd. (10RHT 1719, 1721-1724; Ex. B at 188.) Dr. Kaser-Boyd scored the test. (10RHT 1738.) Two subtests, Vocabulary and Object Assembly,

were not performed. The scores for those subtests were an average of the scores on the completed tests. (11RHT 1858-1859.)

Dr. Kaser-Boyd would have given Dr. Maloney an oral assessment after administering the WAIS-R. (10RHT 1719; 11RHT 1861.) Dr. Maloney did not recall the substance of the oral assessment, but he observed some notes in his own handwriting on the form. For instance, in the upper right hand corner of the first page, Dr. Maloney wrote "seems w/in normal limits" at the end of Kaser-Boyd's notation "Mike – this guy might have a hearing problem[.] He seemed to mishear a number of questions." (10RHT 1720, 1724-1725; Ex. B at 188.) He also wrote, "possibly some aphasia." Aphasia "could be" associated with mental retardation. (11RHT 1861.) Dr. Maloney's notes did not indicate that he saw evidence of aphasia. (11RHT 1942.)

Dr. Maloney overviewed the WAIS-R contents. (11RHT 1899-1917.) All of the subtests were orally administered. (11RHT 1899, 1906-1907.) Dr. Maloney described the Information subtest. (11RHT 1899.) At the top of the Information subtest, Dr. Kaser-Boyd had written, "If I thought about it a lot, I could," apparently referring to question 6 asking to name four presidents. (11RHT 1867-1868; Ex. B at 189.) Dr. Kaser-Boyd's notation "DN" indicated, "don't know." (11RHT 1868-1869.) Dr. Maloney wrote, "lot of DK's" and beneath that, "question motivation." (11RHT 1869.) The notes indicated that petitioner's "I don't know" answers made Dr. Maloney question whether petitioner was motivated in taking the test. The goal was to get an answer, a wrong one. (10RHT 1739.) The Information subtest was administered by starting with question 5 but returning to question 1 if the subject did not correctly answer question 5 or question 6. (11RHT 1869.) If petitioner had provided a wrong answer, Dr. Kaser-Boyd should have written the answer. (11RHT 1870.) Dr. Maloney agreed that the Information raw score should be four rather than five as scored by Dr.

Kaser-Boyd. (11RHT 1871.) That adjustment would produce an overall raw verbal score to 30 (rather than 31). (11RHT 1875; Ex. B at 188.)

The Picture Completion subtest consisted of ink-drawn pictures missing an "important part" that the subject was asked to identify. A note from Dr. Kaser-Boyd reflected that petitioner recognized that the questions became harder as they progressed. (11RHT 1899-1901; Ex. B at 189.) The Digit Span test was an immediate auditory memory task that required the subject to listen to a series of numbers and repeat them back. In the second part of the test, the subject recites the series backward. (11RHT 1901.) Dr. Maloney did not describe the Picture Arrangement subtest. (11RHT 1904.)

The Vocabulary subtest was not administered. (11RHT 1858-1859.) On the WAIS-R, the Vocabulary subtest was entirely oral and required the subject to define the words. (11RHT 1904-1905.) Regarding the Vocabulary subtest later administered by Dr. Khazanov, Dr. Maloney would have expected petitioner to have scored higher than a 2. (11RHT 1877-1878.) On the WAIS-III, the Vocabulary subtest included a form bearing large print that the subject could view while being questioned. (11RHT 1905.)

The Block Design subtest involved nine cubicle blocks with different colors on their faces. The administrator asks the subject to make the same design as a control pattern. (11RHT 1905.) The Arithmetic subtest was administered orally and involved money concepts. Petitioner correctly answered three questions. (11RHT 1905-1906.) For item six, it took petitioner 15 seconds to answer, and he asked "how much do they cost?" (11RHT 1906-1907.) The Object Assembly test, which was not administered to petitioner, requires the subject to assemble puzzles of four images. (11RHT 1902.)

The Comprehension subtest (subtest 9) involved both knowledge and judgment. (11RHT 1903.) Its proverbs require "knowledge of the idioms

but also abstract reasoning ability." In the Comprehension subtest, Dr. Kaser-Boyd made the notation, "hearing problem" in reference to item 12. (11RHT 1865; Ex. B at 190.) Dr. Maloney would not expect someone with petitioner's background to know the proverb, "striking when the iron's hot." (11RHT 1943.) The notation above the subtest, "His talk comes out all confused" was in Dr Kaser-Boyd's handwriting. (11RHT 1862; Ex. B at 190.) When Dr. Maloney talked with petitioner, he did not see evidence that petitioner's "talk" was confused. (11RHT 1942.)

The Digit Symbol subtest was as speed recognition test; the marks belonged to petitioner. For the WAIS-R, subjects had 90 seconds to complete the test. For the WAIS-III, subjects were given 120 seconds. (11RHT 1908; Ex. B at 193.) Petitioner had 55 correct answers, equivalent to a scaled score of 9. (11RHT 1908-1909.)

On the Similarities subtest, for the orange/banana question Dr. Maloney concurred with the two-point designation. Dr. Kaser-Boyd wrote, "real trouble distinguishing the concept"; difficulty with the concept could be an indication of mental retardation. (11RHT 1866; Ex. B at 193.) Accuracy is not the issue for the Similarities subtest; it is identifying the most common abstract concept. (11RHT 1795, 1797.)

The WAIS-R and the WAIS-III are comparable. (11RHT 1889.) Dr. Khazanov's rescoring of the WAIS-R (FSIQ 71) fell within the reliability range for the WAIS-R as originally scored (FSIQ 73). (11RHT 1890.)

Dr. Maloney (and/or his assistant) administered the WRAT and found that petitioner's phonetic reading was at the third or fourth grade level. (10RHT 1751; 11RHT 1779, 1911.) Dr. Maloney considered an adult who read at the third or fourth grade level to be illiterate. (11RHT 1779-1780.)

d. Other Circumstances Impacting Petitioner's Test Scores

Dr. Maloney had the WAIS administered in order to obtain an independent idea of petitioner's level of cognitive functioning. The WAIS-R administered to petitioner was published in 1981 and was normed on 3,000 people drawn from the United States census population based upon education level, geographic area, occupational position of the primary worker in the family, and other characteristics. (10RHT 1728; 11RHT 1879-1880.) According to Dr. Maloney, "Persons from Mr. Lewis' background will always score low on these kinds of tests, lower than probably their level of intelligence." (10RHT 1728.) The lower score would result from petitioner's level of education, his removal from societal intercourse in regular life at around 12 years of age (when he entered the juvenile system), and his experiences with other disadvantageous factors. (10RHT 1728-1729.)

Dr. Maloney opined, "Unless we re-norm tests for these subgroups, unfortunate people in the population, no matter what race they are, you're gonna get lower scores." (10RHT 1730.) Dr. Maloney believed that IQ numbers should not be used to gauge intelligence and only reflected levels of ranges of functioning. "You got to look at what advantages a person may have had, what disadvantages a person may have had, you have to take the whole background in consideration." (10RHT 1730.)

In 1984, the cutoff for mental retardation was an IQ score of 70. Dr. Maloney anticipated that petitioner might score lower on the intelligence testing due to his life experience and background. When Dr. Maloney interviewed petitioner, petitioner seemed to be "at least in the average range." (10RHT 1729.) Thus, petitioner's WAIS-R full scale IQ of 73 did not put him solidly in the mentally retarded range because he did not come from the background on which the test was normed. If petitioner's

motivation was compromised, his test score would be even lower. (10RHT 1739.)

For all intelligence tests, "If you use an absolute cut-off score and you use a test that may not be appropriate for a certain subgroup of the population, you can end up with misclassification." (10RHT 1748.) Given the standard error of measurement on the WAIS, Dr. Maloney opined, "it's very risky to use an absolute score and say this means thus and such, especially with these subgroups in our population that are different. And it's – poverty is an issue. Experience in infancy is an issue. Learning in school is an issue." (10RHT 1750.)

Given petitioner's background and reading level, one would expect his verbal IQ score to be lower and the performance score higher. (11RHT 1780.) The inability to read could impact performance on the WAIS-R because of the failure to obtain knowledge necessary to perform well on the test. (11RHT 1934-1935.) Dr. Maloney could not quantify how many points would be impacted on an IQ test. (11RHT 1946, 1948.) The simplest explanation for a lower verbal score than a performance score would be "lack of broad experiences during early years" that would include "[l]earning to read, learning to profit from education, learning to profit from one's own experience." (11RHT 1936.) Absent "other specific evidence going to brain damage or neuropsychological impairment," which demanded a lot more supportive data, the simple explanation was the most logical one. (11RHT 1937.)

Dr. Maloney opined that norming adjustments were not adequate to account for literacy and socioeconomic factors. (11RHT 1879-1880.) Dr. Maloney opined, "these tests probably should not be used with specific scores for people that come from very different backgrounds." Even the current WAIS, when used with mainstream people had high reliability and validity coefficients, but was "not point to point." (11RHT 1881.)

Dr. Maloney would not call petitioner's background "mainstream." (11RHT 1937-1938.) Petitioner might be the kind of person for whom the tests should not be used because they do not reliably and validly indicate intelligence. (11RHT 1938.) For a non-mainstream person, the IQ test results "don't accurately reflect that person's level of problem-solving ability." Petitioner "could" fit within the classification of people for whom that would be an issue. (11RHT 1939.) The "potential" intelligence of an individual lacking enriching experiences could be even higher than 15 points than measured in an IQ test score. (11RHT 1951.) Regarding enriching experiences, Dr. Maloney was most concerned about the period from birth through age 18. (11RHT 1952.)

e. Dr. Maloney's Assessment of Possible Penalty Mitigation

It would have been Dr. Maloney's custom and practice to discuss his psychological impressions of petitioner with Slick. (10RHT 1676.) Dr. Maloney was certain that he told Slick that he would not be of value. (10RHT 1712, 1753.) If Dr. Maloney had felt there was something positive to be used in the penalty phase, he would have written a report. (10RHT 1711-1712.) Dr. Maloney did not write a report in this case, which was unusual. He recalled only that he did not believe it would be helpful to the defense for him to write a report. (10RHT 1679.) Dr. Maloney had recently read Dr. Sharma's report and did not believe that his opinion differed from Dr. Sharma's opinion. (10RHT 1679-1680.)

Based upon Dr. Kaser-Boyd's test results and his own clinical interview, Dr. Maloney did not have any concerns that petitioner was mentally retarded. (10RHT 1739-1741.) In 1984, Dr. Maloney would have considered "significant mental retardation" to be a potential mitigating circumstance in a capital case. (10RHT 1741-1742.) Dr. Maloney had testified during the penalty phase of capital cases that someone was

mentally retarded. Those cases predated *Atkins* and involved individuals whose IQ test results were in the low to middle sixties. (11RHT 1791.)

In petitioner's case, "He responded to me in a fairly casual way. He was not upset. He did not have a significant mental disturbance. His thinking was goal-oriented, clear. His intelligence tested is below average. His own verbal report to me, if read in that trial, wouldn't help anybody, and I would mention to the attorney this is what I think." (10RHT 1753.)

In 1984, petitioner's full-scale score of 70 on the WISC "would put him at the very top end about two percentile" of general intelligence, meaning that the score was two standard deviations below the mean. (11RHT 1778.) In 1984, the cutoff was 70 – below 70 was mentally retarded. Using the WISC, mild mental retardation was 55 to 69. (11RHT 1781.) By 1984 standards, Dr. Maloney would not have perceived petitioner to be mentally retarded. (11RHT 1801.) In 1984, he was "not trying to diagnose mental retardation." He was asked to address questions relevant to the penalty phase and "what could I do as a witness. So the focus of my testimony now on intelligence and mental retardation was not there." (11RHT 1801-1802; see 11RHT 1806.) Dr. Maloney indicated his belief that after meeting with the family witnesses he told Slick "that I did not believe on the bottom line scale I'd be a good witness for his defense." (11RHT 1806.)

Dr. Maloney explained, "I was collecting a lot of data and pretty well could rule out that he had an functional mental disorder, that he's functioning well below average in terms of I.Q. testing, but his history was consistent with that. In my perspective what he told me, there was a lot of negative information. [¶] I did discuss, and I don't know in what detail, with defense counsel he refused to complete the M.M.P.I. which I was reading to him, things like that. I don't believe I would be of value to you."

(11RHT 1822; see Ex. B at 198-199 [MMPI with notation "wouldn't complete"].)

The definition of learning disability had not changed since 1984. (11RHT 1824.) Dr. Maloney knew that petitioner was well below average in terms of reading. "If someone asked me does he have a learning disorder, I'd probably say he did." (11RHT 1825.) He would have shared the information contained in his notes with Slick. (11RHT 1827.)

When Dr. Maloney evaluated petitioner in 1984, he did not identify petitioner as suffering a primary mental retardation. (11RHT 1945.) Dr. Maloney "did not go and look at his adaptive behaviors in any detail during my evaluation of him." (11RHT 1821; see also 11RHT 1921-1922.)

In Dr. Maloney's view, the standard for mental retardation has changed since 1984 and the *Atkins* decision. He discussed changes to the definition of mental retardation since 1969. (11RHT 1800-1801.) Currently, various associations used a standard referring to mental retardation as falling into the range from 70 to 75. (11RHT 1781.) Dr. Maloney agreed with the referee's statement that petitioner "was in the gray area." (11RHT 1778; 11RHT 1784-1785.) Dr. Maloney agreed with the referee's characterization that it was "a closer case" under today's standards. (11RHT 1802.) Petitioner's full scale IQ on the WAIS-R was 73. (11RHT 1811.) A verbal score of 72, performance score of 76 and full scale score of 73 did not fall within the mental retardation range in 1984. They could, however, fall within the 2011 range. (11RHT 1812.)

At the time of his assessment in 1984, Dr. Maloney was aware that petitioner claimed "he went to school to the seventh, but really didn't go. I was aware of that at the time." That circumstance would affect verbal skill development and could impact test performance. (11RHT 1816-1817.) Dr. Maloney saw nothing positive in petitioner's history that would cause a test result to be artificially high. (11RHT 1817.)

When he saw petitioner in 1984, Dr. Maloney had no "sense" that petitioner was malingering (that is, purposefully attempting to feign or exaggerate symptomatology for a known gain). Dr. Maloney further opined, "And if he was doing that now, I'd expect more suppressed scores." (11 RHT 1891.)

Dr. Maloney disagreed that the test results suggested impairment to the left hemisphere of the brain. (11RHT 1897-1898.) Physical deficits in brain development occur before age 10 or 11. (11RHT 1898.)

Dr. Maloney estimated that the "mental age" of an adult with an IQ of 70 would be in the ball park of a 10 to 12 year old. (11RHT 1927-1929.)

f. Interpretation and Impact of Petitioner's Pre-18 Test Scores

A person cannot accidentally get a high score on an intelligence test. (10RHT 1736.) Dr. Maloney did not believe that he examined petitioner's school records in 1984. (10RHT 1731; Ex. Z.) In reviewing petitioner's scores obtained prior to age 18, in group settings, some individuals do not respond, which caused their score to be artificially low. (11RHT 1764.) Dr. Maloney did not use the Kuhlmann-Anderson, which was a group test. (11RHT 1766.) The Stanford-Binet L administered November 20, 1959, reflected a chronological age ("CA") of seven and one half and a mental age ("MA") of six years two months and a score of 83. (11RHT 1940-1941, 1948-1949.) A score of 83 on the Stanford-Binet was not consistent with mental retardation. (10RHT 1736; 11RHT 1942.) "It's high end to borderline." (11RHT 1942.) Dr. Maloney recited that the "borderline range for mental retardation was 70 to 84." (10RHT 1736-1737.)

The Stanford-Binet test was the first individually administered, legitimate IQ test, but it was biased because it was normed on young white people. (11RHT 1766; 10RHT 1735-1736.) Prior to age six, the Stanford-Binet L test involved nonverbal items. "At around age four or five, around

there, it starts becoming a verbal test and then it's more problematic." It was "problematic" "to use with people who have learning deficits or lack of enriching experiences during early years." (11RHT 1940.) If the test was administered appropriately, a score of 83 may actually underestimate intelligence in a person who falls outside the norms on which the Stanford-Binet was developed. (11RHT 1941.)

The Revised Beta is a non-verbal test of intelligence, administered in group format, developed for screening military recruits. It remains one of the army classification tests. (11RHT 1766-1767.) The test scores reflected on People's Exhibit 23 (at page 10) all were above the cutoff for mental retardation with the exception of the second Lorge-Thorndike, a group test dealing with word knowledge. (11RHT 1766-1767.) With the exception of the listed score on the second Lorge Thorndike, petitioner's test scores were not consistent with mental retardation. (11RHT 1778.)

Dr. Maloney was not familiar with the particulars of the SRA IQ test. (11RHT 1767-1768; Ex. G.) However, the comments on the clinic educational report dated September 11, 1968, reflected Dr. Maloney's thinking. (11RHT 1783-1784; Ex. G.) The report recited the results of the SRA IQ Test, the Revised Beta Examination, the California Achievement Test, and the Wide Range Achievement Test and included the comment, "His scores as listed are meaningless for subject is not academic or vocationally oriented. He may be able to function as a dull normal, but that surmise is a projection based on his non-verbal S.R.A. score." (Ex. G.) "Dull normal" was usually above the cutoff for mentally retarded. (11RHT 1784.)

The WISC was the most reliable of the tests given to petitioner prior to age 18. (11RHT 1892, 1939-1940.) Dr. Maloney viewed the WISC as "the best test for children at that time." (11RHT 1782.) Assuming an individual with a WISC score of 70 with a background like petitioner's, Dr.

Maloney opined that none of the intelligence tests were valid and reliable because they do not account for his background. (10RHT 1735.) Regarding all of the tests, Dr. Maloney opined, "it's very risky to look at them as specific measurable points. There's too much error variance. The standard error of measurement, it's three or four points. So you really have to look kind of at ranges. That number [the WISC], depending on when it was done, who did it and so forth, could range from 66 or so to 74. So you look at the other scores that top one, 89 percent – IQ of 89, 85 would put you at the 15 percentile. So the Stanford-Binet is a little below. 89 is a little higher than that. 83 on the Revised Beta at the bottom is probably 13 percentile compared to the normal population. They're different tests, they're different numbers." (11RHT 1778-1779.)

In reviewing the range of test scores (Ex. 23 at 10), Dr. Maloney opined, "If you look at these scores, at 6 he's 89; at 7, 83; 7, 78; 9, 82; 10, 70; is his intelligence really changing that much in those years or are there assessment or measurement problems? I tend to think the latter." (11RHT 1782.) Dr. Maloney acknowledged that petitioner's WISC score was fairly consistent with his WAIS-R and WAIS-III scores. (11 RHT 1892.)

Regarding the volume of tests administered to petitioner as a young child, Dr. Maloney testified that "If you took an average student, this would be more than average. But what you have when this happens, if someone takes a test, gets in the school record, they have a tendency to give it over again. So once they're identified as a problem student for any reasons, you have more of these evaluations." (11 RHT 1894-1895.)

B. Post-Conviction Mental Retardation Expert – Dr. Charles Hinkin, Ph.D

Dr. Charles Hinkin obtained a Ph.D in clinical psychology in 1991 from the University of Arizona. (12RHT 1960-1962; Ex. I [2009 curriculum vitae, report, billing records].) He was licensed as a

psychologist in 1991 or 1992. (12RHT 1975.) He is board certified in clinical neuropsychology. (12RHT 1965.) He had focused during the last 15 years upon psychological and neuropsychological assessment and researching the neuropsychological effects of various diseases and injuries. (12RHT 1963.) As the Director of Neuropsychological Services at the West Los Angeles Veteran's Administration and as a professor of psychiatry in behavioral sciences at UCLA, Dr. Hinkin assessed patients with suspected psychiatric or neurological disorders. (12RHT 1963-1965.)

Dr. Hinkin began working with mentally retarded individuals in 1983. (12RHT 1966, 1973.) Dr. Hinkin estimated that he had assessed many hundreds of people and had determined that between 100 and 200 individuals were mentally retarded. (12RHT 1972, 2094.) Since the late 1990's, Dr. Hinkin had engaged in forensic work in both civil and criminal cases. In the criminal arena, he had mostly been retained by the Public Defender's Office, including work in capital cases that involved both mental retardation issues and mitigating neurocognitive problems as well as sanity issues. (12RHT 1967-1968.) In approximately 75 to 80 percent of cases he was employed by the defense. (12RHT 1969-1970.) He had been more frequently called as a defense witness to testify about mental retardation. (12RHT 1974.) Dr. Hinkin testified on behalf of the respondent at evidentiary hearings involving Anderson Hawthorne, Jr. (involving an *Atkins* question), Steve Champion, and Alfredo Valdez. (12RHT 1968-1969.)

Dr. Hinkin spent almost 100 hours reviewing voluminous materials provided by the District Attorney's Office. (12RHT 1975-1979; Ex. I at 127-131, 141-148.) He also attended the hearing. (12RHT 1979.) He did not personally examine petitioner. (12RHT 1985.)

Dr. Hinkin explained that "significantly subaverage intellect" was "typically defined as an I.Q. of approximately 70 or below as per the DSM,

as well as per the [AAMR]." (12RHT 1985.) There is no "bright line" since "there's always some error built in." (12RHT 1985.) Clinicians "look for coalescence of data, when you get replication and you're seeing similar stuff over and over again. That gives you greater weight to the results." (12RHT 1985.) All of the definitional criteria specify that mental retardation qualifies as two standard deviations below the mean (i.e., 70) rather than 1.3 standard deviations below the mean (i.e. 75). (12RHT 1986.)

Adaptive behavior is "how effectively individuals cope with common life demands and how they – how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, community setting." (12RHT 1986.) In other words, "are they able to make it, are they able to hang in the community, are they able to independently prosper and survive in their community." (12RHT 1986.) The first two prongs assess "book smarts versus street smarts." (12RHT 1986.)

1. Significantly Subaverage General Intellectual Functioning

a. The Intelligence Testing

Dr. Hinkin prepared a chart listing all known intelligence tests administered to petitioner throughout his life, from age 6 through age 51. (12RHT 1987-1988; Ex. NN.) Dr. Hinkin agreed with Dr. Khazanov's supposition that the number of tests administered by school authorities indicated that there likely was "something about him that made him stand out" and prompted school authorities to administer more than the usual number of tests because the schools did not have resources to test children six, eight or ten times. (12RHT 1989.) However, the focus could have been on intellectual problems and partly upon emotional issues. (12RHT 1995.) Dr. Hinkin believed that it was likely that some of the group tests

were administered to petitioner individually given the resource demands. (12RHT 2094-2095.) The change in administration technique could potentially reduce or elevate the scores obtained if the test was normed on a group administration. (12RHT 2096.)

In eight or nine of the eleven tests, petitioner's IQ performance was above the area consistent with mental retardation. (12RHT 1988.) "[W]hen you get up to the low 70's, and some have argued even as high as 75, you know, you want to entertain the possibility that the individual may be mentally retarded, but there's also in this record a host of I.Q. test scores which are far in excess of that 70 to 75 range or in the 60's is where really as Dr. Maloney was testifying where mental retardation truly lies." (12RHT 1988.) Individually administered tests were better because they allowed the test administrator to evaluate motivation. (12RHT 1988-1989.) The group tests, however, had value and should be considered. (12RHT 1989.)

As Dr. Maloney testified, although there are a number of reasons why an individual might perform *worse* on an IQ test than his true level of intellect, "You can't do better. If someone is mentally retarded, you're not going to see scores as 89 on the Kuhlmann-Anderson. Or even when he was 16, that non-verbal I.Q. of 99 on the Thurstone Primary Mental Abilities S.R.A." (12RHT 1989-1990.) The Lorge-Thorndike 3-A-V administered to petitioner consisted only of the verbal portion of that test. The very low score reflected his poor verbal performance in May 1963 within days of the WISC. (12RHT 2006-2007.)

Although Dr. Hinkin believed all tests and test results should be considered and weighed, he opined that "the Stanford-Binet, which is like the first I.Q. test in the U.S., and the W.I.S.C. and the W.A.I.S. test are better tests, and you know, I think they perhaps deserve more weight than the Kuhlmann-Anderson, the Lorge-Thorndike, the Revise[d] Beta. All

deserve weight, it's just a matter of how much weight one is given." (12RHT 1990.) The tests administered before petitioner was age 18 provide data about his level of functioning. (12RHT 2025.)

Dr. Hinkin agreed with Dr. Maloney and Dr. Khazanov that "the Wechsler family of tests are probably the better tests." (12RHT 1990.) However, he clarified that the Stanford-Binet and Wechsler tests were the "most reliable" tests and that the tests administered to petitioner "that have the best reliability and validity would be the Stanford-Binet, the WISC, the WAIS-R, the WAIS-III." (12RHT 2096-2097.) The Red Book, the DSM, and all authoritative sources agreed with the inclusion of the Stanford-Binet. In breaking down the tests and assessing their positive and negative characteristics, he concluded the other tests are "not as good." (12RHT 2097.)

b. The Impact of Literacy on Petitioner's Test Scores

Dr. Hinkin opined that, "Mr. Lewis is illiterate, functionally illiterate. He can't read, you know, worth a darn." (12RHT 1992.) Petitioner's WRAT test scores ranged from the 1.8 grade level to third grade level. (12RHT 1993-1994.)

The IQ tests given to younger children focus more on non-verbal performance (called the performance I.Q.). The downward progression of petitioner pre-18 test scores (as shown on Ex. NN) demonstrates that, "when either the information that's being tested is not something that's learned through reading, through verbal information, his scores are much better. And as . . . at least part of the test become increasingly verbally dependent or mediated, you see his score dropped." (12RHT 1992.)

Although the Wechsler tests do not require the subject to read the questions, Dr. Hinkin explained that "the information that's being tested on the verbal subtest is information that you learn through reading. It's what

you learn sitting in class, sitting in your history and your geography and your science classes, through reading, you know, literature and whatnot. That's where you pick up those information issues, those vocabulary-types of questions, the similarities or comprehension proverbs, idioms." (12RHT 1992-1993.)

Dr. Hinkin opined that petitioner "has a decent level of non-verbal intellect" but as the tests became increasingly dependent upon verbal information and reading, his scores declined. (12RHT 1993.) Studies and "a whole host of literature" demonstrate that "verbally mediated I.Q. [tests] were underestimating patients' I.Q.'s whether it's because of illiteracy, whether it's because of E.S.L. [English as a second language] issues, because of socialcultural, you know, immigrant issues." (12RHT 1994.)

In order to differentiate the "chicken or the egg issue" – an individual with a "bad brain" will not be able to learn to read, and failing to learn to read means perform poorly on intelligence tests – "you look to corollary data." (12RHT 1994-1995.) However, if petitioner had a "bad brain, then why is he doing so good on the non-verbal skills. If he's got a bad brain, and this is also where the adaptive behavior prong comes in, then why he is able to cut it on the street and adaptively behave in a normal fashion?" (12RHT 1995.)

Petitioner's scores received prior to age 18 included scores in the middle to high 80's and 99. "[S]omeone who is mentally retarded is not going to be able to get 1 99 I.Q., a 89 I.Q." (12RHT 2026.) The 99 performance score was on the Thurstone Primary Abilities Test, about which the tester indicated that petitioner might be able to function at a "dull normal." (12RHT 2026; see Ex. G.) A full-scale IQ score was roughly an average of the verbal and nonverbal scores. Thus, the average score on that SRA test was in the low to mid 80's. (12RHT 2026-2027.)

Looking at all the test scores, Dr. Hinkin agreed it was a "close call." (12RHT 2027.) Dr. Hinkin placed greater weight on the WAIS tests because they are better tests. He also gave more weight to tests administered in a school setting rather than prison. (12RHT 2027.) Dr. Hinkin believed that reasonable psychologists would agree that petitioner's case was not a "slam dunk" either way. That was "because there's absolutely no way someone that is mentally retarded is getting I.Q. scores that high, at least on the non-verbal stuff. But, ... if you focus just on the better tests, which are the W.A.I.S. tests, then ... it would not be unreasonable to conclude that it meets that prong if you just focus on those tests." (12RHT 2027.)

Only looking at the three Wechsler tests, there was consistency in the full scale IQ score. (12RHT 2104.) Dr. Hinkin saw some consistency between the WAIS-R and WAIS-III results, but there were some areas "where there's quite a bit of dissimilarity." (12RHT 2104.) For instance, on the Similarities subtest, petitioner's score was a full standard deviation higher on the WAIS-III. (12RHT 2105, 2110; Ex. 24.) The 2003 score on the Block Design test was also two scaled scores higher, which equaled two-thirds of a standard deviation. (12RHT 2106, 2110.) In 2003, petitioner also performed slightly better on the Information subtest. (12RHT 2110.) The higher scores in the verbal area suggested that petitioner had the ability to learn and, therefore, the prior poor scores were not the result of brain dysfunction. (12RHT 2107.) While a deficit in mental ability was a possibility, it was not a probability. (12RHT 2110-2111.)

c. Absence of Evidence of Brain Damage or Dysfunction to Explain the Test Scores

The divergence between petitioner's verbal IQ and performance IQ scores necessitated an inquiry into why one part of petitioner's brain

functioned better than the other. (12RHT 1995.) However, Dr. Hinkin saw no evidence of brain damage. (12RHT 1996.) Dr. Hinkin opined that the more "straightforward and simpler explanation, is that it's an effective reading problem." (12RHT 1997.)

Regarding Dr. Khazanov's testimony that the brain changes at age 10 or 11, Dr. Hinkin explained that left hemisphere dominance was programmed prior to birth but could be changed up to age 6 or 7 as had been demonstrated by the ability of epileptic children who have their left hemispheres entirely removed to be able to learn language. Older children could not regain language ability. (12RHT 1990-1991.) While advancements in development would need to be considered, "[t]here's minimal reason to suspect that would be present at seven but not a factor at ten." (12RHT 2098.)

Fetal alcohol syndrome would not produce lateralized brain dysfunction. (12RHT 1996.) Dr. Hinkin saw no evidence of neuroimaging that could reveal lateralized disease process. (12RHT 1996.) Structural neuroimaging (such as magnetic resonance imaging) would detect tumors, damage from strokes, or the shrinkage of the brain expected from fetal alcohol syndrome. (12RHT 1997-1998.) Functional neuroimaging detect abnormal brain function and could reveal abnormalities of brain function that would be relevant to the mental retardation question. (12RHT 1998, 2117-2118.) Had such imaging been done and produced positive findings, it would have been useful. But negative results would not demonstrate nothing was wrong. (12RHT 1999.) If Dr. Hinkin had Dr. Khazanov's view of petitioner's brain functioning – wherein she opined that petitioner suffered damage in the left hemisphere, frontal lobe, and parietal lobes – he would have felt it was "clinically incumbent" to request neuroimaging because her opinions about diffuse brain damage implied the possibility of cancer, strokes, or other neoplastic disease. (12RHT 2116-2117, 2120,

2160.) Dr. Hinkin saw no evidence in the voluminous materials that he reviewed that petitioner had undergone neurological testing, which would assess strength, reflexes, sensation, etc., and help identify the presence of neurological disease or disorder. (12RHT 1999.)

The Halstead-Reitan battery was designed to diagnose various neurocognitive problems involving brain damage and does not provide information about IQ relevant to an *Atkins*-type exam. (12RHT 2031.) Dr. Khazanov erroneously interpreted the Halstead-Reitan battery, which she said indicated that petitioner suffered diffuse brain damage. (12RHT 2031-2032.) Dr. Khazanov used outdated norms from the 1950's. Analyzing her results using the more current and accurate normative data, "tests that she was calling impaired were perfectly normal." But even her Halstead-Reitan test results were consistent with the IQ testing in the sense that petitioner performed better on the performance tests. That was exactly the pattern Dr. Hinkin expected from an illiterate person. (12RHT 2032.) On the Category test, using current normative data petitioner fell within the 14th percentile, which was the low end of the average range, even with 107 mistakes. (12RHT 2032-2033.) On the finger tapping test, in which the subject taps a telegraph-type key, petitioner's score was "perfectly normal." Dr. Khazanov omitted the best score, and her explanation that it was produced after petitioner continuing despite being instructed to stop defied credulity since it violated the standards for test administration. (12RHT 2033.) Dr. Khazanov misinterpreted her data to conclude petitioner suffered diffuse brain damage. (12RHT 2034.)

Regarding Dr. Khazanov's memory testing, it was also consistent with petitioner's better non-verbal performance and weaker verbal scores. In Dr. Hinkin's view, there was no evidence of brain damage and the results were consistent with illiteracy. (12RHT 2035-2036.)

d. Petitioner's Illiteracy (not Mental Retardation) Explained His Scores

Approximately one in seven (14 percent) of adults in the United States were functionally illiterate. Because the rate of mental retardation in the general population was one to three percent, it was "far more likely" that petitioner's poor performance on the verbal aspects of the testing resulted from his illiteracy rather than mental retardation. (12RHT 2000-2001; Ex. AA.) Children raised by parents who read to them learn how to read and do better in school. Petitioner's background of a drunken mother and only intermittently present father suggested no one was in the home to assist petitioner in learning these skills. (12RHT 2002-2003.) Petitioner's description of his school attendance and attitude toward school was consistent with Dr. Hinkin's understanding of petitioner's early educational background. (12RHT 2003, 2005.) It was also "very consistent with the type of pattern that we would expect" because school-acquired information became more important as the testing progressed and petitioner's scores would begin to decline. (12RHT 2005.) The school records did not reflect that petitioner was placed in educational classes for mentally retarded individuals. (12RHT 2006.)

Intelligence speaks to how we are able to learn, process, and utilize new information such as problem solving, judgment, reasoning, abstraction, and the ability to handle new situations and is not the same as "I.Q." (12RHT 2008.) The goal for standardized IQ tests is for the score to match the individual's actual level of intellect. However, the tests fulfill that goal better for some individuals than others. (12RHT 2009.) For a "white middle class suburban kid, their I.Q. test score and their level of intelligence are likely to be much more consistent." In contrast, "when you're dealing with an individual who, for whatever reason, they're dissimilar from mainstream . . . the chances of their I.Q. test score and their

level of intelligence differing increase." (12RHT 2009.) Dr. Hinkin agreed with Dr. Maloney's assessment that petitioner was not from the "mainstream" group. (12RHT 2009.)

Historically, African-Americans have scored approximately 15 IQ points lower than their Caucasian counterparts on such tests, a full standard deviation difference using the Wechsler scale metric, although within the last 10 years the gap has narrowed to approximately 10 points or two thirds of a standard deviation. (12RHT 2011.) This difference is not due to anything genetic or intrinsically related to race; rather, race serves as a proxy for discrimination in "educational opportunities, occupational opportunities, the kind of things that would--that would affect IQ test performance." The court decision that prohibited the use of IQ testing in California public schools resulted from the phenomenon that African-American children were being incorrectly diagnosed and misclassified as mentally retarded. (12RHT 2011-2012.) Dr. Hinkin did not agree with Dr. Maloney's position that the solution was to disregard IQ scores entirely. (12RHT 2012.) Dr. Hinkin believed that the test scores could be relied upon, but not heavily relied upon, and keeping cognizant of the error potential based upon socioeconomic factors. (12RHT 2015-2016.)

Concerning the IQ tests administered after petitioner was age 18, Dr. Hinkin reviewed the data with "a fine tooth comb." (12RHT 2019-2020; see Ex. NN.) He agreed with Dr. Khazanov's rescoring of the Information subtest. (12RHT 2020.) For the testing Dr. Khazanov conducted, Dr. Hinkin scored the WAIS-III as a 68 while she scored it as a 67. (12RHT 2024; Ex. NN.) However, going up or down one point was unimportant. (12RHT 2020.) "[I]f you had just that test in isolation with no other data, you know, that could be consistent with somebody who is mentally retarded. It might not be, but it could be." (12RHT 2021.)

Dr. Hinkin disagreed with Dr. Khazanov's insertion of the 2003 Vocabulary subtest results into the WAIS-R. (12RHT 2021, 2099.) While Dr. Hinkin considered the insertion to be "an interesting thought experiment, as data that I would rely upon for an IQ test, it's absolutely not appropriate." (12RHT 2099-2100.) Taking a score from a test administered when petitioner was in his fifties and inserting it into a test taken 19 years earlier was not good scientific practice. (12RHT 2100.) The WAIS-R and WAIS-III differed both in questions and normative data. The WAIS-R testing manual provided a table for calculating prorated scores for omitted subtests because that circumstance often occurred. (12RHT 2100.)

Because petitioner's verbal performance was consistent among the subtests, Dr. Hinkin expected the prorated score to be representative of his performance. The score of two obtained by Dr. Khazanov 19 years later was "disproportionately out of range." (12RHT 2101.) Dr. Hinkin did not take issue with Dr. Khazanov's administration and scoring of the WAIS-III vocabulary subtest, but its retroactive use within the WAIS-R. (12RHT 2102-2103.) Dr. Hinkin also disagreed with Dr. Khazanov's correction within the Comprehension subtest. (12RHT 2103.)

If Dr. Hinkin only had the rescored WAIS-R as the only piece of data, he would not be able to say that petitioner was not mentally retarded. (12RHT 2021.) The rescoring moved his opinion of petitioner's overall thinking "down a tad." (12RHT 2022.) The various standardized tests were normed under specific conditions. Changing the conditions, such as by administering a test in a jail or prison, potentially introduced more error into the testing and certainly would not produce a higher score since incarceration was unlikely to elicit an individual's best performance. (12RHT 2022-2023.)

Petitioner's WAIS-III score was in the mentally retarded range. However, Dr. Hinkin disagreed that the significantly subaverage

intelligence prong was met by this test because mental retardation was distinct from dementia. (12RHT 2024-2025.) The WAIS-III demonstrated how petitioner performed at age 51. (12RHT 2025.) Dr. Hinkin observed that petitioner had suffered from hepatitis C, which could affect the brain, as well as hypertension. (12RHT 2034.) Dr. Hinkin opined that, at the time of Dr. Khazanov's testing, there was no evidence petitioner suffered from brain damage. (12RHT 2034-2035.)

2. Dr. Khazanov's Deficient Methodology

A competently performed neuropsychological evaluation always included a measure of symptom exaggeration. Dr. Hinkin was "aghast" that Dr. Khazanov did not administer a test for malingering, which was comparable to a surgeon failing to wash his hands prior to surgery and the patient surviving without an infection. (12RHT 2029-2030.) One test for malingering was the T.O.M.M. (12RHT 2045.) It was recommended that the test be used at the beginning of the examination because the test was fairly easy, although it looked difficult; therefore, if administered later in the testing sequence, a subject might be able to thwart the test. Waiting to the end of a 12-hour testing process was not consistent with good clinical practice. (12RHT 2046.) While Dr. Hinkin believed that Dr. Khazanov may have "lucked out" in this case, her failure reflected upon her competence and credibility. (12RHT 2029.) Dr. Hinkin believed that the referee should consider that her work was "kind of sloppy." (12RHT 2030.)

Additionally, Dr. Khazanov chose to devote 12 hours to "testing on stuff which is really superfluous and omitting testing of the stuff that was most essential to the question at hand" such as adaptive behavior testing. She did not administer the self-report version of the standardized adaptive behavior test. (12RHT 2046.) Although she acknowledged in her 2003 declaration the importance of using a standardized assessment of adaptive

behavior, she failed to do so. A psychologist does not make up their own adaptive behavior test as Dr. Khazanov did. (12RHT 2047.) She used a homemade, self-constructed, idiosyncratic, untested, unnormed, unvalidated interview. (12RHT 2049.)

3. Adaptive Behavior

Adaptive behavior assessed "street smarts," how the individual functioned "in their own community" – whether the person could independently function or were be victimized or manipulated. (12RHT 2054.) "The test of the adaptive behavior prong is how an individual functions in their daily life in their community. To the degree that they're doing all of the things and they're cumulatively doing more and more, having more and more adaptive strengths and few and few adaptive weakness . . . if they're able to function across the board in their community, then by definition, they wouldn't have adaptive weaknesses." (12RHT 2122.) Mentally retarded individuals had areas of strength and areas of weakness. (12RHT 2123.) Depending upon the strengths and what they were, they could cancel out the deficits in other areas. (12RHT 2125.)

Dr. Hinkin opined that petitioner was *not* mentally retarded. In Dr. Hinkin's view, the subaverage intelligence prong "is probably closer to the mental retardation. I don't think that's it, but that one is certainly in the ballpark. Whereas, I don't see the evidence, at least in the record, for the adaptive behavior prong being close to being met. I mean, he certainly can't read, so as far as that little, that piece of the adaptive behavior criteria is met, but it's almost a circular thing because, you know, that's also part of the reason why he's got the bad I.Q. [score], so it's almost like double dipping." (12RHT 2017.)

Dr. Hinkin opined that the record was inadequate to demonstrate the adaptive behavior prong. That partly resulted from his assessment that Dr.

Khazanov "did not do a good job on this." (12RHT 2073.) However, "particularly looking at the contemporaneous sources and looking at the whole – even the data that Dr. Khazanov is using to support her contention that he has adaptive behavior deficits, with the exception of that literacy piece, I don't see evidence in the record that he has significant adaptive behavior deficits at two standard deviation[s] below the mean had she given a test that is required for the diagnosis." (12RHT 2073-2074.) Based on the data he possessed, Dr. Hinkin opined that petitioner was not mentally retarded. (12RHT 2078.)

Asked whether petitioner's repeated arrested demonstrated that "He wasn't a very good robber," Dr. Hinkin declined to make that assumption "because I don't know what the denominator is" since "we don't know how many crimes he committed." (12RHT 2018.) There was other contemporaneous evidence that petitioner supported himself as a gambler, a pimp, a drug dealer, and ripping off drugs houses. (12RHT 2018.) While there were "holes" due to the passage of time, Dr. Hinkin put more weight on the adaptive behavior evidence that was more contemporaneous to the period in question (pre-18 onset) than testimony recollecting 30 years prior. (12RHT 2150-2151.) In Dr. Hinkin's view, the preponderance of the evidence "suggests that this man is functioning quite well in his community" and satisfied the test for the AAMR and DSM. It was not, however, an incontrovertible issue. (12RHT 2161.)

Dr. Hinkin listened to a recording of an interview of petitioner by police (Ex. PP) and read a transcript of the recording (Ex. OO). (12RHT 2039-2040.) Petitioner's interview with Dr. Maloney, particularly his description of where he drove, reflected good memory for events that transpired six to eight months earlier. Also, petitioner's description during his recorded interview with police and with Dr. Maloney reflected an ability to give directions, which fell within the adaptive behavior prong.

(12RHT 2036.) Petitioner also provided a detailed statement to police and to Dr. Maloney. (12RHT 2037.)

In Dr. Hinkin's view, petitioner's police interview was applicable to the adaptive behavior prong and provided information about his memory, his communication and language skills, his ability to give directions, and his general "social savvy." Petitioner verbally sparred with the detectives and was able to communicate his version of the events. (12RHT 2040.) The type of banter and petitioner's use of humor (responding to the detective's questions about the victim being shot with a question referencing a harpoon) "suggests a higher level of intellect." (12RHT 2041.) Petitioner's discussion and comparison of the car he claimed to have to have bought (the victim's) versus another vehicle that he claimed he really wanted to purchase included statements that petitioner understood that his preferred vehicle was "flashier" and could prompt police interest. (12RHT 2041-2042.) Dr. Hinkin opined petitioner's level of discourse was above that for mental retardation. (12RHT 2042.) Petitioner's discussion of the value of life and the consequences of killing reflected an ability to anticipate consequences, which pertained to the adaptive behavior component of the ability to anticipate what might happen. (12RHT 2043.) It also spoke to petitioner's diagnosis of Antisocial Personality Disorder. (12RHT 2043-2044.)

While Dr. Khazanov decided that petitioner's deficiencies in read and writing satisfied the conceptual domain and excused her from exploring anything else, Dr. Hinkin disagreed. In a "gray area" case such as petitioner's, his performance in all areas would not be uniformly bad and it was important to consider the pattern of strengths and weaknesses. For instance, some of the more simple behaviors such as self-dressing and toileting, would not be impaired in an individual with mild mental retardation. (12RHT 2050, 2129.)

The DSM-IV-TR offered another listing of adaptive behavior deficits that overlapped in some respects with the AAIDD list. (12RHT 2053, 2126; Ex. MM [DSM-IV-TR excerpts].) Dr. Hinkin agreed that petitioner had literacy problems. (12RHT 2051.) Dr. Hinkin noted that using the AAIDD definition of adaptive behavior functioning, the conceptual reading and writing "piece" was "clearly there." (12RHT 2052, 2139.) However, there was mixed evidence that petitioner had language deficits. In face-to-face interviews, Dr. Maloney did not find him to have a "language" problem. Dr. Kaser-Boyd noted some confused speech and a potential hearing problem. In contrast, Kleinbauer characterized petitioner as "articulate." Dr. Sharma described petitioner as conniving and charming. (12RHT 2052.) Petitioner also bantered with police during his lengthy record interview. Thus, the majority of people found petitioner to be able to understand what they asked of him. In Dr. Hinkin's assessment there was a preponderance of evidence that petitioner's language skills were "more or less okay." (12RHT 2053.)

Avoiding victimization was a corollary to gullibility and naïveté. (12RHT 2065.) More contemporaneous reports in 1987 by Gladys Spillman, Rose Davidson, and Shenike Spillman described petitioner as a provider for the family. He was described as always having several hundred dollars on his person and supporting himself as a gambler, a drug dealer, and a pimp. (12RHT 2054, 2058-2059.) When arrested, petitioner possessed $380 and a Bulova watch. (12RHT 2064; Ex. B at 259.) Information that petitioner worked as a pimp, possibly prostituting his wife, was relevant because mentally retarded persons are more commonly used by others than victimizers. (12RHT 2065, 2129-2130.) Dr. Hinkin took this information at face value in the absence of a reason to believe it was specious. (12RHT 2083-2084.) This information tended to demonstrate that petitioner was not mentally retarded. (12RHT 2081, 2129.)

There was evidence that, when he was not incarcerated, petitioner provided financial support to his father, wife, sisters, and girlfriends and that the money was earned through some gainful employment and various illegal activities. Dr. Hinkin did not understand the evidence to demonstrate that petitioner engaged in illicit activities solely at the behest of his father. (12RHT 2146-2148.) In the area of "money concepts," petitioner's description to Dr. Maloney of how he negotiated the price of the victim's vehicle – that the victim wanted $12,000 and he offered $11,000 in cash (even if untrue) evidenced an understanding of money concepts and what would "win the day" in a negotiation. (12RHT 2063-2064.)

Prison records documented petitioner's prior escape and efforts to escape, and they evidenced a "level of planning and guile that was noteworthy." In one instance, petitioner fashioned a dummy in his cell and snuck down the stairs. (12RHT 2066-2067, 2135.) In a recorded phone conversation in which he discussed an escape plan with a female accomplice, petitioner acknowledged the risk created by the fact the woman had given her father the address of the house where petitioner intended to hide. (12RHT 2066-2067, 2137.) These incidents reflect an ability to plan despite the ultimate outcome. (12RHT 2136.) Petitioner did not seem to be naïve based upon the record. (12RHT 2136-2137.)

The declaration of Dernessa Walker confirmed Dr. Hinkin's opinions about petitioner's adaptive behavior. (12RHT 2067-2068; Ex. QQ; Ex. I at 26.) Dr. Hinkin also considered the 1987 declaration of Dr. Terry Kupers, a psychiatrist who interviewed petitioner, important because Dr. Kupers described petitioner "in a manner which is not at all consistent with a mentally retarded person." (12RHT 2068-2069; Ex. RR [Kupers declaration]); see also Ex. I at 30-31.) The description was "diametrically

opposite of what would be typical in a mentally retarded individual." (12RHT 2070.)

While the "reading and writing" concept was the weakest point of adaptive functioning, there was other indications that petitioner was learning to read and write while in prison, enjoyed reading westerns and the Bible, and that he exchanged Bible passages with a correspondent. (12RHT 2070.) The current prison records also indicated that petitioner sought medical treatment. (12RHT 2070-2071.)

Regarding Cleveland's testimony about his relationship with petitioner, Cleveland described himself as smarter than petitioner. Cleveland's testimony demonstrated strengths and weaknesses. (12RHT 2131-2132, 2133.)

While Dr. Hinkin assessed that petitioner gave satisfactory answers to the adaptive behavior questions posed by Dr. Khazanov, she exaggerated his deficiencies. Areas that she categorized as adaptive deficiencies in her declaration were actually adaptive strengths. (12RHT 2050-2051.) As for Khazanov's statement that petitioner could not tell time accurately, petitioner got most of the exercises correct. (12RHT 2056.) Dr. Hinkin saw no evidence that petitioner was a safety risk to himself. (12RHT 2065-2057.)

Regarding the possibility of "masking" or cloaking mental retardation, the same phenomenon applied to people of average intelligence. However, such "bluffs" could be discovered by asking for explanations of behaviors and examining personal history. (12RHT 2061-2063.) Dr. Hinkin noted that the definition of mental retardation required significant deficits in daily adaptive behaviors. (12RHT 2061.)

Dr. Hinkin stated that it was "always better to examine a patient than to offer a diagnosis based on a review of medical records. That said, I do that type of work all the time clinically, at U.C.L.A., at the V.A., in

medical/legal settings. There's cases where I'm doing posthumous psychological autopsy where the person is dead and it's entirely impossible." (12RHT 2077.)

In reviewing the WAIS-R and WAIS-III, Dr. Hinkin did not adjust for the Flynn effect. (12RHT 2087-2088.) The Flynn effect was "something that has arisen and is only being applied solely in the context of *Atkins* hearings." If there was a true concern about the IQ testing norms, the adjustment would be made in all applications, not simply the death penalty context. (12RHT 2089, 2159.) Dr. Hinkin did not adjust any of the scores for the things that could impact normative data. (12RHT 2089-2091.)

ARGUMENT

I. RESPONDENT TAKES EXCEPTION TO THE REFEREE'S FINDINGS IN SUPPORT OF HIS CONCLUSION THAT PETITIONER IS MENTALLY RETARDED WITHIN THE MEANING OF *ATKINS V. VIRGINIA* (2002) 536 U.S. 304 AND *IN RE HAWTHORNE* (2005) 35 CAL.4TH 40 (QUESTION ONE)

The referee concluded that petitioner met his burden and demonstrated that he is "mentally retarded," meaning "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." Respondent takes exception to the referee's selection of the 2010 AAIDD's diagnostic "definition" of adaptive behavior as the legal standard by which the second adaptive behavior component of Penal Code section 1376 may be met. Respondent also takes exception to the referee's factual findings. The specific exceptions to the findings are detailed further below.

A. Applicable Law

1. Standard of Review Following Reference Hearing

This Court has previously articulated the rules for examining the referee's findings on numerous occasions. This Court independently reviews a referee's resolution of legal issues and mixed questions of law and fact. (*In re Johnson* (1998) 18 Cal.4th 447, 461.) This Court has said, "we give great weight to those of the referee's findings that are supported by substantial evidence." (*In re Thomas* (2006) 37 Cal.4th 1249, 1256-1257 [citing cases].) "Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. [Citations.]" (*Ibid.; People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1013 ["In a given case an appellate court might, within its proper role, hold that such a finding was not supported by substantial evidence in the hearing record."].) Nevertheless, "the referee's findings are not binding on this Court. [Citations.]" (*Thomas, supra*, 37 Cal.4th at p. 125.) Rather, this Court must "make the findings on which the resolution of [petitioner's] habeas corpus claim will turn [Citations]." (*Ibid.*)

This Court explained in *In re Hawthorne* (2005) 35 Cal.4th 40, that a determination of mental retardation is a question of fact that "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*Hawthorne*, *supra*, 35 Cal.4th at p. 49; see also *Vidal*, *supra*, 40 Cal.4th at p. 1013.) Following an evidentiary hearing, "[r]eview of any ultimate finding shall conform to established appellate procedures for habeas corpus proceedings. (*Hawthorne*, *supra*, at pp. 50-51.)

2. Law Applicable to the Referee's Findings on Mental Retardation

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321, the United States Supreme Court held that execution of the mentally retarded violates the Eighth Amendment. The Supreme Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' [Citation.]" (*Atkins*, *supra*, 536 U.S. at p. 317.) As this Court earlier recounted, "[t]he California Legislature responded by enacting section 1376, applicable in 'any case in which the prosecution seeks the death penalty.' (§ 1376, subd. (b)(1).)" (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 44.) In *Hawthorne*, this Court observed that Penal Code section 1376 "makes no provision for cases in which the death penalty has already been imposed." (*Id.* at p. 45.) In post-conviction capital cases, this Court has concluded that "tracking [Penal Code] section 1376 as closely as logic and practicality permit—is warranted here, both to maintain consistency with our own legislation and the judicial frameworks adopted in other jurisdictions and to avoid due process and equal protection implications." (*In re Hawthorne*, 35 Cal.4th at p. 47.)

First and foremost, in post-conviction cases "*the petitioner* shall have the burden of proving his mental retardation by a preponderance of the evidence. (See § 1376, subd. (b)(3).)" (*Hawthorne*, *supra*, 35 Cal.4th at p. 50, emphasis added.)

Penal Code section 1376 defines "mentally retarded" to mean "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Pen. Code, § 1376, subd. (a).) In *Hawthorne*, this Court observed, "[t]he Legislature derived this standard from the two clinical definitions referenced by the high court in *Atkins*, *supra*, 536 U.S.

at page 309, footnote 3." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 47.) This Court then quoted from the *Atkins* opinion, which provides as follows:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." [(9th ed. 1992).]
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." [Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).] "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. [*Id.*, at 42-43.]

(*In re Hawthorne*, *supra*, 35 Cal.4th at pp. 47-48.)

This Court stated that, in determining whether a petitioner has proved by a preponderance of the evidence that he is mentally retarded and thus constitutionally exempt from execution, that the hearing court "shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation. [Citations.]" (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 50; emphasis added.)

B. The Referee's Repeated Comments Denigrating the Mental Retardation Inquiry Should Temper Any Deference Afforded to His Findings on Mental Retardation

Apart from the question whether substantial evidence supports individual factual findings, the deference that this Court might otherwise extend to the referee should be informed by the referee's intemperate comments that cast doubt on the referee's devotion to the process and the quality of its findings. More than one year *before* the first witness testified at the reference hearing, the assigned referee became frustrated with the pre-hearing discovery process and pondered aloud, "I'm just sitting here wondering how did I get this?" (1-A RHT C12.) The referee continued, "I'm a hard-working trial court. I try more jury trials than any judge in this building. Try--I've tried more death penalty cases than anybody I know. Why am I assigned to this?" (1-A RHT C12.)

After remarking that the referee had seen a recent opinion from the federal appellate court reversing a 1982 conviction and its frustration at some of the discovery issues bandied by the parties, the referee's subsequent comments suggested a predisposition toward the outcome of the question of mental retardation in order to obviate what the referee saw as a waste of his time and judicial resources: "I understand the difficulties of reconstructing the record on this. *I don't know why the people just don't concede he's mentally retarded and give up on death.*" (1-A RHT C-13.) After the hearing had begun, the referee again expressed frustration about the proceedings and the likelihood of an ultimate reversal of penalty by a higher federal court: "[T]his whole exercise is fairly pointless. But I'm trying to do the best I can to take testimony and to make appropriate rulings based on the evidence that I hear." (2RHT 415; see also 3RHT 492 ["this whole thing is beyond me. I think everybody would be better off with a different judge. But be that as it may, I've been assigned this matter so I'm

trying to do what I can with it."]; 4RHT 684 [referee apologizes for "the intemperate comments of the court at various times during this proceeding. I well realize this is a serious matter"]; 13RHT 2323 ["I'm a trial judge. I do not do appellate matters and I am uncomfortable and I have been uncomfortable presiding over this matter. I do not think, and I have earlier said I do not think I was an appropriate judge for this matter. I've done my best and I will do my best."].)

After the hearing concluded and during the midst of oral argument, the referee expressed confusion and frustration about the legal principles and concepts to be applied to make a determination on the mental retardation question:

> I am so confused by this whole area. Nobody tells us anything. [¶] The Supreme Court says if you're mentally retarded you can't be executed but we're not going to define mental retardation. We're going to leave it up to the State. And the state defines it but they don't give us a cut-off number for whatever reason in California. [¶] So we have that and we have the cases all over the place. [¶] You know, what is a judge to do? [¶] I don't really know. [¶] I'm just disgusted by this whole area that here we are sitting how many years later and we're trying to figure out is this man today mentally retarded because of what he did when he was less than eighteen years of age. *It is stupid. That's all I can say. It is a stupid exercise that we find ourselves in.*"

(14RHT 2441; emphasis added.)

This Court should not afford deferential treatment to the referee's findings relevant to mental retardation, but should instead independently review the record to determine whether Lewis has proved by a preponderance of the evidence that he is mentally retarded.

C. The Referee Selected a Legal Standard for "Adaptive Behavior" Not Endorsed by Either *Atkins* or *Hawthorne*

Respondent takes exception to the referee's selection of the 2010 AAIDD's diagnostic "definition" of adaptive behavior as the legal standard by which the second adaptive behavior component of Penal Code section 1376 may be met.

In the Report's opening discussion of the applicable legal principles, the referee surveyed the various diagnostic psychological resource materials in existence at the time of the *Atkins* decision in 2002 as well as the revisions to those clinical resource materials subsequent to the decision in *Atkins* and the enactment of Penal Code section 1376. (Report, pp. 3-7 & fns. 2-4.) In footnote 3 of this discussion, the referee made the following observations about the current psychological resource materials and their "clinical definitions" of mental retardation:

> While the AAIDD's definition of mental retardation (intellectual disability) in the 10th and 11th editions differs from the 1992 definition in the 9th edition cited by Atkins, the parties agree and the referee accepts all three editions as authoritative. Due to the evolving nature of the study and assessment of mental retardation (intellectual disability), the referee accepts the AAIDD's 2010 Intellectual Disability [Definition] (the 11th edition "Green Book") as the most current authority on this subject.

(Report, pp. 5-6, fn. 3, emphasis added.)[8]

The referee concluded the section of the Report with the statement, "The referee accepts for purposes of this hearing, Lewis must prove by a preponderance of the evidence that he is mentally retarded by proving he

[8] Respondent does not disagree that, at the time of the hearing, the 2010 AAIDD clinical definition was the most current (i.e., "recent") published clinical reference "authority" on the subject.

(1) has significant subaverage general intellectual functioning, and (2) significant deficits in adaptive behavior, which (3) were manifested before the age of 18. (*Penal Code Section 1376.*)" (Report, pp. 6-7.)

Later, when addressing the adaptive behavior component of the mental retardation finding, the referee relied upon the 2010 AAIDD definition to define "adaptive behavior" as follows:

> The AAIDD further defines these criteria to include the following:
>
> *Conceptual skills*: language, reading and writing; and money, time, and number concepts
>
> *Social skills:* interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e. wariness), 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).)

> Evidence of significant limitations in one of the three criteria or "domains" is sufficient to meet the adaptive behavior prong for mental retardation. [Footnote omitted.]

(Report, p. 20, citing 2010 *Intellectual Disability Definition*, p. 46.)

The referee expressly stated that he "[found] it unnecessary to consider the DSM-IV TR criteria, and chooses to use the more current AAIDD criteria." (Report, p. 21, fn. 32.)

In *Hawthorne*, this Court observed, "[t]he Legislature derived this standard from the two clinical definitions referenced by the high court in *Atkins*, *supra*, 536 U.S. at page 309, footnote 3." (*Hawthorne*, *supra*, 35 Cal.4th at p. 47.) More recently, this Court repeated that the definition of mental retardation in section 1376 is "derived from, and is consistent with

[the] widely used clinical standards" cited in *Atkins*. (*Vidal*, *supra*, 40 Cal. 4th at p. 1011.) A comparison of the 1992 AAMR definition and the 2000 APA (DSM) definition recited in *Atkins* reveals they are virtually identical and both require a finding of two deficient areas among eleven specified areas of adaptive behavior. (*Hawthorne*, *supra*, 35 Cal.4th at p. 47-48.)

In her declaration filed in this Court in 2003, Dr. Khazanov relied upon the 1992 AAMR definition and the DSM-IV-TR. (Ex. 13 at ¶ 121-123, 126.) At the reference hearing, Dr. Khazanov (petitioner's expert) testified that the APA Diagnostic Statistical Manual IV (DSM-IV-TR) is used by the psychological community for purposes of *consistent diagnosis*. (8RHT 1290-1292; Ex. 23 at 3.) However, Dr. Khazanov opined that the 2000 DSM-IV definition was "lagging behind." (8RHT 1312, 1318.) Instead, Dr. Khazanov used "adaptive functioning" as defined by the AAIDD in 2002 ("Red Book") and 2010 ("Green Book"). (8RHT 1301-1302, 1311; Ex. 23 at 6.)[9]

The meaning of section 1376 is not dictated by psychological societies or the opinion of an expert testifying in a reference hearing. To the extent the California Legislature intended that the assessment of the adaptive behavior element of mental retardation be defined using the definitions outlined in *Atkins* and reiterated in *Hawthorne*, respondent takes exception to the referee's selection and application of the 2010 AAIDD definition.[10] In other words, the definition used the referee has not been

---

[9] Dr. Khazanov repeatedly and mistakenly referred to the "Green Book" as published in 2009 during her testimony and in her demonstrative power point presentation (Ex. 23).

[10] CALCRIM No. 775, the jury instruction devised for use in *pre-conviction cases* governed by Penal Code section 1376 tracks the terminology from the 1992 AAMR and 2002 DSM-IV as specified in the *Atkins* decision. Indeed, the instruction directs juries that the defendant prove by a preponderance of the evidence that "he also has deficits in two

(continued...)

adopted by our Legislature or our courts, is inconsistent with the definition set forth in *Atkins* and *Hawthorne*, and should not have been used in deciding Question 1.

D. Allocation of "Lesser Weight" to Dr. Hinkin's Testimony

Respondent takes exception to the referee's finding that "[Dr.] Hinkin's testimony is entitled to lesser weight than that offered by the other experts." (Report, p. 27.) The referee's determination to place "lesser weight" on Dr. Hinkin was premised upon two factors: "[he] will receive more than $60,000 from respondent for his services in this case" and did not personally interview petitioner. (Report, p. 27; see also Report, p. 11.) Respondent takes exception to this finding and determination.

Respondent agrees that both factors are relevant considerations in assessing credibility of witnesses. (Evid. Code, §§ 722(b), 780.)[11] However, on this hearing record, the referee's decision to afford "lesser weight" to Dr. Hinkin's testimony hinges upon the referee's disgust over the money and time consumed in the process this Court directed it to

---

(...continued)
or more areas of adaptive behavior" which were "observable before the defendant reached the age of 18 years. [¶] *Adaptive behavior* is the set of learned skills that people generally need to function in their everyday lives. Those skill areas include communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academics skills, work, leisure, health and safety." (Italics in original.)

[11] Evidence Code section 722, subdivision (b), provides: "The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." Pursuant to Evidence Code section 780, factors relevant to a determination of a witness's credibility include "(f) The existence or nonexistence of a bias, interest, or other motive."

undertake rather than a true weighing of Dr. Hinkin's credibility. This is particularly true when considered in the context of the referee's initial protestation that "*I don't know why the people just don't concede he's mentally retarded and give up on death*" (1-A RHT C-13, emphasis added) and his repeated exhortations that "this whole exercise is fairly pointless" (2RHT 415), "this whole thing is beyond me" (3RHT 492), and "I'm just disgusted by this whole area that here we are sitting how many years later and we're trying to figure out is this man today mentally retarded because of what he did when he was less than eighteen years of age. *It is stupid. That's all I can say. It is a stupid exercise that we find ourselves in*" (14RHT 2441, emphasis added).

Rather than express a true determination of "bias" relevant to credibility or an effort to assess the factual foundation of Dr. Hinkin's opinions, the referee's finding and decision to afford "lesser weight" to Dr. Hinkin's opinions gives the appearance of a result-oriented excuse to disregard substantial evidence corroborative of Dr. Maloney and Dr. Sharma and critical of Dr. Khazanov. The referee's decision certainly did not turn upon Dr. Hinkin's qualifications since the referee cut short an exploration into his qualifications, stating, "I'm accepting him as an expert. I think he's certainly well qualified. My goodness, he's written hundreds of articles on different things." (12RHT 1965.) In contrast, Dr. Khazanov did not perform research and had never published any articles on *any subject*, including mental retardation. (9RHT 1542.)

To the extent Dr. Hinkin's compensation was relevant to an assessment of his potential bias, his compensation did not stop Dr. Hinkin from giving an opinion that petitioner's general intellectual functioning as measured by the IQ tests put him in a "gray area" – a position confirmed by Dr. Maloney who had personally conducted testing of petitioner in 1984, much closer to the relevant time frame (prior to age 18) than Dr. Hinkin or

any other post-conviction expert to possibly achieve. Dr. Khazanov was presumably paid less than Dr. Hinkin. (Ex. B at 48-49 [in 2003 Dr. Khazanov billed $200 per hour].) However, Dr. Hinkin's higher hourly rate is arguably commensurate with his board-certification (versus Dr. Khazanov's lack of board certifications), research and academic backgrounds, and other qualifications. Dr. Hinkin will necessarily be paid more than Dr. Khazanov for any comparable enterprise. Moreover, Dr. Hinkin had voluminous materials to review, and it certainly was not inappropriate for him to watch the hearing testimony rather than read it. Because petitioner *chose not to call either of the defense trial experts* (Dr. Maloney and Dr. Sharma) and did not recall Dr. Khazanov, Dr. Hinkin inevitably reviewed and considered more material than she did.

Finally, while Dr. Hinkin did not personally interview petitioner, the impact of that decision upon his credibility should be tethered to an assessment of how it impacts the foundation for his opinions. In these post-conviction cases, the mental retardation inquiry is necessarily a retrospective analysis based upon historical events. Petitioner was nearly 59 years old at the time of the reference hearing. Nothing in the hearing record supports a finding that a personal examination of petitioner by Dr. Hinkin *in 2010 or 2011* (seven or eight years following Dr. Khazanov's 2003 interviews) would provide stronger and more satisfactory evidence on the issues of petitioner's intellectual or adaptive functioning before the age of 18 than the materials Dr. Hinkin reviewed. Those materials were eminently more contemporaneous to the relevant time period (prior to age 18) than either Dr. Khazanov's observations or testing in 2003 (when petitioner was 51 years old) or any assessments made after the appointment of the referee in January 2009. Those materials included the results of eight IQ tests administered to petitioner before he was 18 years old, school records (Ex. Z), a recording of a portion of petitioner's interview by

detectives in November 1983 (Ex. OO [transcript], PP [recording]), the 1984 WAIS-R and Quick Test results and interview notes of Dr. Maloney (Ex. B at 188-208), Dr. Sharma's 1984 report (Ex. B at 303-305), and Dr. Terry Kupers' July 1, 1987 declaration documenting a two-hour interview conducted with petitioner on May 16, 1986 (Ex. RR). Dr. Hinkin also heard the descriptions offered by people who knew and interacted with petitioner when he was a child (Larry Cleveland, Stephen Harris, John Williams) and a teenager or young adult (Georgia Agras, Deborah Helms) and reviewed the 1986 videotaped interviews of petitioner's sisters and niece (Exs. 19, 19A, 20, 20A, 21, 21A). Additionally, because petitioner *chose not to call either of the defense trial experts* as witnesses, Dr. Hinkin (but not Dr. Khazanov) had the benefit of hearing Dr. Maloney's explanation of his testing process, notes and observations made in 1984 and his views as to why petitioner's test results did not prompt him to consider petitioner to be mentally retarded in 1984.

Ironically, during the hearing the referee openly criticized the exaggerated interpretations Dr. Khazanov drew from the adaptive behavior assessment made during her personal interview with petitioner in 2003, noting that Dr. Khazanov made "such strong statements in [her] summary" (9RHT 1604, referring to Ex. II at ¶ 24 [Khazanov declaration]) and offering the view that Dr. Khazanov's conclusions "seem overstated" (9RHT 1628). Dr. Khazanov's personal interaction with Lewis was confined to the unique circumstances of her neuropsychological testing, which was conducted when Lewis was 51 years old and had been confined in San Quentin for nearly 20 years with the corresponding restrictions of experiences inherent in his confinement.

Based on this record, the referee's decision to place "lesser weight" on Dr. Hinkin's testimony should not be afforded deference by this Court.

E. Findings On Significant Subaverage General Intellectual Functioning

Respondent takes exception to the referee's finding that petitioner suffers from "significantly subaverage general intellectual functioning." (Report, pp. 12-20, 26-27.) Exceptions to specific areas of erroneous findings are addressed below.

1. The Referee's Wholesale Rejection of All Tests Other than the WISC and WAIS Is Not Supported by Substantial Evidence

Respondent takes exception to the referee's rejection and disregard of the 1959 Stanford-Binet Form L test result and the six other intelligence tests administered to petitioner prior to age 18 – with the exception of the WISC administered in 1963 – because the finding contradicts the substantial evidence presented.

In his Report, the referee made findings as follows:

> The experts agreed that the most reliable test was the Wechsler Intelligence Scale for Children (WISC) given to petitioner shortly before his eleventh birthday. [FN 19 omitted.] Dr. Hinkin felt the Stanford-Binet was also reliable. [FN 20 omitted.] Dr. Maloney disagreed, calling the Stanford-Binet "the most biased" of the tests because it "was normed on white young people." (10 RHT 1735; 11 RHT 1766.) [FN 21omitted.]"

(Report, p. 15.)

After creating this seeming "conflict," the referee resolved it by concluding, "Based on the evidence, the referee finds petitioner's WISC score in 1963 to be the most reliable assessment of petitioner's then existing IQ. The referee further finds the other tests administered to petitioner prior to the age of 18 to be of questionable reliability." (Report, p. 16.) Respondent takes exception to these findings.

The eight intelligence tests known to have been administered to petitioner prior to age 18 are listed on Table 1 of the Report. (Report, p.

12; Ex. G; Ex. Z.)[12] The six different IQ tests administered to petitioner between April 14, 1959 and May 21, 1963 (grades 1-4), included the individually administered Stanford-Binet Form L in November 1959 and the Wechsler Intelligence Scale for Children ("WISC")) in May 1963 plus four tests designed for administration to groups. (Ex. Z at 6.)

The referee's decision to disregard petitioner's Stanford-Binet result due to "bias" and "unreliability" contradicts all the experts and extant psychological resource authorities. According to Dr. Khazanov, the standardized tests recommended by AAIDD and APA include the WISC (for children between the ages of 3 and 16) and the WAIS (for adults), *and the Stanford-Binet.* (8RHT 1336; see also Ex. 23 at 9.) Even the 2010 AAIDD "Green Book," which she determined to be "authoritative" (Report, pp. 5-6, fn 3.), refers to the Stanford-Binet Intelligence Scale on equal footing with the Wechsler scales. (*2010 Intellectual Disability Definition*, p. 32; see also 12RHT 2097 [DSM, Red Book, and all the authoritative sources agreed with the inclusion of the Stanford-Binet].)

The finding also blatantly mischaracterizes the reference hearing evidence by divesting it from its context. Dr. Maloney's actual testimony about the "bias" of the testing was given in response to a question from the referee concerning the reliability *of the 1970 WISC test* when administered

---

[12] Table 1 was derived from Petitioner's Exhibit 23 and Respondent's Exhibit NN. (Report, p. 12 & fn. 14). Table 1 erroneously identifies the second test as the "Standard Binet"; it is the Stanford Binet Form L. (Ex. Z; see Ex. BB.) Also, both Table 1 and Exhibit NN erroneously list the date for the Lorge Thorndike Form 3 A-V test as "8/16/1963." School records reflect that it was administered on May 16, 1963, five days prior to the WISC and shortly before petitioner's eleventh birthday. (Ex. Z.)

To the extent Table 1 constitutes factual findings by the referee, respondent takes exception to the erroneous information.

to "people from the socioeconomically deprived areas[.]" Dr. Maloney answered:

> A. "None of those tests are [reliable].
>
> Q. The Court: All of the tests are not reliable? Is that what you're saying?
>
> A. They don't take into consideration his background factor. In fact, the most biased one there is the Stanford-Binet. He gets a fairly good score there.
>
> Q [By respondent's counsel]: [¶] You're talking about the 83 on the Stanford-Binet form 'L'?
>
> A. Yes.

(10RHT 1735-1736, emphasis added.)

Subsequently, Dr. Maloney explained that "bias" of the Stanford-Binet test derived from it having been "normed on young white people." (11RHT 1766.) For that reason, it was "problematic" "to use with people who have learning deficits or lack of enriching experiences during early years" (11RHT 1940). In other words, petitioner's IQ score of 83 on the Stanford-Binet may *underestimate* intelligence in a person (like petitioner) who falls outside the norms on which the Stanford-Binet test was developed. (11RHT 1941.)[13] Indeed, Dr. Maloney repeatedly voiced the opinion that *none of the tests administered to petitioner while he was in grade school, including the WISC,* were scientifically valid measures of his

---

[13] The referee's comments during oral argument reflect that its interpretation of the testimony offered by Dr. Maloney and Dr. Hinkin about the bias and reliability of the Stanford-Binet and the other tests due to their reliance upon only Caucasian children for norming misunderstood and disregarded the substantial evidence in the record. (See 14RHT 2407; 14RHT 2415 ["If you're going to argue to me that, hey, Judge, you've got to throw the scores out because he's from a lower socioeconomic class and they're meaningless and I accept that as an argument."]; 14RHT 2416-2426.)

intelligence because they failed to take into account petitioner's background. (See 10RHT 1735, 1778-1779.) Despite these concerns, Dr. Maloney testified that a person cannot *accidentally* get a high score on an intelligence test. (10RHT 1736.) Dr. Maloney saw nothing positive in petitioner's history that would cause a test result to be artificially high. (11RHT 1817.)[14]

Instead, Dr. Maloney advocated a totality approach that examined all test scores rather than focusing on individual scores: "[I]t's very risky to look at them *as specific measurable points*. There's too much error variance. The standard error of measurement, it's three or four points. So *you really have to look kind of at ranges*. That number [the WISC], depending on when it was done, who did it and so forth, could range from 66 or so to 74. So you look at the other scores that top one, 89 percent – IQ of 89, 85 would put you at the 15 percentile. So the Stanford-Binet is a little below. 89 is a little higher than that. 83 on the Revised Beta at the bottom is probably 13 percentile compared to the normal population. They're different tests, they're different numbers." (11RHT 1778-1779, italics added.) In reviewing petitioner's range of test scores (Ex. 23 at 10), Dr. Maloney opined, "If you look at these scores, at 6 he's 89; at 7, 83; 7, 78; 9, 82; 10, 70; is his intelligence really changing that much in those years *or are there assessment or measurement problems*? *I tend to think the latter*." (11RHT 1782.)

Indeed, Dr. Maloney agreed that the following comments made about tests administered in 1968 reflected his thinking: "His scores as listed are meaningless for subject is not academic or vocationally oriented. He may

[14] As part of this discussion the referee observed: "Clearly if these factors are in play, they could result in a test score that is not accurate and reliable, that's what I get. *And that it would be an understatement of his actual ability*." (11RHT 1818.)

be able to function as a dull normal, but that surmise is a projection based on his non-verbal S.R.A. score." (11RHT 1783-1784; Ex. G.) "Dull normal" was usually above the cutoff for mentally retarded. (11RHT 1784.)

In deciding to disregard and reject all test results except the WISC/WAIS scores, the referee also erroneously found that the Stanford-Binet results were *not inconsistent* with a finding of mental retardation: "Maloney also said that while one cannot 'accidentally' score high on an intelligence test, the 83 score attributed to petitioner on the Stanford-Binet was at the 'high-end' of the 'borderline range' *for mental retardation* of 70 to 84. (10 RHT 1736, 1737.)" (Report, p. 15, fn. 21; emphasis added.) Respondent takes exception to this erroneous and assertion.

All experts agreed that petitioner's 83 IQ score on the November 1959 Stanford-Binet L (at age 7 & 1/2 years old) estimated his intelligence to be at the high end of the borderline range of intelligence, an intelligence range above that for mental retardation. (Dr. Khazanov: 9RHT 1483-1484; Dr. Maloney: 10RHT 1736-1737, 11RHT 1937-1938, 1941-1942; Dr. Hinkin: 12RHT 1988 [eight or nine of 11 tests not consistent with mental retardation]; 12RHT 2005-2006 [Dr. Hinkin: the IQ test scores obtained before Lewis reached age 18 "with one or two exceptions, [were] for the most part far in excess of the range that would be consistent with mental retardation"].) In other words, all experts agreed the Stanford-Binet result was *inconsistent* with mental retardation.

The referee conflated the intelligence range referred to as "Mental Retardation" with the intelligence range defined as Borderline Intelligence, the level above that for mental retardation. (See *In re Hawthorne*, *supra*, 35 Cal.4th at pp. 47-48, citing to *Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fns. 3 & 5 [mild mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70; "'It is estimated that

between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'"]; see also Ex. MM [Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) (hereafter "DSM-IV-TR"), pp. 41-42 [showing four levels of mental retardation to range between IQs below 20 or 25 to a "level 50-55 to approximately 70"].)

As Dr. Maloney subsequently repeated, although a number of reasons may explain why an individual might perform *worse* on an IQ test than his true level of intellect, "You can't do better. *If someone is mentally retarded*, you're not going to see scores as 89 on the Kuhlmann-Anderson. Or even when he was 16, that non-verbal I.Q. of 99 on the Thurstone Primary Mental Abilities S.R.A." (12RHT 1989-1990, italics added.) *In accord with Dr. Maloney*, Dr. Hinkin found it significant that petitioner's scores prior to age 18 included scores in the middle to high 80's and 99: "someone who is mentally retarded is not going to be able to get a 99 I.Q., a 89 I.Q." (12RHT 2026.)

Also in accord with Dr. Maloney, Dr. Hinkin opined that while the various tests could be reasonably given different weight (12RH 1990), they all needed to be considered in assessing petitioner's intellectual functioning. (12RHT 2025-2097.) Most specifically, the reason *why* petitioner performed more poorly on the verbal IQ tests than the performance tests rasied a fundamental question: Did petitioner's scores result from illiteracy or brain dysfunction? If petitioner had a "bad brain, then why is he doing so good on the non-verbal skills. If he's got a bad brain, and this is also where the adaptive behavior prong comes in, then why he is able to cut it on the street and adaptively behave in a normal fashion?" (12RHT 1995.)

The referee's determinations that it need only consider the 1963 WISC and that it could disregard all the other tests administered to petitioner before he turned 18 years old due to "unreliability," and that it could also disregard the November 1959 Stanford-Binet due to its "bias" are contradicted by substantial evidence in the record.

2. Findings Rejecting Possible Lack of Motivation and the Impact of "Socioeconomic Bias" Are Not Supported by Substantial Evidence

Respondent takes exception to the referee's finding that evidence of "petitioner's possible lack of motivation is inconsistent and speculative [fn. 27 omitted] and belied by the fact that petitioner's WISC full scale score of 70 is remarkably consistent with his scores on the WAIS-R (71) and the WAIS-III (67)." (Report, p. 18.) Subsequently, the referee stated, "[it] is impossible to know how much, if any, adjustment should be made in petitioner's IQ scores for socioeconomic factors. In light of the AAIDD's recent pronouncement that adjustment of IQ scores for such factors should not be made, the referee declines to make any adjustment to the scores." (Report, p. 19.) Respondent takes exception to these findings.

a. Lack of Motivation

Respondent takes exception to the referee's finding regarding possible "lack of motivation" because it ignores substantial evidence presented in the record. In 1984, Dr. Maloney questioned petitioner's motivation when he took the WAIS-R based on the number of "don't know" answers petitioner provided. "We hope to get people to give an answer even if it's wrong. When they--when you get the series of I don't know, you don't really know--we may think these are great tests. *Some people say this is a drag, I don't want to do it*, and that's why I have that note there [on page 189 of Exhibit B]." Although petitioner's full scale IQ score of 73 on the 1984 WAIS-R *placed him compared to national norms at 3 percent*, Dr.

Maloney testified: "But as we've already talked, *he doesn't come from that background. So even at that, he's not scoring solidly in the mentally retarded range. [¶] If his motivation is compromised, it makes his score go lower.*" (10RHT 1739, emphasis added.)

Dr. Khazanov had no evidence as to what petitioner's motivation was on May 21, 1963, when he took the WISC and scored a 70 full-scale IQ but conceded that petitioner's motivation could have impacted his performance on the test. (9RHT 1489-1490, 1495; Exs. Z, NN.) On the other hand, in 2003, as part of her clinical assessment, Dr. Khazanov asked petitioner about school. Petitioner told her he "'*never liked school*' except math …& spelling. Kindergarten failed. Difficult to be separated from mother. *Joker in school.* [] Got [] swats, detention. *Missed lots of school. Would sleep in class*. Had problems reading. Became embarrassed when couldn't read aloud in class. Learned to read and write in prison per Robert, age 16 or older. *Age 10 to 11 stopped going to school.*" (9RHT 1487; Ex. JJ at 316; ellipsis in original notes & emphasis added.) Dr. Kaser-Boyd's notes on the WAIS-R "Record Form" indicate under "Education," "4th or 5th" and also indicate "Very poor Ed[ucation]. In & out of jail since 13[.] From 6th on I never did [anything in school.]" (Ex. B at 188, 10RHT 1721-1722.)

When asked how frequently petitioner and Cleveland played hooky from school, Cleveland testified, "Probably every day sometimes." (3RHT 550; see also 3RHT 520.) They would "[p]robably go to school and [at the] first recess take off." Cleveland explained, "[b]ack in those days" "[t]hey just passed you to the next grade. *They didn't care if you went to school or not.*" (3RHT 550; emphasis added.)

Earlier, in a January 11, 1973 "Social Evaluation" completed after petitioner was sentenced to state prison for robbery, the following information appears: "Prior to [petitioner's] first commitment to juvenile camp, he had been indefinitely suspended because of his impulsive stealing

habits. He readily admitted he did not like school, learned very little and was truant a great deal. He describes his associates, during his formative years, as the delinquent nonconforming element and stated he had been involved in numerous gang activities." (Ex. A at 2775.) petitioner's 1973 account of his schooling history was consistent with the account he gave to Dr. Khazanov in 2003 and provides clear evidence of an additional reason *why* petitioner would not have performed to the best of his abilities in May 1963, when he took the WISC (IQ 70) and Lorge Thorndike Form 3A-V (verbal 57) and received his two lowest overall scores. (See Ex. Z.) At that point, petitioner had stopped applying himself in school and was deeply involved with "the delinquent non-conforming element" which included Cleveland by his own admission. As petitioner's father told Maloney in 1984, petitioner's "peers [were a] real rough bunch" and "[a]ll they wanted was something for nothing and to see what they could get away with." (10RHT 1705-1707, Ex. B at 235, 236.)

Petitioner's possible lack of motivation is neither inconsistent nor speculative. Having lost interest in school, devoted himself to playing "hooky" with Cleveland, and coming from an admittedly disadvantaged background, his literacy and background inevitably impacted his test performance. There is sufficient evidence of lack of motivation in the record to conclude that petitioner's IQ test scores on the May 1963 tests (WISC and Lorge-Thorndike Form 3A-V) potentially underestimated petitioner's intellectual functioning.

b. Socioeconomic Factors (including Literacy)

Substantial evidence also contradicts the referee's finding that socioeconomic factors should not be considered in assessing petitioner's test scores and general intellectual functioning. (Report, p. 19.)

In previously stating that no fixed cut off IQ score exists under California law, this Court noted "that significantly subaverage intellectual

functioning may be established by means other than IQ testing. *Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment.* [Citation.]" (*Hawthorne, supra*, 35 Cal.4th at p. 48, emphasis added.) Here, both board-certified forensic experts (Dr. Maloney and Hinkin) affirmed this scientific proposition and opined that petitioner's particular personal disadvantaged background would negatively impact his performance on the IQ tests.

With his unique and extensive experience with individuals from disadvantaged backgrounds through his work on the Los Angeles County forensic psychologist panel since the 1970's and as Mental Health Clinic Director for the Los Angeles County Jail System since 1997, Dr. Maloney testified, "*Persons from Mr. Lewis' background will always score low on these kinds of tests, lower than probably their level of intelligence.*" (10RHT 1728, emphasis added.) As Dr. Maloney explained, petitioner received limited education and "[h]e was removed from intercourse and regular life probably around 12 years of age. So there's a lot of disadvantageous factors with a man like this. We know that ahead of time." (10RHT 1728-1729.) Petitioner's background was not in Dr. Maloney's opinion "mainstream." (11RHT 1937-1938.)[15] Dr. Maloney had the WAIS-R administered to petitioner "with the anticipation he's gonna be lower than average, and one of the issues at hand was – did relate to his level of intelligence, and I believe we got results that were in the 70's, low 70' s. At that time the cut-off for mental retardation would have been 70, IQ 70. [¶] So the fact that I anticipate he's gonna score lower and

[15] Dr. Hinkin agreed that Petitioner was not from the "mainstream" group. (12RHT 2009.)

he scores at 70, in a very gross way I'm saying he's not as low as many people from his background." (10RHT 1729.)

Dr. Maloney explained, "It is not like giving – taking temperature. *They're just ranges of levels of functioning. You got to look at what advantages a person may have had, what disadvantages a person may have had. You have to take the whole background in consideration.*" (10RHT 1730; emphasis added.) In other words, as an evaluator "*you have to be cognizant of a lot of variables with a person's background, and numbers on these kinds of standardized tests are not accurately represented.*" (10RHT 1731; emphasis added.) "So to me, it's very risky to use an absolute score and say this means thus and such, especially with these subgroups in our population that are different. And it's--poverty is an issue. Experience in infancy is an issue. Learning in school is an issue." (10RHT 1750.)

As Dr. Hinkin explained, historically African-Americans have scored approximately 15 IQ points lower than their Caucasian counterparts on such tests, a full standard deviation difference using the Wechsler scale metric, although within the last 10 years the gap has narrowed to approximately 10 points, equaling two thirds of a standard deviation. This difference is due to educational opportunities, occupational opportunities, and other things that affect IQ test performance. (12RHT 2009-2012.) Dr. Khazanov also confirmed that, *thirty years ago*, African-American children scored 10 to 15 points lower than European children on these intelligence tests. (8RHT 1405.)[16] Petitioner's 1963 WISC score and his 1984 WAIS

---

[16] To place this point differential in perspective, a mainstream Caucasian student who scores 85 on the WISC or the WAIS scores at one point higher than the high end of the Borderline Intelligence range (i.e., 70-84). (10RHT 1736-1737 [Dr. Maloney].) The nonmainstream African-American student who scores 15 points or one standard deviation lower than his or her white counterpart scores at 70, two standard deviations

(continued...)

score fall within this general historical time period. Still, Dr. Khazanov, who admittedly does this type of work "very part time" (8RHT 1437), opined that petitioner's Wechsler test scores were sacrosanct.

Here, the referee was ignored substantial evidence by failing to consider well-known and documented deficiencies in the validity of intelligence test instruments to measure general intellectual functioning for individuals with backgrounds like petitioner's, who were outside the "mainstream" on which the test was normed. The WAIS-R administered to petitioner was published in 1981 and was normed on 3,000 people drawn from the United States Census population based upon education level, geographic area, occupational position of the primary worker in the family, and other characteristics. (10RHT 1728; 11RHT 1879-1880.) The subset corresponding to his circumstances, if represented at all, was necessarily a tiny number.

Substantial evidence as to petitioner's admittedly disadvantaged non "mainstream" background and lack of literacy provides support for the conclusion that his test performance underestimates his general intellectual functioning.

(...continued)
below the mean of 100. "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." (Ex. MM, DSM-IV-TR, p. 41.)

Litigation concerning the racially-correlated misclassification of individuals due to the use of intelligence testing ultimately resulted in a prohibition against California public schools from utilizing standardized tests for the purpose of placing students into educational mentally retarded classes. (*Larry P. by Lucille P. v. Riles* (9th Cir. 1984) 793 F.2d 969.)

3. The Referee Failed to Make the Fundamental Factual Finding Whether Petitioner Suffered Brain Damage or Dysfunction that Created Mental Retardation

In making the ultimate finding on general intellectual functioning, the referee stated, "The evidence is compelling that petitioner's general intellectual functioning is subaverage and was manifest before the age of 18. His IQ scores on the Wechsler tests are remarkably consistent – 70 in 1963, 71 in 1984, and 67 in 2003 – and fall well within the cutoff score for mental retardation of 75." (Report, p. 19.)[17] However, in reaching this determination, the referee stated, "The referee finds it unnecessary to the finding of mental retardation to decide whether petitioner has brain damage." (Report, p. 22, fn. 34.)[18] Respondent takes exception to the referee's determination that a resolution of the disputed and critical existence of brain damage or dysfunction was not necessary to its ultimate factual finding about mental retardation.

All the experts agreed that petitioner was illiterate. In 1984, the WRAT administered to petitioner indicated that his phonetic reading was at the third or fourth grade level. (10RHT 1751; 11RHT 1779, 1911.) Dr.

---

[17] Earlier, the referee made a related finding: "Petitioner's WISC 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." (Report, p. 16.) The referee repeated this observation, "Petitioner's scores on the WAIS-R and WAIS-III subtests are very similar and present a consistent profile which appears to be reliable. [FN 29 omitted]." (Report, p. 18.)

[18] It appears the referee's forbearance on the question applied to brain damage pre-dating Petitioner's eighteenth birthday. The referee made a different finding relating to brain dysfunction originating since Petitioner's incarceration as follows: "The consistency in petitioner's scores on the Wechsler tests over 41 years also supports the view that his low WAIS-III score of 67 in 2003 is not the result of dementia. (Khazanov, 8 RHT 1392.)" (Report, p. 18.)

Maloney considered an adult who read at the third or fourth grade level to be illiterate. (11RHT 1779-1780.) Dr. Hinkin opined that "Mr. Lewis is illiterate, functionally illiterate. He can't read, you know, worth a darn." (12RHT 1992.) To Dr. Khazanov, the WRAT provided evidence that petitioner could not read or write. (9RHT 1607, 1610.) Dr. Khazanov agreed that the verbal IQ score for an illiterate person would be significantly lower than a true reflection of intelligence because the inability to read will have prevented learning the information necessary to test well on the verbal portion of the WAIS. (9RHT 1504, 1506.)

Dr. Khazanov's opinion that petitioner was mentally retarded hinged upon her determination that he had suffered brain damage/dysfunction that manifested during his early childhood years. (See Ex. 23 at 26 ["All this created and exacerbated brain dysfunction which resulted in MR"].) Dr. Khazanov opined that the drop in petitioner's test performance between age 7 and 11 resulted because "at about age ten and eleven, our brain functioning changes very dramatically." (8RHT 1340.) She explained, "what happens at age eleven, our left hemisphere becomes responsible for the language and speech and right hemisphere facilitates more like spatial relations, music." (8RHT 1340-1341.) Thus, that was "why the majority of people who have mental retardation would be likely diagnosed and the measure will be more reliable at about this age." (8RHT 1341.) In short, while conceding that petitioner's Stanford-Binet L score of 83 administered in 1959 (age 7&1/2) was not consistent with mental retardation (9RHT 1483-1484), Dr. Khazanov opined that petitioner's brain functioning had changed before he took the WISC in 1963 within weeks of his 11th birthday, and this brain change resulted in a full-scale score of 70, "the cut-off score for mental retardation." (8RHT 1340-1341.)

Dr. Khazanov testified that, although approximately 14 percent of the American population is illiterate, individuals who attended school usually

do not have difficulty learning to read unless they have a learning disability or mental retardation. (8RHT 1347-1348.) Dr. Khazanov opined that petitioner attended enough school despite his poor attendance record to learn to read *if he were able to do so*. (8RHT 1346; Ex. 23 at 11, italics added.) Instead, "*[T]he reason he couldn't learn [to read]*, in my opinion, *is because there was very specific part of his brain that was miswired probably from birth*." (8RHT 1348, italics added.)

Dr. Khazanov "discovered" petitioner's brain dysfunction by administering the Halstead-Reitan Battery in 2003. (8RHT 1349-1350.) Dr. Khazanov opined that her neuropsychological testing administered when petitioner was 51 years old revealed brain damage/brain dysfunction. (8RHT 1349-1350.) Dr. Khazanov opined that petitioner was *unable to learn to read* and that petitioner's performance on the WISC, WAIS-R and WAIS-III tests established the significantly subaverage intellectual functioning prong required for a mental retardation diagnosis. (9RHT 1346-1350, 1386-1388, 1390-1392; Ex. II at 3-19 [declaration].) Dr. Khazanov hypothesized that petitioner "has the typical pattern of brain dysfunction in people who had in utero alcohol exposure. So he has the combination of what is called diffused and also localized brain damage. [¶] Diffused damage means that it is scattered throughout the brain and localized damage identified in two areas: one is frontal lobes and another is parietal lobes." (8RHT 1444.)

Dr. Hinkin concurred that the divergence between petitioner's verbal IQ and performance IQ scores *necessitated* an inquiry into *why* one part of petitioner's brain functioned better than the other. (12RHT 1995.) Because the rate of mental retardation in the general population was one to three percent while the illiteracy rate in the United States was significantly higher (14 percent, or one in seven adults), it was "far more likely" that petitioner's poor performance on the verbal aspects of the testing resulted

from his illiteracy rather than mental retardation. (12RHT 2000-2001; Ex. AA.)

Moreover, Dr. Hinkin saw no evidence of brain damage. (12RHT 1996.) In reviewing the neuropsychological tests administered by Dr. Khazanov in 2003, and specifically the Halstead-Reitan battery, Dr. Khazanov misinterpreted the data to conclude petitioner suffered diffuse brain damage. (12RHT 2031-2032, 2034.) Dr. Khazanov used outdated norms from the 1950's. Analyzing her results using the more current and accurate normative data, "tests that she was calling impaired were perfectly normal." For instance, petitioner's performance on the Category Test fell in the low end of the average range using current normative data and his score on the Finger Tapping Test was "perfectly normal." (12RHT 2032-2033.) But even the 2003 Halstead-Reitan test demonstrated that petitioner performed better on the performance tests, which was *exactly the pattern expected from an illiterate person*. (12RHT 2032, 2034-2036.)

Additionally, while the three Wechsler tests had consistency in the *full scale IQ score*, within the WAIS-R and WAIS-III there were areas "where there's quite a bit of dissimilarity." (12RHT 2104.) For instance, on the Similarities subtest (verbal), petitioner scored a full standard deviation higher on the WAIS-III. (12RHT 2105, 2110; Ex. 24.) The 2003 score on the Block Design subtest (non-verbal) was also two scaled scores higher, which equaled two-thirds of a standard deviation. (12RHT 2106, 2110.) In 2003, petitioner also performed slightly better on the Information subtest than he had in 1984. (12RHT 2110.) The higher scores in the verbal areas (that is, similarities and information) suggested that petitioner had the ability to learn and, therefore, the prior poor scores were not the result of brain dysfunction. (12RHT 2107.) While a deficit in mental ability was a possibility, it was not a probability. (12RHT 2110-2111.)

Dr. Maloney echoed the consensus that a resolution of the question of illiteracy versus brain dysfunction was necessary to a determination whether petitioner is mentally retarded. As Dr. Maloney testified, the inability to read could impact performance on the WAIS-R because of the failure to obtain knowledge necessary to perform well on the test. (11RHT 1934-1935.) The simplest explanation for a lower verbal score than a performance score would be "lack of broad experiences during early years" that would include "[l]earning to read, learning to profit from education, learning to profit from one's own experience." (11RHT 1936.) Absent "*other specific evidence going to brain damage or neuropsychological impairment*," which demanded a lot more supportive data, the simple explanation was the most logical one. (11RHT 1937.)

Without a finding concerning brain dysfunction, petitioner's IQ test scores do not support a finding that petitioner's general intellectual functioning is significantly subaverage as required for a finding of mental retardation. Without that finding, substantial evidence in the record establishes that petitioner's verbal test performance suffered due to his poor reading ability and other factors relating to his background and experiences and that his full scale scores likely underestimate his general intellectual functioning. As a result, the reference hearing record does not establish by a preponderance of the evidence that petitioner's general intellectual functioning is significantly subaverage.

F. The Referee's Factual Findings on Adaptive Behavior Deficits Are Not Supported by Substantial Evidence

The referee chose to utilize the 2010 AAIDD definition of "adaptive behavior." (Report, p. 21, fn. 32.) This was the definition that Dr. Khazanov took pains to clarify that she used. (8RHT 1310-1311.) The definition articulated in the 2010 AAIDD requires evidence of significant limitations in one of the three criteria or "domains" described as

"conceptual skills," "practical skills," and "social skills." (Report, p. 20, citing *Intellectual Disability* (11th Ed. 2010) p. 46.) Using that definition, Dr. Khazanov testified that significant deficits in one domain met the requirement. (8RHT 1302.) However, "significant limitations in more than just one subscale" of a domain was required. (8RHT 1303.)

Under the adaptive behavior definitions set forth in *Atkins* and *Hawthorne*, petitioner must establish, by a preponderance of the evidence that, prior to age 18, he suffered significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (*Hawthorne, supra*, 35 Cal.4th at pp. 47-48.)

1. Inability to Effectively Understand and Communicate

In summing up, the referee found "petitioner clearly exhibited significant adaptive behavior deficits before the age of 18. Perceived by friends and family as mentally "slow," he was unable to read and write and to effectively understand and communicate, and remains so to this day." (Report, p. 25.) Subsequently, the referee elaborated, "petitioner's difficulties in understanding were documented in 1984 by Dr. Nancy Kaser-Boyd, and observed in 2003 by Dr. Khazanov. This evidence provides strong corroboration for the description of petitioner as mentally "slow" offered by childhood friends Larry Cleveland and Stephen Harris, and his cousin Tommie McGlothin. The referee finds the evidence sufficient to establish that petitioner suffered substantial adaptive behavior deficits which were manifest before age 18." (Report, p. 26; see also Report, p. 21, 22, 24.) The referee's selection of the 2010 AAIDD definition and stated reasons indicate a focus upon the "conceptual skills domain," that is, "language, reading and writing, money, time and number

concepts." Respondent takes exception to the referee's factual findings that petitioner suffered significant deficits in adaptive behavior prior to age 18. Specifically, respondent takes exception to the finding that petitioner could not "*effectively understand and communicate*" within the context of his community and peers.

The Report includes multiple assertions that petitioner "didn't know how to read and write," is "unable to read," and has "an inability to read." (Report, p. 21, citing 8RHT 1307, 1309, 1331.) However, because a significant deficit in more than one "subscale" is required under the 2010 AAIDD definition and deficits in more than one skill area are required under the 1992 AAMR and 2000 DSM-IV definitions, petitioner's illiteracy alone does not satisfy any formulation of "adaptive behavior." Petitioner's literacy problems fall within the areas of "functional academic skills" of the DSM-IV and "reading and writing" under the conceptual skills domain of the 2010 AAIDD.[19] Respondent's expert agreed that, using the AAIDD definition of adaptive behavior functioning, the conceptual reading and writing "piece" was "clearly there." (12RHT 2052, 2139.)

As the referee acknowledged, adaptive behavior deficits "must be considered within the context of community environments typical of the individual's age, peers, and culture." (Report, p. 5, fn. 2, citing *2010 Intellectual Disability Definition*, p. 1.) The referee concluded that the

---

[19] The experts agreed that, based upon his reading performance level, Petitioner was appropriately characterized as "illiterate." (Khazanov: 9RHT 1607, 1610; Maloney: 11RHT 1779-1780; Hinkin: 12RHT 1992.) In 1984, Petitioner's standardized test performance (WRAT) indicated that he read at the third or fourth grade level. (10RHT 1751; 11RHT 1779-1780, 1911.) In 2003, Dr. Khazanov personally administered the Wide Range Achievement Test (WRAT-III), and her assistant read the spelling words. Petitioner scored at the second grade level in reading and spelling, and at the third grade level in arithmetic. (8RHT 1460-1461; Ex. 25.)

communication deficits perceived by Dr. Khazanov in 2003 and potentially perceived by Dr. Kaser-Boyd in 1984, demonstrated that petitioner could not effectively understand and communicate. The observations of Dr. Kaser-Boyd and Dr. Khazanov are properly directed to petitioner's performance on the intelligence testing, and do not provide any direct evidence of petitioner's ability to communicate within his daily life in East Long Beach from 1952 until 1970 (prior to age 18). Moreover, extreme significance was placed upon comments by their author (Dr. Kaser-Boyd), who was not called to explain their significance or scope. It may well be that petitioner had difficulty expressing one or more of the comprehension concepts and had difficulty understanding the concept of similarities when faced with a psychological instrument that, as Dr. Maloney explained, does not reward simplicity or accuracy but focuses upon the most common abstract concept. (11RHT 1795, 1797.) Presuming deficiencies in adaptive behavior from test performance is circular and ignores the purpose of the adaptive behavior analysis.

In daily life, people engage in conversations that require that they understand what is asked of them and express relevant information. Dr. Maloney's clinical interviews in 1984 provide better information about petitioner's abilities to "communicate" in his daily life. Dr. Maloney he did not see evidence that petitioner's "talk" was confused when he evaluated petitioner on May 20, 1984, and interviewed and tested him on June 16, 1984. (11RHT 1942.) Dr. Maloney opined that petitioner was able to communicate in a reasonable fashion and that his oral communication "seemed pretty good." (10RHT 1698-1701.) And any "hearing problem" perceived by Kaser-Boyd (10 RHT 1718-1719, 1723; Ex. B at 188) was not observed by Dr. Maloney during his two meetings with petitioner. (10RHT 1724.) Instead, Dr. Maloney's note of his clinical interview indicated that petitioner possessed an ability to communicate in a reasonable fashion and

"[h]is thinking processes appeared to be goal oriented, and not loose." (10RHT 1698-1699.) Petitioner "was able to carry on a conversation with me, to follow me. He used language that was appropriate to the situation, appropriate to the questions I was asking." (10RHT 1700-1701.)

And Dr. Khazanov's view that, *at age 51*, petitioner had difficulty understanding instructions about performing the neuropsychological tests she administered does not speak directly to petitioner's communicative expression within his relevant community or during the time period prior to age 18. (8RHT 1320, 1331-1332, 9RHT 1461-1462.) That information is better provided by looking to more contemporaneous sources. And when the inquiry moved away from the esoteric finger tapping, arithmetic and spelling questions, and proverb quizzes, to the "semi-structured" questioning on adaptive behavior, petitioner's answers demonstrate his ability to effectively communicate and understand concepts relevant to his community. (See Ex. B at 83-86.)

As described further below, the reference hearing evidence demonstrated that petitioner gambled and won thousands of dollars in Las Vegas and engaged in various criminal activities. To the extent his "business" was committing robberies, the probation reports of his prior offenses demonstrate that he competently communicated with his probation officers. (See Ex. B at 2646-2673 [current offense], 2676-2680 [A107555], 2681-2688 [A017581].) For the current offense, petitioner declined to speak to the probation officer after inquiring whether his participation was "required." (See Ex. B at 2658.) He provided verbal statements in his other cases. (Ex. B at 2678, 2686.) He realized he would probably receive a state prison sentence for his multiple offenses in 1977 and was "congenial and cooperative." (Ex. B at 2686, 2687.) Although Dr. Khazanov opined that probation reports demonstrated that petitioner did not "make sense"

(Report, p. 21), no reference to any document substantiated or substantiates that assertion. (8RHT 1322; see Ex. A at 2714-3115.)

In 1984, Kleinbauer met with petitioner on more than six occasions; in 1988 she described petitioner as "quite articulate" and able to respond to her questions with responsive, intelligible sentences. (4RHT 698-701; see Petn. Ex. 12 at 2.) After meeting with petitioner for four hours on two occasions, in his 1984 report, Dr. Sharma described petitioner as "a charming, manipulative young man" whose "speech was goal directed, coherent and logical." (Ex. B at 304; 13RHT 2193.) During petitioner's police interview, which is further discussed below, petitioner bantered with police and laid a foundation for his alibi. (12RHT 2053.)

In addition, petitioner sent letters to Deborah Helms. (1RHT 194.) Georgia Agras learned of the serious nature of the charges against petitioner from a letter that he wrote her after the trial. (1RHT 159-160.) After petitioner was sent to state prison, Ms. Agras stayed in touch with him through letters. (1RHT 174-175.) Ms. Agras observed, "he does write beautiful letters now." (1RHT 156.) Ms. Agras could read the letters petitioner wrote. One letter was one page in length and several were two pages long. (1RHT 160.) At the reference hearing Ms. Agras testified that he "still writes me today." (1RHT 159.) Additionally, Cleveland communicated with petitioner in writing – since 1983, Cleveland had written petitioner a few letters, and petitioner had sent Cleveland a card. (3RHT 568-569.) There is also evidence in the record that petitioner's post-conviction counsel have communicated with him by letters. (See Ex. R at 2580 [In a letter dated July 5, 1985, Don Specter mentions "Mr. Lewis' recent letter"]; Ex. B at 52.)

Cleveland testified that he and petitioner "hustled" by gambling with others shooting pool. (3RHT 555-556.) Petitioner never had trouble with monetary denominations. (3RHT 574.) As teenagers, Cleveland and

petitioner committed robberies together. (3RHT 503, 505-506, 507.) When they were together, "it wasn't no need to have to do any writing for anything. You know, we shot pool. We shot dice. You didn't need to do no writing to do any of those things." (3RHT 569.) Cleveland opined that he was a better gambler at craps than petitioner and that petitioner did not pick up gambling as quickly as Cleveland. Cleveland considered petitioner to be "slow" in those areas. (3RHT 570-571, 575.) Still, Cleveland and petitioner went to Las Vegas together and won money. (3RHT 538.) petitioner sometimes won large sums of money gambling. (3RHT 533.) The two men exchanged money "all the time." (3RHT 536.)

Stephen Harris met petitioner when he was close to 10 years old at the community recreation center. (7RHT 1209-1210.) They attended different schools. (7RHT 1210-1211.) Neither had been to the other's home. They saw each other on the street or at the recreation center. (7RHT 1218.) They socialized when petitioner was out of jail. (7RHT 1212-1214.) Harris considered himself to be a good pool player and was better than petitioner and Cleveland. (7RHT 1215-1216.) Harris did not consider petitioner to be intellectually smart. Harris and petitioner talked about simple things, but never had an intellectual conversation. (7RHT 1216-1217.) Harris did not believe that petitioner was mentally retarded, but he did not think that petitioner was as "smart" as he was or as Cleveland was. (7RHT 1217, 1229.)

To the extent the referee adopted Dr. Khazanov's assertion that petitioner's illiteracy (that is, his inability to read and write at a functional level) is "strong evidence of petitioner's adaptive behavior functioning deficits" because his sisters and Cleveland learned to read and write while attending the same schools and being raised in the same environment (Report, p. 24, fn. 39), respondent takes exception. The hearing record lacks *any information* regarding his sisters' ability to read or write or their

proficiency in doing so. No school records for petitioner's sisters were introduced at the reference hearing; their prior "declarations" were videotaped rather than reduced to writing. Larry Cleveland's testimony asserted, without any objective confirmation, that he could read at a higher level than petitioner. No evidence in the record establishes his writing or reading proficiency.

The description of petitioner's daily activities provided by the friends and acquaintances who testified at the reference hearing, the video-recorded "declarations" of his sisters, petitioner's recorded interview with police in 1983, the information provided by petitioner, his father and sisters in 1984, as well as his criminal activities chronicled in his CDC records constitutes substantial evidence petitioner could, indeed, effectively understand and communicate within *his community* and among *his peers*.

2. The Police Interview Conducted November 21, 1983

Additionally, the referee rejected the assertion that "petitioner's interview by detectives on November 21, 1983 following his arrest in this case shows that petitioner did not suffer communication difficulties. (Exs. OO and PP.)" (Report, p. 25.) To the contrary, the referee concluded that petitioner's police interview "similarly fails to provide persuasive evidence rebutting his weakened mental condition." (Report, p. 25.) Instead, the referee observed that petitioner "confidently denied his true identity and asserted he had never before been to prison. (Ex. PP, pp. 9, 10, 36.)" The referee noted these "easily disprovable lies" "could have been easily established by a fingerprint check"; the referee concluded "it was foolish for him to maintain otherwise" and that the interview "displays unclear thinking and an obvious lack of cunning." (Report, p. 25 & fn. 42.) Respondent takes exception to these findings.

The recorded interview (Ex. PP) and the transcript (Ex. OO) are available for the Court and are the type of documentary evidence for which deferential review needed not be entertained. This is a contemporaneous recording of Petitioner engaged in back and forth conversation. And this is not just any conversation, but a robbery/murder investigation interview conducted after petitioner's arrest for the robbery/murder of Milton Estell. While the referee perceived petitioner's denial of his "true identity" as "foolish" and easily disprovable, that interpretation fails to account for the context. As petitioner's sister Gladys told Kleinbauer in 1984, petitioner and the Long Beach Police had a rancorous relationship. (Ex. B at 222.) Admitting his identity would only assist the officers in making additional connections, and petitioner was already under arrest for murder and clearly knew he was not being released with any alacrity. Instead, petitioner admitted the criminal activities he was widely known for, and confidently denied the most serious charge.

The record interview reveals no evidence of a language or communication deficit. Instead, petitioner "banters" with the police. (12RHT 2053.) The interview reveals a man familiar with the "game" of arrest and interrogation, confident in his confrontation by two named Long Beach Police Detectives and three additional unidentified ones. When faced with strenuous pressure from what appears as many as five interrogators, petitioner gave no ground despite acknowledging the interrogator's strong emotion (indicating you are "upset"). (Ex. OO at 14.) In the interview, petitioner furthered his own agenda by explaining his possession of the victim's vehicle (he bought it), identifying the amount and source of the funds for the purchase (cash won in Las Vegas), and identifying an alibi for the crime (a pink slip dated prior to the murder and with various women). (Ex. OO at 1-8, 11-14.) Petitioner's conversation was goal-oriented even if ultimately fruitless. And he knew to invoke his

right to an attorney. (Ex. OO at 22 ["I want to see a lawyer now."]) He knew murder could result in "capital punishment." (Ex. OO at 33.)

3. Findings about Petitioner's "Success" as a "Hustler" or Criminal

The referee found that, "The evidence does not suggest that petitioner was a *successful* street hustler. He was arrested and convicted numerous times. His apparent failure to learn from his experience, provides additional support that he is mentally retarded." (Report, p. 25.) Respondent takes exception to this finding.

Petitioner's measure of "success" as a criminal requires knowledge of the number of crimes he committed. The reference hearing record substantiates that petitioner clearly committed more criminal activities than his criminal arrest history documents. Cleveland, petitioner's childhood "best friend," testified that as teenagers they committed robberies together. (3RHT 503, 505-506, 507.) Cleveland estimated that they committed nine robberies together for which neither was incarcerated. (3RHT 509, 561-562.) Deborah Helms, who met petitioner in 1970 or 1971 (when he was age 19 or 20) estimated that on more than 10 and *probably more than 20 occasions*, she heard petitioner's father ask petitioner for money, and petitioner would later arrive with a brown paper bag that petitioner said contained a gun and money purportedly taken during a robbery. (1RHT 186-187, 196-198.) Petitioner told the probation officer following his conviction for the February 21, 1977 robbery at Cash's Men's Store (a subject of the stipulation at the penalty phase): "committing armed robberies was his *business* and that he did not mind serving time in prison." (Ex. A at 2678 [prob. rpt., case no. A017555].) When arrested for the murder/robbery of Milton Estell, petitioner possessed a Bulova watch and $380 in cash. (12RHT 2064; Ex. B at 260.) On July 10, 1984, petitioner's sister, Gladys Spillman, told Kleinbauer that petitioner "was selling cocaine

and running prostitutes" before his November 1, 1983 arrest for Estell's robbery/murder. Before petitioner's trial, his father told Kleinbauer that petitioner "would keep three or four hundred dollars in his pocket and was generous with his money. Robert sold cocaine and also robbed the dope houses to get both money and cocaine." (Ex. B at 229.)

Cleveland also confirmed that petitioner engaged in "hustling" activities – such as playing pool and dice as well as gambling, that were not necessarily of a criminal nature. For instance, growing up they gambled by shooting pool. (3RHT 555-556.) Later, Cleveland and petitioner went to Las Vegas together and won money. Petitioner sometimes won large sums of money gambling. (3RHT 533, 538.) The two men exchanged money "all the time." (3RHT 536.) Petitioner's sister Gladys confirmed gambling activities in her interview with Kleinbauer. Gladys reported that "Robert also liked to gamble and had been in Las Vegas shortly before the murder." (Ex. B at 223.) Helms testified that petitioner "knew the streets well. He survived on them." (1RHT 182-185, 212-213.)

Substantial evidence in the record demonstrated that petitioner engaged in extensive criminal activities. As corroborated by Cleveland and Helms, petitioner's juvenile "community" and his adult "community" consisted of a criminal element within a socioeconomically depressed neighborhood. Petitioner provided his own self-assessment that "committing armed robberies was his business and that he did not mind serving time in prison." (Ex. A at 2678 [prob. rpt. case no. A017555].) Petitioner's persistent delinquent criminal conduct resulted from a personality disorder – Antisocial Personality Disorder – and not mental retardation. (See Ex. B at 304-305 [Dr. Sharma's report].) The record does not support a finding that petitioner's "apparent failure to learn from his experience" corroborates a finding that he is mentally retarded. To the contrary, his delinquent criminal behavior was a form of adaptive behavior

that allowed petitioner to compensate for his vocational and educational deficiencies.

II. CONTRARY TO THE REFEREE'S FINDING, PETITIONER DID NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS MENTALLY RETARDED SO THAT IMPOSING THE DEATH PENALTY WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

In *Claim XVIII*, petitioner contends that he is mentally retarded and that executing him would constitute cruel and unusual punishment as articulated in *Atkins v. Virginia* (2002) 536 U.S. 304. (Petn. 180-183.) In *Atkins*, where the standardized tests (WAIS-III) administered to the defendant after his 1996 crimes produced a full-scale IQ score of 59, the Supreme Court explained part of the rationale for finding an Eighth Amendment prohibition:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

(*Atkins*, *supra*, at pp. 306-307.)

It was and remains petitioner's burden to prove his mental retardation by a preponderance of the evidence. (*Hawthorne*, *supra*, 35 Cal.4th at p. 50; see § 1376, subd. (b)(3).) Here, the totality of the reference hearing evidence demonstrates that petitioner did not meet his burden, by a preponderance of the evidence, to establish that he is mentally retarded, meaning "the condition of significantly subaverage general intellectual

functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

A. Petitioner Has Not Met His Burden To Prove Significantly Subaverage General Intellectual Functioning Before Age 18

As this Court has stated, "[M]ental retardation, as a question of fact, 'is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence.'" (*Hawthorne*, *supra*, 35 Cal.4th at p. 49.) Here, a review of the reference hearing evidence demonstrates that petitioner did not meet his burden, by a preponderance of the evidence, to establish that he is mentally retarded, meaning "the condition of significantly subaverage general intellectual functioning."

According to Dr. Maloney's reference hearing testimony, petitioner's full scale IQ on the WAIS-R (73), his verbal score (72) and his performance score (76) did not fall within the mental retardation range in 1984. They could, however, fall within the 2011 range. (11RHT 1811-1812.) Thus, he agreed with the referee's statement that petitioner "was in the gray area." (11RHT 1778; 11RHT 1784-1785.) Dr. Maloney agreed with the referee's characterization that it was "a closer case" under today's standards. (11RHT 1802.) Dr. Hinkin also acknowledged "this isn't one of those [cases] where it's undeniabl[e], no one could possibly argue on one side or the other. It is a gray area." (12RHT 2013.) Dr. Hinkin believed that the test scores could be relied upon, but not heavily relied upon, and keeping cognizant of the error potential based upon socioeconomic factors. (12RHT 2015-2016.) Dr. Hinkin testified it was his opinion petitioner is not mentally retarded. "Of the two prongs, I think that the IQ subaverage intellectual prong is probably closer to the mental retardation. I don't think

that's it, but that one is certainly in the ballpark. Whereas, I don't see the evidence, at least in the record, for the adaptive behavior prong being close to being met." (12RHT 2017.)

Respondent provides the following table, which corrects documented errors in the referee's Table 1 (Report, p. 12) and identifies the evidentiary support:

IQ TESTS BEFORE AGE 18

Test Name	Date Admin.	Age[20]	IQ Score	Ex. No.
Kuhlmann-Anderson Form A	4/14/1959	6 yrs 318 days	**89**	Z
Stanford Binet Form L	11/20/1959	7 yrs 142 days	**83**	Z
Lorge-Thorndike Form 1A	1/8/1960	7 yrs 222 days	**78**	Z
Kuhlmann-Anderson Form C	1/8/1962	9 yrs 222 days	**82**	Z
Wechsler Intelligence Scale for Children (WISC)	*5/21/1963*	*10 yrs 355 days*	***70***	*Z*
Lorge-Thorndike Form 3A-V	5/16/1963	10 yrs, 350 days	**57**	Z
Revised Beta IQ [Youth Authority]	8/1968	16 yrs, 61-90 days	**83**	G
Thurstone Primary Mental Abilities SRA-IQ [Youth Authority]	9/3/1968	16 yrs, 95 days	**67 V** **99 N V**	G[21]

All experts agreed that petitioner's 83 IQ score on the November 1959 Stanford Binet L (at age 7 & 1/2 years old) estimated his intelligence to be at the high end of the borderline range of intelligence, an intelligence range

---

[20] This calculation utilizes the date of birth indicated in the Report. (Report, p. 26, fn. 43, citing Ex. B at 49.)

[21] This Clinic Educational Report documents scores of various tests administered to Petitioner in 1968 at CYA. While somewhat difficult to read, the comment contained on the Report states: "This tends to be a non-reading, non-bookish boy whose cultural set is so diverse from major cultural patterns that he cannot be adequately tested. His scores as listed are meaningless for subject is not academic or vocationally oriented. He may be able to function as a dull normal, but that surmise is a projection based on the non-verbal SRA score." (Ex. G.)

above that for mental retardation. (Dr. Khazanov: 9RHT 1483-1484; Dr. Maloney: 10RHT 1736-1737, 11RHT 1937-1938, 1941-1942; Dr. Hinkin: 12RHT 1988; 12RHT 2005-2006.) In other words, all experts agreed the 1959 Stanford-Binet result was *inconsistent* with mental retardation. However, a few years later in 1963, petitioner (age 10) obtained a WISC full-scale score of 70, the cutoff score for mental retardation. (8RHT 1341.)

Additionally, all the experts agreed that petitioner, at least as an adult, is illiterate. (Dr. Maloney: 10RHT 1751; 11RHT 1779-1780, 1911 [WRAT phonetic reading at third or fourth grade level; considered an adult who read at the third or fourth grade level to be illiterate]; Dr. Hinkin 12RHT 1992 ["Mr. Lewis is illiterate, functionally illiterate. He can't read, you know, worth a darn"]; Dr. Khazanov: 9RHT 1607, 1610 [WRAT provided evidence that petitioner could not read or write].) All experts also agreed the verbal IQ score for an illiterate person would be lower than a true reflection of intelligence because the inability to read will have prevented learning the information necessary to test well on the verbal portion of the WISC/WAIS. (Dr. Khazanov: 9RHT 1504, 1506; Dr. Maloney: 11RHT 1879-1880; Dr. Hinkin: 12RHT 1992-1995.)

The experts completely disagreed, however, about the interpretation to draw from the test record and petitioner's demonstrated illiteracy. Dr. Khazanov opined that the drop in petitioner's test performance between age 7 and 11 resulted because "at about age ten and eleven, our brain functioning changes very dramatically." (8RHT 1340.) She explained, "what happens at age eleven, our left hemisphere becomes responsible for the language and speech and right hemisphere facilitates more like spatial relations, music." (8RHT 1340-1341.) Thus, that was "why the majority of people who have mental retardation would be likely diagnosed and the measure will be more reliable at about this age." (8RHT 1341.) In other

words, at age 11, the brain damage/dysfunction that likely pre-dated his birth manifested during this pivotal point in his childhood and created his mentally retardation. (See Ex. 23 at 26 ["All this created and exacerbated brain dysfunction which resulted in MR"].) In short, while conceding that petitioner's Stanford-Binet L score of 83 administered in 1959 (age 7 & 1/2) was not consistent with mental retardation (9RHT 1483-1484), Dr. Khazanov opined that petitioner's brain functioning had changed before he took the WISC in 1963, and this brain change resulted in a full-scale score of 70, "the cut-off score for mental retardation." (8RHT 1340-1341.) Dr. Khazanov opined that petitioner attended enough school despite his poor attendance record to learn to read *if he were able to do so*. (8RHT 1346; Ex. 23 at 11, italics added.) Instead, "*[T]he reason he couldn't learn [to read]*, in my opinion, *is because there was very specific part of his brain that was miswired probably from birth*." (8RHT 1348, italics added.)

Dr. Khazanov "discovered" petitioner's brain dysfunction by administering the Halstead-Reitan Battery in 2003. (8RHT 1349-1350.) Dr. Khazanov opined that her neuropsychological testing administered when petitioner was 51 years old revealed brain damage/brain dysfunction. (8RHT 1349-1350.) Dr. Khazanov opined that petitioner was *unable to learn to read* and that petitioner's performance on the WISC, WAIS-R and WAIS-III tests established the significantly subaverage intellectual functioning prong required for a mental retardation diagnosis. (9RHT 1346-1350, 1386-1388, 1390-1392; Ex. II at ¶ 3-19 [declaration].) Dr. Khazanov hypothesized that petitioner "has the typical pattern of brain dysfunction in people who had in utero alcohol exposure. So he has the combination of what is called diffused and also localized brain damage. [¶] Diffused damage means that it is scattered throughout the brain and localized damage identified in two areas: one is frontal lobes and another is parietal lobes." (8RHT 1444.)

Because, in her view, the subsequent tests given in 1968 were not "reliable" (the Revised Beta and SRA IQ Test), the only remaining tests with which Dr. Khazanov chose to address were the WAIS-R (1984) – Verbal 68, Performance 76, Full-scale 71 – and the WAIS-III (2003) – Verbal 66, Performance 75, Full-scale 67. (Table 1: Report, p. 17.)[22]

In contrast, the independent forensic examinations conducted in 1984 by Dr. Maloney and Dr. Sharma yielded no evidence of brain damage. (11RHT 1937 [Dr. Maloney]; Ex. B at 303-306 [Dr. Sharma: "No evidence of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations."].) Dr. Maloney disagreed that the test results suggested impairment to the left hemisphere of the brain. He confirmed that physical deficits in brain development occur before age 10 or 11. (11RHT 1897-1898.) Additionally, petitioner's 83 score on the Revised Beta (a non-verbal test) in 1968 was above the cutoff for mental retardation. The Revised Beta remains a test used for Army classification. (11RHT 1766-1767.)

Subsequently, Dr. Maloney explained that the Stanford-Binet test had been "normed on young white people," which resulted in a "bias" against "people who have learning deficits or lack of enriching experiences during early years." (11RHT 1766, 1940.) In other words, petitioner's Stanford-Binet 83 IQ score may *underestimate* intelligence in a person (like petitioner) who falls outside the norms on which the Stanford-Binet test was developed. (11RHT 1941.) All of the tests administered to petitioner

---

[22] Although both Dr. Maloney and Dr. Hinkin disagreed with Dr. Khazanov's "rescoring" of the WAIS-R and her overall reduction of the full-scale IQ score from 73 to 71, both postulated that a modification of a point or two was insignificant to the overall assessment of intellectual functioning. (11RHT 1877-1878; 12RHT 2020-2021, 2099-2100.)

suffered from similar deficiencies because they failed to take into account petitioner's background. (See 10RHT 1735, 1778-1779.)

Despite these concerns, Dr. Maloney testified that a person cannot *accidentally* get a high score on an intelligence test. (10RHT 1736.) Dr. Maloney saw nothing positive in petitioner's history that would cause a test result to be artificially high. (11RHT 1817.) As Dr. Maloney subsequently repeated, although a number of reasons may explain why an individual might perform *worse* on an IQ test than his true level of intellect, "You can't do better. *If someone is mentally retarded*, you're not going to see scores as 89 on the Kuhlmann-Anderson. Or even when he was 16, that non-verbal I.Q. of 99 on the Thurstone Primary Mental Abilities S.R.A." (12RHT 1989-1990, italics added.)

Instead, Dr. Maloney attributed petitioner's poor verbal test performance on his disadvantaged background, including limited education, juvenile incarceration and removal from regular life at age 12, poverty, and literacy issues. (10RHT 1728-1731, 1750.) With his unique and extensive experience with individuals with disadvantaged backgrounds through his work on the Los Angeles County forensic psychologist panel since the 1970's and as Mental Health Clinic Director for the Los Angeles County Jail System since 1997, Dr. Maloney testified, "*Persons from Mr. Lewis' background will always score low on these kinds of tests, lower than probably their level of intelligence.*" (10RHT 1728.) Dr. Maloney perceived the downward progression of petitioner's intelligence test scores as indicative of the limitations posed by his non "mainstream" background: "at 6 he is 89; at 7, 83; 7, 78; 9, 82; 10, 70; *is his intelligence really changing that much in those years or are there assessment or measurement problems? I tend to think the latter.*" (11RHT 1781-1782, emphasis added.) Thus, "[t]he simplest explanation for a low verbal score versus performance" score was petitioner's disadvantaged background and his lack

of broad experiences during early years – including learning to read, learning to profit from education, learning to profit from one's own experience – as possibly exacerbated by coming from a broken home which provided little support. (11RHT 1936-1937.) In summing up his assessment of petitioner's intellectual functioning in 1984, Dr. Maloney explained, "[w]hen I interviewed him, I said he seems *at least in the average range*." (10RHT 1730.)

As Dr. Hinkin explained, the intelligence testing given to young children necessarily focuses upon non-verbal performance, and the tests become increasingly verbally-dependent as the subject increases in age. petitioner's test scores reflected his literacy limitations; as the information tested became more dependent upon information gained through reading and school subjects, petitioner's scores dropped. (12RHT 1992-1993.) *In accord with Dr. Maloney*, Dr. Hinkin found it significant that petitioner's scores prior to age 18 included scores in the middle to high 80's and 99: "someone who is mentally retarded is not going to be able to get a 99 I.Q., a 89 I.Q." (12RHT 2026.)

Dr. Hinkin agreed with Dr. Maloney's assessment that petitioner was not from the "mainstream" group on which intelligence tests are normed, particularly at the historical time periods relevant to the retrospective analysis being undertaken in this case. (12RHT 2008-2011.) For a "white middle class suburban kid, their I.Q. test score and their level of intelligence are likely to be much more consistent." In contrast, "when you're dealing with an individual who, for whatever reason, they're dissimilar from mainstream . . . the chances of their I.Q. test score and their level of intelligence differing increase." (12RHT 2009.)

Additionally, a probable lack of motivation (not malingering) likely influenced petitioner's test results during his childhood years and produced scores that underestimated his intelligence. (10RHT 1739.) At the

reference hearing, Cleveland testified that, on a near daily basis, he and petitioner went to school but left at the first recess. Cleveland explained, "[b]ack in those days" "[t]hey just passed you to the next grade. *They didn't care if you went to school or not.*" (3RHT 520, 550.) A January 11, 1973 "Social Evaluation" completed after petitioner was sentenced to state prison for robbery, includes the following information: "He readily admitted he did not like school, learned very little and was truant a great deal. He describes his associates, during his formative years, as the delinquent nonconforming element and stated he had been involved in numerous gang activities." (Ex. A at 2775.) As petitioner's father told Dr. Maloney in 1984, petitioner's "peers [were a] real rough bunch" and "[a]ll they wanted was something for nothing and to see what they could get away with." (10RHT 1705-1707, Ex. B at 235, 236.) Petitioner gave Dr. Khazanov a consistent history in 2003. Petitioner told her he "'*never liked school*' except math ...& spelling. Kindergarten failed. Difficult to be separated from mother. *Joker in school.* [] Got [] swats, detention. *Missed lots of school. Would sleep in class*. Had problems reading. Became embarrassed when couldn't read aloud in class. Learned to read and write in prison per Robert, age 16 or older. *Age 10 to 11 stopped going to school.*" (9RHT 1487; Ex. JJ at 316; ellipsis in original notes & emphasis added.)

Thus, around the time of the 1963 WISC, petitioner had stopped applying himself in school and was deeply involved with "the delinquent non-conforming element." That type of attitude militates against a finding that petitioner was motivated in 1963 to perform well on the WISC and provides clear evidence of an additional reason *why* petitioner would not have performed to the best of his abilities in May 1963 and received his two lowest overall scores. (See Ex. Z.)

As Dr. Hinkin opined, because the rate of mental retardation in the general population was one to three percent while an estimated 14 percent of adults (one in seven) in the United States are functionally illiterate, it was "far more likely" that petitioner's poor performance on the verbal aspects of the testing resulted from his *illiteracy* rather than mental retardation. (12RHT 2000-2001.) Children raised by parents who read to them learn how to read and do better in school. Petitioner's background of a drunken mother and only intermittently present father suggested no one was in the home to assist petitioner in learning these skills. (12RHT 2002-2003.) Petitioner's description of his school attendance and attitude toward school was consistent with the expected pattern of test scores because school-acquired information became more important as the testing progressed and petitioner's scores would begin to decline. (12RHT 2003, 2005.)

In previously stating that no fixed cut off IQ score exists under California law, this Court noted "that significantly subaverage intellectual functioning may be established by means other than IQ testing. *Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment.* [Citation.]" (*Hawthorne, supra*, 35 Cal.4th at p. 48, emphasis added.) Here, both board-certified experts (Drs. Maloney and Hinkin) affirmed this scientific proposition and opined that petitioner's particular personal disadvantaged background negatively impacted his performance on the verbal portions of the IQ tests.

In other words, given petitioner's background, his self-admitted lack of motivation and interest in school, the increasing verbal orientation of the intelligence testing as petitioner aged, and the biases in existence particularly in the 1960's up through the 1980's, petitioner's IQ test results *likely underestimate* his general intellectual functioning. Given that

likelihood, petitioner has not met his burden to demonstrate significantly subaverage intellectual functioning that manifested prior to age 18.

B. Petitioner Has Not Met His Burden To Prove Significant Deficits In Adaptive Behavior Prior To Age 18

As indicated above, all experts agreed that petitioner is illiterate. At the reference hearing, Dr. Khazanov did not rely upon the adaptive behavior deficits that she had offered to this Court previously. (Petn. Ex. 13; Ex. II.) Rather, Dr. Khazanov opined, "the deficits in his academic skill, his illiteracy is the strong enough indicator of the deficits in adaptive functioning. This is something that in my opinion allows us to conclude that he does have mental retardation." (9RHT 1606-1609.) Indeed, Dr. Khazanov testified that petitioner's illiteracy was "so apparent" that it justified her decision not to pursue additional inquiry into other adaptive behaviors by using any of the available standardized testing instruments. (9RHT 1604, 1651.) Dr. Khazanov's reliance upon petitioner's literacy or lack of academic skills had no correlation to petitioner's community or peers or his actual ability to adapt to daily life prior to age 18.

Here, the reference hearing record fails to establish by a preponderance of the evidence that prior to the age of 18, petitioner suffered from a conceptual deficit in the area of language skills. Instead, the overwhelming weight of the evidence was that petitioner functioned among his peers and in his community at above a subaverage level.

The reference hearing record includes the CD and transcript of petitioner's post-arrest November 1983 interview with Long Beach Police detectives. (Exs. OO [transcript] & PP [CD].) The recording is likely the best, most contemporaneous evidence of petitioner's abilities to effectively communicate and understand consequences, to think beyond the moment,

and to be confident and assertive. (See Arg.II,E.2, *ante.*) Respondent earlier summarized other evidence in the reference hearing record disputing the finding of deficits in communicating and understanding. (See. Arg.II.E.1, *ante.*)

To the extent petitioner suffered deficits in understanding and communication or language separate from strictly "functional academic skills" or "literacy" (i.e., "reading and writing), those deficits were limited rather than significant and were countered by petitioner's other adaptive mechanisms. Petitioner adapted to the demands of his daily life by gambling and engaging in illegal activities. (See Arg. II.E.3, *ante.*)

Here, the referee relied heavily upon Dr. Khazanov's personal assessment in 2003 of petitioner's ability to understand her testing instructions (Report, p. 21) as slimly "corroborated" by a few statements and observations by childhood associates Larry Cleveland and Stephen Harris and his cousin Tommie McGlothin. Regarding the "corroboration" drawn from petitioner's childhood associates, although Cleveland claimed that petitioner could not read street signs or spell words (3RHT 522, 526), Petitioner was able to drive and, as demonstrated through his statement to Dr. Maloney and in his police interview, knew how to get around and had adapted to the potential difficulties related to his compromised literacy level. McGlothin's testimony fails even to reflect a communication or adaptive behavior problem; rather, McGlothin described petitioner's "problem" as stealing bicycles and going in and out of jail. (7RHT 1165-1166.)[23] Petitioner and McGlothin did not have conversations, which was understandable given their age difference. (7RHT 1166-1167.) Harris did

---

[23] McGlothin was in his early twenties when he moved to California in 1965 and was 12 years older than Petitioner, who would have been 12 or 13 years old. (7RHT 1155-1158.)

opine that he and Cleveland were "smarter" than petitioner. (7RHT 1216-1217, 1229.) However, in 1984, Harris's own "adaptive functioning" fell at a lower level than petitioner's adaptive functioning – Harris lived on the streets and was addicted to crack cocaine. (7RHT 1225-1226.)

In contrast to Dr. Khazanov's perception of petitioner's communication and understanding difficulties, Dr. Maloney testified that as part of the clinical interview, petitioner described the purchase of Milton Estell's Cadillac. Dr. Maloney's notes state in part: "*Goes through detailed discussion of how the person shows the car, et. cetera. Says the guy wants $12,500. [petitioner] says I'll give you 11,000 in cash.*" (10RHT 1690, Ex. B at 204-205; emphasis added.) Petitioner's account to Dr. Maloney was significant to Dr. Hinkin on the adaptive behavior concept of money. As Dr. Hinkin testified, petitioner's description of offering cash in exchange for a reduced price "suggested a degree of sophistication and appreciation" about money that could prevail in a negotiation. Thus, "the level of detail suggests intact communication skills. And the negotiation over the car's price would speak to the money concepts." (12RHT 2063-2064.)

After spending four hours interviewing petitioner, Dr. Sharma wrote a report dated July 25, 1984, in which he said, "'During the interview the [petitioner] presents himself as a charming, manipulative young man who was willing to make any statement as long as it suit[s] his needs. A major portion of the time during both interviews was spent with the [petitioner] complaining about the weak evidence the state had against him and his opinion that his attorney was not doing enough for him to get him out of jail. Even when evidence like the [petitioner's] fingerprints, and writing, etc. was brought to his attention, the [petitioner] dismissed them as erroneous. He did not engage in any bizarre behavior during the interview. His speech was goal-directed, coherent and logical. [¶]...[¶] No evidence

of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations. The [petitioner] in the past has been given a diagnosis of Antisocial Personality Disorder starting at an early age. I agree with that diagnosis.'" (Ex. B at 304-305; Ex. R at 2441.) These observations are inconsistent with a person experiencing conceptual adaptive deficits with language.

Additional contemporaneous observations were made by Kleinbauer, whose billing records reflect that she "interviewed Mr. Lewis" on five occasions and "[s]aw Mr. Lewis" on two other occasions. (Ex. A at 2639-2643.) Kleinbauer remembered talking to petitioner and describing him in a 1988 declaration as "quite articulate." While Kleinbauer would sometimes have to rephrase some of her questions, petitioner was nevertheless "very" responsive to her questions. Petitioner responded in an articulate manner in that he was "able to make intelligible sentences." In general, they understood each other. (4RHT 697-701.)

Although Dr. Khazanov opined that the difficulties she perceived in communicating with petitioner during the hours she spent testing petitioner in 2003 was corroborated by statements in probation reports that petitioner did not "make sense," the probation reports, police reports, CYA and CDC records in the reference hearing record do not reflect a language deficit such as described by Dr. Khazanov. (Report, p. 21; 8RHT 1322; see Ex. A at 2714-3115.) Nor did the lay witnesses testify about such a language deficit.

Furthermore, Dr. Khazanov's opinion and interpretations of petitioner's communication skills were discredited by the disclosure of the questions she posed to petitioner in an experimental effort to assess his adaptive behavior and her notes revealing that his answers demonstrated a high level of performance. (9RHT 1592-1594; see Ex. B at 83-84; Ex. JJ at

329-330.) Some of petitioner's answers are provided in her notes. (9RHT 1597; Ex. JJ at 331-334.)

As the referee opined during the reference hearing, petitioner's answers to Dr. Khazanov's questions not only failed to support Dr. Khazanov's conclusions of adaptive deficits; rather, they proved just the opposite. Contrary to Dr. Khazanov's opinion that petitioner could not tell time accurately, petitioner "got most of them right." (12RHT 2056; see also Ex. JJ at 338.) While Dr. Khazanov said that petitioner was unable to prepare simple meals for himself, the referee remarked, "I didn't see any evidence of that." (12RHT 2056.) Regarding Dr. Khazanov's claim that petitioner was unable to maintain a checking account, the referee stated, "And I think it was earlier raised that he doesn't know how to maintain a checking account, and I accept the response position that a lot of these people wouldn't have checking accounts." (12RHT 2056.)[24]

When asked by the referee if she had examples of deficits in practical skills, Dr. Khazanov offered the following as an example of a deficit in adaptive functioning: When asked what he would do if he experienced severe chest pain at home, petitioner said he would lie down and see if it went away. When then asked what he would do if it were a heart problem, petitioner answered that he would call a family member. If he could not drive, he would call 911. (8RHT 1307-1308.) On cross-examination, Dr. Khazanov admitted that was an appropriate answer. (9RHT 1601-1602.) Dr. Hinkin found petitioner's response "went through a logical progression of decision-making." (12RHT 2057.)

---

[24] Despite her initial assertion, at the hearing Dr. Khazanov conceded it was unlikely that teenagers living in petitioner's neighborhood and culture would have checking accounts. (9 RHT 1615.)

In explaining her statement that "[h]e was unable to describe how to safely cross a street," Dr. Khazanov explained "this is where I use my clinical judgment in talking to him. I was trying to assess how good he would be in coming out with the strategy for doing certain things." (9RHT 1605.) Petitioner said he would walk to the corner, wait until the light changed to green, look both ways, then cross. If he were in a hurry, he would jaywalk. Dr. Khazanov admitted his answers were responsive to her question. (9RHT 1602-1603; Ex. JJ at 331.) The referee aptly disagreed with Dr. Khazanov's assessment. (12RHT 2057.)

As Dr. Hinkin testified, adaptive behavior looks more to a person's "street smarts, how do they function in their community." It looked to independent functioning versus the need for assistance and victimization or manipulation. (12RHT 2054-2055.) Based on Kleinbauer's 1984 reports of interviews and the 1987 videotaped declarations of petitioner's sisters and niece (Exs. 19, 19A, 20, 20A, 21 & 21A)), Dr. Hinkin opined that the "big picture" demonstrated petitioner was "[n]ot just surviving, *but thriving*." (12RHT 2054-2055.) This opinion was supported by substantial evidence. Petitioner girlfriend, Dee Walker, told Kleinbauer that petitioner "always had money, though he didn't talk about any of his business with her." They had a "game" wherein she charged him for having been absent. He would always turn his back to her, count his money, and give her $50 to $100. Walker reported that he usually had at least a few hundred dollars with him. (Ex. B at 224.) Petitioner's father told Kleinbauer that petitioner kept "three or four hundred dollars in his pocket and was generous with his money. Robert sold cocaine and also robbed the dope houses to get both money and cocaine." (Ex. B at 229.) Petitioner's sister, Gladys Spillman, told Kleinbauer on July 10, 1984, that petitioner "was selling cocaine and running prostitutes" before his November 1, 1983 arrest for the murder/robbery of Milton Estell. (Ex. B at 223.) Cleveland confirmed that

petitioner gambled and won large sums of money. (3RHT 533, 538.) Cleveland and petitioner also committed robberies together. (3RHT 503, 505-506, 507.)

Petitioner also told Dr. Maloney as part of his social history, "[a] woman ran off on me. *Had two notes: 1 for car and had to pay rent. Robbery again.*" (10RHT 1695-1696; emphasis added; Ex. B at 207; see also Ex. A at 2794 [June 1981 Board of Prison Terms Report: "In discussion of instant offense [robbery, petitioner] admits responsibility, *stating that the robberies were perpetrated in order to secure monies to meet financial obligations*"].) Similarly, petitioner told the probation officer following his conviction for the February 21, 1977 robbery at Cash's Mens Store: "[C]ommitting armed robberies was his business and that he did not mind serving time in prison." (Ex. A at 2678.)

Dr. Hinkin found abundant evidence of normal and effective adaptive behavior in the materials that were more contemporaneous to the relevant period (prior to age 18, i.e., prior to May 1970). For instance, the declarations from petitioner's two sisters and niece who were interviewed in 1987, much closer in time to the relevant period of functioning, described petitioner as a provider who was industrious and self-assertive. Petitioner gave them advice on child rearing, on dietary practices, and Bible interpretation. (12RHT 2058-2059; see Exs. 19 & 19A [Gladys Spillman], 20 & 20A [Rose Davidson], 21 & 21A [Shineaka Spillman].)

Dr. Hinkin also found the 1987 declaration of Dr. Terry Kupers, a psychiatrist retained by petitioner's first habeas counsel (Ex. RR), "to be of more significance than some of the records." "The way [Dr. Kupers] describes Mr. Lewis is in a fashion which is not at all consistent with a mentally retarded individual." Summarizing some of the relevant paragraphs from that declaration, Dr. Hinkin testified Dr. Kupers found petitioner "didn't want to be a financial burden on his mom, so at an early

age he began to steal and rely entirely on himself. He took care of his siblings as best he could, tried to be the man in the house." Dr Kupers also observed "Despite his long-term incarceration, [petitioner] managed to maintain a long-term relationship with two other women. In view of [petitioner's] lengthy periods of incarceration, his ability to maintain such strong lasting relationships is impressive." (12RHT 2068-2069; see Ex. RR at 3-4, ¶¶ 5, 8 & 9.) To Dr. Hinkin, Dr. Kupers' characterization of petitioner was consistent with "someone who was the head of the house, someone who provided for others, someone who took care of others and looked out for others. So this is – this is pretty much the diametrical opposite of what would be typical in a mentally retarded individual." (12RHT 2070.)

The reference hearing records shows petitioner, even if "functionally illiterate," had the requisite social skills to maintain numerous complex relationships with women, family, and friends, treated gambling and robbery as a "business," traveled freely around Los Angeles and to Las Vegas. His chosen criminal lifestyle fit his anti-social personality and did not create the need for the application of "functional academic skills" such as reading and write in his daily life. Nor does the reference hearing record establish that petitioner suffered any deficiency, much less a significant deficiency, in any other skill area in his daily life. Within his community and among his peers, his deficits in adaptive functioning were not significant. On this record, petitioner did not meet his burden to demonstrate he suffered from mental retardation prior to age 18.

As a result, *Claim XVIII* should be denied.

III. PETITIONER IS NOT ENTITLED TO HABEAS RELIEF DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL RESULTING FROM FAILURE TO INVESTIGATE AND PRESENT ADDITIONAL MITIGATION EVIDENCE AT THE PENALTY PHASE

Reference Questions 2 through 6 asked the referee to resolve factual questions relating to *Claim XIV*, *Claim XV*, and *Claim XVI* of the Petition. *Claim XIV* broadly alleged that petitioner's trial attorney denied him effective assistance by failing to investigate and introduce a variety of mitigating evidence during the penalty phase trial, including information about petitioner's family, his history, and his good character, petitioner's mental retardation and learning disabilities, and evidence that petitioner spent most of his formative years in juvenile institutions that failed to properly "identify and address [petitioner's] mental health needs" and did not prepare him to find employment once he was released. (Petn. 104-135.) *Claim XV* focused upon trial counsel's performance regarding evidence that petitioner was mentally retarded and suffered from brain damage/learning disabilities. (Petn. 136-166.) *Claim XVI* focused upon trial counsel's performance regarding evidence of the negatives effects of petitioner's juvenile incarceration. (Petn. 167-178.) The referee's answers to Questions 2, 4, and 5 include factual findings regarding the investigation conducted by trial counsel relating to *Claims XIV*, *XV*, and *XVI*. In responding to Question 2, the referee concluded that trial counsel conducted an adequate investigation. (Report, pp. 36-38.) The referee incorporated those findings into Questions 4 and 5. (Report, pp. 38-39.) In answering Question 3 with the statement, "The question is mooted by the finding in response to Question 2" (Report, p. 38), the referee did *not make any factual findings* concerning (1) what additional information might have been gathered with additional investigation, (2) the credibility of the additional information, or (3) "[w]hat investigative steps would have led to

this additional evidence?" (See Question 3.) In answering Question 6, the referee concluded that "Slick's investigation developed a great deal of negative information about petitioner, and no significant positive information" and that Slick made an informed, reasonable tactical decision to call only petitioner's sister Rose during the penalty trial and to rely upon information elicited from his sister Gladys and petitioner's father during the guilt phase. (Report, pp. 39-42.)

The referee's findings and the substantial supporting evidence in the reference hearing record confirm that Slick conducted a constitutionally adequate investigation of penalty mitigation evidence and made a reasonable tactical decision in presenting the penalty case in the manner he did. Therefore, petitioner has not shown deficient performance of counsel and is not entitled to habeas relief on these claims.

A. Respondent Takes Exception To The Referee's Findings For Question 2 Only To The Extent The Referee Appears To Find Kleinbauer Spent Only 85 Hours Investigating Petitioner's Case

In the Report, the referee found "From May 22, 1984 through July 20, 1984, Kleinbauer spent 85 hours investigating and writing reports." (Report, p. 31.) Respondent takes exception to this finding only to the extent it implies or finds that Kleinbauer's investigation was limited to those hours and that time period.

At the reference hearing, a second billing invoice dated September 3, 1984, was presented to Kleinbauer. Although Kleinbauer had no present independent recollection of her work on this case, she recognized her invoice, which was contained within trial counsel's file. (4RHT 617; Ex. R at 2446-2448.) The second invoice reflected that Kleinbauer spent an additional 25 hours investigating aspects of petitioner's case between July 24, 1984, and August 17, 1984. (4RHT 617; Ex. R at 2446-2448.) Her two

invoices charged for a total of 110.5 hours of investigation work. (4RHT 680; Ex. 7; Ex. R at 2446-2448, 2450-2453.)

B. Applicable Legal Principles

Both the United States and California Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) In order to prevail on his claim, petitioner must demonstrate both that trial counsel's performance was deficient in that it fell below an objective standard of reasonableness under professional norms, and a reasonable probability that, but for counsel's deficient performance, the result would have been more favorable to petitioner. (*Strickland, supra*, 466 U.S. at pp. 687, 696.) Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459), and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra*, at p. 689.) A court need not address both the performance and prejudice components of the *Strickland* standard, and may reject an ineffective assistance of counsel claim where the defendant makes an insufficient showing on one prong. (*Id.* at p. 697; *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Regarding performance during the penalty phase of a capital trial, there is a strong presumption as to the penalty phase that counsel made all significant decisions in the exercise of reasonable professional judgment, and there are countless ways to provide effective assistance in a given case. (*Cullen v. Pinholster* (2011) 131 S. Ct. 1388, 1407.) A petitioner must demonstrate deficient performance by showing his counsel had no tactical

reason for his actions. (See *People v. Zapien* (1993) 4 Cal.4th 929, 980; *People v. Williams* (1998) 44 Cal.3d 883, 936.)

Whether counsel's performance was deficient, and whether any deficiency prejudiced the petitioner, are both mixed questions subject to independent review by this Court. (*In re Hardy* (2007) 41 Cal.4th 977, 993 [citing cases].)

C. Petitioner Fails to Meet His Burden to Demonstrate Deficient Performance Concerning the Adequacy of Slick's Investigation of Evidence of Petitioner's Family, History, Good Character or His Reasonable Tactical Decision to Limit the Penalty Presentation (*Claim XIV*)

The referee summarized the information adduced at the reference hearing concerning Slick's "actions to investigate potential evidence in mitigation" (Report, pp. 28-31) as well as the results of the investigation conducted by trial investigator Kleinbauer, Dr. Maloney, Dr. Sharma, and Slick (Report, pp. 31-36). The reference hearing record amply supports the referee's findings that Slick conducted a constitutionally adequate penalty investigation and that Slick's decision to present a short penalty case without the information he uncovered was an informed and reasonable strategic decision.

1. Slick Conducted a Constitutionally Adequate Investigation of Potential Mitigation

Regarding petitioner's trial, pretrial motions were heard on August 8, 1984; jury selection occurred August 15, 16, and 21; and opening statements occurred on August 21. The trial testimony began on August 22, the defense presented its guilt-phase case on August 23, and the jury rendered its verdict on August 24, 1984. The penalty phase trial occurred on August 28, and a verdict was reached the same day. (4RT 651.)

As the referee found, trial counsel Ronald Slick obtained funding for investigation and experts in January 1984, well in advance of petitioner's

trial, and obtained additional funding in August 1984. Slick selected and utilized a trial investigator experienced and knowledgeable about death penalty investigation (Kristina Kleinbauer) and two experienced and competent mental health experts, forensic psychologist Dr. Michael Maloney and forensic psychiatrist Dr. Kaushal Sharma. (Report, pp. 28-29, citing 1RHT 217-220, 4RHT 590, 594, 5RHT 769, Ex. P at 13-16, 32.)

Kleinbauer understood the importance of gathering anecdotal information from family members and developing "as many mitigating factors as possible on your client's side" in order to "humanize the defendant" in a possible penalty phase. (Report, p. 29, citing 4RHT 596.) Slick's written instructions to Kleinbauer directed her, among other things, to investigate petitioner's "2. background history (grew-up, school, friends, and family), 3. character witnesses (friends, family, guards), [and to] take a statement from family & friends for character testimony." (Report, p. 29, citing Ex. R at 2645; 5RHT 811-812.)

On May 8, 1984, Slick obtained orders authorizing Dr. Maloney and Dr. Sharma to visit petitioner at the County Jail. (Ex. P at 36-37.) On May 8, 1984, Slick sent letters to Dr. Maloney and Dr. Sharma asking them to answer five questions relating to petitioner's competency to stand trial and sanity at the time of the offense, and six additional questions relating to possible sentencing issues in a penalty phase. (Report, p. 29 & fn. 54, citing Ex. B at 182-184 [Maloney], 299-302 [Sharma].) Both letters included available documents about the current charges (the information, police reports, preliminary hearing) and three probation reports from earlier cases (A024769, A017555, A017581) involving petitioner. (Report, pp. 29-30, citing Ex. B 184, 302.) According to Dr. Maloney, "especially in those years, there was very little provided in terms of background information other than legal reports, you know, probation/prison records, that kind of stuff." (10RHT 1672.)

In addition, Slick's May 8, 1984 letter to Dr. Maloney asked him to "administer the necessary psychological tests and *prepare a complete psychological profile for presentation to a jury.*" (Report, p. 29, citing Ex. B at 182, emphasis added.) Slick's letter to Dr. Maloney also requested a personal meeting with Dr. Maloney after his "initial conference with Mr. Lewis" in order "to discuss the case." (Ex. B at 182-183, 239; Ex. R at 2354-2357; 5RHT 920-921.)

On May 31, 1984, Slick sent Dr. Sharma 331 pages of records obtained from the CDC relating to petitioner (Ex. R at 2353), as well as Slick's outlines of petitioner's criminal history, personal history, and the CDC records (Ex. R at 2341-2350), which Slick had prepared a week earlier in May 1984. (Report, p. 30, citing Ex. 10; see also Ex. A at 2741-3115 [bates-stamped CDC records].)

Slick's billing records document that he billed 190 hours for trial preparation and investigation and 42 hours for court appearances. (Report, p. 30, citing Ex. 10.) Slick and his investigator met repeatedly with petitioner, his family members (father and sisters), and those with the closest relationships to him (wife and girlfriend). Between January and July 1984, Slick met with petitioner seven times (apart from court appearances) on January 18, February 1, February 27, May 18, May 31, July 24, and July 31, 1984. Slick interviewed Denesa ("Dee") Walker (petitioner's girlfriend, with whom he was arrested) on December 22, 1983, and again on February 24, 1984. On May 29, 1984, Slick interviewed Janireo Lewis (petitioner's wife) and Gladys Spillman (his sister). On May 29, 1984, Slick wrote a note documenting his negative impression of petitioner's wife as a witness: "Known D [petitioner] for 14 years. Married [petitioner] 12-1976. D [petitioner] makes his money pimping. Wife has tried to help D [petitioner] go straight but has been unsuccessful. Doesn't trust juries. I think she would make a bad witness because of her

attitude and she cannot say anything good about Robert." (Report, p. 34, fn. 63, citing Ex. A at 2636.) Slick also wrote a note regarding his interview with Gladys Spillman that includes, "Loves her brother"; "D will get even if harmed by someone. D went to 6 or 7th grade." (Ex. A at 2635.) Slick interviewed Spillman and Janiroe Lewis again on July 24 and met with Kleinbauer. (Ex. 10.)

As reflected in Kleinbauer's billing invoice dated July 23, 1984, during the same time period Kleinbauer interviewed petitioner six times, on May 24, June 6, June 13, July 5, July 11, and July 17, 1984. (Report, p. 31, citing Ex. A at 2639-2643.) Kleinbauer also interviewed petitioner's sisters (Gladys Spillman and Rose Davis), his girlfriend (Dee Walker), his wife (Janiroe Lewis) and his father (Robert, Sr.) and prepared reports of those interviews. (Report, p. 31, citing Ex. 7; Ex. B at 222-232 [reports].) The reports of her interviews with petitioner's sisters include information about petitioner's childhood, his relationship with his father, information about his home life, his juvenile delinquency, and his illegal activities that included selling cocaine and "running prostitutes." (Ex. B at 222-223.) In 1984, Kleinbauer utilized an outside typing service to prepare her reports. Her July 1984 invoice reflected that the service typed 20 pages of reports, and she billed for the cost. (4RHT 617-618; Ex. 7 at 1; Ex. R at 2454.) The reference hearing record includes only 11 pages of her reports of interviews with Gladys Spillman, Rose Davis, Robert, Sr., Dee Walker, and Janiroe Lewis. (Ex. B at 222-232.) Kleinbauer billing invoice dated September 3, 1984, reflects that she conducted additional investigation just before and during petitioner's trial, including "talk[ing] to Mr. Lewis Sr. and Mrs. Janiroe Lewis" on August 4, 1984, and meeting with petitioner at the County Jail on August 10, 1984. (Ex. R at 2447.)

Kleinbauer's report of an interview with petitioner's sister Spillman on July 10, 1984, mentioned that petitioner and Larry Charles Cleveland

were arrested together after they had been to Las Vegas. (Ex. B at 222-223.) Kleinbauer's report of her July 14 interview with petitioner's father mentions Larry Cleveland as being a friend – and a friend that the father opined might be a bad influence upon petitioner. (Ex. B at 228-230 ["When Robert was released in June, 1983, his friend Larry Charles Cleveland was waiting for him at Mr. Lewis' house when he got out. Mr. Lewis expressed the view that this may be why Robert got into trouble this time, since they grew up together and are close friends"].) Kleinbauer's billing records indicate that she attempted to locate "Larry Charles Cleveland" on July 16, 1984. (Ex. A at 2639.)

In the meantime, Dr. Maloney had twice met with petitioner at the County Jail and evaluated him. His notes of the second interview conducted June 16, 1984, reflect petitioner's discussion of the events leading to his arrest and his family history and background. (Ex. B at 203-208; Ex. R at 2449.) When Dr. Maloney asked about discipline at home, petitioner said that he "got my ass whipped" with a switch or a belt. (10RHT 1697-1698; Ex. B at 208.) Dr. Maloney testified that the type of discipline petitioner described was "unremarkable" at that time. (11RHT 1760-1761; Ex. B at 208.) Dr. Maloney personally administered the "Quick Test" to petitioner on June 16, and had his assistant administer the WAIS-R on July 5. (Ex. R at 2449; 10RHT 1726-1727, 1754-1755; Ex. B at 195-196; 11RHT 1911-1915.) Billing records reflect that Slick met with Kleinbauer on July 24 (Ex. 10; Ex. R at 2447) and with Dr. Maloney on July 25 (Ex. 10; Ex. R at 2436). Certain reports authored by Kleinbauer were contained in Dr. Maloney's file. (11RHT 1819; see Ex. B at 222-232.) Dr. Maloney read everything Slick gave him. (11RHT 1819-1820.)

On July 31, 1984, at Slick's request, Dr. Maloney spent several hours with Slick interviewing petitioner's father, wife, and girlfriend at Slick's office and made notes of the interviews, which he read into the record.

(10RHT 1705-1710; Ex. B at 233-236; Ex. R at 2449.) Slick's billing for the interviews conducted on July 31, 1984, also name Rose Davis. (Report, p. 30 & fn. 57, citing Ex. 10.) Slick thought it would be helpful to have Dr. Maloney talk to the witnesses and "size them up." (6RHT 951, 970-971, 7 RHT 1095-1097.) Dr. Maloney's notes indicated the witnesses were of "negative quality," and he was certain that he shared that assessment with Slick. (10RHT 1712; 11RHT 1840-1841.) According to the notes, petitioner's father attributed petitioner's first getting into trouble at age 12 to not having a father around and the rest to petitioner's associates and had advised petitioner to get with new friends. The father described petitioner's peers as "a real rough bunch. All they wanted was something for nothing and to see what they could get away with." Dr. Maloney wrote that the father "had nothing to say about possible penalty plea." (10RHT 1705-1706; Ex. B at 236.) His notes about Janiroe Lewis indicated that she had three children, the oldest with Down Syndrome, that she admitted five or six prostitution arrests and had a petition filed against her in family court to remove her children from the home. (10RHT 1708; Ex. B at 234.) Dr. Maloney's notes about Denessa "Dee" Walker included the notations, "bright" "but streeter-fighter type"; "seems angry – background is negative," which would have referred to a significant illegal background, and "secondary to burglary, prostitution, and assault with a deadly weapon." (10RHT 1710; Ex. B at 233.)

Slick also came away from the July 31 interviews with negative impressions. On August 1, 1984, Slick wrote a note about the interviews and his impressions of these witnesses that reflected his negative assessments of their witness potential. (Report, pp. 34-35 & fn. 63; Ex. A at 2637.)

Slick's note reads,

> Meeting w[ith] Mike Maloney [and] witnesses:
>
> Robert Lewis, Sr. [S]hould not be used as a witness because he accepts no responsibility, believes his son is not guilty, and cannot say anything good about him. Knows D [petitioner] was in shootout, where one [person] was killed.
>
> Ganero [Janiroe] Lewis should not be used because she is not stable (crazy) [and] has 5 prostitution arrests, knows D [petitioner] uses guns in robberies and cannot say anything good about D [petitioner]. In my opinion does not appear good.
>
> Dee Walker - said she saw car on 26th, but told police she saw car on 29th. She now says she lied to police to protect herself. This destroys her credibility although she makes a good appearance. Also she does not know much about D['s] [petitioner's] background.
>
> Rose Davis can testify about D['s] [petitioner's] background and he was always in trouble. Loves brother and says she does not know anything about D's [petitioner's] criminal history except "that's what people say." Her credibility is no good or she is stupid. Robert not capable of killing.

(Ex. A at 2637.)

At the hearing, Dr. Maloney testified that he was certain that he told Slick that he would not be of value. (10RHT 1712, 1753.) If Dr. Maloney had felt there was something positive to be used in the penalty phase, he would have written a report. (10RHT 1711-1712.) Dr. Maloney did not write a report in this case, which was unusual. He recalled only that he did not believe it would be helpful to the defense for him to write a report. (10RHT 1679.)

At the reference hearing, Dr. Sharma testified that he considered Slick's letter to him, including the questions posed, as asking him to look for evidence that could be used in mitigation at the penalty phase. (13RHT 2186-2187, 2203-2206; Ex. B at 300-301.) After interviewing petitioner

for a total of four hours over the course of two days and reviewing documentation provided about the crime and numerous prison records concerning petitioner, Dr. Sharma prepared a report dated July 25, 1984, containing his conclusions and opinions. (13RHT 2175, 2197-2198; Ex. B at 303-305 [report].)

Dr. Sharma's report states, "The defendant is presently not suffering from a mental disorder and was not suffering from such a mental disorder at the time of the alleged crime." (Ex. B at 303.) Dr. Sharma's report advised Slick that his examination revealed, "[n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations. The defendant in the past has been given a diagnosis of Anti-social Personality Disorder starting at an early age. *I agree with that diagnosis*." (Ex. B at 305, emphasis added.) Dr. Sharma's report continued, "In the absence of any significant mental illness or other emotional or mental disturbance, *I have nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant'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 such mitigating factors exists in this case*." (Ex. B at 305, italics added.)

As noted by this Court, in *Strickland* the United States Supreme Court "made clear courts should not equate effective assistance of counsel with exhaustive investigation of potential mitigating evidence." (*In re Andrews* (2002) 28 Cal.4th 1234, 1254, citing *Strickland, supra*, 466 U.S. at pp. 690-691.) Thus, this Court has held that there is no requirement, even in a capital case, that an attorney must conduct an exhaustive investigation of potential mitigating evidence and make "a lengthy presentation of a broad range of witnesses describing in detail various aspects of [a] petitioner's background." (*In re Andrews, supra*, at p. 1256.) Recently, the United States Supreme Court clarified that its *Strickland* jurisprudence does not

impose "a constitutional duty to investigate" that establishes a prima facie case of ineffective assistance of counsel whenever a defense attorney stops an investigation of a capital defendant's background after acquiring "only rudimentary knowledge of his history from a narrow set of sources." (*Cullen v. Pinholster* (2011) 131 S. Ct. 1388, 1406-07, internal quotes omitted). Instead, counsel "is entitled to balance limited resources in accord with effective trial tactics and strategies." (*Harrington v. Richter* (2011) 131 S.Ct. 770, 779.) The Supreme Court reiterated that, "[i]t is '[r]are' that constitutionally competent representation will require 'any one technique or approach.'" *Ibid.*

Although, due to the passage of time, incomplete information is available concerning the information provided by petitioner, his family members, and his acquaintances that would be relevant to the penalty phase investigation and presentation, what was produced was not helpful. As this summary demonstrates, Slick or his trial investigator met with petitioner on a total of 13 separate occasions not including court appearances. Slick met with petitioner's sister Gladys Spillman twice (May 29 and July 24), his sister Rose once (July 31), petitioner's wife three times (May 29, July 24, July 31), petitioner's father once (July 31), and the "girlfriend" with whom petitioner was arrested four times (December 22, 1983, February 24, 1984, July 31, August 6). Kleinbauer met with petitioner on six occasions, interviewed petitioner's sisters (Spillman and Rose Davis), girlfriend (Dee Walker), wife (Janiroe Lewis) and father (Robert Lewis, Sr.) and gave Slick reports of those interviews. (Ex. 7; Ex. B at 222-232 [reports]; Ex. A at 2639-2643.) Slick also had Dr. Maloney participate in the interviews with at least petitioner's father, wife, and girlfriend. (10RHT 1705-1710; Ex. B at 233-236; Ex. R at 2449; Ex. 10.) Dr. Maloney's file also includes copies of the witness reports, which Dr. Maloney would have read. (11RHT 1819-1820; see Ex. B at 222-232.) Slick also had substantial information about

petitioner's history through his CDC records, criminal case files and probation reports. Slick had very unfavorable information from Dr. Sharma, and Dr. Maloney told Slick that he would not be helpful to the defense and felt that even writing a report would potentially be detrimental to petitioner.

Here, the investigation conducted by Slick, his investigator, and retained experts developed more than rudimentary knowledge of petitioner's background but did not produce helpful mitigating information. The reference hearing record provides substantial evidence in support of the referee's finding that trial counsel Slick conducted a constitutionally adequate investigation.

2. Slick's Decision to Present Limited Mitigation Evidence Was a Reasonable and Informed Tactical Decision

As long as a reasonable investigation was conducted, the reviewing court should defer to counsel's strategic choices. (*Strickland, supra,* 466 U.S. at pp. 690-691.) As the referee found in answering Question 6,

> Slick's investigation developed a great deal of negative information about petitioner, and no significant positive information. Family members knew petitioner used a gun to commit robberies, were themselves criminals, and had nothing good to say about petitioner. Slick knew from a prior case probation report that: on February 21, 1977, during a robbery, petitioner had threatened to kill a store clerk, and had shot at the clerk when the clerk shot at him; that on June 17, 1977, during a different robbery, petitioner had been involved in a shoot-out in which an innocent bystander was shot in the eye and killed; and that petitioner had told a probation officer that "robberies was [sic] his business and he did not mind serving time in prison." (Ex. A, pp. 2677-2679.)
>
> By stipulating that petitioner had four robbery convictions, Slick was able to keep the jury from hearing about the negative details of those robberies, including the defendant's gun use. (6 RHT 1030.)

(Report, p. 40.)

At the reference hearing, Slick testified that he debated how to handle the penalty presentation: "Well, I evaluated it twice. I was on the fence. I didn't like what they were saying, I didn't like how they presented themselves. It just didn't – in general it didn't look mitigating to me." (5RHT 868.) Slick's billing records indicate that even after trial began, he considered calling Dr. Maloney as a witness. (Ex. 10 [8-21-84 entry].)

The transcript of petitioner's trial reflects that, at the outset of the penalty phase, the prosecution was prepared to prove the prior convictions using court records and that Slick had seen the witnesses "out in the hall" that were there to assist in proving those prior offenses. (4RT 830-831.) In 1984, Slick explained he was prepared to stipulate because he knew the prior convictions to be true based upon his review of the various materials and that he did not want the jury to learn "that Mr. Lewis had used firearms or dangerous weapons in those prior cases" and felt it would be advantageous to stipulate and "will have less of an impact on the jury." (4RT 831.)

At the reference hearing, Slick testified that he thought the stipulation would weaken the prosecution case, especially because the stipulation omitted bad details about the prior crimes. He decided not to risk the presentation of additional aggravating evidence by presenting more from petitioner's family members and making it worse for petitioner. (5RHT 861-864; 6RHT 1030, 1042.) Slick was pleased with the stipulation because he had been concerned about dealing with the facts of the prior crimes. (6RHT 1043.) The stipulation was not conditioned on petitioner not presenting such evidence. (5RHT 863.) Nor did the stipulation include an agreement that the prosecution would not present additional evidence of the prior bad acts in rebuttal. (6RHT 1041-1042.) Slick believed that it was to his advantage to have a short penalty phase. (5RHT 866-867.) He

made a strategic decision. (5RHT 868.) When he had questioned petitioner's father and sisters, he asked leading questions in order to keep them focused on exactly what he wanted to elicit and to not drift into other areas. (5RHT 871-872.) His choices were deliberate. (5RHT 872.) He did not call Dr. Maloney as a witness due to his concern of drawing out additional aggravating evidence. (5RHT 896.)

Here, as the referee concluded, the "humanizing" evidence discovered during Slick's constitutionally adequate investigation failed to present a compelling mitigation case: "Family members knew petitioner used a gun to commit robberies, were themselves criminals, and *had nothing good to say about [P]etitioner*." (Report, p. 40, emphasis added.) Moreover, as the referee found, trial counsel made a reasonable tactical decision to limit his penalty presentation in order to avoid the potential introduction of negative details about the four robbery convictions that had been introduced only by stipulation. (Report, p. 40, citing 6RHT 1030.) The prosecution's aggravating evidence consisted entirely of a stipulation that petitioner had been convicted of four robberies in case numbers A012661, A017581, A017555, and A024769 made in the following form: "Counsel, do you stipulate that the defendant, Robert Lewis, Jr., was convicted of robbery in 19 –, in felony case __?" (4RT 835 [Crim 24135].) Had trial counsel presented evidence concerning the impact of petitioner's prior incarcerations, the prosecution would have had the motive and opportunity to present evidence concerning the circumstances of the prior robberies. petitioner had used a firearm or a dangerous weapon in all four robberies. However, as the referee observed, two of robberies included particularly egregious facts: on February 21, 1977, during a robbery of Cash's Mens Wear, petitioner had threatened to kill a store clerk, and had fired at the clerk when the clerk shot at him (case no. A017555) and on June 17, 1977, during a different robbery, petitioner had been involved in a shoot-out in

which an innocent bystander was shot in the eye and killed (case no. A017581); and that petitioner had told a probation officer that "robberies was [sic] his business and he did not mind serving time in prison." (Report, p. 40, citing Ex. A at 2677-2679.)

Particularly when juxtaposed with the very negative details of petitioner's four robbery convictions – three occurring over the course of a relatively recent period (1977 through 1982) – trial counsel's tactical decision not to present the underwhelming mitigation evidence developed through his adequate investigation was reasonable.

Petitioner has failed to meet his burden to establish that he is entitled to habeas relief on *Claim XIV.*

D. Petitioner Fails to Meet His Burden to Demonstrate Deficient Performance Concerning the Investigation and Presentation of Evidence of Petitioner's Mental Retardation, Brain Damage, or Learning Disabilities (*Claim XV/Claim XIV*)

In *Claim XV/Claim XIV*, petitioner contends that Slick denied him effective assistance of counsel by failing to investigate and present mitigating evidence that petitioner was mentally retarded and suffered from brain damage or learning disabilities. (Petn. 136-166.) In answering Question 4, the referee found, "Slick investigated petitioner's mental condition, but *did not specifically investigate whether petitioner was mentally retarded or suffered from a learning disability.* See response to Question 2, above." (Report, p. 38, italics added.) The referee's findings on Question 2 and Question 4, confirm that petitioner is not entitled to habeas relief on his claim of ineffective assistance of counsel as stated in *Claim XIV* and *Claim XV.*

The reference hearing record produced evidence that Slick retained a competent forensic psychologist (Dr. Maloney) and a competent forensic

psychiatrist (Dr. Sharma) to evaluate petitioner. Slick's psychological investigation was broad enough to encompass potential mitigation regarding mental retardation and learning disabilities. And even if trial counsel had *specifically focused* upon the possibility of mental retardation or learning disabilities, the reference hearing record demonstrated Slick would not have obtained helpful information.

In his written instructions to Dr. Maloney, Slick specifically asked Dr. Maloney to "administer the necessary psychological tests and *prepare a complete psychological profile* for presentation to a jury." (Report, p. 29, citing Ex. B at 182.) Thereafter, Dr. Maloney met twice with petitioner at the jail, and caused his psychological assistant Dr. Nancy Kaser-Boyd to administer psychological tests to petitioner. (Ex. R at 2436.) Dr. Maloney also reviewed case materials, met with attorney Slick, and participated in interviews of petitioner's family members. (Ex. R at 2436.) Dr. Maloney testified that it was not his custom and practice to bill for time spent speaking informally with Dr. Sharma unless it was a significant amount of time. The same was true about to speaking with trial counsel. (10RHT 1674.) Dr. Maloney did not write a report because he felt his input would not be helpful to petitioner's case. (Report, p. 9; 10RHT 1679.) Dr. Maloney testified one of his concerns was that he might provide information in a report that would be deleterious to a defendant. (Report, p. 9; 10RHT 1671, 1672.) According to Dr. Maloney, it was "very rare I didn't write a report." (Report, p. 9; 10RHT 1712.)

At the reference hearing, Dr. Maloney testified that in 1984 he would have considered "significant" mental retardation to be a potential mitigating factor in a capital case, and if a defendant was "clearly mentally retarded," he would bring it up to defense counsel. (Report, p. 9; 10RHT 1741, 1742.) Dr. Maloney further testified that he did not perceive petitioner to be mentally retarded by 1984 standards, but he was not focused on

determining if petitioner was mentally retarded as it was "not central" to his consideration of petitioner at the time. (Report, p. 9; 11RHT 1802, 1805.) Petitioner's Quick Test did not indicate intelligence at a level of mental retardation, and because it was normed on white adults it "[c]ertainly doesn't represent persons from [petitioner's] background," and "should underestimate him." Dr. Maloney viewed the results as consistent with the other test results. (10RHT 1755; 11RHT 1916; see Ex. B at 196 [norming scales].) Concerning petitioner's results on the WAIS-R, Dr. Maloney opined, "Persons from Mr. Lewis' background will always score low on these kinds of tests, lower than probably their level of intelligence." (10RHT 1728.) The lower score would result from petitioner's level of education, his removal from societal intercourse in regular life at around 12 years of age (when he entered the juvenile system), and his other disadvantageous experiences. (10RHT 1728-1729.) Dr. Maloney anticipated that petitioner might score lower on the intelligence testing due to his life experience and background. When Dr. Maloney interviewed petitioner, petitioner seemed to be "at least in the average range." (10RHT 1729.) Thus, petitioner's WAIS-R full scale IQ of 73 did not put him solidly in the mentally retarded range because he did not come from the background on which the test is normed. If petitioner's motivation was compromised, his test score would be even lower. (10RHT 1739.)

Given petitioner's background and reading level, Dr. Maloney expected his verbal IQ score to be lower and the performance score higher. (11RHT 1780.) The inability to read could impact performance on the WAIS-R because of the failure to obtain knowledge necessary to perform well on the test. (11RHT 1934-1935.) The simplest explanation for a lower verbal score than a performance score would be "lack of broad experiences during early years" that would include "[l]earning to read,

learning to profit from education, learning to profit from one's own experience." (11RHT 1936.)

Dr. Sharma testified that he viewed Slick's letter to him, including the questions posed, as asking him to look for evidence that could be used in mitigation at the penalty phase. (13RHT 2186-2187, 2203-2206; Ex. B at 300-301.) Dr. Sharma was not specifically asked to evaluate petitioner for mental retardation. (13RHT 2206-2207.) Dr. Sharma interpreted the question inquiring about petitioner present and mental and physical condition to include mental retardation. (13RHT 2207.) Mental retardation was included among the things that Dr. Sharma would be looking for. (13RHT 2208.) In evaluating petitioner, Dr. Sharma would attempt to assess whether he suffered from brain damage, mental retardation, and learning disabilities. (13RHT 2192.)

Dr. Sharma did not administer any tests to petitioner. (13RHT 2196, 2226.) He viewed Dr. Maloney's role as a psychologist to be focusing more on intellectual functioning than his role. (13RHT 2209.) During the 1980's, both men had offices in the same building. They frequently met to discuss the cases on which they worked together. (10RHT 1663-1665; 13RHT 2184.) Dr. Sharma had no recollection in this case whether Dr. Maloney shared any test results with him. (13RHT 2209-2210, 2226.) However, his custom and practice at the time was to talk with Dr. Maloney multiple times before preparing a report. (13RHT 2210.)

Slick obtained 331 pages of CDC documentation concerning petitioner. (See Ex. A at 2741-3115.) Slick provided these materials to Dr. Sharma. (Ex. B at 303.) Those records included, a 1973 social evaluation stating, "[p]resent psychological data indicate he is of low average intelligence (Revised Beta), with a grade placement level of 4.0" (Ex. A at 2776); an Adult Authority Report (San Quentin) reciting that petitioner "is presently enrolled in school at the literacy level where he has maintained a

'C' average" (Ex. A at 2781); and a 1968 clinical evaluation documenting a Revised Beta IQ of 83 and results on the SRA IQ Test, the the California Achievement Test, and the Wide Range Achievement Test and including the comments, "His scores as listed are meaningless for subject is not academic or vocationally oriented. He may be able to function as a dull normal, but that surmise is a projection based on his non-verbal S.R.A. score." (Ex. G; Ex. A at 2938.)

After interviewing petitioner for a total of four hours over the course of two days and reviewing documentation provided about the crime and numerous prison records concerning petitioner, Dr. Sharma prepared a report dated July 25, 1984, that contained his conclusions and opinions. (13RHT 2175, 2197-2198; Ex. B at 303-305 [report].) Dr. Sharma's report states, "The defendant is presently not suffering from a mental disorder and was not suffering from such a mental disorder at the time of the alleged crime." (Ex. B at 303.) Dr. Sharma specifically advised trial counsel Slick that his examination revealed, "[n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations. The defendant in the past has been given a diagnosis of Anti-social Personality Disorder starting at an early age. I agree with that diagnosis." (Ex. B at 305.) Dr. Sharma continued, "In the absence of any significant mental illness or other emotional or mental disturbance, I have nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant'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 such mitigating factors exists in this case." (Ex. B at 305.)

If Dr. Sharma had suspected that petitioner suffered from significant subaverage intellectual functioning, he would have made a notation in his report, directed Dr. Maloney (as the appointed psychologist) to conduct IQ testing, and would have alerted the defense attorney. (13RHT 2198.) And

as the referee found, Dr. Sharma agreed that he likely informed Slick that he could not help him with petitioner's defense. "This one [petitioner], nothing there. He's just a bad dude." (13 RHT 2213.)" (Report, p. 10, fn. 10.)

Trial counsel was entitled to rely on the reports and advice of the qualified experts he consulted. (See *Summerlin v. Stewart* (9th Cir. 2001) 267 F.2d 926, 943; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 947 [entitled to rely on expert consulted].) Moreover, trial counsel was not required to seek additional expert opinions simply because he received unfavorable opinions. (*Walls v. Bowersox* (8th Cir. 1998) 151 F.3d 827, 835; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038.)

The reference hearing failed to develop evidence that trial counsel had any reason to doubt the qualifications of Dr. Sharma or Dr. Maloney or doubt the veracity of the opinions they offered him. Both men evaluated petitioner through multiple interviews prior to trial, and both men considered issues of mental retardation, brain damage or learning disabilities to fall within the scope of their assessment. Additionally, the reference hearing produced no evidence that either Dr. Maloney or Dr. Sharma informed Slick that petitioner was mentally retarded or suffered from a mental disorder, brain damage, or learning disabilities that would qualify as mitigating circumstances. The hearing record contains no evidence that either expert suggested or opined that further examination, testing, or information was needed in 1984. Although this record does not support a showing that either Dr. Maloney or Dr. Sharma performed deficiently under standards in existence in 1984, there is no constitutional right to the effective assistance of a mental health expert. (*People v. Samayoa* (1993) 15 Cal.4th 795, 838-839.) At the reference hearing, petitioner failed to demonstrate that, after consulting two forensic mental

health experts, trial counsel possess any favorable opinion about mental retardation, brain damage, or learning disabilities.

No immediate family members testified at the reference hearing. Reports authored by the defense trial investigator, Kristina Kleinbauer, reveal no information that might have independently alerted Slick that there was a need for additional psychological testing or for additional documentation on the issue of mental retardation or learning disabilities that would have suggested in 1984 that additional investigation of petitioner's cognitive abilities was necessary. Trial investigator Kleinbauer personally interviewed petitioner for a total of 14 hours over six days. (Ex. 7 at pp. 2-4.) During these repeated contacts, Kleinbauer perceived petitioner to be "a very pleasant man who was *quite articulate*." (4RHT 698-701.) Kleinbauer's reports of interviews with petitioner's sisters (Gladys and Rose) and his father are devoid of information calling petitioner's cognitive abilities into question. (4RHT 658-659, 661; Ex. B at 222-232.) So, too, are the video "declarations" of his sisters and niece prepared in 1987. (Ex. 19, Ex. 20, Ex. 21.)

In answering Question 1, the referee found, "The psychologist and psychiatrist who examined petitioner in 1984 were not focused on mental retardation because the *Atkins* decision exempting mentally retarded defendants from execution did not occur until 2002, more than 18 years later. To further complicate matters, the standard for mental retardation has changed over the years and is today more lenient than in 1983 and 1984." (Report, p. 28.) The change in the law nearly 20 years after petitioner's evaluation and trial does not demonstrate ineffective assistance of counsel.

In sum, petitioner failed to meet his burden to demonstrate Slick performed deficiently in failing to present evidence, in 1984, that petitioner suffered from mental retardation or learning disabilities. This Court should deny *Claim XV/Claim XIV*.

E. Petitioner Fails to Meet His Burden to Demonstrate Deficient Performance Concerning the Investigation and Presentation of Evidence of "Negative Impact" of Petitioner's Juvenile Incarceration (*Claim XVI/Claim XIV*)

In *Claim XVI/Claim XIV*, petitioner contends Slick failed to investigate and present evidence concerning the impact of petitioner's juvenile incarcerations. (Petn. 167-178; see Petn. Ex. 15.) In answering Question 4, the referee found, "Slick investigated petitioner's family, history, and his good character. Slick investigated petitioner's mental condition, but did not specifically investigate whether petitioner was mentally retarded or suffered from a learning disability. See response to Question 2, above." (Report, p. 38.) The referee's findings on Question 2 and Question 4 confirm that petitioner is not entitled to habeas relief on *Claim XVI.*

At the reference hearing, petitioner presented testimony from Dr. Adrienne Davis concerning this subject. Her testimony was almost entirely premised upon the declaration she submitted to this Court with the Petition. (1RHT 22-143; Petn. Ex. 15.) Because the referee concluded that the answer to Question 2 "mooted" Question 3, the referee *did not make findings* regarding what evidence concerning petitioner's juvenile "institutionalization" could have been discovered by trial counsel, did not make findings about the credibility of such evidence, and did not make findings about what investigative steps would have led to such information. (Question 3.)

As found by the referee (in addressing Question 2), Slick adequately investigated potential mitigating evidence. Slick retained a forensic psychologist (Dr. Maloney) and a forensic psychiatrist (Dr. Sharma). Slick provided both experts copies of three probation reports. (Ex. B at 182-184, 299-302.) Slick asked Dr. Maloney to "prepare a complete psychological

profile for presentation to a jury" in petitioner's case where the prosecution was seeking the death penalty. (Ex. B at 182.) Dr. Maloney's notes of his June 16, 1984 clinical interview with petitioner outline historical information about petitioner's family, schooling, juvenile camp and Youth Authority placements. (Ex. B at 206.) After evaluating petitioner, administering psychological tests, and meeting with family members, Dr. Maloney did not write a report because he felt his input would not be helpful to petitioner's case. (Report, p. 9; 10RHT 1671-1672, 1679.) According to Maloney, it was "very rare I didn't write a report." (Report 9; 10RHT 1712.)

Slick provided Dr. Sharma with 331 pages of CDC records pertaining to petitioner's prior incarcerations. (Ex. B at 303; Ex. A at 2747-3115.) In Dr. Sharma's report to trial counsel, Dr. Sharma noted: "[petitioner] was evaluated by psychiatrists when he was confined to the Youth Authority, however, he was not provided with any treatment per se. The [petitioner] has a seventh grade education only because of his repeated detainment in Juvenile Hall." (Ex. B at 304.) Dr. Sharma advised trial counsel that he discovered, "[n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder during the examinations." (Ex. B at 305.) Dr. Sharma concluded, "In the absence of any significant mental illness or other emotional or mental disturbance, *I have nothing to suggest any mitigating circumstances for the defendant*. In fact, given the defendant'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 such mitigating factors exists in this case*." (Ex. B at 305, emphasis added; Report, p. 34.) At the hearing, Dr. Sharma agreed that he likely informed Slick that he could not help him with petitioner's defense. "This one [petitioner], nothing there. He's just a bad dude." (13 RHT 2213.)" (Report, p. 10, fn. 10.)

Thus, Slick employed the services of two experienced and competent forensic mental health experts to fully evaluate petitioner for possible mitigation evidence to present at a penalty phase. The reference hearing record demonstrates that neither expert advised Slick that institutional failures bore responsibility in some part for petitioner's outcome in life or that they could testify about petitioner's prior juvenile incarcerations in a manner that would be helpful to petitioner or conceivably mitigating to the penalty jury. Trial counsel was entitled to rely on the reports and advice of the qualified experts he consulted. (See *Summerlin v. Stewart*, *supra*, 267 F.2d at p. 943; *Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 947.) Moreover, trial counsel was not required to seek additional expert opinions simply because he received unfavorable opinions. (*Walls v. Bowersox*, *supra*, 151 F.3d at p. 835; *Hendricks v. Calderon*, *supra*, 70 F.3d at p. 1038.) Trial counsel's reliance upon these qualified mental health experts did not deny petitioner effective assistance.

Moreover, as the referee observed, trial counsel made a reasonable tactical decision to limit his penalty presentation in order to avoid the potential introduction of negative details about the four robbery convictions that had been introduced only by stipulation. (Report, p. 40, citing 6RHT 1030.) The prosecution's aggravating evidence consisted of a stipulation that petitioner had been convicted of four robberies in case numbers A012661, A017581, A017555, and A024769. (Supp. 4RT 809-810.) Had trial counsel presented evidence concerning the impact of petitioner's prior incarcerations, the prosecution would have had the motive and opportunity to present evidence concerning the aggravating circumstances of the prior robberies. And, although not specifically mentioned by the referee, evidence of the impact of juvenile and adult incarcerations would have necessitated the presentation of evidence concerning petitioner's lengthy juvenile and adult incarcerations and his poor behavior while in custody.

Petitioner failed at the reference hearing to demonstrate that trial counsel performed deficiently in either investigating the impacts of his juvenile incarcerations or criminal incarcerations or in not presenting such evidence. This Court should deny *Claim XVI/Claim XIV.*

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court deny the petitions for writ of habeas corpus.

Dated: April 30, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General

FOR MARGARET E. MAXWELL
Supervising Deputy Attorney General
Attorneys for Respondent

LA2003XH0016
60993441.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 50,508 words.

Dated: April 30, 2013

KAMALA D. HARRIS
Attorney General of California

FOR MARGARET E. MAXWELL
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Robert Lewis, Jr. On Habeas Corpus**
No.: **S117235**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 30, 2013, I served the attached **RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Robert M. Sanger (2 copies)
Attorney at Law
125 East De La Guerra Street, Ste 102
Santa Barbara, CA 93101

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

William Hodgman
Deputy District Attorney
210 West Temple Street
Los Angeles, CA 90012

Legal Affairs Secretary
Governor's Office
State Capitol, First Floor
Sacramento, CA 95814

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 30, 2013, at San Francisco, California.

Nelly Guerrero
Declarant

Signature

LA2003XH0016
60994285.doc