IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ROBERT LEWIS, JR., Petitioner, On Habeas Corpus.	CAPITAL CASE Case No. S117235 Related Automatic Appeal Case No. S020670 Los Angeles County Superior Court No. A027897

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

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

I.

PETITIONER IS INTELLECTUALLY DISABLED WITHIN THE MEANING OF *ATKINS V. VIRGINIA* (2002) 536 U.S. 304, *IN RE HAWTHORNE* (2005) 35 CAL.4TH 40 and PENAL CODE § 1376

The Referee's finding that Petitioner is intellectually disabled[1] within the meaning of *Atkins* and *Hawthorne* is supported by the evidence presented at the evidentiary hearing. Petitioner has proven by a preponderance of the evidence that he meets the three prongs of the "legal definition"[2] for intellectual disability. He demonstrates subaverage intellectual functioning (Prong 1) concurrently with significant deficits in adaptive behavior (Prong 2) that became manifest before the age of 18 (Prong 3). Therefore, he is not eligible for execution.

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

[2]This Court has used "legal definition" and "legal standard" to described the three "prong" statement of intellectual disability. (*People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1003, 1011.) For consistency, Petitioner will use the term "legal definition" to describe the three prong statement.

A. The Referee Applied the Correct Legal Definition to Determine Whether Petitioner Is Intellectually Disabled

1. The Three Prong Legal Definition of Intellectual Disability - a Condition of Significantly Subaverage General Intellectual Functioning (Prong 1) Existing Concurrently with Deficits in Adaptive Behavior (Prong 2) and Manifested Before 18 Years of Age (Prong 3) - Used by the Referee is the Correct One and is Consistent with *Atkins* and *Hawthorne*.

The Referee applied the following legal definition to determine whether Petitioner is intellectually disabled:

> "The Referee accepts for purposes of this hearing, petitioner must prove by a preponderance of the evidence that he is mentally retarded by proving he (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.*)" (Referee's Report, pp. 6-7.)

This legal definition is correct. It is consistent with the clinical definition referenced in *Atkins v. Virginia* (2002) 536 U.S. 304, the legal definition adopted by the Legislature in Penal Code §1376 as well as this Court's holdings in *In re Hawthorne* (2005) 35 Cal.4th 40 and *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999.

The United States Supreme Court in *Atkins* announced that "evolving standards of decency" mandated that execution of the intellectually disabled offends the Eighth Amendment and constitutes cruel and unusual punishment. (*Atkins v. Virginia*, *supra*, 536 U.S. at 321.)

It should be noted that the United States Supreme Court in *Atkins* did not set forth a "legal definition" of intellectual disability. The "clinical definitions" referred to by the Court, summarized from the evidence in that case, included the three criteria, "subaverage intellectual functioning," "significant limitations in adaptive skills" and "manifest before age 18". With regard to the second criteria the Court did not require that any particular categories of evidence be present; rather it listed possible categories of limitations in adaptive skills, "such as communication, self-care, and self-direction" by way of example. (*Id.* at 318.)

Since the Court in *Atkins* did not adopt a "legal definition", Respondent is incorrect in stating that the Referee's definition "is inconsistent with the definition set forth in *Atkins*." (Respondent's Brief, p. 99.)

Furthermore, the Court in *Atkins* did not adopt any specific "clinical definition." The Court simply recites in a footnote, without discussion, two clinical definitions of intellectual disability from the literature. The first is that of the American Association of Mental Retardation (AAMR) in its manual, *Mental Retardation: Definition, Classification, and Systems of Support*, 9th Edition, 1992[3]; the second that of the American Psychiatric Association (APA) in its *Diagnostic and Statistical Manual for Mental Disorders*, 4th Edition Text

[3] Referred to as "AAMR, 9th Ed." in the Brief.

Revision[4]. These are not adopted as legal definitions or, even as controlling clinical definitions.

In fact, the Court in *Atkins* stated that it is up to the states to implement its ruling just as it had following the prohibition against executing the insane in *Ford v. Wainwright* (1989) 477 U.S. 399. In a footnote following this proposition, the Court stated, "The statutory definitions of mental retardation are not identical but generally conform to the clinical definitions set forth in n. 3 above." (*Id.* at 317 and fn. 22.)

California did not have a statutory definition of intellectual disability for death penalty cases. In response to *Atkins*, the Legislature created a statutory definition of intellectual disability as, "the condition of significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Penal Code § 1376.) This is the "legal definition"used by the Referee to answer the reference question posed by this Court in this case and is consistent with the United States Supreme Court's holding in *Atkins*.

Respondent also contends that the legal definition used by the Referee "is inconsistent with the definition set forth ... in *Hawthorne*." (Respondent's Brief, p. 99.) This is also incorrect. As was stated by this Court in *Hawthorne*

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[4] Referred to as "DSM-IV-TR" in the Brief.

and made clear in *Vidal*, the Legislature in Penal Code § 1376 adopted the three prong "legal definition" set forth above but did not adopt as part of the "legal definition" any specific content with regard to the individual prongs:

> "It [intellectual disability] 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."
> (*In re Hawthorne*, *supra*, 35 Cal. 4th at 49)

The Referee used the three prong "legal definition" of Penal Code § 1376. Under this Court's decisions, this is the correct legal definition to determine whether Petitioner is intellectually disabled and, therefore, not eligible for execution.

2. Respondent Argues That the Referee's Selection of the 2010 AAIDD's 4th Ed. Diagnostic Definition of Adaptive Behavior as the Legal Standard by Which the Second Adaptive Behavior Component of Penal Code Section 1376 May Be Met Is Erroneous and Not Endorsed by *Atkins* or *Hawthorne*.

Respondent argues that the Referee selected the 2010 AAIDD Intellectual Disability, 11th Ed. for the "definition "[5]of adaptive behavior. Respondent claims the Referee used this as the legal standard to determine if

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[5] Referred to as "AAIDD, 11th Ed" in this Brief. The AAMR changed its name to the American Association for Intellectual Disability and Development (AAIDD).

adaptive behavior prong of Penal Code §1376 was met. Respondent claims this is erroneous and not endorsed by *Atkins* or *Hawthorne*. (Respondent's Brief, pp. 96-99.) Respondent is wrong.

i. It Was Proper for the Referee to Adopt the AAID Manual, 11th Ed. To Determine Whether Petitioner Met Prong 2 of the Legal Definition of Intellectual Disability.

The "legal definition" of intellectual disability has three prongs: Prong 1, significant subaverage general intellectual functioning; Prong 2, concurrent deficits in adaptive behavior; and Prong 3, manifested before the age of 18. (Penal Code §1376.) Each prong is analyzed under diagnostic criteria as interpreted by clinicians and by the trier of fact after hearing all the evidence. These diagnostic criteria are not part of the "legal definition" and are referred to in the literature in terms of "domains" and "categories" of evidence within the "domains".

The diagnostic criteria used over the years to analyze each of the prongs of the "legal definition" of intellectual disability are set forth in the chart below:

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Prongs	Heber (1959)	American Association of Mental Retardation (AAMR) (9th Edition) (1992)	American Psychiatric Association (DSM-IV-TR) (2000)	American Association of Mental Retardation (AAMR) (10th Edition) (2002)	American Association of Intellectual and Developmental Disabilities (AAIDD)(11th Edition) (2010)
1	Subaverage general intellectual functioning	Significantly subaverage intellectual functioning	Significantly subaverage general intellectual functioning	Significant Limitations in intellectual functioning	Significant limitation in intellectual functioning
2	Impairment in 1 or more of the following: Maturation Learning Social Adjustment	Limitations in 2 or more of the following applicable adaptive skill areas: Communication Self-Care Home living Social skills Community use Self-direction Functional academics Leisure Work Health and safety	Significant limitations in adaptive functioning in at least 2 of the following skill areas: Communication Self-Care Home living Social/interpersonal skills Use of community resources Self-direction Functional academic skills Leisure Work Health Safety	Significant limitations in adaptive behavior as expressed in: **Conceptual Skills** Language Reading and writing Money concepts Self-direction **Social Skills** Interpersonal skills Responsibility Self-esteem Gullibility Naivete Follows rules Obeys laws Avoids victimization **Practical Skills** Activities of daily living Eating Transfer/mobility Toileting Dressing Instrumental activities of daily living Meal preparatio Housekeeping Transportation Taking medication Money management Telephone use Occupational skills Maintains safe environments	Significant limitations in adaptive behavior as expressed in: **Conceptual Skills** Language Reading and writing Money concepts Time concepts Number Concepts **Social Skills** Interpersonal skills Social Responsibility Self-esteem Gullibility Naivete Follows rules/obeys laws Avoids being victimized Social problem solving **Practical Skills** Activities of daily living (personal care) Occupational skills Use of money Safety Health care Travel/transportation Schedules/routines Use of the telephone
3	Originates in the developmental period	Manifests before age 18	Onset must occur before age 18	Disability originates before age 18	Disability originates before age 18

The diagnostic criteria pertaining to Prong 1, significantly subaverage intellectual functioning, have remained the same over the years in all the manuals. The determination of subaverage intellectual function is, and has been, based on individualized I.Q. testing and clinical observation. Therefore, there is no issue as to one version over another as to Prong 1.

Likewise the diagnostic criteria pertaining to Prong 3, manifestation before the age of 18, have remained the same. They require that significantly subaverage intellectual functioning and deficits in adaptive behavior manifest or occur in the developmental period or before the age of 18.[6] Therefore, there is no issue as to one version over another as to Prong 3.[7]

It is only with respect to the diagnostic criteria in the various iterations pertaining to Prong 2 (deficits in adaptive behavior) that, on the surface, there seems to be some variation in the language describing the "categories" of evidence or "domains" illustrating the deficiency in that prong.

As will be shown, this variation in the description of the "categories" of evidence or "domains" included in the diagnostic criteria used by clinicians

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[6]"There has been very little change in the age of onset criterion (manifestation or occurrence before age 18 or during the developmental period) over the last 50 years." (AAIDD, 11th Ed. p. 28.)

[7]There could be a difference between manifesting before the age of 18 and occurring before age 18 in some other case. There could also be a question as to whether the developmental period extends beyond 18. But these are not at issue in the present matter.

and courts to determine if Prong 2, deficit in adaptive behavior, is met does not change the nature of this evidence at all. The same categories and domains have been consistently in place for over 50 years.

The AAMR, 9th Ed., recites that a deficit in adaptive behavior (Prong 2) is present when there are "limitations in two or more of the following adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work."

The APA's "DSM-IV-TR", sets forth similar "categories" of evidence: "significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety."[8]

The AAMR's *Mental Retardation: Definition, Classification, and Systems of Support 5,* 10th Edition, 2002., ("AAMR, 10th Ed.") and the AAID 11th Ed., seem to change the categories of evidence for Prong 2. However, they actually use the same diagnostic criteria that have been in use since 1959. The AAMR10th Ed. and the AAIDD, 11th Ed., state that limitations in adaptive

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[8]These are the same 10 categories of evidence for Prong 2 as in the AAMR, 9th Ed., unless "health and safety" are considered separately, in which case there are 11 in each.

behavior is evidenced by "adaptive behaviors expressed in conceptual, social and practical adaptive skills." Conceptual, social and practical skills are the three traditional "domains" that include the "categories" of evidence referred to in the AAMR, 9th Ed. And DSM-IV-TR.

In this case, the Referee found that, "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." (Referee's Report, pp. 5-6, fn. 3.) The AAID, 11th Ed. states that "Intellectual disability is a disability characterized by significant limitation in intellectual functioning and adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originates before age 18." (*Id.* at p. 1; RH Ex.. 23, p. 4; RH Ex. I, p. 4.)

The Referee was correct in accepting the AAIDD, 11th Ed. as the most current authority on intellectual disability. First, the courts should rely on the best practice of the scientific community in understanding and diagnosing a mental health condition. Second, as will be explained below, there is simply no difference in the clinical definitions of intellectual disability or with the categories of evidence to support a finding of intellectual disability.

The AAIDD, 11th Ed. made no changes in the three criteria of the

clinical definition of intellectual disability - subaverage intellectual functioning, deficits in adaptive behavior manifested under the age of 18. The same three criteria (the three Prongs) have persisted throughout the manuals and literature since 1959.[9] To the extent there is any difference in the wording of the categories of evidence under the adaptive behavior criteria it makes sense that the latest accepted clinical standards govern the Court's inquiry. Both Dr. Khazanov and Dr. Maloney accepted the AAIDD, 11th Ed., as the basis for a current diagnosis regarding intellectual disability. (8 RHT 1284; 11 RHT 1800-1802) It was proper for the Referee to adopt the most current clinical manual to make his factual determination as to Prong 2 of the legal definition, (deficit in adaptive behavior), because it reflects the best practices in the scientific community which studies these matters.

ii. Respondent's Uses the Terms "Legal Standard" and "Definition" Indiscriminately and Incorrectly

Respondent uses the terms "legal standard" and "definition" inconsistently. Respondent uses these terms correctly to refer to the three prongs of the "legal definition" of intellectual disability but incorrectly to refer to the "categories" of evidence or "domains" included in the diagnostic criteria

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[9] "1959 (Heber): Meatal retardation refers to subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in one or more of the following: (1) maturation, (2) learning, (3) social adjustments." (AAIDD, 11th Ed., p. 8.)

used by clinicians and courts to determine if Prong 2 of the "legal definition" is met. (Respondent's Brief, pp. 96-99.)

Each prong of the "legal definition" of intellectual disability set forth in Penal Code § 1376 is analyzed under diagnostic criteria as interpreted by clinicians and by the trier of fact after hearing all the evidence. Diagnostic criteria are not part of the "legal definition" of intellectual disability and are referred to in the literature in terms of "domains" and "categories" of evidence within the domains. These diagnostic criteria are not part of the "legal definition". Therefore, it is incorrect and confusing for the Respondent to say that "the Referee selected a legal standard for adaptive behavior .... not endorsed by either *Atkins* or *Hawthorne*." (Respondent's Brief, p. 96.) The Referee correctly recognized that there are three prongs to the "legal definition" of intellectual disability and that he had to consider the evidence relating to Prong 2 and that there is no rigid definition as to what evidence constituted a deficit under Prong 2.

Neither the AAMR, AAIDD or APA, "defines" adaptive behavior. A definition is "a word or phrase expressing the essential nature" of something. (*Webster's New International Dictionary,* Third Edition.) The diagnosis of a mental condition involves a clinical process and not a definition. The Referee was correct in his understanding that the AAMR/AAIDD and the APA apply

"categories" to make a clinical diagnosis. This Court has held that the three prongs taken together as being the "legal definition" of intellectual disability. (*In re Hawthorne*, *supra*, 34 Cal.4th at 48.) The three prongs of the legal definition of intellectual disability and the type of evidence supporting them is set forth in the following chart:

Intellectual Disability Chart:

The Three Prongs of the Legal Definition	The Evidence of each Prong
1. Subaverage Intellectual Functioning	IQ testing and clinical assessment
2. Deficit in Adaptive Behavior	Clinical assessment of limitations in "domains" and "categories of evidence"
3. Manifest before age 18	Evidence of age of onset of Prongs 1 and 2

Respondent's argument, then, is that the Referee considered evidence within the "wrong"categories under Prong 2 because the categories had changed from the time of *Atkins* and *Hawthorne*. (Respondent's Brief, pp. 96-99.) This assertion involves a fundamental misunderstanding of the diagnostic "domains" and "categories" for Prong 2. The Referee correctly understood that the three "domains" for Prong 2 are conceptual skills, social skills and practical skills. (Referee's Report, p. 20.) Those "domains" include the "categories" and "sub-categories" of evidence that a clinician and the Court

should consider. The Referee applied the correct three prong "legal definition" of intellectual disability and considered the correct categories of evidence and domains under each prong, including Prong 2, to determine whether Petitioner is intellectually disabled

iii. Intellectual Disability Is a Question of Fact Which Is Not Determined Based on a Fixed Intelligence Score or Specific Adaptive Behavior Deficiency but on an Assessment of the Individual's Overall Capacity Based on a Consideration of All the Relevant Evidence.

Whether an individual is mentally retarded is a question of fact which is not measured according to a fixed intelligence score or a specific adaptive behavior deficiency but by an assessment of the individual's overall capacity based upon a consideration of all relevant evidence:

> "In addition to maintaining parity with the statutory scheme, the order for an evidentiary hearing reflects the consensus that mental retardation is a question of fact. It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence."
> (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 49 [citations omitted].)

In *Vidal*, the People argued that the trial court used the wrong legal standard for Prong 1 of the legal definition of intellectual disability when it used the verbal I.Q. score coupled with the defendant's adaptive behavior

scores in lieu of the full scale I.Q. to find that the defendant was intellectually disabled. (*People v. Superior Court (Vidal)* (2007) 40 Cal. 4th 999, 1008.) The Court concluded that the trial court did not:

> "On the substantive question, we conclude the trial court did not use an incorrect legal standard in making the finding of retardation. That Vidal's Full Scale Intelligence Quotient on Wechsler IQ tests (Full Scale IQ) has generally been above the range considered to show mental retardation does not, as a matter of law, dictate a finding he is not mentally retarded. The legal definition of mental retardation for purposes of Atkins's constitutional rule does not incorporate a fixed requirement of a particular test score. The trial court, therefore, did not commit legal error in giving less weight to Vidal's Full Scale IQ scores and greater weight to other evidence of significantly impaired intellectual functioning, including Verbal Intelligence Quotient scores on Wechsler IQ tests (Verbal IQ) in the mental retardation range.
> (*Id.* at pp. 1003-04.)

In reaching this conclusion, the Court stressed that "mental 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.'" Therefore, "[t]o impose an absolute rule that a trial court's finding of mental retardation must be based primarily on Wechsler Full Scale IQ scores would be to read into the statute a criterion the Legislature chose to omit and would be inconsistent with the principle that a factual

finding of retardation must be based on all the relevant evidence. (*Id.* at p. 1011 [citations omitted].) Furthermore, "[t]he Legislature has mandated that trial courts, in determining mental retardation for Atkins purposes, find whether the individual's 'general intellectual functioning' is significantly impaired, but has not defined that phrase or mandated primacy for any particular measure of intellectual functioning. The question of how best to measure intellectual functioning in a given case is thus one of fact to be resolved in each case on the evidence, not by appellate promulgation of a new legal rule. "(*Id.* at p. 1014 [citations omitted].

The same analysis applies to the present case. Respondent seeks to create a new legal "definition" for Prong 2. Just as the Court held in *Hawthorne* and *Vidal*, that there is no specific definition of Prong 1, Penal Code § 1376 also does not define "deficits in adaptive behavior" under Prong 2. The question of how to measure deficits in adaptive behavior in a given case is one of fact to be resolved in each case based on all the evidence presented, not by Respondent's purported promulgation of a new legal rule.

3. As More Fully Set Forth Below, the Facts Support a Finding of Intellectual Disability Regardless of Which Manual is Used.

Petitioner has been accurately diagnosed as being intellectually disabled. Dr. Khazanov testified that in her opinion "[Petitioner] does meet

criteria for mental retardation as set forth by the American Psychiatric Association or American Association for Intellectual and Developmental disabilities ... I felt it was a pretty straightforward case of mental retardation." (8 RHT 1284-1285.) Dr. Khazanov testified that went on to state that "may I just clarify a little bit about AAMR and AAIDD. There was no change in the definition of mental retardation between the previous edition 2002 and the new edition. There is no change in these domains of adaptive functioning." (8RHT 1301-1302.)

The Referee's use of the AAIDD, 11th Ed. to determine Prong 2 comports with the guidelines announced in *Atkins,* the legal definition of intellectual disability of Penal Code § 1376 and the holdings of and *Hawthorne* and *Vidal* and was, therefore, proper. However, we respectfully submit that Petitioner meets the criteria for intellectual disability under all of the manuals as fully set forth below.

B. The Referee Found That Petitioner Met Prong 2, the Adaptive Behavior Prong, of the Legal Definition of Intellectual Disability; this Finding Is Supported by Substantial Evidence.

The Court said in *Hawthorne* and *Vidal* that intellectual disability is determined under the three prong legal definition set forth in Penal Code §1376. The trier of fact must decide whether each prong is met based on all of the evidence. Whether an individual is intellectually disabled is not

measured according to a fixed intelligence score or a specific adaptive behavior deficiency but rather by an assessment of the invididual's overall capacity based upon a consideration of all the relevant evidence. *(People v. Superior Court (Vidal), supra*, 40 Cal.4th at 1011.)

Although it has been amply demonstrated that the three prong legal definition is also the clinical definition adopted by the AAMR/AAIDD and the DSM-IV and V in all of their iterations back to Heber's 1959 definition, Respondent continues to argue that, somehow, the definition has changed over time and that, somehow, this Court requires the trier of fact to use a "definition" of Prong 2 that was cast in concrete in 1992 by the AAMR, 9th Ed., and the DSM-IV-TR. (Respondent's Brief, p. 120.) That is not the law. Petitioner has shown that the meaning did not change at all even though there were differences in the language describing the "domains" and the "categories" of evidence to be considered for diagnosis under Prong 2. All the categories of evidence of deficiencies in Prong 2 that are within the three "domains" of the older and later works are also within the "categories" of evidence listed in the 1992 AAMR 9th Ed. and the DSM-IV-TR

However, even if the Court had required, contrary to the express language used in *Vidal*, that there be a finding of significant limitations in two of the "categories" set forth in the AAMR 9th Ed. and the DSM-IV-TR, the fact

is that the Referee's findings, supported by substantial evidence, show that there are substantial limitations in not just two but eight of the categories. As diagnostic criteria, these limitations also come within the three "domains" of the older and newer iterations. Petitioner will take the Referee's findings and the evidence point by point and demonstrate what "categories" of evidence under the AAMR 9th Ed. and the DSM-IV-TR and what three "domains" and various subcategories of the AAIDD 11th Ed.[10] are present in this case.

1. Illiteracy

The Referee found that Petitioner was and is illiterate. (Referee's Report, p. 21.) This is finding is supported by substantial evidence. Larry Cleveland testified that Petitioner could not read; Petitioner would ask him to read him the words on street signs. (3 RHT 520-522.) All three experts agreed that he was illiterate. (8 RHT 1307, 1309; 10 RHT 1751; 11 RHT 1992, 1997.)

Illiteracy is a limitation within the "categories" of Communication and Functional Academic Skills under the AAMR 9th Ed. and the DSM-IV-TR as well as the "domain" of Conceptual Skills under the subcategories of Language and of Reading and Writing under the AAIDD 11th Ed.

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[10]The AAIDD 11th Ed., 2010 is essentially the same as the AAMR 10th Ed., 2002.

2. Aphasia

The Referee found that Petitioner suffers from Aphasia. (Referee's Report, p. 23.) Aphasia is an expressive language difficulty that Dr. Maloney testified "might be associated with mental retardation." (11 RHT 1861.)

Aphasia is a significant limitation within the "category" of Communication under the AAMR 9th Ed. and the DSM-IV-TR) as well as the "domain" of Conceptual Skills under the subcategory of Language under the AAIDD 11th Ed.

3. Money Concepts

The Referee found that Petitioner had a "severe deficit" with respect to "money concepts". (Referee's Report, p. 22.) This is supported by Dr. Khazanov's evaluation. She asked Petitioner to calculate how much money he would have if he were to start with $300 and went to the store to spend "X" amount of money. Petitioner could not answer the question. (9 RHT 1615.)

Money concepts is not specifically spelled out under the AAMR 9th Ed. or the DSM-IV-TR but monetary limitations is both a conceptual and practical skill. Given the limitations as described in the record regarding the use of money, they would be limitations in the "category" of Functional Academic Skills and Social/Interpersonal Skills under the AAMR 9th Ed. and DSM-IV-TR as well as the "domain" of Practical Skills under the subcategory of Money

Concepts and the "domain" of Practical Skills under the subcategory Use of Money under the AAIDD 11th Ed.

4. Communication

The Referee found that Petitioner had difficulties understanding questions asked of him. (Referee's Report, p. 23.) This is supported by the testimony of both Drs. Maloney and Khazanov. Dr. Maloney testified that the psychologist assisting him, Dr. Nancy Kaser-Boyd, wrote a memo on the testing sheet stating that "[Petitioner] seemed to mishear a number of questions." (Ex. B, p. 188, emphasis in original; 10 RHT 1723-1724.) Dr. Khazanov testified that she, too, had to repeat the instructions for the test "many, many times." (8 RHT 1331-1332.) Steven Harris, Petitioner's childhood friend testified that "[Petitioner] just wasn't as quick as the rest of us." (7 RHT 1217, 1229.)

Communication is a significant limitation within the "category" of Communication under the AAMR 9th Ed. and the DSM-IV-TR as well as the "domain" of Conceptual Skills under the subcategory of Language. under the AAIDD 11th Ed.

5. Trouble Distinguishing Concepts

The Referee found that Petitioner had difficulty distinguishing concepts. (Referee's Report, p. 23.) This is supported by the evidence that

Petitioner had difficulty distinguishing the concept of similarities. Dr. Maloney testified that Dr. Kaser-Boyd wrote a note above the question pertaining to a dog and a lion that said, "real trouble distinguishing the concept." (11 RHT 1866.) Dr. Maloney testified that this deficit could be evidence of mental retardation. (11 RHT 1866.)

Difficulty distinguishing concepts is a significant limitation within the "category" of Functional Academic Skills under the AAMR 9th Ed. and the DSM-IV-TR as well as the "domain" of Conceptual Skills under the subcategory of Language. under the AAIDD 11th Ed.

6. Inability to Shoot Pool or Roll Two Dice With One Hand

The Referee found that Petitioner was unable to shoot pool or gamble with dice as well as his friends. (Referee's Report, p. 24.) Larry Cleveland stated that, "[Petitioner] didn't learn to shoot pool as well as I did ... he just didn't pick up that with the same skill level." (3 RHT 571.) Mr. Cleveland testified that "[Cleveland] learned how to use dice, two pair in one hand, you know where [Petitioner] didn't have that mobility skill either to do those things." (3 RHT 571.)

The inability to shoot pool or roll two dice with one hand is a significant limitation within the "category" of Leisure under the AAMR 9th Ed. and the DSM-IV-TR as well as the "domain" of Practical Skills under the

subcategory of Activities of Daily Living under the AAIDD 11th Ed.

7. Inability to Learn from Mistakes

The Referee found that Petitioner kept getting into trouble. (Referee's Report, p. 24-25.) The Referee also found that Petitioner's failure to learn from his experience provides additional support that Petitioner is mentally retarded. (Referee's Report, p. 25.) Dr. Khazanov testified that Petitioner was not learning from his life experience because he spent his life in and out of the juvenile justice system and later he was in and out of the criminal justice system. (8 RHT 1433.) Petitioner's cousin, Tommie McGlothin stated that "I think something [was] wrong with him. He had a problem." (7 RHT 1166.) Mr. McGlothin stated that the problem was that Petitioner kept getting into trouble by "doing the same thing, going out and stealing bicycles." (7 RHT 1166.)

The inability to learn from mistakes is a significant limitation within the "categories" of Self-Direction and Health and Safety under the AAMR 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategories of Social Responsibility and Follows Rules/Obeys Laws under the AAIDD 11th Ed.

8. Bad Street Hustler

The Referee found that Petitioner was a bad street hustler who had been

arrested and convicted many times. (Referee's Report, p. 25) As stated above, Petitioner was in and out of both the juvenile and criminal justice systems all of his life. (8 RHT 1433; 7 RHT 1157-1158, 1165-1166.) Petitioner was frequently in trouble with his friend Larry Cleveland. (7 RHT 1212- 1213; 3 RHT 561.)

Petitioner's inability to be a successful street hustler is a limitation within the "categories" of Self-direction and Health and Safety under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategories of Interpersonal Skills and Social Responsibility and the "domain" of Practiced Skills under Health and Safety under the AAIDD 11th Ed.

9. Pleasing Behavior

The Referee found that Petitioner attempted to please Dr. Khazanov and he was not malingering. (Referee's Report, p. 22.) Evidence that Petitioner engaged in behavior designed to please others is demonstrative that Petitioner suffers from adaptive behavior deficits. Dr. Khazanov testified that Petitioner brushed his mother's hair and washed her feet. This inappropriate behavior was designed to please his mother. Dr. Khazanov stated that pleasing behavior is typical for someone who is mentally retarded. (9 RHT 1650-1651.) Dr. Khazanov testified that Petitioner continued working on his I.Q. tests even

after she told him time was up and he could stop. It was her opinion that Petitioner was trying to please her and that was why he was trying so hard. (8 RHT 1333-1334.)

Pleasing behavior is a significant limitation within the "categories" of Social/Interpersonal Skills and self direction under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategories of Interpersonal Skills and Self Esteem under the AAIDD, 11th Ed.

10. Unwillingness to be Labeled "Crazy"in Order to Save His Own Life

The Referee found that Petitioner did *not* want Dr. Khazanov to find him "crazy." (Referee's Report, p. 22, Emphasis in original.) The Referee found that Petitioner's resistance to being diagnosed with a condition that could spare him execution was consistent with being mentally retarded. (Referee's Report, p. 22 fn 35.) Dr. Khazanov testified that Petitioner told her "if you are going to find me crazy, I don't want it." (8 RHT 1334.)

An unwillingness to be labeled crazy in order to avoid execution is a significant limitation within the "categories" of Self-Care and Health and Safety under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategory of Avoid Victimization and the "domain" of Practical Skills under the subcategory of Health Care under the AAIDD 11th Ed.

11. Inability to Problem Solve

Petitioner's inability to problem solve is evidence of adaptive behavior deficits. Dr. Khazanov testified that Petitioner was unable to problem solve when he was asked a hypothetical question about steps to take in the event he had a heart attack. (8 RHT 1307-1308.) Petitioner first responded that he would lie down. Dr. Khazanov had to prompt Petitioner by explaining that this was a serious condition and she had to ask him about subsequent steps he would take. Petitioner responded that he would next call his Mama. At the time Dr. Khazanov administered the test, Petitioner's mother had been dead several years. After Dr. Khazanov prompted him again by asking what step would he take if his Mama was not available, Petitioner responded that he would call his sister or Dada. The last step in Petitioner's analysis was going to the hospital. (8 RHT 1307-1308.) Dr. Khazanov testified that this exchange was typical of Petitioner's severe deficits in adaptive functioning. (8 RHT 1308.)

The inability to problem solve in a medical emergency is a limitation within the "categories" of Health and Safety and Use of Community Resources. under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Practical Skills under the subcategories of Health Care and Safety. under the AAIDD 11th Ed.

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12. Petitioner's Manipulation by His Father

Petitioner's father cultivated a relationship with Petitioner in order to obtain money from Petitioner to support his drug habit. (2 RHT 324.) Deborah Helms testified that Petitioner's father asked Petitioner for money to buy drugs on numerous occasions. After his father asked for money, Petitioner would show up with a lunch bag containing a gun and money from robberies. (1 RHT 186-187; 196-198.) This evidence illustrates that Petitioner was gullible, naive and easily manipulated by his father.

Manipulation by his father demonstrates significant limitations within the "categories" of Self-direction and Social/Interpersonal Skills under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategories of Gullibility, Naivete, Avoids Being Victimized. under the AAIDD, 11th Ed.

13. Masking Behavior

Petitioner's masking behavior provides further evidence of adaptive behavior deficits. Petitioner engaged in masking behavior when he latched on to Larry Cleveland to compensate for his own deficiencies. (3 RHT 520-522, 573) Dr. Khazanov testified that it is common for people who do not know how to read or write to attach themselves to a higher functioning individual. (8 RHT 1327.) Dr. Khazanov characterized this behavior as "masking" and

stated that people who have intellectual disabilities are more likely to try to mask their behaviors. (8 RHT 1334.) Dr. Maloney testified that a gullible, naive person could tend to latch on to another higher functioning person as a way of getting by in life. (11 RHT 1849-1850.)

Masking behavior is a significant limitation within the "category" of Self-care under the AAMR, 9th Ed. and the DSM-IV-TR as well as the "domain" of Social Skills under the subcategories of Gullibility, Naivete and Interpersonal Skills under the AAIDD, 11th Ed.

14. Inability to Work Due to Cumulative Effect of Evidence of Limitations on Adaptive Behavior

Finally, taking all of the evidence of limitations on adaptive behavior, the cumulative effect would result in limitations in his ability to work, a "category" under AAMR, 9th Ed. and DSM-IV-TR and the "domains" of Practical Skills under the subcategory of Occupational Skills under the AAIDD, 11th Ed.

15. The Referee's Findings Set Forth above Demonstrate That Petitioners Suffers from Limitations in Adaptive Behavior in Eight Categories.

Therefore, the Referee's findings, supported by substantial evidence, demonstrate that Petitioner suffers from limitations in eight of the "categories". This exceeds the diagnostic criteria of the AAMR, 9th Ed. and DSM-IV-TR which seeks significant limitations in two of the categories.

Petitioner's limitations also come within all the three "domains" of the older and newer iterations. There is substantial evidence in the record that Petitioner suffers from significant limitations in adaptive behavior within the meaning of *Atkins, Hawthorne, Vidal* and Penal Code § 1376 and all iterations of the AAMR/AAIDD manual and the DSM-IV-TR

16. Although it Is Irrelevant to the Referee's Findings, Respondent Is Incorrect in Criticizing Dr. Khazanov's Comments on the DSM-IV-TR

Respondent claims faults Dr. Khazanov for offering the opinion that the DSM-IV-TR diagnostic criteria were "lagging behind." (Respondent's Brief, p. 98; 8 RHT 1312, 1318.) Dr. Khazanov was, of course right. The DSM-IV-TR was out of date. Even though it does not affect the Referee's findings, it should be pointed out that Dr. Khazanov's observations were borne out by the most current findings as expressed in the DSM-V which has just been published.

Basically, the APA in the DSM-V takes the same approach as the AAIDD, 10th and 11th editions and reasserts the "domains" as articulated by Heber in 1959 and the iterations of the AAMR/AAIDD and APA since then. In order to make this clear, a chart follows showing the diagnostic criteria of the three prongs of the legal definition of intellectual disability.

Prongs	**DSM-V (5th Edition, 2013)**
1	Deficits in intellectual functioning Individualized, standardized intelligence testing
2	Deficits in adaptive functioning **Conceptual (academic) domain** Memory Language Reading Writing Math reasoning Acquisition of practical knowledge Problem solving Judgment in novel situations **Social domain** Awareness of others' thoughts, feelings, and experiences Empathy Interpersonal communication skills Friendship abilities Social judgment **Practical domain** Learning and self-management across life settings, including Personal care Job responsibilities Money management Recreation Self-management of behavior School and work task organization
3	Onset of both deficits during developmental period[11]

[11] DSM-V, p. 33-41.

As shown above, the DSM-V did substantially revise the Section on Intellectual Disabilities from the older version, the DSM-IV-TR. However, the three elements of the diagnostic criteria in DSM-V "are the same as the three prongs in the "legal definition": (1)"deficits in intellectual functions;" (2) deficits in adaptive functioning;" and (3), "onset of [both] deficits during developmental period."

For Prong 1, deficit in intellectual functioning, the DSM-V still relies on "individualized, standardized intelligence testing." There is an increased emphasis on "clinical assessment." But, essentially, the text refers to the same testing criteria that has been prevalent over the last 50 years. It notes, as was testified to in this case, that on tests, like the WAIS where there is a mean of 100 and a standard deviation of 15, this "involves a score of 65 to 75." (DSM-V p. 37) It also recognizes that factors that may artificially increase test scores that "include practice effect and the 'Flynn effect.'" (*Id.*)

As to the Prong 2, there is a return to the same three domains that were the basis for the definition of intellectual disability since the Heber definition in 1958 and the same three domains that were reported in the AAMR, 10th Ed. and the AAIDD, 11th Ed. Prong 2 (or Criterion B as used in the DSM-V) "is met when at least one domain of adaptive functioning – conceptual, social or practical – is sufficiently impaired that ongoing support is needed in order for

the person to perform adequately in one or more life settings at school, at work, at home, or in the community." (DSM-V p. 38) Just as in the prior DSM and the AAMR/AAIDD, there are categories of evidence that can be considered in making the determination as to whether Prong 2 is met: "The *conceptual (academic) domain*, involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others." (DSM-V, p. 37).

Dr. Khasanov was correct in criticizing the artificial listing of categories in the DSM-IV-TR and the AAMR, 9th Ed. The requirement that the clinician find two categories of evidence from a limited menu has been superseded in the scientific community by an approach that goes back to the three domains and suggests non-exclusive categories of evidence that might be present.

However, the entire attack of Respondent on the development in the science in the area of intellectual development is irrelevant in this case – and, most likely almost all, if not all, cases. The fact is that there is substantial evidence to support the finding of the Referee and additional evidence in the record to establish intellectual disability in at least one of the "domains" under Herber, AAMR, 10th Ed., AAIDD, 11th Ed. or DSM-V as well as in at least two of the categories of evidence set out in the AAMR 9th Ed. and the DSM-IV-TR.

C. The Referee Correctly Found That Petitioner Demonstrated Significant Subaverage Intellectual Functioning under Prong 1that Was Manifest Before the Age of 18 under Prong 3.

The Referee found that the evidence of Petitioner's general subaverage intellectual functioning manifest before he age of 18 was "compelling." (Referee's Report, p. 19.) Substantial evidence supports the Referee's finding. Indeed, as shown on the table below, "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. (Referee's Report, p. 19.)

Test	Date	Age	Full Scale I.Q.
Wechsler Intelligence Scale (WISC)	5/21/63	10	70

Wechsler Adult Intelligence Scale - Revised (WAIS-R)	7/5/84	32	73 71* 70.1**
Wechsler Adult Intelligence Scale - III (WAIS-III)[12]	6/10/03	51	67 65.2**

* Rescored by Dr. Khazanov

** Adjusted for the Flynn Effect

In addition, the absence of any evidence of malingering coupled with the consistency of the scores over a period of 41 years provide further support to the Referee's finding that Petitioner has subaverage general intellectual functioning under Prong 1. (8 RHT 1356, 1387.)

1. The Referee's Reliance on the Wechsler tests (WISC and WAIS-R and WAIS-III) was Proper and Supported by Substantial Evidence

i. The Experts Agreed That the Wechsler Tests Were Reliable

The Referee relied properly on the Wechsler tests to determine that Petitioner has subaverage general intellectual functioning. All of the experts testified it was a reliable testing instrument. (8 RHT 1339; 9 RHT 1481, 1581; 11 RHT 1892; 12 RHT 2097.) Dr. Khazanov called the Wechsler tests the "gold standard." (8 RHT 1339.) Dr. Khazanov and Dr. Maloney agreed that the WISC administered to Petitioner before his eleventh birthday was the most

[12]For test data see RH Ex. 23, pp. 10 and 12, and RH Ex. NN.

reliable test. (8 RHT 1344; 11 RHT 1892.) Dr. Hinkin included the WISC in his list of the most reliable and valid tests. (12 RHT 2097.)

Respondent, after the fact, opines at length that the intelligence tests did not match. (Respondent's Brief, pp. 104-108.) However, the testimony does not support this conclusion. This was not the opinion of Drs. Khazanov, Maloney or Hinkin. (8 RHT 1372-1373; 11 RHT 1947; 12 RHT 2106.)

The Referee correctly found that the consistency of Petitioner's scores on the Wechsler tests over a long period of time demonstrated the accuracy of the tests. All of the experts testified that it would have been extremely difficult, if not impossible, for anyone to fake such similarities. (8 RHT 1371-1373; 11 RHT 1890-1892; 12 RHT 2106.)

ii. The Referee Did Not "Create a Conflict"in the Evidence. The Experts Had Conflicting Opinions and the Referee as Is His Duty Resolved the Conflict of Opinions.

Respondent argues that the Referee "created a conflict" when he stated that Dr. Hinkin felt the Stanford-Binet was reliable but Dr. Maloney and Dr. Khazanov disagreed. (Respondent's Brief, p. 103) While the Referee acknowledged the disagreement, he did not "create a conflict."

Dr. Khazanov testified that the Stanford-Binet as a testing instrument is not considered a reliable test. (8 RHT 1352.) Dr. Maloney testified that the Stanford-Binet was the most biased test Petitioner received because it did not

take his background factor into consideration because it was normed on white young people. (Referee's Report, p. 15; 10 RHT 1735; 11 RHT 1766.) Dr. Hinkin was the only expert who felt that the Stanford-Binet was a reliable test. (12 RHT 2097.)

The Referee, as the trier of fact, resolved the conflict in testimony. He found that the Stanford-Binet was of questionable reliability. His finding was supported by substantial evidence and should be given great weight. (*In re Hardy* (2007) 41 Cal.4th 997, 993.)

2. The Referee's Rejection of Lack of Motivation Is Supported by the Evidence

Respondent asserted that Petitioner was malingering. However, the Referee found to the contrary and that finding is supported by substantial evidence. (Referee's Report, p. 19.) The consistency of the Wechsler scores over the course of 41 years supports the finding that Petitioner did not lack motivation. Dr. Maloney testified, "Malingering is a purposeful attempt to feign or exaggerate symptomatology for a known gain, and it is purposeful behavior. When we saw [Petitioner], I had no sense that he was doing that. And if he was doing that now, I'd expect more suppressed scores." (11 RHT 1891.) [13]

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[13]The Court: What I get from this, doctor, is that the consistency of the two tests, even though they're different tests, suggest to you that he did – that these are not the results of somebody who was malingering?

Similarly, Dr. Khazanov testified that Petitioner was not malingering. She stated, "I don't believe he's – he was malingering. I believe he was putting forth his best effort. I actually was impressed with how he continued sticking with it." (8 RHT 1332.) Dr. Khazanov testified that during the Category Test she administered, she had to give Petitioner feedback. Petitioner was not getting the answers correct and Dr. Khazanov had to tell him "incorrect about a hundred thirty times." She stated that most test-takers would have just given up but Petitioner kept trying[14]. (8 RHT 1332-1333.)

Furthermore, Dr. Khazanov testified that at no time did Petitioner act like he was trying to project himself as intellectually disabled; quite the

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Maloney: That would be correct.

Q: In line with what you just said about your WAIS-R and Dr. Khazanov's WAIS -III, if we look back to the WISC when [Petitioner] was 10-years-old, it also is fairly consistent. Is that correct?

Maloney: Correct

Q: And of these tests, the WISC is probably considered the most reliable based on what you know?

Maloney: It would be considered that way, yes. (11 RHT 1891-1892.)

[14] Khazanov: It was impressive how he was really persistent and continued working on the tasks even when I gave him the option to not because on the Wechsler test, there are tests that are timed. So when he was over the time limit, I am okay, you can stop now, but he continued working even though he had an option to not. So I definitely feel that he was trying really hard.

Q: So if somebody were trying to malinger or do badly on the test and you said time's up, they would stop?

Khazanov: They would give up

Q: Right

Khazanov: Or sometimes even before I say you have to stop, they would say okay, I don't know how to do it. I'm done. (8 RHT 1333.)

opposite. Dr. Khazanov stated that Petitioner was trying to impress her and trying to please her during the testing. At one point, Petitioner explicitly told Dr. Khazanov, "if you are going to find me crazy, I don't want it." (8 RHT 1334.)

Testimony from the only two experts who met with Petitioner and personally evaluated him demonstrated that Petitioner did not lack motivation. Dr. Maloney and Dr. Khazanov both testified that Petitioner was putting forth his best efforts and still scoring in the intellectually disabled range as defined by *Atkins.* Furthermore, Drs. Khazanov and Maloney both noted that it would have been extremely difficult, if not impossible, for anyone to fake similarities not only in test scores but in the sub-tests. (8 RHT 1372; 11 RHT 1890.) The Referee's finding that Petitioner did not lack motivation is supported by substantial evidence in the record.

3. Race and Socioeconomic Factors Should Not Be Considered

Respondent claims that socioeconomic factors should be considered to increase Petitioner's test scores. (Respondent's Brief, pp. 111-114.) The Referee found to the contrary and that finding is supported by substantial evidence. (Referee's Report, p. 19.)

Dr. Hinkin opined that there has historically been a recognized gap between the IQ performance on people who come from mainstream versus

people who come from backgrounds such as Mr. Lewis, in particular African-American. (12 RHT 2011.) If Dr. Hinkin is correct in stating that African-Americans do not perform as well on IQ tests because of their race, it would follow that African-Americans actually have lower IQ scores than people of other races. This is a controversial position that is not universally accepted. Dr. Hinkin stated that race is a "proxy variable" for socioeconomic discrimination. (11 RHT 2011.) Dr. Khazanov disagreed. She testified that it was inappropriate to adjust IQ scores based upon race or socioeconomic factors. (8 RHT 1399.) She stated that the most recent publications of the AAIDD supports using standardized tests without adjustments for race or socioeconomic status. (8 RHT 1399, 1402.) The Referee found the evidence speculative on whether adjustments should be made to Petitioner's IQ scores. (Referee's Report, p. 19.) The Referee stated, "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." (Referee's Report, p. 19.)

Socioeconomic factors should not be considered because the Wechsler tests are properly normed. Dr. Khazanov testified that the WAIS-III properly normed and reliable. (8 RHT 1339; 9 RHT 1481,1581.) Dr. Khazanov testified that norms are critically important to the accuracy of the test because they give

the evaluator accurate comparisons on which to rely. She stated that the WAIS is the "gold standard" in the field because it is so well normed. (8 RHT 1339; 9 RHT 1581.) The test is well normed because a lot of people were tested using this instrument and the sample was created using the census data in the United States at the time the test was created. (8 RHT 1339.) The WAIS is re-normed every ten years which accounts for changes in population and increases its validity. (8 RHT 1339-1340.) The new norms are essentially new standards and this is what allows the psychologist to know that they are really measuring the IQ[15]. (8 RHT 1340.)

The Referee correctly found that the evidence on whether adjustments should be made to Petitioner's IQ scores amounts to mere speculation. (Referee's Report, p. 19.)

4. A Finding of Brain Damage is Unnecessary

A finding of brain damage is not a requirement for intellectual disability. Penal Code § 1376 defines intellectual disability as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

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[15]Khazanov stated, "I use this test so many times and I find it reliable, really helpful. I tested so many people in so many different settings. To me, it is no different testing in the clinical setting or forensic setting. Neuropsychology is very solid." (9 RHT 1581.)

Brain damage is not a prong of the definition of intellectual disability. However, evidence of brain damage could be relevant to the trier of fact in determining if there is an impairment in intellectual functioning or deficits in adaptive behavior before age 18. Therefore, while not required for the findings, it could be relevant to one or all three prongs.

Dr. Khazanov testified that the social environment can cause an actual lack of development in the brain. She stated that humans are born with about a hundred billion neurons. Not all of the neurons are used. Around the age of 10 or 11 brain functioning changes dramatically. A natural "pruning" process takes place wherein unused neurons are removed. Our intelligence level at the age of 11 is the same as the intelligence level in an adult. Dr. Khazanov testified that this is the reason why people who have mild intellectual disabilities are not diagnosed until they reach the age of seven, eight or ten years old. (8 RHT 1340.) At age 11, functional asymmetry is formed and, therefore, the measure of intelligence with be more reliable at this age. (8 RHT 1340-1341.) Dr. Khazanov testified that Petitioner's inability to read and write, and his intellectual impairments were the result of life-long brain damage. (8 RHT 1348-9.)

Dr. Hinkin did not agree with Dr. Khazanov and stated that it was "quite possible that there is some sort of lateralized disease process that has

been undetected through [Petitioner's] 51-odd years of life. (12 RHT 1996-1999.) Dr. Hinkin went farther stating, "we know something is wrong with [Petitioner] [...] there's a reason he was sent to see the school psychologist so often." (12 RHT 1995.)

Brain damage is not a prong in the definition of intellectual disability diagnosis criteria. The Referee did not find that there was no brain damage. Instead, the Referee correctly found that there was no need to make a finding of brain damage. (Referee's Report, p. 22)

D. The Referee's Findings of Intellectual Disability Should be Given Great Weight and Special Deference

The Referee gave careful and thorough consideration to all the evidence presented. As stated in his Report, he found that Petitioner is intellectually disabled and not eligible for execution "[a]fter hearing from 15 witnesses over 14 days, and considering hundreds of pages of exhibits, and the argument of counsel." (Referee's Report, p. 1.)

The Referee heard testimony spanning over a year, beginning on January 4, 2011 and occurring periodically until February 1, 2012. At each stage of the testimony he asked Petitioner and Respondent for briefings on the evidence. (7 RHT 1259; 12 RHT 2162.) At the conclusion of the hearing, the Referee indicated that he intended to re-read the transcripts. (12 RHT 2164.) Prior to ruling, he also " ...spent a great deal of time in reviewing the

testimony of Maloney and Khazanov and Hinkin. I have gone through their testimony painstakingly. I have taken days trying to collect my thoughts on this issue." (13 RHT 2323.)

The Referee's findings pertaining to intellectual disability were supported by substantial evidence and should therefore, be given great weight.

1. The Referee is in the Best Position to Assess Credibility

This Court gives "great weight" to the referee's findings that are supported by substantial evidence and "special deference" to those involving credibility determinations:

> "The applicable law is settled. '[W]e give great weight to those of the referee's findings that are supported by substantial evidence. [citations omitted] This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations ; consequently, we give special deference to the referee on factual questions 'requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying'." *(In re Hardy* (2007) 41 Cal.4th 977, 993 [citations omitted].)

In this case, there is substantial evidence to support the Referee's findings on intellectual disability. As set forth in more detail above, Petitioner's test scores on the WISC, WAIS-R and WAIS-III demonstrate

significant subaverage intellectual functioning which was manifest before age 18. Further, Petitioner's significant deficits in the conceptual functioning, social skills and practical skills domains demonstrate substantial and concurrent adaptive behavior deficits also manifest before the age of 18. The weight of the testimony supports the Referee's findings.

The evidentiary hearing necessitated that the Referee both assess the credibility of the witnesses and resolve the conflict in testimony. The Referee did so after carefully, listening to and reviewing the testimony of the experts, Drs. Khazanov, Maloney and Hinkin as well as the other witnesses. Therefore, his findings must be given special deference pursuant to the standard set forth in *In re Hardy*, *supra*.

2. The Referee's Finding That Dr. Hinkin's Testimony Is Entitled to Lesser Weight than That Offered by the Other Experts Was Proper

Dr. Hinkin's testimony is entitled to an allocation of lesser weight because he made no attempt to examine Petitioner and nevertheless sought to render an opinion as to Petitioner's intellectual disability. This does not comport with the guidelines of the American Psychological Association (APA) which state that,

> "Psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or

> conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document efforts they made and the results of those efforts, clarify the probable impact on their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations." *(American Psychological Association, Ethical Principles of Psychologists and Code of Conduct,* Section 901(b).)

Dr. Hinkin could not ethically render an opinion and testify without first at least attempting to examine Petitioner in person.

Forty five years ago, this Court recognized the important role of a personal interview in evaluating a defendant:

> "We do not presume to advise members of another profession in the conduct of their practice. Nevertheless, a distinguished federal court recently surveyed the medical writings on this subject, and concluded: '**The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject.** [citations omitted] More than three or four hours are necessary to assemble a picture of a man. A person sometimes refuses for the first several interviews to reveal his delusional thinking, or other evidence of mental disease. [citations omitted.] Paranoid patients particularly may be able to guard against revealing their disorder with extraordinary skill. From hours of interviewing, and from the tests and other materials, a skilled psychiatrist can construct an explanation of personality and inferences about how such a personality would react in certain situations. And he can explain his

> findings in nontechnical terms to a jury.' (Fn. omitted.)"
> (*People v. Bassett* (1968) 69 Cal.2d 122, 142 [emphasis added, citations omitted].)

A determination of intellectual disability requires the same personal interview. The AAIDD manual on intellectual disability emphasizes the importance of clinical judgment when diagnosing intellectual disabilities:

> "Clinical judgment is essential, and a higher level of clinical judgment is frequently required in complex, diagnostic and classification situations in which the complexity of the person's functioning precludes standardized assessment alone, legal restrictions significantly reduce opportunities to observe and assess the person, historical information is missing and cannot be obtained, or there are serious questions about the validity of the data. *Clinical judgment* is defined as a special type of judgment rooted in a high level of clinical expertise and experience and judgment that emerges directly from extensive training, experience with the person, and extensive data. The purpose of clinical judgment and the use of clinical judgment strategies is to enhance the quality, validity, and precision of the clinician's decision or recommendation in a particular case."
> (AAIDD, 11th Ed., p. 29, [emphasis in original].)

In this case, Dr. Hinkin did not interview or attempt to interview Petitioner even though he acknowledged, as the Referee points out in his Report, that "[i]t's always better to examine a patient rather than to offer a diagnosis based on the review of medical records." (Referee's Report, p. 11;

12 HRT 2077.) On the other hand, Dr. Maloney met with Petitioner for three and half hours. (10 HRT 1674) His Registered Psychological Assistant, Dr. Kaiser-Boyd, met with Petitioner for two hours and tested him. (10 HRT 1675.) It is of note that so that some specific observations of Dr. Kaser-Boyd provided insight that corroborated the observations of Dr. Khazanov. (8 HRT 1331-1332.) Dr. Khazanov spent 12 hours meeting with, testing and interviewing Petitioner. (8 HRT 1324.)

Respondent argues Dr. Hinkin's background compares favorably to Dr. Khazanov's background because she did not perform research and has never published articles on any subject, including mental retardation. (Respondent's Brief, p. 100.) This is incorrect and misleading. Unlike Dr. Hinkin, Dr. Khazanov has spent her entire career dealing with intellectual disabilities.

Dr. Khazanov obtained her Master's Degree in Clinical Psychology in 1977 from Leningrad State University . (8 RHT 1270.) After obtaining her Master's Degree, she worked for three years as a staff psychologist at the Psychiatric Hospital Number 6 in St. Petersburg. She had already received training in mental retardation and testing. There, she was asked to test Russian conscripts, ages 18 and 19, for potential mental retardation or borderline intellectual functioning using the WAIS test. Since military service was compulsory, many conscripts tried to avoid serving so Dr. Khazanov

encountered many individuals who were malingering. This gave her the opportunity to observe the differences between individuals who were really mentally retarded and those who were not. She observed that the individuals who were not really retarded tried to under-perform on the tests while those who had deficiencies tried really hard and were also upset if she found them to be mentally retarded. (8 HRT 1270-1271.)

Dr. Khazanov obtained her Ph.D. in 1988 from the Bekhterev Psychoneurological Institute. (8 RHT 1270.) She was involved with the Bekhterev Psychoneurological Institute in St. Peterburg in various capacities from 1980 to 1991. The Bekhterev was considered the foremost facility in psychiatry, neurology and psychology in Russia. Its stature is similar to the University of California San Francisco (UCSF). (8 HRT 1275.) There, she served as an Assistant Clinical Professor of Psychology from 1988 to 1991. In that capacity, she taught neuropsychological assessment classes to postgraduate students. She also developed and taught postgraduate continuing education seminars on psychological assessment to psychiatrists and psychologists, including the WAIS test. (Exhibit 22.) Additionally, Dr. Khazanov was involved in creating norms for the WAIS test for the Russian population. (8 RHT 1276.)

After emigrating to the United States, from 1993 to 1996, Dr. Khazanov worked as a Psychological Assistant for Dr. Rosemarie Bowler, Dr. Karen Froming who introduced her to the field of forensic psychology, and UCSF. Since obtaining her license in 1996, she has worked in private practice and performed neuropsychological and personality assessments in criminal and civil litigation . In addition, she served as a Clinical Instructor and Assistant Clinical Professor, a position she holds today, at UCSF. In the course of her career, Dr. Khazanov has continued to stay up-to-date on the WAIS. (Exhibit 22; 8 HRT 1280-1281.)

Dr. Khazanov has evaluated more than 50 criminal defendants in for mental retardation as a part of neuropsycholgoical battery intelligence tests. Forty-eight of those defendants were involved in post-conviction proceedings. Forty-six had been sentenced to death and two received life without the possibility of parole. She only found three out of the 50 to be mentally retarded. (8 HRT 1281-1283.)

Dr. Maloney, who was called by Respondent, has authored two significant books on psychological assessment, one of which is a treatise on intellectual disability, *Mental Retardation in Modern Society,* 1979, published by the Oxford University Press.[16] (10 RHT 1659.) Further, Dr. Maloney

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[16]The other book is *Psychological Assessment: A Conceptual Approach,* 1976.

estimated that he had evaluated more than a thousand people for cognitive functioning over the course of his career. (10 RHT 1660.)

By contrast, Dr. Hinkin's work and research has focused primarily on the neuropsychological effects of HIV infection and other issues but not intellectual disability. (12 HRT 1963.) Similarly, Dr. Hinkin has published in the area of AIDS research and other issues but not on intellectual disability. (Exhibit I.)

Under Evidence Code § 720 (a), a witness is allowed to testify as an expert "if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." An expert's qualifications must be related to the particular subject matter upon which he is giving testimony; qualifications on related subject matters are insufficient. (*People v. Hogan,* (1982) 31 Cal.3d 815, 852; *People v. DeHoyos* (2013) 57 Cal. 4th 79.) Here, Dr. Hinkin did not qualify as an expert in the field of intellectual disability. His testimony should not be given any weight.

3. It is a Fair Comment on the Part of the Referee that Dr. Hinkin, Respondent's expert, was Paid a Large Amount of Money

The Referee commented on how much money Dr. Hinkin received while not examining Petitioner:

> "Although Dr. Hinkin spent more than 100 hours outside of court and five full days in court, and will receive more than $60,000 from respondent for his work in this case,he never examined petitioner."
> (Referee's Report, p. 11.)

In addition to his failure to see Petitioner, the sheer amount of money Dr. Hinkin received is relevant to his potential bias in favor of District Attorney who engaged him.

Furthermore, Dr. Hinkin accepted five other cases from the same District Attorney as their designated expert on intellectual disability in three of them. Each of those cases is a capital case in which the District Attorney is trying to defeat a claim under *Atkins*. (12 RHT 1967-1969.) This new employment as a prosecution *Atkins* expert will result in hundreds of thousands of dollars income to Dr. Hinkin. Accordingly, the amount of compensation in this case and, inferentially, five others, goes directly to Dr. Hinkin's bias and possible interest in the outcome.

4. The Referee Gave a Full and Fair Hearing to Both Sides

In its brief, Respondent launches an aggressive *ad hominem* attack on the Referee. This harkens to the observation of Sophocles when he said, : "No one loves the messenger who brings bad news."(Antigone, lines 276-277.)

But *ad hominem* attacks do not address the merits of a claim. Petitioner will address only a couple and then will move one. Respondent twice cites disparagingly the Referee as saying, "I don't know why the people just don't concede he's mentally retarded and give up on death." (Respondent's brief, pp. 94, 100; 1-A RHT C-13.) Respondent takes the Referee's comments out of context. The Referee made it clear that he would listen to all of the evidence and make rulings. (13 RHT 2323.) As set forth below, a judge in a bench trial is permitted to make comments.

The Referee in an court trial can speculate along the way as long as he fairly evaluates the evidence - which he did on this issue of intellectual disability. More importantly, the Referee's question is a logical one. Why is the state of California trying to kill a man who scored between 67 and 70 on IQ tests, is obviously illiterate and had difficulty functioning all of his life?[17]

Respondent also sarcastically characterized another statement made by the Referee. (Respondent's brief, p. 95.) Respondent's sarcasm is not warranted by the facts. The Referee humbly expressed difficulty in sorting

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[17]This is particularly poignant coming from an experienced judge like Judge Perry. He is a trial judge on the high security 9th Floor of the Clara Foltz Criminal Courts Building in downtown Los Angeles where his assignment, with a few other select judges, is to hear the most serious criminal cases in the County. We ask this Court to take judicial notice pursuant to Evidence Code § 452 of the fact that Judge Perry has presided over 29 death penalty cases involving 34 defendants, 12 of whom were sentenced to death. (Referee's Report, p. 3, fn. 2.) Therefore, his not so rhetorical question in this case has considerable significance.

out some of the issues. (14 RHT 2441.) Respondent claims that the Referee admitted "confusion". However, Respondent failed to point out that every statement the Referee made with respect to the legal principles immediately following that remark was correct. The Referee said "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 [true statement] but we're not going to define mental retardation [true statement]." The Referee went on to state "And the state defines it but they don't give us a cut-off number [true statement]" (14 RHT 2441.) Further, his comprehensive findings on intellectual disability at the close of the case demonstrate his full understanding of both the evidence and the law.

It is clear that the Attorney General does not love the messenger who so clearly organized and articulated the evidence of intellectual disability. But that does not mean his findings were not supported by substantial evidence. They were.

5. The Referee's Comments and Questions Were Proper for a Bench Trial

Respondent complains that the Referee asked questions. However, this was a reference hearing and questions are not only appropriate, but are encouraged by this Court. In *In re Scott,* this Court said:

> "Petitioner contends that the referee's actions at the hearing showed he "lacked the neutrality required" of a referee. he complains that the referee 'took an active role in questioning witnesses' . . . When the judge is acting as a referee seeking answers to factual questions a reviewing court has posed, and thus no jury is involved, questioning witnesses is especially appropriate. We encourage our referees to take an active role in asking whatever questions they believe will assist in fully and accurately determining the facts." (*In re Scott* (2003) 29 Cal.4th 783, 817-818 [emphasis added].)

II.

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

A. Introduction

The Referee provided a detailed answer to only one of the five questions regarding the effectiveness of trial counsel contained in the Order to Show Cause (Referee's Report, pp. 28-38) and essentially did not address the remaining questions. (Referee's Report, pp. 38-42.) By placing an inordinate focus on the hours trial counsel claimed he spent preparing the case rather than the actual quality of the mitigation investigation, the Referee incorrectly found that trial counsel's performance was competent. This finding was not supported by substantial evidence. The Referee then used this finding to justify not making detailed findings regarding the remaining reference questions. As a result, the Referee's Report lacks detailed factual findings regarding

Questions 3 through 6. We respectfully submit that, had the Referee given the same scrutiny he gave to this Court's questions regarding intellectually disability, he would have found that the evidence supports the conclusion that trial counsel's performance in investigating and presenting the penalty phase was constitutionally inadequate pursuant to *Wiggins v. Smith* (2003) 539 U.S. 510 and *Strickland v. Washington* (1984) 466 U.S. 668.

B. Respondent's Claim that the Referee Underestimated the Hours Kristina Kleinbauer Spent on Penalty Phase Issues Is Without Merit

While the Referee made a finding regarding the number of hours spent by Kleinbauer on the investigation and both sides have addressed those hours, dwelling on the number of hours billed is somewhat distracting. The fact of the matter is that this case involved a cursory amount of investigation and preparation. It fell far below the standard of practice for defending a death penalty case. Nevertheless, since Respondent brought up the number of hours as the only substantive issue, Petitioner will reply to that claim.

Kleinbauer submitted two invoices for the entire investigation on Petitioner's case including both guilt and penalty phase. (RH Ex. 7.) The first invoice is dated July 23, 1984 and spans a two-month time period beginning May 22, 1984 and ending July 20, 1984, it is for 85 hours during a 24 day period. (4RHT 649-650; RH Ex. 7.) The mitigation portion of the investigation

documented in the invoice consisted of the following: on July 10th Kleinbauer interviewed Petitioner's sisters, Rose Davis and Gladys Spillman; on July 14th Kleinbauer interviewed Petitioner's girlfriend, Dee Walker and Petitioner's father, Robert Lewis, Sr.; finally, on July 20th Kleinbauer interviewed Petitioner's wife, Janiroe Lewis. (4 RHT 644-645; RH Ex. 7.) These three occasions were the full extent of the mitigation investigation before Kleinbauer essentially stopped looking for mitigation evidence on July 24th. (4 RHT 647-655.)

The Referee found that Kristina Kleinbauer spent 85 hours investigating and writing reports from May 22, 1984 through July 20, 1984. (Referee's report, p. 31.) Respondent objects to this and states, "Respondent takes exception to this finding only to the extent it implies that Kleinbauer's investigation was limited to those hours and that time period ... her two invoices charged for a total of 110.5 hours of investigation work."(Respondent's brief, pp. 149-150.) Kleinbauer's second invoice dated September 3, 1984, itemizes 25.5 hours for investigation services between July 24, 1984 and August 17, 1984. (4 RHT 635; RH Ex. 7.) Respondent asserts this should be added to the Referee's finding of 85 hours for a total of 110.5 hours spent on investigation for the case. (Respondent's brief, p. 149.) However, this assertion is not supported by substantial evidence. Kleinbauer

testified that the second bill for 25.5 hours was for guilt phase investigation with the exception of interviews with Robert Lewis, Sr. and Janiroe Lewis. (4 RHT 647.) Therefore, those hours should not be included in an analysis of how much time was spent on mitigation investigation.

The bulk of the entries on the second invoice pertain to guilt phase investigation. (RH Ex. 7.) According to the invoice, on July 24th Ms. Kleinbauer met with Slick to turn in and discuss her investigation reports. (4 RHT 655.) She also wrote a letter to Shu Yin Huang, owner of the Kai Aloah Motel as a part of the two hours billed for that day. Kleinbauer spent two hours on these two tasks. The invoice lists four hours spent calling or trying to call Mr. Huang and Slick. Ms. Kleinbauer spent five hours attempting to locate witnesses at the Kai-Aloha motel and the Circle-K store in Lynwood. Ms. Kleinbauer spent three and one-half hours attempting to serve a subpoena on Nancy Hsieh. Finally, Ms. Kleinbauer billed seven and one-half hours seeing Petitioner at the L.A. County Jail and two attempts to see Cheryl Humphries. (4 RHT 704.) How long Ms. Kleinbauer spent with Petitioner at the jail is unclear because this billing entry is not itemized. (RH Ex. 7.) The invoice almost entirely consists of guilt phase investigation hours and Kleinbauer testified that she essentially did no penalty phase investigation after July 24th. (4 RHT 647-655.)

Nevertheless, quibbling about the number of hours spent by Kleinbauer does not answer the question of whether the investigation was constitutionally adequate. The fact is, this was a cursory investigation. Neither the investigator nor the lawyer sought to follow up and develop mitigation. A superficial penalty phase investigation was conducted and it was immediately abandoned.

C. Without Regard to the Number of Hours Kleinbauer Spent, Slick's Performance Fell Below the Standard of Care

Slick accepted Kristina Kleinbauer's perfunctory investigation reports on July 24, 1984, three weeks before trial and never requested any further investigation or follow up. (5 RHT 873-874.) Slick's decision not to request any further investigation did not reflect reasonable professional judgment. (*Wiggins v. Smith,* (2003) 539 U.S. 510, 520.) In *Wiggins v. Smith,* (2003) 539 U.S. 510, the United States Supreme Court held:

> *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.
> (*Wiggins v. Smith*, *supra*, 539 U.S. 510, 527.)

Like the counsel in *Wiggins,* Slick ignored significant avenues of investigation of which he should have been aware. Only one week after receiving the preliminary and only investigation reports, there was no excuse for Slick or Kleinbauer not making any further efforts to develop mitigation.

Petitioner respectfully asks this Court to remember that Kleinbauer was only successful in contacting five potential mitigation witnesses. (4 RHT 645, 668-669, 737.) She failed to interview people who were right under her nose, like Deborah Helms who accompanied Robert Lewis, Sr., to his interview. (4 RHT 669-671.) They were the same people Slick interviewed with Maloney on July 31st, a week after Kleinbauer turned in her reports. (6 RHT 949-951.) Astonishingly, Slick interviewed the same witnesses with Dr. Maloney and purportedly wrote his self-serving memo on August 1st, the next day, regarding the lack of penalty phase evidence. (Ex. 10; 5 RHT 951.) The timing of the memo demonstrates that Slick abandoned his mitigation investigation as soon as it started. This perfunctory investigation is inadequate under *Wiggins*.

As set forth below and in the Petition for Writ of Habeas Corpus and in Petitioner's Exceptions to the Referee's Report and Brief on the Merits, there was a wealth of evidence relating to Petitioner's childhood and to his life up to the time of trial that should have been presented. Slick's performance fell

below an objective standard of reasonableness because he failed to pursue investigation for the penalty phase and thus deprived Petitioner of effective assistance of counsel.

D. An Adequate Investigation Would Have Uncovered Additional Evidence in Mitigation

Respondent states that "Slick conducted a constitutionally adequate penalty phase investigation and Slick's decision to present a short penalty case without the information he uncovered was an informed and reasonable strategic decision." (Respondent's brief, pp. 151, 160.) The evidence does not support this assertion. Petitioner was deprived of effective assistance of counsel because Slick failed to investigate adequately for the penalty phase and his decision did not reflect reasonable professional judgement. Respondent argues that Slick obtained funding for investigation and experts in Jan 1984, "well in advance" Petitioner's trial. (Respondent's brief, p. 151.) However Kleinbauer did no work on the case until she read the police report and preliminary hearing transcript on May 22, 1984. From January 1984 through virtually the end of May, 1984, no investigation work at all was done on this case. (4 RHT 626.) May 22, 1984 kicked off a flurry of investigative activity just weeks before the start of trial. This flurry of activity was both perfunctory and fruitless. The Referee's finding stated that Kleinbauer did not develop any "startling evidence" she thought would be helpful in a potential penalty phase.

(Referee's Report, p. 32; 4 RHT 650.) Despite this, Slick proceeded to trial without ever requesting additional investigation for the penalty phase.

On May 8, 1984, Slick sent similar letters to Drs. Maloney and Sharma. (5 RHT 895, 909-912, 915, 920-921.) Slick requested that they answer five questions relating to Petitioner's sanity at the time of the offense, competency to cooperate with counsel and ability to represent himself and six questions relating to possible sentencing issues in a penalty phase. (Referee's Report, p. 29, fn. 54, citing RH Ex.. B at 182-184 [Maloney], 299-302 [Sharma].) The fact that the letters were sent on May 8, 1984 further supports an inference that trial counsel conducted no mitigation investigation between his appointment on November 18, 1983 and May of 1984.

Ron Slick's decision to present one witness during the penalty phase deprived Petitioner of his right to effective assistance of counsel because it failed to meet the standard set forth in *Strickland v. Washington*, and failed to comply with the American Bar Association (ABA) guidelines. Petitioner was prejudiced because had the jury been presented the available mitigating evidence, "it is very likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" (*Strickland v. Washington* (1984) 466 U.S. 688, 695-696.) Additionally, the

ABA guidelines from 1980, make clear the lawyer's duty to present mitigating evidence in capital cases:[18]

> The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.
> (ABA Standards for Criminal Justice 4-4.1, Commentary, p. 4-55 (2d ed. 1980)(Emphasis added.)

[18] The United States Supreme Court cited the 1980 standards for the proposition that counsel's failure to introduce evidence of defendant's intellectual disability and a comparatively voluminous amount of evidence that did speak in defendant's favor was not justified by a tactical decision to focus on defendant's voluntary confession. In that case, the homicide occurred in 1985. Defendant was convicted of capital murder in 1986. *See, Williams v. Taylor* (2000) 529 U.S. 362, 395-396.

Slick's penalty phase can best be described as feeble. Slick's mitigation consisted of putting on one live witness[19], Petitioner's sister, and asking the following closed-ended questions:

1. Ms. Davidson, you know Robert Lewis, Jr.?

2. Is this Robert Lewis, Jr. here in court?

3. And what relationship is Robert to you?

4. What is the size of your family? How many brothers and sisters do you have?

5. And your one sister, is that Gladys Spillman?

6. What is your brother's name?

7. Your other brother?

8. Whereabouts is he right now?

9. Is he in jail in L.A. County or state prison, if you know?

10. Okay. Has he been in jail in his past, your other brother?

11. A couple of times?

12. Okay. Your father, has he been in prison as well?

13. A number of times?

14. Okay. How about your mother? Where is your mother now?

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[19]Referee: So the prosecution offered stipulated evidence and then you called a live witness, and that was it?
Slick: Yes.
(5 RHT 841.)

15. When did she die?

16. Now, let me just conclude with this. Do you care about your brother, Robert?

17. Do you love your brother, Robert?

18. Do you care what happens to him?

19. Do you care whether harm comes to him?

(4 RST 810-812; RH Ex. 13.)

There was much more the jury should have known about Petitioner. Twenty-nine years later, Petitioner's current counsel was able to produce six witnesses for the Evidentiary Hearing who painted a humanizing portrait of Petitioner. (1 RHT 144-213; 3 RHT 499-539, 545-579; 7 RHT 1155-1175, 1208-1258.) Petitioner is a complicated person. He suffers from intellectual disabilities. (8 RHT 1284.) He endured a childhood rife with chaos and instability. His father was a sexual predator and perverse role model. (1 RHT 152, 185, 187; 2 RHT 279, 320-323.) His mother was an illiterate alcoholic who ran a gambling den out of the home. (3 RHT 513.) Petitioner suffered unimaginable trauma and neglect. (1 RHT 145, 148.) Yet despite all of the odds, Petitioner has demonstrated good character as a loving son to both of his parents, a loving brother to his sisters and a tenderness for his handicapped

child and step-children. (1 RHT 191; 2 RHT 300-301; 3 RHT 523-526.) The jury heard none of this.

There was too much mitigating evidence that was not presented to now be ignored. The jury heard almost nothing that would humanize Petitioner. The jury heard almost nothing that would allow them to accurately gauge Petitioner's moral culpability. Had Slick been effective, the jury would have learned of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." (*Wiggins, supra* at 535.) Had the jury been able to place Petitioner's troubled history "on the mitigating side of the scale" and reduced the weight on the aggravating side of the scale, there is a reasonable probability that the jury "would have struck a different balance." (*Wiggins, supra* at 537.)

Petitioner was constitutionally entitled to an individualized sentencing determination with full consideration of *any* mitigating factors about him which supported a life sentence. (*Lockett v. Ohio,* (1978) 438 U.S. 586, 604. Emphasis added.) Slick's performance fell below the standard of practice for appointed criminal defense counsel in a capital case in Los Angeles in 1984. Michael Adelson, an experienced death penalty defense attorney who practiced in Los Angeles during that time, testified that:

> The goal was to humanize your client to the jury. Usually in the

> cases where the D.A. sought the death penalty was a horrible case factually; so you had to overcome what we perceive to be an intense dislike of what the defendant had done and show where the defendant had come from, allow the jury to step into the shoes of the defendant for a period of time to understand the kind of things that would provide risk to the defendant to become what he did, and in doing so, family would often be able to, once they overcame the reluctance to reveal the family secrets, provide anecdotal evidence which was the most important kind of evidence [...] that a jury would remember.
> (2 RHT 260.)

Mr. Adelson explained the significance of this for Petitioner:

> An example of which in this case was when we were interviewing some of the witnesses, one of the sisters, the older sister said she remembered Mr. Lewis had stayed out all night as a young child – I think he was six years old at that time – and they found him in the backyard in the morning and he was crying and he was explaining that he was doing something bad so that his father would be called to come home and discipline him. Apparently he was terribly concerned that his father was involved with another family

> raising other children and as a youngster, he didn't understand why his father couldn't come home and raise him, and it's that kind of evidence with many other anecdotes that stays with a jury. (2 RHT 260-261.)

Slick's failure to present any mitigation evidence at Petitioner's penalty phase was an abject failure and a dereliction of his duties as competent counsel. The Ninth Circuit has held that "failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 117, 1135 [citing *Mark v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619.]) In this case, the jury had no idea of the horror of Petitioner's upbringing. A wealth of mitigating evidence was accessible to counsel and would have be available had Slick conducted reasonable investigation and preparation. Mr. Adelson testified, "[after interviewing family members] I found a wealth of anecdotal evidence that could have been presented to the jury in a penalty phase." (2 RHT 272.)

Petitioner's case is analogous to the findings in *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868.) In that case, the Court found that counsel was ineffective due to the failure to present mitigating evidence to the jury. The Court noted, "The available mitigating evidence would have provided the jury

with insight into Ainsworth's troubled childhood, his history of substance abuse, and his mental and emotional problems." (*Ainsworth v. Woodford, supra,* 268 F.3d at 875.) The Court concluded that had mitigating evidence that was available to counsel been presented to the jury, there was a reasonable probability that the jury would have rendered a verdict of life imprisonment without possibility of parole:

> In the instant case, counsel failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether Ainsworth would live or die. A reasonable investigation would have uncovered a substantial amount of readily available mitigating evidence that could have been presented to the jury. Instead the jurors as in Wallace, 'saw only glimmers of [the defendant's] history and received no evidence vis-a-vis mitigating circumstances' (*Ainsworth v. Woodford, supra,* 268 F.3d at 874.)

Slick claimed that he did not put on mitigating witnesses because he felt it would open the door to introducing aggravating evidence. Slick testified, "The penalty phase, the family, I'm concerned that asking them more questions than what I did ask them about – I snuck in some of the stuff. Some of it was during the case in chief. But some of it got in, and I thought the risk of bringing everything in – and there's stuff there that's mitigating in general, I

can't tell you now what they all are, but there's an awful lot of stuff that was aggravating." (5 RHT 862.) Slick stipulated to Petitioner's four prior robbery convictions but the jury was not told the circumstances surrounding them. (5 RHT 861.) The jury was left to wonder about the details of these crimes.[20] It was not a condition of the stipulation that Slick refrain from offering certain witnesses in the penalty phase, yet he chose not to. (5 RHT 863.) Mr. Adelson testified that failure to present mitigation evidence because it might initiate other bad acts in rebuttal was not an option. Mr. Adelson stated, "[i]f you didn't, you were dead in the water. It was nothing to lose. And it was our experience that that's what the jury wanted to hear. They wanted to hear why and how the defendant got to the point he did where he would commit the horrible act [...] and you just had to present the evidence. That's what we're taught and that's what was felt by lawyers who knew what they were doing." (2 RHT 265.)

Accordingly, in *In re Jackson* (1992) 3 Cal. 4th 578, where the capital trial occurred in 1978-1979, this Court "conclude[d] that defendant's trial counsel, by failing to conduct a reasonable investigation of defendant's

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[20] Adelson: What factors into my decision in that regard is the nature of the instant offense, the Estell murder, how bad it was and that it had to be overcome that the fact that there was a stipulation to four robberies which left the jury to speculate about how they occurred [...] Mr. Lewis would be dead without the humanizing factors. (2 RHT 385.)

background and childhood to enable him to make an informed decision as to the best manner of proceeding at the penalty phase, failed to provide competent representation under the prevailing professional standards." (*Id.*, at 612.)

In *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, the Ninth Circuit rejected the same argument raised by Respondent here, explaining:

> [T]he ineffectiveness at issue in this case did not arise from failure to employ novel or neoteric tactics. Rather, it resulted from inadequacies of rudimentary trial preparation; providing experts with requested information, performing recommended testing, conducting an adequate investigation, and preparing witnesses for testimony. These were not alien concepts in 1981, but were an integral thread in the fabric of constitutionally effective representation.
> (*Bean v. Calderon, supra,* at 1080.)

Slick quit after he received Ms. Kleinbauer's investigation reports on July 24, 1984, the same day he announced ready for trial.[21] The jury never got

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[21]Sanger: And you didn't ask Ms. Kleinbauer after July the 24th when she gave you your reports, you never asked her to do any further mitigation investigation, did you?
Slick: It's in the record.
Sanger: And as you're looking at the record, you don't see anything there that suggests that you requested further mitigation investigation, correct?
Slick: I do not.
(5 RHT 873-874.)

to hear that Petitioner's father had 18 children. (2 RHT 321.) The jury did not know that Petitioner was devastated when his father abandoned the family. The jury never heard about Petitioner's father using and manipulating Petitioner for drug money. (1 RHT 186, 196-197.) The jury did not know Petitioner was so desperate for love and attention from his father that he committed robberies to fund his father's drug habit. (1 RHT 211; 2 RHT 324.) The jury never heard that Petitioner's father molested his own daughter who was 13 years-old and fathered a child by her that was both Petitioner's half-brother and his nephew. (2 RHT 319.) The jury was unaware that Petitioner's mother was an illiterate alcoholic who ran a gambling parlor out of the house and beat Petitioner with a bullwhip and electrical cords. (1 RHT 148, 168, 173, 188-190, 205.) The jury did not know that Petitioner's father dated Ms. Agras and subsequently began having sex with her daughter, Ms. Helms. (1 RHT 152.) The jury never heard that Petitioner's father had two daughters with Ms. Helms that he molested and got hooked on drugs. (1 RHT 185, 211.) The jury did not know the tenderness Petitioner had for his son with Down Syndrome. (3 RHT 523, 526.) The jury never heard about how much Petitioner loved his step-children and treated them as if they were his own. (3 RHT 523-525.) The jury did not know that after Petitioner's father walked out on the family, Petitioner took up the role of man around the house and cared for his mother

and sisters. (1 RHT 191-192; 2 RHT 300-301.) The jury never knew that Petitioner had the capacity to love people, and he did. Instead, the picture drawn for the jury was that of a convicted robber – a recidivist. In a penalty phase where the jury was being asked to decide between life and death, Slick made their decision much easier.

Under the federal constitutional standards set forth in *Strickland v. Washington,* Petitioner must demonstrate that there is a "probability sufficient to undermine the confidence in the outcome." (*Strickland, supra* at 693-695.) Petitioner has met his burden to show that a lack of confidence in the outcome of the case is appropriate. The jury was deprived from hearing copious amounts of relevant evidence about Petitioner's background; evidence that was relevant to Petitioner's level of moral culpability. Society's long held belief that "defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable," is the foundation for the reason that mitigation evidence in a penalty phase is so critical. (*California v. Brown* (1987) 479 U.S. 538, 545, Justice O'Connor, concurring.) In this case, the jury heard none of the mitigation evidence pertaining to Petitioner's background; evidence which "might well have influenced the jury's appraisal of [Petitioner's] moral culpability." (*Williams v. Taylor* (2000) 529 U.S. 362, 398.)

Petitioner has met his burden by producing witnesses and evidence 29 years later that was available to Slick and would have been uncovered with an adequate investigation. Petitioner was deprived of effective assistance of counsel because Slick's inadequate performance prejudiced Petitioner and fell below an objective standard of reasonableness.

E. Trial Counsel Failed to Conduct an Adequate Investigation of Intellectual Disabilities, Learning Disabilities and the Effects of Institutionalization

Slick received Dr. Sharma's report approximately two weeks before jury selection began. (RH Ex. B, p. 303-305.) In the three-page report dated July 24, 1984, Dr. Sharma states that Petitioner "served time at Tracy, San Quintin [sic], and Folsom State prisons on two occasions each. His rap sheet indicates that the Petitioner started to commit antisocial activities[22] at a very early age. He was repeatedly detained at Juvenile Hall." (RH Ex. B, p. 304.) The report unambiguously describes Petitioner's history of institutionalization. Slick did not order any mitigation investigation to follow-up on this information. This was an obvious theme that was never explored.

Dr. Sharma's report also alerted Slick to the fact that Petitioner was uneducated. The report states that Petitioner "has a seventh grade education

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[22] The only diagnosis Petitioner received in the Juvenile facilities was anti-social personality disorder. Dr. Davis testified that this is incorrect because that diagnosis may not be given until the subject reaches the age of 18 and a conduct disorder diagnosis is given prior to the age of 15. (1 RHT 54-56.)

only because of his repeated detainment in Juvenile Hall." (RH Ex. B, p. 304.) However, this should not have been news to Slick because on May 22-24, 1984, Slick billed 14 hours for studying and outlining Petitioner's prison package. (RH Ex. 10.) Petitioner's prison package contained probation reports detailing Petitioner's long history of institutionalization and school records. Slick should have been aware of Petitioner's lack of education two months before he received Dr. Sharma's report. There was never any attempt to explore this area of mitigation further. Petitioner's lack of education was taken at face value and blamed on his history of institutionalization.

Slick testified that he received Petitioner's records indicating that Petitioner had been incarcerated in the California Youth Authority (CYA) and in juvenile facilities. (5 RHT 905.) Additionally, Slick stated that he was aware of the institutional effects a person would experience as a result of spending their formative years in custody. (5 RHT 904-907; RH Ex. A.) However, Slick made no effort to explore this theme or request investigation into the negative effects of Petitioner's institutionalization.

The prison package Slick reviewed in May also documented additional avenues of mitigation that were never explored. Dr. Davis testified that the institutions had Petitioner's probation reports and attendance records. These documents detailed the social chaos, dysfunction and neglect Petitioner

experienced during his formative years. (1 RHT 46.) Petitioner was first arrested at age 12 and sent to youth camp. At age 13, Petitioner was sent to CYA. Dr Davis testified that during this time, the CYA was reserved for more serious offenders. Dr. Davis explained that placing someone as young and small as Petitioner in a facility with older, hardened minors and adults would have been extremely damaging and inappropriate. (1 RHT 35-44.)

Petitioner's lack of education and long history of institutionalization were topics rich with potential mitigation material and of which Slick was aware, yet he failed to mine. Once again, Slick missed an opportunity and as a result, Petitioner paid the price. Slick's performance fell below an objective standard of reasonableness when he failed to seize an opportunity for mitigation evidence that was right in front of him. The Referee stated that Slick spent 14 hours studying and outlining Petitioner's "lengthy prison package." (Referee's Report, p. 30; RH Ex. 10.) Slick had ample opportunity to delve into Petitioner's history of institutionalization for mitigation evidence, yet he chose not to.

Petitioner was prejudiced and deprived of an effective assistance of counsel because Slick failed to investigate Petitioner's intellectual disabilities, learning disabilities and the effects of institutionalization.

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F. Trial Counsel Failed to Provide Experts with a Social History

Slick's representation was ineffective because he failed to provide the experts with a social history. It is not enough to simply ask a mental health expert to evaluate the defendant in a capital case. A proper psychological evaluation cannot be done without an adequate social history of the defendant. (Kaplan & Sadock, Comprehensive Textbook of Psychiatry/VI, at p. 709; Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed-Speculation, 66 Va. L. Rev. 4237 (1980); Report of the Task Force on the Role of Psychiatry in the Sentencing Process, Issues in Forensic Psychiatry, 202 (1984); Issues in Forensic Psychiatry, 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974)H. Davison, Forensic Psychiatry 38-39 (2d ed. 1965).) Slick hired Dr. Sharma to examine Petitioner for competency to stand trial and whether he was sane at the time of the offense. (Letter from Slick to Sharma dated May 8, 1984 [RH Ex. B, p. 299-300.) Slick hired Dr. Maloney to "administer the necessary psychological tests and prepare a complete psychological profile for presentation to a jury." (Letter from Slick to Maloney dated May 8, 1984; RH Ex. B, p. 182.) Slick provided both Dr. Sharma and Dr. Maloney with the same enclosures and a list of six mental health questions, possibly relating to a penalty phase, under the heading of 190.3. (RH Ex. B, p.

301; RH Ex. R, p. 2356.) Slick requested that both doctors answer five additional questions related to Petitioner's sanity at the time of the offense, competency to cooperate with counsel and ability to represent himself. (RH Ex. B, pp. 182-184, 299-302.) Slick testified that this was the same procedure he followed with experts in other death penalty cases and the questions were his standard questions. (5 RHT 912.)

The enclosures provided to Dr. Sharma and Dr. Maloney included a copy of the information, the 52-page police report, the 29-page preliminary hearing transcript and three probation reports from Petitioner's prior cases. (RH Ex. B, pp. 184, 302.) Three weeks later, Slick provided Dr. Sharma with Petitioner's Department of Corrections (CDC) records, and Slick's own outlines of Petitioner's criminal history, personal history and the CDC records. (RH Ex. R, pp. 2341-2350, 2353.) This was the extent of materials provided to the experts. At no time did Slick provide a social history to either Dr. Sharma or Dr. Maloney.

G. Trial Counsel's Decision to Put on a Perfunctory Penalty Phase was Not Tactical Because He Did Not Conduct an Adequate Investigation to Put Himself in a Position to Make a Strategic Decision Based on the Available Information

The ABA guidelines from 1980 state unambiguously the duty of a lawyer to uncover and present mitigation evidence. The guidelines state that in order to accomplish this: *Investigation is essential to fulfillment of these*

functions. (ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980.))

Slick claimed that his decision to introduce only one live witness in the penalty phase was a strategic decision. (5 RHT 868.) However, a lawyer's strategic trial choices must have been made after counsel has conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." (*Strickland, supra,* 466 U.S. at 691, 104 S.Ct. 2052.) During penalty phase proceedings, counsel has a duty to make "diligent investigation into his client's troubling background and unique personal circumstances." (*Williams v. Taylor* (2000) 529 U.S. 362, 415, 120 S.Ct. 1495 (O'Connor, J., concurring.) As the Supreme Court has stated, there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems may be less culpable than defendants who have no such excuse." (*Boyde v. California* (1990) 494 U.S. 370, 382, 110 S.Ct. 1190, 108. (quotation and emphasis omitted.)) Thus, as we have noted, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." (*Wallace v. Stewart,* 184 F.3d 114, 117 (9th Cir. 1999) (quoting *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227 (brackets in original.))

The burden of conducting an adequate investigation falls solely on the shoulders of the attorney. The Referee stated that in terms of the investigation, Slick was "Captain of the ship." [23] Slick conceded this point and confirmed that in 1984, he was aware of his role as overseer of the investigation.[24] Slick quit on July 24, 1984 – the same day he received Ms. Kleinbauer's reports and announced ready for trial. Slick did not put himself in a position to make tactical decisions with respect to the penalty phase because he ended any semblance of a mitigation investigation and started jury selection on August 15th. (4 RHT 654.) Further, during the first six months Slick had this case, no investigation was conducted at all. (4 RHT 625-626.) When the

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[23]Kelberg: Your honor, our position is when they say Slick's investigation, the California Supreme Court recognizes he's the Captain of the ship.
Referee: Right
Kelberg: So he directs whether it's Maloney or Kleinbauer, but ultimately what the court's trying to access is what was done before trial in the way of an investigation that Slick either personally did or directed.
Referee: Right. That's what I perceive. (5 RHT 897-898.)

[24]Sanger: [I] think you said earlier you were Captain of the ship, if those were your words. You understood that ultimately, as the trial lawyer, you're responsible for making sure the investigation is done, correct?
Slick: I do.
Sanger: And you understood that at the time?
Slick: I did.
Sanger: Okay. Now, Miss Kleinbauer had stated to the court that she was surprised that you did not ask her questions or have her participate further in the penalty phase investigation that she had completed on July the 23rd. Did you, in fact, ask her to – ask her any questions or ask her any follow-ups or do anything of that sort with regard to penalty phase?
Slick: I don't remember. The only thing I know was what we have in the file. (5 RHT 903-904.)

investigation finally got under way, it took place in a span of 17 days in the middle of the eighth month of Slick's representation; a mere one month before trial. (RH Ex. 7.)

The paltry number of hours Slick spent on this case and the eventual one hour and thirty-six minute penalty phase establish that he did not meet the burden of a lawyer who takes on the solemn duty to defend the life of a client in a capital case.

H. This Court has Not Ruled on Any of the Claims in the Petition for Writ of Habeas Corpus and Petitioner Respectfully Requests That This Court Grant Relief Based Upon Each and Every Claim Presented.

Respondent cites particular claims in its Brief as if those were the only claims on contention. This Court has not ruled on any of the claims in the Petition for Writ of Habeas Corpus and Petitioner respectfully requests that this Court grant relief based on each and every claim presented.[25]

In particular, Petitioner asks the Court to consider anew the claims relating to ineffective assistance of counsel and a failure to of counsel and his investigator to investigate and prepare for the guilt phase. Even though the Court did not grant a hearing on these issues, the Court could still consider the additional evidence adduced at the reference hearing as a basis to grant relief

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[25] Petitioner is aware that it is the Court's usual practice to resolve the remaining claims in the petition for writ of habeas corpus by a separate order. (*In re Scott* (2003) 29 Cal. 4th 783, 829.)

outright or to order a further reference hearing on the remaining claims, including IAC at the guilt phase. Evidence shows that Slick overbilled by rounding off his time to the hour. (5 RHT 802.) Slick went through a routinized process in trying this case. He sent the same packet of documents to his experts with the same standard six questions he used in all his death penalty cases. (5 RHT 912.) Slick used a psychologist as a mitigation expert. (10 RHT 1676.) As set forth above, he failed to provide experts with a social history for Mr. Lewis. Slick failed to explore evidence that was right under his nose. (4 RHT 669-671.) Mr. Adelson testified that "no reasonable competent counsel would fail to put on this evidence." (3 RHT 483.) It does not matter when or how this Court looks at it, this was a grossly substandard job, including overbilling and underachievement by lawyer and his investigator.

CONCLUSION

This Court should find that Petitioner was denied the effective assistance of counsel in the investigation and presentation of the penalty phase. In addition, the Court should adopt the Referee's finding of fact that Petitioner's

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disability renders him ineligible for execution.

Dated: August 14, 2013

Respectfully Submitted,

SANGER SWYSEN & DUNKLE

By: _____

Robert M. Sanger, Attorney for
Petitioner, Robert Lewis, Jr.

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am a citizen of the United States. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On August 14, 2013, I served the foregoing document entitled: **PETITIONER'S REPLY TO RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND SIMULTANEOUS BRIEF ON THE MERITS** on the interested parties in this action by depositing a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

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

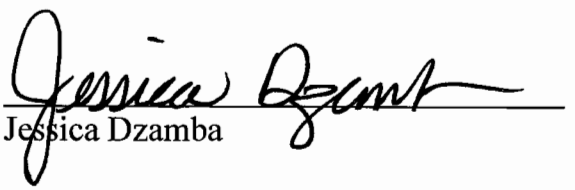
____ **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at

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

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

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

Executed on August 14, 2013, at Santa Barbara, California.



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