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In the Supreme Court of the State of California

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In re

ROBERT LEWIS, JR.,

On Habeas Corpus.

CAPITAL CASE

Case No. S117235

Los Angeles County Superior Court, Case No. A027897
The Honorable Robert J. Perry, Referee

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS AND REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioner endorses the referee's findings as to Reference Question 1. (Pet. Brf. 8-29.) He takes exception to the referee's findings on Reference Questions 2 through 6. (Pet. Brf. 34-90.) For the reasons stated in respondent's exceptions and merits briefing as well as the reasons that follow, respondent urges this Court to reject petitioner's exceptions to the referee's findings and report, to reject the referee's findings that petitioner is mentally retarded such that his execution would constitute cruel and unusual punishment (*Claim XVI*), and accept the referee's findings on Question 2, Question 4, Question 5, and Question 6 and reject the claims of ineffective assistance of counsel stated in *Claim XIV* and *Claim XV*.

I. PETITIONER HAS NOT ESTABLISHED, BY A PREPONDERANCE OF THE EVIDENCE, THAT HE IS MENTALLY RETARDED SUCH THAT HIS EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT

Petitioner endorses the referee's findings in Question 1 that he is mentally retarded[1] and, therefore, ineligible for execution pursuant to *Atkins v. Virginia* (2002) 536 U.S. 304. Respondent disputes petitioner's

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[1] Petitioner substitutes the terminology "intellectually disabled" and "intellectual disability" for "mental retardation" in his briefing and suggests the substitution has been previously endorsed by this Court. (See Pet. Brf. 7, fn. 1.) In 2012, the Legislature amended Penal Code section 1376 to substitute the phrase "intellectual disability" for the phrase "mental retardation" in section 1376. See Stats. 2012, ch. 448 (A.B. 2370), § 42; Stats. 2012, ch. 457 (S.B. 1381), § 42.) The legislative history for the 2012 amendment indicates that the change in terminology was not intended to modify the substantive definition stated in Penal Code section 1376.

Because Penal Code section 1376 utilized the phrase "mental retardation" throughout the instant reference proceedings and that terminology was used by the witnesses, the parties and the referee, respondent utilizes that terminology in its briefing to avoid potential confusion. (See *People v. Barrett* (2012) 54 Cal.4th 1081, 1088, fn. 2.)

arguments, and the referee's findings, that petitioner has met his burden to demonstrate that he suffered from significantly subaverage general intellectual functioning and exhibited significant limitation in adaptive behavior which onset before age 18 as required by the definition of mental retardation set forth by the Legislature in Penal Code section 1376. This Court should deny *Claim XVIII.*

A. In the "Battle of the Experts," Dr. Khazanov's Prior Experience with Mental Retardation and Her Practices In This Case Undermine Her Credibility and the Reliability of Her Opinion

Petitioner endorses the testimony of his expert, Dr. Khazanov, and argues that the referee appropriately credited her testimony over that of Dr. Hinkin and Dr. Maloney because Hinkin did not personally evaluate petitioner and Dr. Maloney had not personally interviewed petitioner since 1984. (Pet. Brf. 11-19.) This Court should not afford deferential treatment to the referee's own deference to Dr. Khazanov or to the referee's findings based upon her expert opinion. Instead, this Court's review of the record will demonstrate that petitioner has not proved, by a preponderance of the evidence, that he is mentally retarded.

The value of an expert's opinion turns upon *its foundation.* (*In re Scott* (2003) 29 Cal.4th 783, 823 ["The chief value of an expert's opinion ... rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion"; alteration & italics in original]; *People v. Bassett* (1968) 69 Cal.2d 122, 141 ["'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions.'"]; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["like a house built on sand, the expert's opinion is no better than the facts on which it is based"].) Indeed, this Court has counseled that trial courts have a duty to act as gatekeepers to see

that expert opinion meets the reliability requirements of Evidence Code sections 801 and 802, including the duty to exclude speculative and irrelevant opinions and to evaluate the propriety of the materials upon which an expert relies and the reasoning process used by an expert. (*Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747, 753, 769-772 [trial court properly excluded, as speculative, expert testimony about lost future profits resulting from breach of contract]). Where a referee serves as both judge and factfinder, it should still adhere to its gatekeeper function. Here, the referee did not evaluate the foundation for Dr. Khazanov's opinion objectively. The record before this Court demonstrates that Dr. Khazanov's opinion that petitioner is mentally retarded is not supported by the material upon which she based that opinion or the reasoning that she applied to the material in order to reach her opinion. Moreover, the metamorphosis of her expert opinion, and its shifting foundation, further undermines her own credibility and the reliability of her opinion.

1. Dr. Khazanov's Prior Experience with Mental Retardation and Her Practices in This Case Undermine Her Credibility

In his Brief, petitioner characterizes both Dr. Khazanov and Dr. Maloney as possessing "extensive, rich backgrounds" in intelligence assessment and claims Dr. Hinkin's experience is limited to a few cases. (Pet. Brf. 11-13.) Respondent agrees that Dr. Maloney has an extensive and knowledgeable background in the assessment of intellectual functioning and in the evaluation and diagnosis of mental retardation. However, contrary to petitioner's assertion, Dr. Khazanov's experience with intellectual disability assessment is both limited and pointedly biased.

After immigrating to the United States in 1991, between 1993 and 1996 Dr. Khazanov performed the supervised work necessary for licensure

in California. She obtained her license in 1996. (8RHT 1279-1281; Exh. 22 at 2.) During the 15 years preceding the reference hearing, Dr. Khazanov had worked on 48 post-conviction habeas cases involving the death penalty, performing that work solely on behalf of the defendants/petitioners. (8RHT 1281-1283.) Dr. Khazanov characterized this work as "very part time." (8RHT 1437.) Her employment as a staff psychologist and clinical instructor at the University of California, San Francisco until 2002 apparently did not include intellectual assessment since she did not testify to that ongoing experience. (8RHT 1281; Exh. 22 at 1.) Nor did Dr. Khazanov testify that her current private practice involved intelligence assessment although she did testify that she provided psychological counseling to one woman who has been previously diagnosed with mental retardation. (8RHT 1281; Exh. 22 at 1.)

The bulk of Dr. Khazanov's "experience" with the assessment of intellectual functioning occurred in Russia. Petitioner relies upon these experiences. (Pet. Brf. 24-25.) Dr. Khazanov's initial "experience" with intellectual assessment occurred while she worked as a staff psychologist in a St. Petersburg hospital from 1977 to 1980. Her duties included administering the Weschler Adult Intelligence Scale ("WAIS") to young men drafted into the Soviet Army. (8RHT 1271-1272.)[2] At that time, the WAIS had not been appropriately normed for the subjects she tested, and Dr. Khazanov used the American norms. Thus, Dr. Khazanov used a testing instrument that was neither reliable nor valid for her subjects. (8RHT 1276-1277.) She deemed subjects who performed poorly on all 14 subtests of the WAIS to be malingering without reference to an objective test. (8RHT 1272-1274, 1314-1315.) Dr. Khazanov did not evaluate the

[2] Dr. Khazanov testified that she received her Master's Degree in 1977 and her Ph.D in 1988. (8RHT 1270-1271.)

adaptive behavior of her subjects for her work for the Soviet Army. (8RHT 1316.) In other words, her assessments of mental retardation in Russia did not comply with the protocols set forth in the APA Diagnostic Statistical Manual (4th ed. 2000) ("DSM") or by the American Association on Mental Retardation ("AAMR") in 1992 or comply with the procedures required by Penal Code section 1376.[3] She knowingly "cleared" subjects for service in the Soviet Army using a testing instrument she knew was neither valid nor reliable for the purpose used and without the assessment of adaptive functioning mandated by all extant procedures in her profession. While she felt "bad" since service in the Soviet Army was viewed as undesirable, she used deficient instruments to assess their intellectual functioning and simply trusted her own personal, subjective ability to identify malingers. (8RHT 1272-1274, 1314-1315.)

The reference hearing record demonstrates that Dr. Khazanov continued this habitual practice in this case. Dr. Khazanov's evaluation of petitioner did not fulfill the requirements of section 1376 or the definitions of mental retardation stated in the DSM-IV, the 1992 AAMR definition, or even the 2002 or 2010 American Association for Intellectual and Developmental Disabilities ("AAIDD") definitions. Instead, as she had

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[3] As petitioner notes (Pet. Brf. 11), Dr. Khazanov testified that she was "involved" in the "norming" of the WAIS to the *Russian population* at some point between 1981 and 1991 but did not specify the degree of her "involvement." (8RHT 1276-1277.) Whatever experience Dr. Khazanov had in ultimately creating norms for the WAIS for use with the Russian population, it is clear that Dr. Khazanov must have been aware of her improper use of the WAIS from 1977 to 1980, yet at the reference hearing she emphasized her Soviet Army testing to bolster her experience and qualifications. Moreover, her experience norming the WAIS for the Russian population did not absolve her failure to evaluate Soviet Army candidates for concurrent deficits in adaptive functioning, nor did it imbue her with experience evaluating adaptive functioning as required by section 1376.

done in Russia, she unilaterally looked to petitioner's performance on intelligence instruments without resort to a competent assessment of adaptive behavior functioning. Dr. Khazanov utilized petitioner's standardized test performance to fulfill both the first section 1376 requirement of significantly subaverage general intellectual functioning and the second requirement of concurrent deficits in adaptive behavior.

At the reference hearing, Dr. Khazanov opined that petitioner presented "a pretty straightforward case of mental retardation." (8RHT 1285.) She made this diagnosis even before she performed an adaptive behavior assessment of petitioner. In her original declaration signed in June 2003, Dr. Khazanov opined that petitioner suffered from deficits in adaptive behavior functioning by referencing his school grades and WRAT performance, his performance on the WAIS-III, and his lack of employment history. (9RHT 1590; see Exh. HH at ¶¶ 134-137 [Petn. Exh. 13].) Based solely upon that information, she opined that petitioner was mentally retarded. (See Exh. HH at ¶ 138.)

When reviewing the intelligence instruments, Dr. Khazanov focused upon the May 1963 WISC, the 1984 WAIS-R that she "rescored," and the WAIS-III she administered in 2003. She excluded and ignored all group-administered tests. While acknowledging the inconsistency of petitioner's November 1959 Stanford-Binet L score, Dr. Khazanov deemed that petitioner's score of 83 to be explained by her hypothesis that he had suffered in utero brain damage that manifested just before he took the WISC in May 1963.[4] (8RHT 1424-1427, 1432-1433.) And she adamantly rejected any explanation for the scores that might relate to petitioner's

[4] Dr. Khazanov was not familiar with the structure, administration, or norming of the Stanford-Binet test. (9RHT 1485, 1505, 1575.)

underprivileged socioeconomic status or his probable lack of motivation in educational pursuits and in the testing environment.[5]

Dr. Khazanov seemingly recognized the inadequacy of the opinion stated in her June 2003 declaration because, in August 2003, she returned to San Quentin to evaluate petitioner's adaptive functioning. To do so, she used a list of questions of her own creation. (9RHT 1590-1600.) In her supplemental declaration filed in this Court, Dr. Khazanov did not reveal that she had not used a standardized instrument designed to assess adaptive behavior functioning; nevertheless, she referenced a selective representation of petitioner's answers to her questions to underscore her previous opinion. (Exh. II.)

At the reference hearing, Dr. Khazanov acknowledged that a deficit in the social or practical skill domains (using the AAIDD three-domain criteria) "needs to be measured using the standardized test," and she identified the most commonly used tests as the B.A.S.K. and Vineland. (8RHT 1303.) Yet she did not even administer the self-report version of the existing adaptive behavior tests but chose to make up her own test that was idiosyncratic, untested, unnormed, and unvalidated. (12RHT 2046-2049.) And even though her questions seemingly targeted the domains that she testified required a standardized test, Dr. Khazanov self-excused her

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[5] Dr. Khazanov's convoluted comment about President Obama demonstrates a fundamental misunderstanding of the historical correlation of socioeconomic deprivation and race subjugation in our country's inglorious past: "With the President in the house, how can we even suspect that we cannot measure one's IQ reliably? [¶] This is something I really don't understand, how the skin color can determine whether we can or cannot measure one's IQ." (9RHT 1586.) Dr. Khazanov's experience norming the WAIS for the Russian population or testing Soviet Army draftees did not provide her with any personal experience regarding the United States population or the various socio-cultural and socio-economic factors prevalent in our country's history.

failure to objectively evaluate petitioner's adaptive behavior by claiming that "because on my testing he did have very severe deficits in reading, writing, and language and money concepts, I didn't have to go that far because by the virtue of having these significant deficits . . . he met the requirement." (8RHT 1303; contra Exh. HH at ¶¶ 130-132.) Instead, Dr. Khazanov characterized the volume of intelligence tests administered to petitioner prior to age 18 as "the strongest evidence I can provide for the deficits of adaptive functioning." (8RHT 1309-1310.) Dr. Khazanov explained that, in her opinion, an individual who scored a full-scale IQ test result of 70 would be mentally retarded *even in the absence of evidence of adaptive behavior functioning* because "I've never seen a person who had I.Q. of 70 who never had deficits in adaptive functioning." (8RHT 1313, italics added.)

A review of Dr. Khazanov's self-created, non-standardized, and non "normed" questions and her assessment of petitioner's answers further demonstrates both her bias and the lack of reliability inherent in her opinion. Presented with a 51 year-old (in 2003) who had spent the last 20 years incarcerated in state prison and nearly all of his teenage and adult years incarcerated, Dr. Khazanov asked him how he would prepare pancakes, order at a restaurant, handle a medical situation at home, or safely cross the street. (9RHT 1599-1604; see Exh. JJ, p. 331.) The absence of any standardized measure for evaluating the answers to these concocted questions should have prompted the referee to inquire *why* Dr. Khazanov selected them in the first place. While Dr. Khazanov found fault with petitioner's answers, at the reference hearing she could not, and did not, demonstrate petitioner's answers fell more than two standard deviations below the mean for his chronological age, community and peers for the relevant time period (before age 18). Despite Dr. Khazanov's personal view that petitioner's answers were deficient, as the referee

recognized, petitioner's answers were detailed and accurate. (9RHT 1598-1605.) This finding is most poignantly demonstrated by petitioner's detailed description of how to safely cross a street (he answered that he would walk to the corner, wait until the light changed to green, look both ways, then cross) and the steps he would take if he experienced severe chest pain at home (he would lie down and see if it went away, he would call a family member, and if could not drive, he would call 911). (9RHT 1601-1602; Exh. JJ, p. 331.) At the hearing, even Dr. Khazanov admitted that petitioner's answers were responsive to her questions. (9RHT 1601-1603.) If petitioner gave these answers at age 51 and after 20 years of constant incarceration, it is reasonable to assume that his communication skills about these subjects would be no worse (and logically better) at a point much closer to the relevant time period (prior to age 18) for assessing mental retardation.

When confronted with her exaggerations, Dr. Khazanov made no effort to justify her subjective assessments and, instead, returned to her single-prong diagnosis, stating, "[in] my opinion the deficits in his academic skill, his illiteracy is the strong enough (sic) indicator of the deficits in adaptive functioning. This is something that in my opinion allows us to conclude that he does have mental retardation." (9RHT 1606.) Also, at the reference hearing, Dr. Khazanov switched the definition of mental retardation from the one that she utilized in her June 2003 declaration (the 1992 AAMR and 2000 DSM-IV definitions referenced in *Atkins* and *In re Hawthorne* (2005) 35 Cal.4th 40), to the 2002 AAMR/2010 AAIDD definition that, in her view, justified a sole focus upon the academic and intelligence testing that she had previously performed. (See 9RHT 1604, 1651.)

In other words, once Dr. Khazanov completed her testing in June 2003, no additional information was going to reverse her opinion about

petitioner's mental retardation. She administered the WAIS-III, concluded that he scored in the range for mild mental retardation, and quit. To persuade this Court to grant petitioner an evidentiary hearing, Dr. Khazanov created a list of questions to ask petitioner in August 2003. Because these questions were her own invention and were not part of one of the existing standardized adaptive behavior questionnaires, Dr. Khazanov lacked any objective measure to determine or opine that petitioner's responses about adaptive functioning fell two standard deviations below the mean as she testified was required for proper assessment under all definitions of mental retardation, including the legal standard referenced in *Atkins* and incorporated in Penal Code section 1376.

At the reference hearing, Dr. Khazanov pointed to remarks in 30-year-old probation reports, anecdotes provided by deceased witnesses and witnesses not presented at the reference hearing, and the lay opinions and anecdotes articulated by witnesses who testified at the reference hearing to claim there was "enough evidence" that petitioner had "deficits in many areas of functioning" to corroborate her opinion based upon petitioner's test performance. (8RHT 1308-1309.) However, her use of these materials rather than a reliable and validated testing instrument further contradicted the professional requirements and undermined the foundation for her opinion. The evidence failed to show the purported adaptive behavior deficiencies enumerated by Dr. Khazanov and the referee (Report, pp. 21, 23-25) fell two standard deviations below the mean such that they qualified as *significant limitations* in adaptive functioning.

Moreover, Dr. Khazanov did not limit her opinion to her interpretation – or misinterpretation – of the materials in existence and available to her. The blatant speculation Dr. Khazanov repeatedly uttered during her testimony should have caused the referee to closely scrutinize her opinion, and it should prompt this Court to undertake the scrutiny the

referee failed to take. For instance, she speculated about petitioner's personal and family history as presenting "risk factors" for mental retardation. Dr. Khazanov speculated, "it was possible that Maggie herself had mental retardation, so maybe there is genetic loading for mental retardation in Robert Lewis." (8RHT 1424.) While anything might be "possible," Dr. Khazanov offered and alluded to no evidence of a scientific possibility, much less a probability, of such a condition. She also speculated that the fact that petitioner's son with Janiroe had Down Syndrome could possibly indicate "genetic loading" for mental retardation; in doing so, she both presumed paternity and speculated that petitioner (and not Janiroe) was the donor of the chromosomal abnormality responsible for the syndrome. (8RHT 1424.) This speculation was not a valid foundation for Dr. Khazanov's opinion or substantial evidence supporting the referee's findings.

Based upon purported information not substantiated at the reference hearing that petitioner's mother drank heavily while petitioner was a youth and may have suffered from cirrhosis of the liver, Dr. Khazanov speculated that petitioner suffered from alcohol exposure while in his mother's womb. (8RHT 1424.) Again, no evidence supported the underlying factual assertions. Dr. Khazanov focused upon Ms. Agras' opinion that petitioner looked malnourished to her (1RHT 176) as another risk factor for mental retardation without accounting for when Agras made the observation (within the five years preceding 1971, which was necessarily after the manifestation of petitioner's "brain dysfunction" via the 1963 WISC) and without speaking to Ms. Agras to explore the factual underpinnings of the opinion. (8RHT 1424.) Dr. Khazanov used this speculation as a springboard to postulate that petitioner's dropping IQ test scores between the Stanford-Binet (age 7) and the May 1963 WISC (nearly age 11) resulted from brain damage and mental retardation and could not be explained by

his lack of interest and motivation in academic learning and resulting illiteracy. Rather than critically examine this rampant speculation, the referee recited and relied upon it as supporting its finding on the adaptive functioning prong. (Report, pp. 23-24.)

Dr. Khazanov disregarded the legal definition of mental retardation as well as the clinical definition and protocol mandated in her profession to diagnosis mental retardation. The referee undertook no meaningful scrutiny of the foundation for her opinions. Particularly given the referee's comment well before the hearing began stating, "*I don't know why the people just don't concede he's mentally retarded and give up on death*" (1-A RHT C-13), as well as its comments that the proceedings were pointless, that he did not "think I was an appropriate judge for this matter," expressing confusion about the applicable inquiry, and calling its findings a "stupid exercise" (Resp. Brf. 94-95), this Court should carefully scrutinize the foundation for Dr. Khazanov's opinions and the evidence underlying the referee's findings.

2. Dr. Hinkin Possessed Extensive Experience Assessing Mental Retardation and Other Cognitive Disorders

Petitioner argues that Dr. Hinkin had limited experience with mental retardation, asserting his experience consisted of some exposure during graduate school and work on five cases in which the Los Angeles County District Attorney had retained him as an expert. (Pet. Brf. 12.) Petitioner drastically mischaracterizes Dr. Hinkin's experience in assessing intellectual functioning and in the forensic arena.

Dr. Hinkin had abundant, non-partisan experience with assessment of cognitive functioning and mental retardation. Dr. Hinkin had been board certified in neuropsychology since 1997. (12RHT 1965.) He maintained an active clinical practice in addition to researching the neuropsychological

effects of various diseases, environmental influences, and conditions. However, Dr. Hinkin was not a mere "researcher." He served as the Director of Neuropsychological Services at the West Los Angeles Veteran's Administration and as a professor at UCLA. In both capacities, Dr. Hinkin assessed patients with suspected psychiatric or neurological disorders and evaluated their cognitive, neurocognitive, and neurological states. His patients suffered from a full range of suspected psychiatric or neurological disorders, and his role was to evaluate the patients and diagnose brain disorders. (12RHT 1963-1965.)

Although the referee expressly discouraged a full presentation of Dr. Hinkin's qualifications because the referee said it was "accepting him as an expert" who was "certainly well qualified" (12RHT 1965), Dr. Hinkin described some of his work with the mentally retarded and his evaluation of patients for mental retardation. Dr. Hinkin began working with mentally retarded individuals in 1983 with an organization in Arizona. In his current ongoing clinical work with veterans, it was "a condition that sometimes presents in patients that I'm seeing for other reasons." Most of these veterans already had been diagnosed with mental retardation, but some experienced cognitive problems that were not fully explained by the condition that prompted the assessment, such as a head injury or stroke. For those patients, Dr. Hinkin discovered and diagnosed mental retardation based upon reviewing the individual's history and looking at early childhood events. (12RHT 1966, 1973.) The question whether these patients had the condition of mental retardation was "essential and integral to [his] differential diagnosis." (12RHT 1966.) Dr. Hinkin had assessed the cognitive functioning of many hundreds of people and had determined that between 100 and 200 individuals were mentally retarded. (12RHT 1972.)

In the forensic arena, beginning in the late 1990's, Dr. Hinkin had been consulted in criminal cases to make assessments that focused upon brain damage and mental retardation in addition to other mitigating mental conditions. (12RHT 1967-1968.) Dr. Hinkin had been retained by the Los Angeles County District Attorney's Office to provide testimony in five capital cases, including evidentiary hearings involving Anderson Hawthorne, Jr. (involving an *Atkins* question), Steve Champion, Alfredo Valdez, and Melvin Turner. (12RHT 1968-1969.) Also, Dr. Hinkin had been retained in capital cases by the defense to render an opinion on mental retardation and, in doing so, found some defendants to be mentally retarded. He had been more frequently called as a defense witness to testify about mental retardation than as a prosecution witness. (12RHT 1974-1975.) Dr. Hinkin estimated that 75 percent to 80 percent of his forensic work was conducted on behalf of the defense. (12RHT 1969-1970, 1973-1974.) That percentage would equate to approximately 20 cases in which he was employed by the defense in a criminal case. (12RHT 1969-1970.)

And while Dr. Khazanov might fancy herself to be a neuropsychologist despite her lack of board certification and choice not to undertake the work necessary for certification (8RHT 1287), Dr. Hinkin actually was a board-certified neuropsychologist whose daily employment as the Director of Neuropsychological Services at the West Los Angeles Veteran's Administration and as a professor of psychiatry in behavioral sciences at UCLA required assessment of patients with suspected psychiatric or neurological disorders on a regular basis. (12RHT 1963-1965.) In this case, Dr. Khazanov purported to use neuropsychological testing to diagnose brain dysfunction – that is, neurological damage. Her lack of board certification truly mattered. Dr. Khazanov claimed that the results of the Halstead-Reitan battery supported her theory that petitioner suffered mental retardation as the result of brain dysfunction caused by fetal

exposure to alcohol. (8RHT 1349-1350, 1388, 1428-1429.) However, as Dr. Hinkin testified, Dr. Khazanov used outdated norms to interpret the test results, explained her scoring by claiming that she violated the standards for the test's administration, and misinterpreted her data to conclude Petitioner suffered diffuse brain damage. (12RHT 1996-1999, 2032-2034.) Rather than consider these problems in weighing Dr. Khazanov's opinion, the referee ignored them by concluding it did not have to decide whether petitioner had suffered brain damage. (Report, p. 22, fn. 34.)

Particularly when compared to Dr. Khazanov, Dr. Hinkin possessed more extensive and relevant experience assessing mental retardation and other cognitive disorders, including the type of brain damage caused by in utero alcohol exposure that Dr. Khazanov purported to diagnose as the precipitating condition for petitioner's mental retardation. On this point of comparison, Dr. Hinkin's opinion is entitled to greater weight than the opinions tendered by Dr. Khazanov.

3. Dr. Khazanov's Personal Interview/Evaluation of Petitioner Did Not Validly Distinguish Her Opinions from Those Offered by Dr. Hinkin, and She Failed to Consider Significant Information Provided by Dr. Maloney and Dr. Sharma

As discussed in its brief (Resp. Brf. 99-102), respondent takes exception to the referee's conclusion that Dr. Hinkin's opinion was entitled to "lesser weight" because he did not personally examine or interview petitioner and because he received a substantial fee for his work on this case. Petitioner argues that Dr. Khazanov was in a uniquely advantageous position because she was the only expert to have personally interacted with petitioner since 1984. (Pet. Brf. 11; Report, p. 8.) Contrary to the views of both petitioner and the referee, while Dr. Khazanov's two trips to San Quentin to interview and test petitioner had some superficial appeal, an examination of the foundation for Dr. Khazanov's expert opinion reveals

that her personal evaluation of petitioner did not play a pivotal role in her expert opinion that petitioner was mentally retarded.

Dr. Khazanov's personal interaction with petitioner was relevant to the extent her "clinical judgment" determined her scoring of the WAIS-III since clinical judgment plays a significant role when *testing subjects*. (8RHT 1337.) But Dr. Hinkin accepted her scoring of the WAIS-III because the differences they found were insignificant. (12RHT 2019-2024.) Rather, it was the experts' interpretation of the significance of petitioner's scores as a juvenile on the WISC, WAIS-R, and other testing instruments that was debated, and personal interaction with petitioner played no role in those opinions. And Dr. Khazanov's personal interaction with petitioner had no relevance to her ultimate expert opinion about petitioner's adaptive functioning since, as discussed in Part A.1, *ante*, she emphatically opined that petitioner's WISC test performance *alone* proved he met the definition of mental retardation. (8RHT 1303; 8RHT 1313 ["I've never seen a person who had I.Q. of 70 who never had deficits in adaptive functioning."].) When stripped to its essentials, Dr. Khazanov's opinion about petitioner's general intellectual functioning and concurrent deficits in adaptive behavior did *not* turn upon *any* personal interaction with petitioner. As such, Dr. Hinkin reviewed and relied upon the *same materials* as Dr. Khazanov even though she traveled to San Quentin and met with petitioner personally.

Nor did the material relied upon by the referee in support of the adaptive functioning test prong rely upon Dr. Khazanov's personal interaction with petitioner. Rather, Dr. Khazanov referenced a barrage of materials as purportedly corroborative of her opinion and diagnosis, including witness declarations and the testimony of the reference hearing witnesses. (Report, pp. 23-24; 8RHT 1308-1309, 1322-1324, 1423-1425.) Apart from her testimony that she believed that petitioner had more

difficulty in understanding her instructions for the psychological testing than the other 48 defendants she had examined (8RHT 1332), Dr. Khazanov's speculations about petitioner's adaptive functioning prior to age 18 relied entirely upon the materials she reviewed and the testimony of witnesses to whom she did not speak. Again, Dr. Khazanov and Dr. Hinkin were on equal footing regarding that material, and her personal interaction with petitioner provided her no advantage.

Moreover, because petitioner *chose not to call either of the defense trial experts* (Dr. Maloney and Dr. Sharma) and did not recall Dr. Khazanov after they testified, Dr. Khazanov did not consider the information provided during their testimony. Dr. Hinkin did hear the opinions and explanations offered by Dr. Maloney and inevitably reviewed and considered more material in reaching his opinions than did Dr. Khazanov.

At the reference hearing, Dr. Khazanov opined that petitioner presented "a pretty straightforward case of mental retardation." (8RHT 1285.) She offered this opinion despite essentially conceding that she was not applying the definition required by Penal Code section 1376. In contrast, neither Dr. Maloney nor Dr. Hinkin viewed the question as so clearly determined. (11RHT 1778; 12RHT 2027.) Both experts viewed petitioner's scores as less determinative since petitioner did not fit the population criteria upon which the tests were normed (that is, a different socioeconomic background). While, under 2011 standards, Dr. Maloney viewed the issue presented by petitioner's test scores to be a "closer" case than he would have thought in 1984 (11RHT 1802, 1945), Dr. Maloney viewed petitioner's juvenile test scores as tending to suggest there were assessment or measurement problems inherent in the testing (11RHT 1782); he was called to testify about the work he had done in 1984 and had insufficient information about adaptive functioning to offer an opinion

regarding whether petitioner was mentally retarded (11RHT 1821, 1921-1922). As Dr. Hinkin testified, because petitioner's IQ scores fell in the "gray area," adaptive functioning assessment was essential to the diagnosis of mental retardation. (12RHT 2013, 2050, 2129.)

Finally, although petitioner suggests that Dr. Hinkin violated the code of ethical principles by failing to personally assess petitioner (Pet. Brf. 13), petitioner selectively excerpts section 9.01(b) of the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct*. Dr. Hinkin testified as a forensic expert, and his evaluation is governed by section 9.01(c).[6] Dr. Hinkin complied with ethical requirements.

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[6] Section 9.01 (entitled "Bases for Assessments") provides, in its entirety as follows:

> (a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)
>
> (b) Except as noted in 9.01c, 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 the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)
>
> (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion,

(continued...)

In sum, despite his monetary compensation, Dr. Hinkin presented a demonstrably less biased approach to petitioner's case than evidenced by Dr. Khazanov. While Dr. Hinkin's experiences differ from those of Dr. Maloney and Dr. Khazanov, Dr. Hinkin's qualifications and experience are broader than Dr. Khazanov's, and Dr. Hinkin's opinion as well as that of Dr. Maloney are both more informed and less demonstrably biased than the opinion tendered by Dr. Khazanov.

The referee erred in according Dr. Hinkin's opinion lesser weight than the opinions tendered by Dr. Khazanov. Rather, Dr. Hinkin's opinion was entitled to no less weight than afforded to Dr. Khazanov by the referee based upon the materials relied upon; given his extensive experience and qualifications and Dr. Khazanov admitted disregard of the professional and legal standards for evaluating mental retardation, her opinion is entitled to lesser weight in this proceeding than either Dr. Hinkin or Dr. Maloney, whose 1984 observations and opinions were entitled to significant weight due to his extensive experience and qualifications and since his 1984 observations of petitioner and opinions formed at that time were more contemporaneous to petitioner's pre-18 mental condition.

B. Petitioner Has Not Met His Burden to Prove Significantly Subaverage General Intellectual Functioning Onset before Age 18

Here, the totality of the reference hearing evidence demonstrated that petitioner does not meet his burden to establish that it is more likely than not (that is, by a preponderance of the evidence) that he meets the first part of the "mental retardation" definition set forth in Penal Code section 1376 of "the condition of significantly subaverage general intellectual

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(...continued)

> psychologists explain this and the sources of information on which they based their conclusions and recommendations.

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

1. The Referee and Petitioner Conflated the Principle of Scientific Reliability (Reproducibility of Results) with Evidentiary Reliability, Which Equates With Scientific Validity

Petitioner emphasizes the purported "reliability" of his 1963 WISC full-scale score (70) and the "consistency" of the 1963 WISC full-scale score and the rescored 1984 WAIS-R and 2003 WAIS-III results. (Pet. Brf. 19-20.) As discussed in the exceptions (Resp. Brf. 103-109), it was entirely unreasonable for the referee to consider only petitioner's 1963 WISC and to disregard the other juvenile test results, most particularly his November 1959 Stanford Binet score (83) on the ground that test was "biased." (Report, pp. 15, 16 [finding consistency of Weschler scores demonstrated evidentiary reliability of WISC score and other tests to be of "questionable reliability"].) Similarly, the record did not support the referee's finding that the consistency of the Weschler test scores was dispositive on the question whether petitioner's full-scale IQ scores on the 1963 WISC (70), provided a scientifically valid and evidentiary reliable measure of petitioner's general intellectual functioning before he turned 18 years old. (Report, pp. 19-20.) Put another way, the referee erred in concluding that petitioner's 1963 WISC full-scale score, 1984 WAIS-R scores, and 2003 WAIS-III scores were the only test results relevant to a determination of the *evidentiary reliability* of the WISC test result because the referee failed to consider and premise evidentiary reliability upon the scientific validity of the test results.

As the United States Supreme Court observed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, "scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?)." (*Id.* at p. 590, fn. 9.) The Court observed, "In a case

involving scientific evidence, evidentiary reliability will be based upon *scientific validity*." (*Ibid.*, italics added.)

Here, the referee conflated the experts' testimony about scientific "reliability" and with *legal* evidentiary *reliability*. The latter principle equates with scientific "validity." This confusion is understandable since lawyers and judges typically think in terms of evidentiary reliability and, therefore, may not be alert to the terminology employed regarding scientific evidence. At several points in the Report, the referee referenced testimony about the "reliability" of the WISC and WAIS tests. (See Report, p. 15 ["The experts agreed that the most reliable test was the Wechsler Intelligence Scale for Children (WISC) given to petitioner shortly before his eleventh birthday."]; Report, p. 15, fn. 19 ["Maloney agreed the WISC "is probably the most reliable" of the tests given petitioner before 18. (11 RHT 1892.)"].) The referee mentioned the scientific "validity" of the various instruments only once without distinguishing that concept from the concept of scientific reliability. (See Report, p. 15, fn. 20 [quoting Dr. Hinkin's testimony: "[I]n terms of IQ, [the tests] that have the best reliability and validity would be Stanford-Binet, the WISC, the WAIS-R, the WAIS-III." (12 RHT 2097.)"].)

The referee ignored or misunderstood the testimony that explained the difference between scientific reliability and scientific validity. For instance, Dr. Maloney explained, "the reliability issue is you could give these IQ tests to people who are not from mainstream and the results will be consistent time after time after time." (11RHT 1939.) Although he did not utter the word "validity," Dr. Maloney addressed the principle by testifying that, for a non-mainstream person (such as petitioner), the IQ test results "don't accurately reflect that person's level of problem-solving ability." (11RHT 1938-1939.) Thus, the "potential" intelligence of an individual lacking enriching experiences could be even higher than measured in an IQ

test score. (11RHT 1951.) According to Dr. Maloney, the WAIS-R suffered from a validity problem when used on petitioner due to its norming population when published in 1981. (10RHT 1728-1730; 11RHT 1879-1880.) The "validity problem" was, in simplistic terms, that use of the test scores could result in underestimation and misclassification of subjects, like petitioner, from disadvantaged backgrounds. (10RHT 1748.)

Similarly, the consistency of the Weschler test scores was *not* dispositive on the question whether petitioner's full-scale IQ scores for the 1963 WISC (70) provided a scientifically valid and evidentiary reliable measure of his general intellectual functioning before he turned 18 years old. Petitioner's full-scale IQ scores for the 1963 WISC (70), the 1984 WAIS-R (73 or 71), and the 2003 WAIS-III (67) all fell within the confidence interval for the tests (plus or minus five points) and, therefore, were "consistent" at a gross level. The consistency may illustrate that the WISC/WAIS tests were scientifically reliable because they produced comparable results time after time. The repeated scores do not, however, illustrate *why* petitioner produced those scores.

The referee's statements declining to "adjust" petitioner's IQ scores based upon his socioeconomic status or probable lack of motivation further illustrate the referee's misunderstanding of the principle of scientific validity that correlates with evidentiary reliability. (Report, pp. 17-18.) Respondent previously outlined the evidence substantiating the legitimacy and relevance of these factors in its exceptions. (Resp. Brf. 109-114.) Respondent did not ask the referee to "adjust" petitioner's scores by adding or subtracting points based upon these factors. Rather, the testimony concerning socioeconomic factors and the lack of motivation was offered to dispute the evidentiary reliability of the scores as a true measure of petitioner's general intellectual functioning – that is, to show that petitioner did not prove that his test results were likely to correspond to his true

general intellectual functioning and, therefore, petitioner had not proved, by a preponderance of the evidence, that he had a condition of significantly subaverage general intellectual functioning prior to age 18. Both Dr. Khazanov and the referee ignored petitioner's *own statement* acknowledging that the timing of his lack of motivation and effort in educational pursuits corresponded with the May 1963 WISC score. (9RHT 1487; Exh. B, p. 56 ["Learned to read and write in prison per Robert, age 16 or older. Age 10 to 11 stopped going to school."].) The referee's omission of these representations when quoting petitioner's 2003 statement to Dr. Khazanov highlights the referee's failure to understand and consider the evidence presented. (Report, p. 17, fn. 26.) Having stopped applying himself to the task of learning, petitioner lacked the basic skills needed to later acquire the same skills or improve his test performance. The consistency of the WISC/WAIS scores does not demonstrate that the condition of mental retardation caused the score.

Given the referee's confusion, this Court should reassess the evidentiary reliability of the evidence concerning petitioner's general intellectual functioning as revealed by a consideration of all his IQ test results.

2. The Evidence Does Not Support a Finding that It Is More Likely Than Not that Petitioner's IQ Test Scores Demonstrate He Had a Condition of Significantly Subaverage General Intellectual Functioning Before Age 18

The referee concluded that petitioner had proven he had a condition of significantly subaverage general intellectual functioning based upon his May 1963 WISC full-scale score of 70. (Report, pp. 12-20.) As discussed in respondent's exceptions, according to the evidence presented at the reference hearing, the explanation for the scores petitioner received lay in one of two areas. According to Dr. Khazanov's theory, petitioner suffered

in utero brain damage that hindered his ability to learn and only fully manifested after the November 1959 Stanford Binet (83) and prior to the May 1963 WISC (70 full-scale). She opined that petitioner's brain damage and resulting mental retardation explained his failure in school, his repeated incarceration in the juvenile justice and criminal justice system, and his willingness to please his father by committing robberies for him. (8RHT 1424-1427, 1432-1433.) The other theory, offered by Dr. Maloney and Dr. Hinkin, was that there was no evidence of brain damage from the 1984 evaluations (and therefore no evidence of brain damage predating the 1963 WISC) and that petitioner's divergent verbal and performance scores were not consistent with brain damage; instead, petitioner's intelligence test scores were more likely explained by his disadvantaged background, limited education, literacy issues, and incarceration and removal from society at a young age. The referee rejected both views and chose a path of its own creation not supported by substantial evidence.

Dr. Khazanov testified that the standardized tests recommended by the AAIDD and the DSM include the WISC (for children between the ages of 3 and 16), the WAIS (for adults), and the Stanford-Binet, which are individually administered tests. (8RHT 1336.) Dr. Khazanov was not familiar with the administration of the Stanford-Binet test but agreed petitioner's November 1959 score of 83 was not consistent with mental retardation. (9RHT 1483-1485.) Using the results of her 2003 administration of the Haltead-Reitan battery, Dr. Khazanov diagnosed petitioner as suffering from brain dysfunction. (8RHT 1349-1350, 1428-1429, 1468-1469.) She opined that his brain dysfunction was likely caused by in utero exposure to alcohol and that this brain dysfunction did not fully manifest until just before petitioner took the Stanford-Binet L in November 1959 and, therefore, the Stanford-Binet score could be safely disregarded. (8RHT 1340-1341, 1424-1427, 1483-1484; Exh. 23, p. 26.)

Dr. Maloney agreed that petitioner's Stanford-Binet score was not consistent with mental retardation. (10RHT 1736; 11RHT 1942.) He explained for subjects younger than six, the Stanford-Binet L test involved nonverbal items. However, Dr. Maloney opined that the Stanford-Binet test was "biased" because it was normed on young "white" people. (11RHT 1766; 10RHT 1735-1736.) It was "problematic" "to use with people who have learning deficits or lack of enriching experiences during early years." (11RHT 1940.) Thus, a score of 83 may actually underestimate intelligence in a person who fell outside the norms on which the Stanford-Binet was developed. (11RHT 1941.) Dr. Maloney opined *all the tests* administered to petitioner suffered from similar deficiencies because they failed to take into account petitioner's background. (See 10RHT 1735, 1778-1779.)

Despite these faults, Dr. Maloney advocated a totality approach that examined all test scores rather than focusing on individual scores and also was cognizant of the standard measurement error applicable to the various tests: "[I]t's very risky to look at them *as specific measurable points*. There's too much error variance. The standard error of measurement, it's three or four points. So *you really have to look kind of at ranges*. That number [the WISC], depending on when it was done, who did it and so forth, could range from 66 or so to 74. So you look at the other scores that top one, 89 percent – IQ of 89, 85 would put you at the 15 percentile. So the Stanford-Binet is a little below. 89 [on the Kuhlmann-Anderson] is a little higher than that. 83 on the Revised Beta at the bottom is probably 13 percentile compared to the normal population. They're different tests, they're different numbers." (11RHT 1778-1779, italics added.) In reviewing petitioner's range of test scores (Exh. 23 at 10), Dr. Maloney opined, "If you look at these scores, at 6 he's 89 [on the Kuhlmann-Anderson]; at 7, 83 [Stanford-Binet L]; 7, 78 [Lorge-Thorndike Form 1A];

9, 82 [Kuhlmann-Anderson Form C]; 10, 70 [WISC]; is his intelligence really changing that much in those years *or are there assessment or measurement problems*? *I tend to think the latter.*" (11RHT 1782.) In Dr. Maloney's opinion, the simplest explanation for a lower verbal score than a performance score would be "lack of broad experiences during early years" that would include "[l]earning to read, learning to profit from education, learning to profit from one's own experience." (11RHT 1936.) Absent "other specific evidence going to brain damage or neuropsychological impairment," which demanded a lot more supportive data, the simple explanation was the most logical one. (11RHT 1937.)

In accord with Dr. Maloney, Dr. Hinkin found it significant that petitioner's scores prior to age 18 included scores in the middle to high 80's and 99: "someone who is mentally retarded is not going to be able to get a 99 I.Q., a 89 I.Q." (12RHT 2026.) In his opinion, the divergent scores *necessitated* an inquiry into why one part of petitioner's brain functioned better than the other. (12RHT 1995.) However, Dr. Hinkin saw no evidence of brain damage. (12RHT 1996.) Dr. Khazanov's results on the Halstead-Reitan showed the same performance/verbal dichotomy, and petitioner's WAIS-III test results showed improvement in some verbal and performance areas. (12RHT 2031-2036, 2104-2110.) Dr. Hinkin opined that petitioner's IQ test scores reflected his literacy limitations; as the information tested became more dependent upon information gained through reading and school subjects, petitioner's scores dropped. (12RHT 1992-1995.) Like Dr. Maloney, Dr. Hinkin opined that the more "straightforward and simpler explanation, is that it's an effective reading problem." (12RHT 1997.) Petitioner's illiteracy compromised his acquisition of information necessary to succeed on intelligence testing. Indeed, because the rate of mental retardation in the general population was one to three percent while an estimated 14 percent of adults (one in seven)

in the United States are functionally illiterate, it was "*far more likely*" that petitioner's poor performance on the verbal aspects of the testing resulted from his *illiteracy* rather than mental retardation. (12RHT 2000-2001.) Similarly, the circumstance that African-Americans historically scored a full standard deviation (approximately 15 IQ points) lower than their Caucasian counterparts on intelligence tests supports a view that the test scores cannot be unquestionably accepted to diagnose and classify mental retardation. (12RHT 2011-2012.)[7]

For these reasons and those set forth more fully in respondent's exceptions and merits briefing (Resp. Brf. 94-119, 130-140), this Court should not defer to or adopt the referee's findings. The referee expressly declined to decide whether petitioner had suffered brain damage. (Report, p. 22, fn. 34.) By dissecting this foundation from Dr. Khazanov's opinion, the referee rendered meaningless her opinion about the scientific validity (that is, evidentiary reliability) of petitioner's IQ test scores. The referee's reliance on remaining aspects of her testimony, and its construction of a new theory of mental retardation, should not and cannot withstand the scrutiny this Court applies in reviewing the referee's findings in resolving petitioner's habeas corpus claims. (*In re Thomas* (2006) 37 Cal.4th 1249, 1256-1257 [citing cases]; see also *People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1013.)

Given petitioner's background, his self-admitted lack of motivation and interest in school, the increasing verbal orientation of the intelligence testing as petitioner aged, and the existing biases in the testing when petitioner was tested from the 1950's until 1984, petitioner's IQ test results

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[7] Dr. Khazanov acknowledged that, 30 years ago, African-American children scored 10 to 15 points lower than "European" children on the Weschler tests. (8RHT 1405.) Petitioner's 1963 WISC score fell in this time period.

likely underestimate his general intellectual functioning. Given that *likelihood*, petitioner has not met his burden to demonstrate, by a preponderance of the evidence, significantly subaverage intellectual functioning that manifested prior to age 18.

C. The Evidence Does Not Support a Finding that Petitioner Experienced Significant Limitations in Adaptive Functioning before Age 18

It was *petitioner's burden* to demonstrate at the reference hearing, by a preponderance of the evidence, that he suffered from significant or substantial limitations in adaptive functioning with an onset prior to age 18. (Pen. Code, § 1376; *Atkins*, *supra*, 536 U.S. at p. 309, fn. 3; *In re Hawthorne*, *supra*, 35 Cal.4th at pp. 47-48.) Petitioner contends that the referee correctly determined that petitioner exhibited significant limitations in adaptive functioning manifest before age 18. (Pet. Brf. 21-29.) He relies upon Dr. Khazanov's testimony that he suffered deficits in "language, reading, writing, money concepts and self-direction" using the 2010 AAIDD definition of adaptive functioning. (Pet. Brf. 23, citing 8RHT 1302-1303.)[8]

As discussed in respondent's exceptions (Resp. Brf. 96-99), the referee found "it unnecessary consider the DSM-IV TR criteria, and [chose] to use the more current AAIDD criteria." (Report, p. 21, fn. 32.) In doing so, the referee failed to apply the appropriate legal standard, which "[t]he

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[8] Dr. Khazanov testified that a deficit in the social domain or practical skill domain "needs to be measured using the standardized test." (8RHT 1303.) Despite her subjective belief that petitioner lacked "self-direction," she did not ultimately rely upon "self-direction" since that area logically fell under the "social skills" domain (requiring a standardized test) and "because on my testing he did have very severe deficits in reading, writing, and language and money concepts, I didn't have to go that far because by the virtue of having these significant deficits . . . he met the requirement." (8RHT 1303.)

Legislature derived . . . from the two clinical definitions referenced by the high court in *Atkins*, *supra*, 536 U.S. at page 309, footnote 3." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 47; *People v. Superior Court (Vidal)*, *supra*, 40 Cal. 4th at p. 1011.) The 1992 AAMR definition and the 2000 DSM-IV definition recited in *Atkins* are virtually identical and both require a finding of significant limitations in at least two of the following 11 skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (*Hawthorne*, *supra*, 35 Cal.4th at pp. 47-48.) Because the referee used the wrong legal criteria for the adaptive functioning prong of Penal Code section 1376, his findings are not entitled to deference. The reference hearing record fails to meet petitioner's burden to show, by a preponderance of the evidence, that he had significant deficits in two of the 11 specified areas of adaptive functioning as defined in the 1992 AAMR and 2000 DSM-IV-TR and adopted by the Legislature as its definition for Penal Code section 1376. Even assuming arguendo that the referee's use of the 2010 AAIDD criteria for adaptive functioning was appropriate, the referee improperly relied upon Dr. Khazanov's opinion that petitioner exhibited significant limitations in the "conceptual domain" since her foundation was entirely speculative and deficient.

The referee used the 2010 AAIDD definition and concluded that "Petitioner clearly exhibited significant adaptive behavior deficits before the age of 18. Perceived by friends and family as mentally 'slow,' he was unable to read and write and to effectively understand and communicate, and remains so to this day." (Report, p. 25.) In doing so, the referee appeared to use the "conceptual skills" domain of the 2010 AAIDD definition: "language, reading and writing; and money, time, and number concepts." (Report, p. 20.) The referee did not expressly find any significant deficit in "money, time, and number concepts" but seemingly

substituted "effectively understand and communicate" for the "language" subscale of the conceptual skills domain. (Report, pp. 21-25.) As discussed in respondent's exceptions (Resp. Brf. 119-130), the articulated bases for the referee's finding do not bear scrutiny of the evidentiary record.

As Dr. Khazanov indicated in both her reference hearing testimony and her declaration filed under penalty of perjury with this Court, all extant clinical diagnostic definitions require "significant" deficits in adaptive functioning – meaning adaptive functioning behavior falling *two or more standard deviations below the mean.* (8RHT 1308-1309; Exh. HH at ¶ 132 [Petn. Exh. 13]; see AAMR (2002) at p. 74.) This measurement is made relative to the subject's chronological age. (DSM-IV-TR at p. 42; AAMR (2002) at p. 75; AAMR (1992) at p. 6.) The requirement of "significant" or "substantial" limitations in *at least two areas* of adaptive skills is included in the *Atkins* opinion upon which the Legislature relied in enacting Penal Code section 1376. (*Atkins*, *supra*, 536 U.S. at p. 309, fn. 3; *Hawthorne*, *supra*, 35 Cal. 4th at pp. 47-48.) As for the 2010 AAIDD definition, significant deficits in one domain meet the requirement. (8RHT 1302.) However, "significant limitations in more than just one subscale" are required. (8RHT 1303.)

The adaptive behavior prong measures how an individual functions in his daily life in his community. (8RHT 1291, 1301; 12RHT 2122.) As Dr. Hinkin put it, while the general intellectual functioning prong assesses "book smarts," the adaptive behavior prong assesses "street smarts." (12RHT 1986, 2054.) Adaptive behavior assessment weighs an individual's adaptive strengths against their adaptive weaknesses. (8RHT 1296, 1314-1315; 12RHT 2122-2123.) An individual's strengths can cancel out the deficits in other areas. (12RHT 2122, 2125.)

Respondent contends that petitioner's illiteracy – whether deemed a deficit in "functional academic skills" (2000 DSM-IV and 1992 AAMR) or a deficit in "reading and writing" (2010 AAIDD) – is not sufficient to satisfy the adaptive behavior prong of Penal Code section 1376. (Resp. Brf. 121; Dr. Hinkin: 12RHT 2052, 2139 [petitioner's illiteracy as established through his test performance met the "reading and writing" subscale of the 2010 AAIDD conceptual skills domain]; Dr. Khazanov: 8RHT 1310-1311; 8RHT 1433 [petitioner, "has severe deficits in adaptive functioning specifically in the functional academics area or the conceptual area"].) Presuming additional deficiencies in adaptive behavior from test performance is circular and ignores the purpose of the adaptive behavior analysis, which is to assess the array of strengths and weaknesses within a subject and to evaluate his ability to adapt and live within his community. Here, apart from the one area of "functional academics" a/k/a "reading and writing," there was insufficient evidence that petitioner's performance on the other subscales measured at a level two standard deviations or more below the mean.

In his brief, petitioner agrees with the referee's summation of its findings that "petitioner clearly exhibited significant adaptive behavior deficits before the age of 18. Perceived by friends and family as mentally 'slow,' he was unable to read and write and to effectively understand and communicate, and remains so to this day." (Report, p. 25; Pet. Brf. 29.) Substantial evidence did not support the referee's finding that any limitations petitioner suffered in the area of "communication" or "ability to understand" fell two or more standard deviations below the mean.

In support of the referee's finding of significant deficits in adaptive functioning, petitioner points to the rampant speculation inherent in Dr. Khazanov's opinion and repeatedly uttered during her testimony. Petitioner claims his "inability to learn" was evidenced by the fact that he could not

learn to read or write while Cleveland could (Pet. Brf. 23; see Resp. Brf. 125-126), could not drive unless Cleveland was in the car (Pet. Brf. 23-24; see Resp. Brf. 141), had difficulty shooting craps and playing pool (Pet. Brf. 24, 25), "latched" onto Cleveland (Pet. Brf. 25, 27), failed to learn from his criminal arrests and incarcerations (Pet. Brf. 26-27, 29; see Resp. Brf. 128-129), and the view of Stephen Harris that petitioner was not as intellectually smart as Harris and Cleveland (Pet. Brf. 29; see Resp. Brf. 125). Respondent will not repeat all the arguments made previously. Regarding the claim petitioner "latched" onto Cleveland, the opposite is supported by the reference hearing record since Cleveland testified that petitioner was his "only friend" (3RHT 511) while petitioner got married and had a family, committed crimes with other individuals, and the two men spent significant time apart due to incarcerations.

There was no evidence that petitioner's ability to play pool or throw dice, even if less skilled than Harris or Cleveland, fell at a level that was two or more standard deviations below the mean measured relative to petitioner's chronological age or that it even qualified as an adaptive deficit. (See also Resp. Brf. 129.) Even if Cleveland were a better gambler than petitioner, petitioner possessed enough skill to make money in these pursuits, which necessarily means he performed better than some in his community. (3RHT 569-571.) And absolutely none of these aspects of adaptive behavior were measured against any objective scale such that the referee could reasonably conclude that petitioner exhibited significant limitations in adaptive functioning. Moreover, even if deficits existed in some areas, there was no substantial evidence that petitioner's adaptive weakness were greater than his adaptive strengths.

To the extent petitioner and the referee rely upon Dr. Khazanov's interaction with petitioner and her opinion that petitioner had difficulty understanding and communicating with her during the psychological testing

(Report, p. 21), responding to the questions posed by the testing (see Exh. B, pp. 188-193; 11RHT 1899-1917) hardly compares to the communication most people experience in daily life or to the communication petitioner needed to navigate the streets of Long Beach/Los Angeles and interact within his community before he turned 18.

Petitioner argues that the referee correctly found that petitioner's criminal behavior and his police interview did not establish that petitioner did not suffer adaptive deficits. (Pet. Brf. 26-27.) As discussed previously (Resp. Brf. 128-130), the referee speculated that petitioner was apprehended a significant number of times relative to his criminal conduct. (Report, p. 25.) And even looking to the robberies for which petitioner was apprehended, petitioner was not an incompetent robber. He obtained money or property in each criminal endeavor and avoided immediate apprehension. Contrary to the referee's finding and petitioner's assertion, the recording of petitioner's police interview (Exhs. OO, PP) remains the best and most contemporaneous evidence of petitioner's ability to communicate and use language relevant to his community, to think beyond the moment, and to be confident and assertive. (See also Resp. Brf. 126-128, 140-141.)

Petitioner relies upon Dr. Khananov's testimony that the presence of adaptive strengths does not necessarily negate a finding of mental retardation. (Pet. Brf. 27-28.) But Dr. Khazanov made no effort weigh the identified area of adaptive weakness against petitioner's adaptive strengths. Rather, she repeatedly testified that petitioner's "deficits in his academic skill, his illiteracy is the strong enough (sic) indicator of the deficits in adaptive functioning." (9RHT 1606; see also 8RHT 1303.) She selected this deficit area and did not weigh the remaining 10 areas of adaptive functioning.

In this case, the referee put itself in the role of an expert in mental retardation and unilaterally picked through the record to conclude that observations purportedly made by petitioner's childhood friends more than 40 years prior to their reference hearing testimony fulfilled the definition of significant deficits/limitations in adaptive functioning as required by Penal Code section 1376. The referee's result-oriented approach, which has no basis in substantial evidence, cannot withstand this Court's review. For all these reasons, petitioner failed to meet his burden to demonstrate that he is mentally retarded and that executing him would constitute cruel and unusual punishment. This Court should deny *Claim XVIII.*

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

At the reference hearing, petitioner failed to meet his burden to demonstrate that Slick's performance in investigating possible mitigation evidence for presentation during the penalty phase of petitioner's trial fell below the constitutional minimum. As such, petitioner failed to meet his burden to demonstrate he is entitled to relief on *Claim XIV*, *Claim XV*, and *Claim XVI.*

A. Slick Conducted a Constitutionally Adequate Investigation of Evidence of Petitioner's Family, History, and Good Character and Made a Reasonable Tactical Decision to Limit the Penalty Presentation (Questions 2, 5 and 6; *Claim XIV*)

In his merits briefing, petitioner's exceptions and his criticism of the referee's findings regarding Reference Questions 2 through 6 utterly fail to acknowledge that trial counsel employed qualified experts, employed a qualified investigator, and personally and through these parties interviewed

petitioner and the individuals closest to him who could be reasonably expected to provide information about his family, history, and good character (if any). The reference hearing record amply supports the referee's findings that Slick conducted a constitutionally adequate penalty investigation and that Slick's decision to present the short penalty case he presented was an informed and reasonable strategic decision.

First, regarding the referee's findings in responding to the individual components of Question 2, petitioner contends that the referee wrongly "placed weight" on the time spent by attorney Slick, investigator Kleinbauer, psychologist Maloney, and psychiatrist Sharma in preparing for petitioner's case. (Pet. Brf. 34-35, 37.) Regarding time billed by attorney Slick, petitioner claims that the 190 hours Slick billed as trial preparation (rather than court appearances) was legally insufficient to investigate petitioner's case and that Slick's records demonstrate that some of those hours were not well spent. (Pet. Brf. 37-39.) These arguments misinterpret the referee's findings. The first question within Question 2 was, "What actions did petitioner's trial counsel, Ron Slick, take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's trial?" The referee articulated the number of hours that Slick charged for investigation, as well as time billed by defense investigator Kleinbauer, Dr. Maloney, and Dr. Sharma as part of its evidentiary findings answering this foundational question. The referee did *not* determine that Slick's investigation was constitutionally adequate simply *because* Slick spent 190 hours in preparation for trial and sentencing or because Slick spent some lesser number of hours preparing for the penalty phase. (Report, pp. 28-38.) Rather, the referee properly relied upon the investigation conducted by the defense team and utter lack of favorable information learned – not the mere number of hours spent. Specifically, the referee detailed the numerous meetings Slick had petitioner, his meetings with

petitioner's father, sisters, wife, and girlfriend, and his meetings and contacts with investigator Kleinbauer and Dr. Maloney. (Report, p. 30 & fn. 57.)

In any event, although petitioner offers his subjective view that the number of hours billed by Slick was inherently insufficient (Pet. Brf. 38-39), petitioner did not present any *evidence* at the evidentiary hearing to establish that the mere number of hours alone was objectively unreasonable in the abstract, much less that it was objectively unreasonable in light of the circumstances of this case, the information obtained by Slick, or the practices in existence in Los Angeles County in 1984. Moreover, neither this Court nor the United States Supreme Court has ever set a minimum number of investigative hours necessary for constitutionally adequate investigation. The evidentiary case concerning petitioner's guilt was limited and straightforward. It involved a single murder, and the prosecution completed its evidentiary presentation in a single day. (3RHT 535-700.)

Moreover, although Slick personally conducted the defense investigation by interviewing petitioner numerous times as well as personally interviewing petitioner's sisters, wife, father, and girlfriend, Slick did not conduct all the investigation alone. Rather, Kristina Kleinbauer spent 110.5 hours investigating petitioner's case, including circumstances in mitigation for a possible penalty phase. Slick also retained and consulted with a forensic psychologist (Dr. Michael Maloney) and a forensic psychiatrist (Dr. Kaushal Sharma), who independently evaluated petitioner and informed Slick that they could not provide helpful information as expert witnesses.

Again, petitioner criticizes the 110.5 hours Kleinbauer devoted to the case investigation as too little. (Pet. Brf. 40-42.) Even if the 110.5 hours spent by Kleinbauer in this case were lower than the hours she spent

conducting investigation in other cases and involved less contact with the attorney in charge (Pet. Brf. 41, citing 4RHT 680, 720), petitioner utterly failed to provide any evidence at the hearing that would permit a comparison of this case to other cases investigated by Kleinbauer.

Rather than focus upon the people interviewed and the information obtained during the pretrial investigation – which all undermines his claims of ineffective assistance of counsel – petitioner instead challenges "how and when the time was spent" by Kleinbauer in conducting her pre-trial investigation. (Pet. Brf. 42-45.) Essentially, petitioner complains that Kleinbauer's mitigation interviews occurred over the course of approximately 17 days between July 3 and July 20. (Pet. Brf. 45.)

However, petitioner mischaracterizes Kleinbauer's mitigation investigation by failing to include the six interviews she conducted *with petitioner* on May 24, June 6, June 13, July 5, July 11, and July 17, 1984. (Exh. A. pp. 2639-2643.) Kleinbauer also interviewed petitioner's sisters (Gladys Spillman and Rose Davis), his girlfriend (Dee Walker), his wife (Janiroe Lewis) and his father (Robert, Sr.) and prepared reports of those interviews. (Report, p. 31, citing Exh. 7; Exh. B, pp. 222-232 [reports].) The report of her interview with petitioner's sisters includes information that petitioner's parents were separated and their father was not in the home during petitioner's childhood, that their father visited the children when he was not in prison, that their mother took the children to visit their father when he was incarcerated, that petitioner resented his father's absence, that petitioner never finished school and was in trouble frequently, that their mother received welfare and also worked to provide for the family, and that petitioner's illegal activities included selling cocaine and "running prostitutes." Neither sister reported any physical abuse by their mother, father or others. (Exh. B, pp. 222-223.) In his interview with Kleinbauer, petitioner's father mentioned his absence from the home, corroborated the

sisters' account of petitioner's home life and early history, and blamed petitioner's friends for his juvenile and adult delinquency. (Exh. B, pp. 228-230.)

Dr. Maloney's interview notes reflect that, during his conversations with petitioner, petitioner denied the level of physical discipline that would have been considered mitigating at the time of his 1984 trial. (11RHT 1760-1761; Exh. B, p. 208.) Dr. Maloney's notes of his interview with petitioner's father reflect that the father acknowledged that his absence from the home and the absence of a father figure may have played a role in petitioner's early delinquency. (Exh. B, p. 236.) No evidence was presented at the reference hearing that petitioner provided any different information to Slick and Kleinbauer. Nor did the evidence adduced at the reference hearing demonstrate that the people closest to petitioner – his father, sisters, wife, and girlfriend – provided any suggestion or representations of physical abuse by petitioner's mother, father, or other parties.

Next, petitioner denigrates Slick's performance vis-à-vis Dr. Maloney. He asserts that Slick's retention letter to Dr. Maloney failed to distinguish petitioner's case from any other capital case. (Pet. Brf. 46-47.) Yet Dr. Maloney testified that Slick's letter did not circumscribe his search for mitigation information. (10RHT 1670-1671, 1682; 11RHT 1920.)

Further, petitioner argues that having Dr. Maloney participate in a round of family witness interviews on July 31, 1984, was "interesting" but was "not part of a real investigation" because these family members had already been interviewed. (Pet. Brf. 47.) Ironically, petitioner's own *Strickland*[9] expert emphasized the need to repeatedly interview family witnesses in order to glean family "secrets." (2RHT 256-257.) Next,

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[9] *Strickland v. Washington* (1984) 466 U.S. 668.

petitioner asserts that once Dr. Maloney told Slick that he did not believe these witnesses would be helpful, trial counsel had an obligation to conduct further unspecified investigation to find witnesses who would be helpful. (Pet. Brf. 47-48.) Petitioner contends that Dr. Maloney's notes of the family witness interviews revealed "themes" that Slick should have explored by further investigation. Specifically, petitioner notes that Robert Sr.'s interview identified a half-sibling (the child of petitioner's mother) and that Slick should have interviewed the half-brother and presumably the father as "prospective additional mitigation witnesses." (Pet. Brf. 48-49.)[10] At the reference hearing, petitioner failed to identify either of these individuals as potential "witnesses" or to provide any evidence of the information they could or would have provided to Slick in 1984, much less that the information would have differed from the information Slick collected from other sources, including petitioner himself. Their mere potential existence in 1984 does not demonstrate deficient performance.

Additionally, petitioner argues that the psychological testing performed by Dr. Maloney and his assistant should have alerted Slick to petitioner's mental health issues (presumably meaning his mental retardation). (Pet. Brf. 48.) Petitioner utterly ignores Dr. Maloney's testimony that, in his expert opinion, he did not believe any of the information he had obtained from petitioner or would be helpful to petitioner's case and that he informed Slick of that circumstance. (10RHT 1676, 1679-1680, 1753.) Petitioner further ignores Dr. Maloney's

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[10] Petitioner possibly refers to his younger half-brother, Ellis Williams, who was mentioned in Kleinbauer's report of her interview with petitioner's sisters as a 29-year-old who was incarcerated in Chino. (Exh. B, p. 222.) At petitioner's trial, his sister Rose testified about Ellis. (4RHT 837.) The reference hearing record does not identify the name of Ellis's father or his whereabouts during the relevant period before petitioner's 1984 trial.

testimony that petitioner's intelligence test results underestimated petitioner's intelligence, that petitioner's intelligence fell at least in the average range of intelligence, and that he did not opine in 1984 that petitioner was mentally retarded. (10RHT 1728-1730, 1739-1741, 1755; 11RHT 1916.) In 1984, Dr. Maloney was trying to address questions that were relevant to the penalty phase and what he could do as a witness. (11RHT 1801-1802.) Petitioner's argument that Slick was obligated to ignore Dr. Maloney's professional assessment and pursue themes of learning disabilities and mental retardation that were contradicted by his qualified psychological experts should be rejected. Petitioner presented no evidence at the reference hearing concerning what mitigating evidence of learning disabilities relevant to a penalty phase mitigation presentation could have been presented in 1984.

Regarding Dr. Sharma, petitioner complains that Slick did not explore the theme of "institutionalization" despite Dr. Sharma's inclusion of petitioner's commitment history in his report. (Pet. Brf. 49-50.) To the extent petitioner suggests that Sharma's *report* should have prompted Slick to further investigate the effects of petitioner's long history of incarceration, he ignores the facts. First, *Slick* knew of petitioner's commitment history and, indeed, gave Dr. Sharma more than 331 pages of CDC records that were briefly summarized in Dr. Sharma's report and also gave Dr. Sharma his own personal outline of the records. (5RHT 922; 6RHT 1067-1068; Exh. R, p. 2353; 13RHT 2210; Exh. B, pp. 303-305.) In his report dated July 25, 1984, Dr. Sharma noted the diagnosis of Antisocial Personality Disorder mentioned in petitioner's commitment records and stated, "I agree with that diagnosis." (13RHT 2200; Exh. B, p. 305; see also 13RHT 2239.) Dr. Sharma's report eliminated the potential of a mitigation presentation based upon petitioner's prior incarcerations: "In the absence of any significant mental illness or other emotional or mental disturbance, *I have*

nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant's long prison record, antisocial behavior at an early age, lack of mental illness, lack of duress, and lack of intoxication, may suggest that no such mitigating factors exist in this case." (Exh. B, p. 305, italics added.)

At the reference hearing, petitioner failed to present any evidence that either of Slick's retained experts believed that he had not been provided sufficient information to reach his opinions. Also, petitioner failed to present any evidence demonstrating that in 1984 an expert specializing in "institutionalization" issues existed and was available to Slick. Neither Dr. Adrienne Davis nor Michael Adelson (petitioner's *Strickland* expert) testified that this particular theme was regularly explored in 1984. Nor did petitioner demonstrate that trial counsel was constitutionally obligated to conduct additional investigation when presented with opinions from a forensic psychologist and a forensic psychiatrist both stating that no mitigating mental health circumstances were present or would be helpful.

Regarding Slick's own participation, petitioner complains that Slick interviewed the same individuals repeatedly, failed to have his investigator look for new witnesses after July 31, 1984, and quit the penalty investigation on August 1, 1984. (Pet. Brf. 51-53.)[11] These points fail to

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[11] Petitioner appears to claim, in a footnote, that Slick did not provide the document memorializing Slick's negative impressions of the witnesses interviewed on August 31 when Slick initially provided his file to petitioner's counsel. (Pet. Brf. 51, fn. 11.) However, at the hearing, Mr. Sanger represented that his firm received a copy of the note from Slick in 1996. (6RHT 1038-1040.) A copy of the August 1, 1984 note is included in reference hearing Exhibit A. (See Exh. A at 2637.) A cover letter dated September 30, 2009, represents that the documents bearing the same identification numbers were received from Slick in 1997. (Exh. V at 1.) Petitioner's prior habeas counsel did not testify regarding what materials, if any, were provided to him by Slick. Mr. Sanger represented to the referee

(continued...)

demonstrate deficient performance. The evidence produced at the reference hearing failed to establish that Slick possessed or should have possessed any reasonable investigative lead remaining as of August 1, 1984. By his personal contacts and through Kleinbauer and Dr. Maloney, Slick had repeatedly interviewed petitioner, his father, his sisters, his wife, and his girlfriend and made efforts to locate other individuals. Kleinbauer's reports (approximately half are missing), Dr. Sharma's report, and Dr. Maloney's notes of his interviews with petitioner and family members all fail to establish further points of investigation that would have produced information different from the information Slick already possessed.

Although petitioner complains that Kleinbauer, who had a master's degree from Stanford and had prior experience investigating capital cases, "did not take investigation classes or have specialized instruction" (Pet. Brf. 56), petitioner fails to link these circumstances with a deficiency in the actual investigation she conducted. Moreover, he ignores his own expert's testimony that, in 1984, the Los Angeles County Public Defender preferred to use law clerks to conduct family and mitigation interviews because the office's trained investigators tended to be intimidating and ineffective. (2RHT 255-258.)

Contrary to his claim, petitioner did not prove at the reference hearing that either Dr. Sharma or Dr. Maloney "provided new information that could have been used for mitigation." (Pet. Brf. 56.) Moreover, Slick did not simply "accept[] Ms. Kleinbauer's reports at face value" but instead personally interviewed the witnesses with the closest relationships to

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(...continued)
that although he obtained materials from Mr. Specter (prior habeas counsel), "It was impossible to tell what came from Mr. Slick, if anything." (6RHT 1038.) No earlier production of the file to petitioner's habeas counsel was documented in the reference hearing record.

petitioner. At the reference hearing, petitioner failed to present any evidence that Slick should have suspected the information he had been provided would be contradicted by other individuals.

Essentially, petitioner argues that Slick's performance was constitutionally deficient because he could have done more. (Pet. Brf. 53-57.) However, as the United States Supreme Court has counseled, "The object of an ineffectiveness claim is not to grade counsel's performance." (*Strickland, supra*, 466 U.S. at p. 697.) "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." (*Harrington v. Richter* (2011) 131 S.Ct. 770, 791.) *Strickland* requires a reviewing court "'not simply to give [defense counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons [he] may have had for proceeding as [he] did.'" (*Cullen v. Pinholster* (2011) 131 S.Ct. 1388, 1407.)

Petitioner points to *Wiggins v. Smith* (2003) 539 U.S. 510, as establishing that Slick's investigation was "inadequate on its face under the standards for investigation and preparation of a capital penalty phase trial." (Pet. Brf. 34, 39.) In *Wiggins*, the defendant argued that his attorneys' failure to investigate and present mitigating evidence violated his Sixth Amendment right to counsel. (*Id.* at p. 514.) Recently in *Cullen v. Pinholster, supra*, 131 S.Ct. 1388, the United States Supreme Court clarified that its recent authority, specifically including the trilogy of cases *Williams v. Taylor* (2000) 529 U.S. 362, *Wiggins*, and *Rompilla v. Beard* (2005) 545 U.S. 374, did not define either "a constitutional duty to investigate" or the principle that a prima facie case of ineffective assistance of counsel was established whenever a defense attorney abandons an investigation of a capital defendant's background "after having acquired only rudimentary knowledge of his history from a narrow set of sources." (*Pinholster, supra*, 131 S.Ct. at pp. 1406-1407 [internal quotes omitted].)

Instead, the Supreme Court has emphasized that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Id.* at p. 1407; *Strickland, supra*, 466 U.S. at p. 689.)

In any event, the circumstances present in *Wiggins* distinguish it from the instant case. In *Wiggins*, the Maryland defendant committed the underlying crime on September 17, 1988. He elected a court trial to determine his guilt of the charged offenses (which was conducted in August 1989) and a jury trial on the appropriate penalty. (*Wiggins*, *supra*, 539 U.S. at pp. 514-515.) At the penalty trial, counsel told the jury that it would hear evidence that the defendant "had a difficult life," had held jobs and attempted to be a productive citizen, and had no prior convictions. (*Id.* at p. 515.) However, counsel did not present any evidence to the jury. Counsel informed the court that, had the court granted a defense motion to bifurcate the penalty trial, they would have presented psychological testimony documenting Wiggins' "limited intellectual capacities and childlike emotional state . . . and the absence of aggressive patterns in his behavior." (*Id.* at pp. 515-516.) In state post-conviction proceedings, Wiggins presented a social history report of severe physical and sexual abuse inflicted by Wiggins' mother, the mother's chronic alcoholism and abandonment of her children for days at a time, sexual abuse suffered in multiple foster placements, and sexual abuse committed by a supervisor in the Job Corps program. (*Id.* at pp. 516-517.) Also, trial counsel testified that he did not recall retaining a social worker to prepare a social history report although funds were available for that purpose and that, well in advance of trial, counsel decided to focus upon relitigating the guilt case. (*Id.* at pp. 517-518.) The Maryland state appellate court concluded that trial counsel made a reasoned tactical decision not to present this evidence and, instead, chose to focus on retrying the guilt case. (*Id.* at p. 518.)

In reviewing and addressing the state court's judgment, the United States Supreme Court first stated that its "principal concern" was "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." (*Wiggins*, *supra*, 539 U.S. at p. 523.) As the Supreme Court has explained, "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' *id.*, at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight")." (*Wiggins*, *supra*, 539 U.S. at pp. 522-523.)

Based upon the record before it, the Supreme Court concluded that counsel's decision not to obtain a social history report "fell short of the professional standards that prevailed in Maryland in 1989." (*Wiggins*, *supra*, 539 U.S. at p. 524.)[12] The Court further concluded that the scope of the investigation was unreasonable in light of the information in the social services records. (*Id.* at pp. 525, 534.) In light of "the apparent absence of

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[12] The Supreme Court concluded that the record before it demonstrated that trial counsel's investigation drew from three sources: the report of a psychologist who had evaluated Wiggins and concluded that he had an IQ of 79, had difficulty coping with demanding situations, and "exhibited features of a personality disorder" but did not reveal any information about Wiggins' "life history"; a presentence investigation (PSI) report, which included a one-page "life history" documenting his early foster-care placements, his "misery" as a youth, and Wiggins' self-description of his own background as "disgusting"; and social service (DSS) records documenting Wiggins' various foster placements and emotional difficulties during the placements, his mother's chronic alcoholism, his frequent and lengthy absences from school, and his mother's abandonment of her children several days without food. (*Wiggins*, *supra*, 539 U.S. at pp. 523-525.)

any aggravating factors in petitioner's background," the high court agreed with the federal district court that "any reasonably competent counsel would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." (*Id.* at p. 525.) The Supreme Court noted,

> Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. See, e.g., *Strickland*, *supra*, at 699, 104 S.Ct. 2052 (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings.

(*Wiggins*, *supra*, 539 U.S. at p. 525.)

In describing the inquiry required of a reviewing court, the Supreme Court stated, "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." (*Wiggins*, *supra*, 539 U.S. at p. 527.) "Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *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. 466 U.S., at 691, 104 S.Ct. 2052." (*Id.* at p. 527.)

While petitioner characterizes Slick's performance as a "complete failure of counsel" (Pet. Brf. 57), that hyperbole ignores legal precedent. The *Strickland* decision itself arose from a death penalty case in which counsel conducted a limited investigation into penalty-phase mitigation evidence. Counsel spoke with the defendant about his background and spoke to the defendant's wife and mother on the phone, but did not follow up on a single unsuccessful effort to meet with them in person. "He did not otherwise weed out character witnesses for [the defendant]." (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 672-673.) "Nor did [counsel] request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems." (*Id.* at p. 673.) "Counsel decided not to present and hence not to look further for evidence concerning [the defendant's] character and emotional state." (*Ibid.*) In mitigation, counsel argued that defendant Strickland had no history of any criminal activity, that he had committed the crimes under extreme mental or emotional stress, and that his life should be spared because he surrendered and confessed. (*Id.* at pp. 673-674.) The aggravating evidence included that "all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain." (*Ibid.*)

In a state post-conviction proceeding, defendant Strickland claimed that his counsel provided ineffective assistance by failing to move to continue the sentencing hearing, by failing to investigate and present character witnesses, by failing to seek a presentence investigation report, and by failing to request a psychiatric report. (*Strickland*, *supra*, 446 U.S.

at p. 674.) In support of his claims, Strickland produced the declarations of 14 friends, neighbors, and family members who would have testified on his behalf. In addition, he provided a psychiatric report and a psychological report stating that he suffered from depression at the time of his crimes. The state trial court rejected the claim without holding a hearing. On federal habeas review, the district court concluded that trial counsel erred in failing to further investigate mitigating evidence but that the error was harmless. (*Id.* at pp. 675-679.)

The Supreme Court reversed the district court's finding that counsel's performance was deficient. The Court explained that counsel's conduct must be judged by a standard of reasonableness and "[m]ore specific guidelines are not appropriate" because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant[.]" (*Strickland, supra,* 466 U.S. at pp. 688-689.) The Supreme Court found that its decision was "not difficult" and that it was "clear" that counsel's performance at and during the capital sentencing hearing was reasonable. (*Id.* at pp. 698-699; *id.* at p. 699 ["The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with [the defendant] that character and psychological evidence would be of little help. . . . On these facts, there can be little question, *even without application of the presumption of adequate performance*, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment"] (italics added)).

In *Burger v. Kemp* (1987) 483 U.S. 776, defendant Burger was convicted of murder and sentenced to death. Burger and codefendant Stevens were United States Army soldiers stationed in Georgia. They summoned a cab driven by Honeycutt to drive them to the airport to pick up

a third soldier. On the way to the airport, Burger and Stevens robbed Honeycutt at knifepoint. While Burger drove, Stevens forced Honeycutt to undress, blindfolded him, tied his hands behind his back; then Stevens committed forcible sexual offenses against Honeycutt. Burger stopped the cab, and Burger and Stevens placed Honeycutt, nude and blindfolded, into its trunk. They drove to a pond, where Burger opened the trunk and asked whether Honeycutt was okay. When he responded affirmatively, Burger closed the trunk, started the cab, placed it into gear, and exited before it entered the water. Honeycutt drowned. (*Id.* at p. 778.)

In a habeas proceeding, Burger claimed that his attorney failed to adequately investigate mitigating circumstances. (*Burger*, *supra*, 483 U.S. at pp. 777-778.) The evidence showed that Stevens was "primarily responsible for the plan to kidnap the cabdriver, the physical abuse of the victim, and the decision to kill him." (*Id.* at p. 779.) In addition, while Stevens was twenty years old, Burger was only seventeen years old at the time of the offenses and "functioned at the level of a 12-year-old child." (*Ibid.*) Counsel also could have presented evidence that "petitioner had an exceptionally unhappy and unstable childhood." (*Id.* at p. 789.) That evidence included: Burger's parents married at a very young age; his mother remarried twice, and neither of Burger's stepfathers wanted him in the home; one stepfather beat his mother in Burger's presence when he was 11 years old, and the other got him involved in drugs. (*Id.* at p. 790.) Later, Burger was placed in a juvenile detention center. (*Ibid.*) Additionally, "Except for one incident of shoplifting, being absent from school without permission, and being held in juvenile detention – none of which was brought to the jury's attention, petitioner apparently had no criminal record before entering the Army." (*Ibid.*) Burger's counsel did not present any of this evidence at either of two sentencing hearings. (*Id.* at pp. 788-790.)

The Supreme Court described this mitigating evidence as including a "'neglectful, sometimes even violent, family background' and testimony that his 'mental and emotional development were at a level several years below his chronological age[.]'" (*Burger v. Kemp*, *supra*, 483 U.S. at p. 790, fn. 7.) Counsel had some family history evidence before the defendant's trial and decided not to present it in order to keep evidence that Burger had committed a prior petty theft away from the jury. (*Id.* at pp. 790-92.) Counsel also decided not to present the testimony of a psychologist because, given Burger's lack of remorse and attitude about the crimes, "he would be subjected to cross-examination that might be literally fatal." (*Id.* at p. 791.) In addition, while other family members could have testified on Burger's behalf, their declarations also referenced Burger's prior contacts with law enforcement and were "at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens's strong influence upon his will." (*Id.* at p. 793.)

Despite the "failure" of Burger's counsel to present *any evidence* at the sentencing hearing, the Supreme Court concluded that counsel's performance satisfied the constitutional standard: "The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" (*Burger v. Kemp*, *supra*, 483 U.S. at p. 794 [citation omitted].) As the high court explained, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an

explanation of petitioner's history would not have minimized the risk of the death penalty." (*Id.* at pp. 794-795.)

As noted above, in *Strickland* the Supreme Court had no difficulty finding adequate investigation based only on an interview of the defendant about his background and phone conversations with the defendant's wife and mother without further follow-up. And in *Burger*, the Court specifically acknowledged that trial counsel could well have conducted a more thorough investigation, but instructed that constitutional minima did not dictate what was "prudent or appropriate." (*Burger v. Kemp*, 483 U.S. at pp. 794-95.)

Here, trial counsel investigated petitioner's family, history, and good character by personally interviewing petitioner, petitioner's father, petitioner's sisters, petitioner's wife and petitioner's girlfriend. (Exh. 10.) Counsel employed investigator Kleinbauer, who separately interviewed these people close to petitioner and prepared reports of her interviews. (4RHT 658-659, 661; Exh. B, pp. 222-232.) None of these witnesses reported any physical abuse of petitioner by either petitioner's mother or father. Both petitioner's sisters and father recounted that petitioner had difficulty with his father being absent from the home. (Exh. B, pp. 222, 228.) Nevertheless, they reported that petitioner had regular contact with his father, which their mother arranged. (Exh. B, pp. 222-223, 228.) According to petitioner's sisters, their mother received welfare and laundered clothing to earn extra money. (Exh. B, p. 223.) Petitioner's wife, Janiroe, also provided some information about petitioner's family and history, but Janiroe was "very bitter" and uncooperative at the time of petitioner's trial because of petitioner's attentions to other women. (Exh. B, pp. 231-232.) Moreover, these same witnesses did not mention or suggest that petitioner was subjected to physical abuse when they were interviewed by post-conviction counsel prior to the 1988 habeas petition or

the 2003 petition. (See Exhs. 19A, 20A; Petn. Exh. 17; S005412 Petn. Exhs. 7-9.)

Both Kleinbauer and Slick interviewed petitioner on multiple occasions. Kleinbauer's billing records indicate that she spoke with several additional individuals and attempted to contact others whose significance to the guilt or penalty case was not explained at the evidentiary hearing (e.g., Mary Nowell, Alma Wilen, Mr. Livingstone, Mr. Thomas, Clarence Pitts). (4RHT 644-647, 649-650, 652; Exh. R, pp. 2452-2453; Petn. Exh. 7, p. 4.) She attempted to locate Larry Cleveland but did not recall what specific efforts were undertaken or why she stopped looking for him. (4RHT 728, 731.) However, it would have been her custom and practice in 1984 to call the jail and state prison when attempting to locate a witness. (4RHT 728-729, 731-732.)

Slick retained two qualified mental health expert s, psychologist Michael Maloney and psychiatrist Dr. Sharma. He provided both experts with written materials that discussed petitioner's life, family and history.[13] The referee found, and petitioner agrees, that via a letter dated May 8, 1984, trial counsel provided Dr. Maloney and Dr. Sharma with the three-page felony information, 52 pages of police reports, the 29-page preliminary hearing transcript, and probation reports from three of petitioner's earlier cases (A017581, A017555, A024769). (Pet. Brf. 83; Report, pp. 29-30,

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[13] As Question 5, this Court asked the referee, "What social history information did trial counsel provide to psychiatrist Kaushal Sharma and psychologist Michael Maloney? When was the information provided?" Petitioner states that the referee did not answer this question "directly" but that the record provides the information. (Pet. Brf. 83.) The referee answered Question 5 with the statement, "See response to Question 2, above." (Report, p. 39.) In answering Question 2, the referee outlined his findings regarding the investigation undertaken by Slick. (Report, pp. 28-35.)

citing Exh. B, pp. 184, 302 & Exh. R, p. 2353.) Copies of these probation reports are contained within the reference hearing record; they chronicled some of petitioner's family and social history and institutionalizations. (See Exh. B, pp. 182-187, 209-221, 240-242.) The referee further found, and petitioner agrees, that on May 31, 1984, Slick gave Dr. Sharma 331 pages of petitioner's CDCR records as well as Slick's outline of those records. (Report, p. 30, citing Exh. R, pp. 2341-2350.)[14]

Dr. Maloney personally interviewed petitioner twice in July 1984, administered psychological testing and had his assistant administer additional tests, and participated in interviews of petitioner's father, wife, girlfriend, and possibly his sister Rose on July 31, 1984. (7RHT 1148; Exh. 10 at 6-7; 10RHT 1702-1706; Exh. B, pp. 233-234, 236; Exh. R, p. 2436.) Dr. Maloney's interview notes reflect that, during his conversations with petitioner, petitioner stated that he was subjected to corporal punishment; however, Dr. Maloney testified that the level of physical discipline described by petitioner was typical of the time-period described and would not have been considered mitigating at the time of petitioner's 1984 trial. (11RHT 1760-1761; Exh. B, p. 208.) Dr. Maloney's notes of his interview with petitioner's wife, Janiroe, indicate that Dr. Maloney was aware that petitioner's son had Down Syndrome. (Exh. B, p. 234.)

From Kleinbauer's interview of petitioner's father and girlfriend, Dee Walker, Slick had information that clearly suggested petitioner gave his father and others money petitioner obtained from his various illegal activities. For instance, petitioner's father told Kleinbauer, "Robert always used to have money. He would keep three or four hundred dollars in his

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[14] According to Maloney, "especially in those years, there was very little provided in terms of background information other than legal reports, you know, probation/prison records, that kind of stuff." (10RHT 1672.)

pocket *and was generous with his money. Robert sold cocaine and also robbed the dope houses to get both money and cocaine.*" (Exh. B, p. 229; emphasis added.) According to Walker, petitioner "always had money, though he didn't talk about any of his business with [Walker]." Walker asked petitioner for money whenever she saw him and, in a playful manner, "charged" him for the time he had been away from her. He always gave her $50 to $100 and usually had at least a few hundred dollars with him. (Exh. B, p. 224.) Given Slick's instructions to Kleinbauer, it is reasonable to infer Kleinbauer questioned petitioner about his relationship with his father, petitioner's sources of income and what he did with his money, and included that information in her report to Slick.

In other words, Slick and his investigator interviewed petitioner's family members who were closest to petitioner and who could logically and reasonably be expected to provide information about petitioner's childhood and family, including his father, sisters, wife and girlfriend. As noted previously by this Court, in *Strickland* the United States Supreme Court "made clear courts should not equate effective assistance of counsel with exhaustive investigation of potential mitigating evidence." (*In re Andrews* (2002) 28 Cal.4th 1234, 1254, citing *Strickland, supra*, 466 U.S. at pp. 690-691.) At the reference hearing, petitioner failed to present any evidence that he or any of these witnesses identified any other individual who could provide information about petitioner's life and history that might or would differ from the information counsel already obtained from petitioner, his father, his sisters, his wife or his girlfriend or that trial counsel could or should have independently reached that conclusion.

B. The Additional "Mitigating" Evidence Presented by Petitioner at the Reference Hearing Demonstrates the Reasonableness of Trial Counsel's Investigation and Its Scope as Well as His Decision to Limit the Penalty Presentation (Question 3)

Petitioner contends that the referee erred in failing to address Question 3 and electing not to make factual findings concerning what additional information an "adequate" investigation would have established, the credibility of such evidence, and the investigative steps that would have produced that evidence. (Pet. Brf. 57-73.) Petitioner further takes exception to the referee's finding that trial counsel investigated petitioner's family, history, and good character. (Pet. Brf. 79-83.) Petitioner's briefing seemingly concedes that trial counsel investigated these issues yet claims that investigation was "perfunctory and incompetent" because it did not uncover the information discovered by post-conviction counsel. Respondent maintains, as argued above, that trial counsel's investigation was constitutionally adequate and, therefore, the referee understandably did not address the further inquiry (posed in Question 3) regarding what an adequate investigation would uncover. Still, an examination of the evidence presented at the reference hearing further substantiates, rather than undermines, the constitutional adequacy of the investigation undertaken. Petitioner has failed to meet his burden to demonstrate that an adequate investigation would have elicited the information presented by post-conviction counsel at the reference hearing or that the information presented was credible.

Because petitioner insists in his briefing that trial counsel could have located the "missing" witnesses (Pet. Brf. 72-73), respondent briefly addresses this assertion. At the reference hearing, petitioner failed to present *any evidence* concerning what investigative steps would have produced the "missing" witnesses in the relevant period before petitioner's

1984 trial. Nor did petitioner present evidence regarding what efforts were undertaken by post-conviction counsel to identify and locate these witnesses. Petitioner seemingly asserts that trial counsel could have found these witnesses in 1984 simply because post-conviction counsel located them for the hearing. Counsel's ability to locate these witnesses in 2011 fails to meet his burden to demonstrate that counsel could and should have located these witnesses in 1984 or that the failure to locate them in 1984 rendered the remaining investigation constitutionally deficient. In merits briefing, counsel asserts "re-interviewing witnesses, following leads, combing available documents for additional materials – all would have led to this additional evidence." (Pet. Brf. 73.) That conclusory assertion is not sufficient to prove what investigative steps would have been necessary to led to the substance of their testimony.

Petitioner identifies the testimony of the six witnesses who testified at the reference hearing (Georgia Bondmason Agras, Deborah Helms, Stephen Harris, Larry Cleveland, Tommie McGlothin, and John Williams) as information trial counsel would have discovered through an "adequate" investigation. (Pet. Brf. 58.) He also names petitioner's sister, Gladys, whom he elected not to call at the reference hearing and six witnesses whom he claims are deceased (Rose Davis, Lavergne Lewis, Robert Lewis, Sr., Dernessa Walker, Janiroe Lewis, and Shineaka[15] Spillman). (Pet. Brf. 70.) Petitioner seemingly asserts that all these witnesses and all the information provided to the referee should have been discovered and presented at his penalty trial without restriction.[16]

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[15] The record includes various spellings of this witness's first name. Respondent uses "Shineaka" throughout this pleading for consistency.

[16] To the extent petitioner points to the "calendar of events" submitted as Exhibit 9 as support for his assertion that Slick's investigation was inadequate (Pet. Brf. 57), that claim should be rejected. Exhibit 9 was (continued...)

The information relating to petitioner's family, his history, and his good character that may be derived from the reference hearing testimony is somewhat contradictory and ultimately unimpressive. Petitioner claims that Agras, Helms, and Cleveland would have provided information that petitioner's mother physically disciplined petitioner and that (according to Cleveland) a neighbor also disciplined petitioner physically. (Pet. Brf. 58-61, 80-81.) Also, Ms. Agras testified regarding one instance in which petitioner's father whipped him and that petitioner tried to please his father. (Pet. Brf. 59; 1RHT 153, 157.) Petitioner claims that Cleveland and Helms could provide information concerning petitioner's love and loyalty to his family and his father's encouragement of his criminal activity (Pet. Brf. 60-61, 63, 81), and that Cleveland, Harris, and Williams provided information about the criminal element that dominated the area in which they lived and their desire to emulate these individuals and possess flashy material possessions (Pet. Brf. 64, 68, 69, 82). Further, petitioner recites testimony from Agras, Cleveland and McGlothin that petitioner's mother conducted gambling in her home. (Pet. Brf. 58, 62, 66-67.)

Slick and investigator Kleinbauer interviewed petitioner's family members who were closest to petitioner and who could logically and reasonably be expected to provide information about petitioner's childhood

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(...continued)
a demonstrative aide created by petitioner's post-conviction counsel that compiles information drawn from other sources, such as billing records. Moreover, in *Strickland*, the Supreme Court rejected a claim of ineffective assistance of counsel even though counsel relied solely on his conversations with the defendant, spoke with his wife and mother on the telephone, did not request a psychiatric examination because the defendant did not indicate he had psychological problems, did not look for further character witnesses, and decided not to present or look further for evidence concerning his client's character and emotional state. (*Strickland v. Washington, supra*, 466 U.S. at pp. 672-73.)

and family. At the reference hearing, petitioner failed to present evidence that any of the "missing" witnesses were identified by petitioner or any other witness as persons who could provide information about petitioner's life and history that might or would differ from the information counsel already obtained from petitioner, his father, his sisters, his wife or his girlfriend.

Petitioner observes that, at the hearing, Slick did not recall that petitioner's father had molested petitioner's half-sister (who did not reside with petitioner) and claims Ms. Agras could have testified about the "relationship within petitioner's family" and revealed "the sexual predatory nature of petitioner's father" by testifying that petitioner's father had seduced and married her teenage daughter (Helms). (Pet. Brf. 79-81.) However, as this Court has explained,

> [T]he background of the *defendant's family* is of no consequence in and of itself. That is because under both California law (e.g., *People v. Gallego* (1990) 52 Cal.3d 115, 207 [276 Cal.Rptr. 679, 802 P.2d 169] (conc. opn. of Mosk, J.) [construing Pen. Code, § 190 et seq.]) and the United States Constitution (e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 801 [73 L.Ed.2d 1140, 1154, 102 S.Ct. 3368] [construing U.S. Const., Amend. VIII]), the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the '*defendant's* character or record' that 'the sentencer . . . [may] not be precluded from considering' – not *his family's*. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604 [57 L.Ed.2d at pp. 989-990], italics added (plur. opn. by Burger, C. J.); compare *People v. Cooper* (1991) 53 Cal.3d 771, 844 & fn. 14 [281 Cal.Rptr. 90, 809 P.2d 865] [leaving open the question whether the "impact [of a death verdict] on the defendant's family" is material under U.S. Const., Amend. VIII]; *People v. Fierro* (1991) 1 Cal.4th 173, 243 [3 Cal.Rptr.2d 426, 821 P.2d 1302] [following *Cooper*].)

(*People v. Rowland* (1992) 4 Cal.4th 238, 279, emphasis in original; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604, fn. 12 ["Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence

not bearing on the defendant's character, prior record, or the circumstances of his offense."].) Even assuming, for sake of argument that Slick was not aware of this information at the time of petitioner's trial, particularly since petitioner's father did not reside with petitioner and there is no evidence petitioner was aware of his father's sexual misbehavior, petitioner did not ineffective assistance for failing to discover or present such irrelevant evidence.

1. The Witnesses Presented at the Reference Hearing

Petitioner points to the testimony of Georgia Agras as documenting his interactions with his mother and his father, including several instances of physical discipline or abuse, that petitioner's mother conducted gambling in her home, that petitioner's mother would give petitioner money and send him from the home, her opinion that petitioner's mother treated petitioner more like a friend than a son, and her claim that petitioner called her "mom" and told her that he considered Ms. Agras to be more of a mother to him than his own mother. (Pet. Brf. 58-59, 80.) At the reference hearing, petitioner failed to present any evidence that Ms. Agras was identified by petitioner or any other witness as a person who could provide information about petitioner's life and history that would differ from the information counsel already possessed. Neither Ms. Agras's hearing testimony nor her 2003 declaration established that she was available to trial counsel; indeed, petitioner failed to present any evidence regarding Ms. Agras's whereabouts during the relevant period between Slick's appointment on December 29, 1983 (1RHT 1-4), and his 1984 trial. (1RHT 144-180; Exh. 5.) While petitioner's *Strickland* expert, Michael Adelson, opined that Slick should have called Agras as a penalty witness (2RHT 278, 287-288), Mr. Adelson's testimony did not fill these evidentiary gaps.

Moreover, Ms. Agras's reference hearing testimony can be charitably described as convoluted. Ms. Agras was 82 years old at the time

of the reference hearing. (1RHT 157.) Her memory was "much better" in 2003, when she signed a declaration submitted with the habeas petition. (1RHT 161-163; Pet. Exh. 5 [declaration]; 1RHT 178.) She testified that she had a five-year relationship with petitioner's father. (1RHT 144-146, 155.) She provided conflicting testimony concerning when she first met petitioner; she alternately testified that she encountered him when he was 12 or 13 years old (1RHT 179-180) and when petitioner was 17 years old in 1969 (1RHT 163-164). In her 2003 declaration, Agras stated, "I never met Robert Lewis, Jr. as he was growing up." (Exh. 5, ¶ 6; 1RHT 165.) At the hearing, Agras testified that petitioner was incarcerated in the Youth Authority when she met petitioner's father. (1RHT 166.) While she lived with Robert Sr., petitioner called his father, who visited him in custody. (1RHT 165-167.) If Agras met petitioner when he was 12 or 13 years old (in approximately 1964 or 1965), then Agras had limited opportunities to personally witness any interaction between petitioner and his mother or petitioner and his father while petitioner was a juvenile because, after April 12, 1965 (age 12 years 11 months) petitioner was free from custody from: April 7, 1967, until July 5, 1967; from May 3, 1968, until August 12, 1968; and from September 4, 1969 (age 17 years 3 months) until October 21, 1970. (1CT 179-180.)

Petitioner claims that Deborah Helms would have provided mitigating information about the relationship petitioner had with his father, and would have corroborated that petitioner's mother abused him and that his father encouraged petitioner to steal. (Pet. Brf. 59-60, 80.)[17] To the

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[17] If petitioner means to argue that trial counsel should have discovered and presented evidence in 1984 that petitioner's father had molested his daughters with Helms (Pet. Brf. 59), the reference hearing testimony fails to demonstrate that Helms was aware of this molestation in 1984 (she testified that it occurred from 1981 through approximately 1989

(continued...)

extent petitioner suggests that Helms would have testified that petitioner's father encouraged petitioner to commit robberies by asking him for money and that petitioner would show up with a "lunch bag" containing money and a gun (Pet. Brf. 59-60), petitioner failed to present evidence at the hearing that Helms would have provided that information to trial counsel during the relevant period between 1983 and 1984, particularly since that information had a tendency to incriminate both petitioner as well as Helms' then-husband, Robert Lewis, Sr. At least as of 1984, there is no indication that the relationship between Helms and Robert Sr. would have prompted such revelations about either petitioner's father or petitioner. Regarding Helms' observations about petitioner's mother striking petitioner (Pet. Brf. 60), Helms testified that she did not meet petitioner until 1970 or 1971. (1RHT 183.) Because petitioner was born in May 1952, he would have been an adult when Helms observed this conduct. Helms' information about petitioner giving half his pay check to his mother constituted hearsay for which petitioner proffers no exception. (Pet. Brf. 60; 1RHT 191.)

Petitioner claims that Helms' testimony would have been valuable because it would have "shed more light on the type of human being petitioner was and that he was close to and loyal to his family members, even to the point of being willing to steal for his father." (Pet. Brf. 61.) Testimony that petitioner committed more robberies than he had suffered convictions was the sort of evidence Slick reasonably attempted to limit. (5RHT 861-864; 871-872; 6RHT 1030, 1041-1043.) Additionally, Helms testified that she was personally addicted to cocaine from 1980 until 1989.

(...continued)
and that Robert Sr. later was prosecuted for these offenses). (1RHT 185, 208-211.)

(1RHT 208.) Thus, it is entirely unclear that Helms would have made a credible and desirable witness at the time of petitioner's 1984 trial.

Regarding the investigative steps necessary to locate Helms, petitioner notes that she could have been located because she accompanied petitioner's father (then her husband) to his interview with Kleinbauer. (Pet. Brf. 61, 72; see Exh. B, p. 228.) The information Robert Sr. disclosed to Kleinbauer (in Helms' presence) was widely divergent from the information Helms provided at the reference hearing. Petitioner did not meet his burden to establish that Helms would have provided, in 1983-1984, the information she conveyed at the 2011 reference hearing. By the time of the reference hearing, petitioner's father was deceased and his relationship with Helms had ended years earlier (after petitioner's trial) after Helms discovered that Robert Sr. molested one or more of their daughters. (1RHT 185-187, 208-209.) In contrast, at the time of petitioner's trial, Helms was married to Robert Sr. Her 2011 testimony inculpated herself in criminal activity in 1984 (as a drug user and addict), and would have inculpated petitioner and his father in additional crimes.

Petitioner claims that Larry Cleveland was petitioner's childhood friend and could have provided colorful accounts of petitioner's mother's gambling and drinking, her physical discipline and possible abuse of petitioner, their childhood truancy, their admiration of gamblers, prostitutes and other criminals in the neighborhood, petitioner's commission of robberies and gambling after speaking with his father, and petitioner's professed love for his son who had Down Syndrome. (Pet. Brf. 61-66, 81.) Petitioner argues this testimony would have bolstered a theory of mental retardation (Pet. Brf. 63); however, no evidence was presented at the reference hearing that such evidence would have altered Dr. Maloney's opinion in 1984 that petitioner was not mentally retarded.

Slick had information from petitioner's father that Cleveland was a bad influence on petitioner and that they had been arrested together. (Exh. B, pp. 223, 228, 229.) Indeed, the 1982 robbery conviction that petitioner admitted (A024769) implicated Cleveland as a possible accomplice. (Exh. A, pp. 2660-2662; Exh. N, pp. 112-117.) At the reference hearing, Cleveland confirmed the information Slick already knew. Cleveland testified that he and petitioner committed at least 10 robberies together; Cleveland was apprehended and sent to the Youth Authority for one of the robberies in 1968, but petitioner was never caught or punished for any the robberies. Cleveland testified that they used weapons during the robberies, but they only used guns on two occasions. (3RHT 503, 505-510, 547, 561-562.) Because trial counsel reasonably aimed to limit the jury's exposure to evidence about petitioner's violent criminal past, the proposed testimony was not information that trial counsel would reasonably wish to present to a penalty jury.

To the extent petitioner criticizes Kleinbauer's inability to locate Larry Cleveland (Pet. Brf. 40-41), at the hearing petitioner failed to present any evidence regarding what he had told Slick or Kleinbauer about the information Cleveland would provide them. Because Cleveland was in custody at the time of petitioner's trial, inculpated himself and petitioner at reference hearing in numerous unsolved robberies and other offenses for which the statute of limitations seemingly would not have run as of 1984, there is no reasonable probability that Cleveland would have provided the information in 1984 that he provided in 2011. Moreover, Cleveland's testimony about petitioner's criminal conduct was precisely the sort of information Slick reasonably sought to avoid presenting to the jury. Indeed, Slick reasonably concluded that petitioner's life of crime, including robberies and the use of firearms, "was likely to be more harmful than helpful if introduced as mitigation during the penalty phase of his trial."

(*Evans v. Secretary, Dept. of Corrections* (11th Cir. 2013) 703 F.3d 1316, 1327-1328 (en banc).) Indeed, the absence of details about petitioner's criminal past permitted Slick to argue that his current crimes and history put him outside the class of individuals for whom the death penalty was appropriate. (See 4RT 854-866 [Crim 24135] [defense penalty argument].) The sort of testimony that Cleveland gave at the reference hearing would have totally undercut such an argument and could have prompted petitioner's jury to conclude that he "was simply beyond rehabilitation." (See *Cullen v. Pinholster*, *supra*, 131 S.Ct. at p. 1407.) Applying the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland*, *supra*, 466 U.S. at p. 689), in the absence of contrary evidence this Court must presume that Slick's investigation of information that could have been provided by Cleveland fell within the range of reasonable performance.

Petitioner claims that Tommie McGlothin had briefly lived in the home of petitioner's mother, knew Larry Cleveland, witnessed the gambling hosted by petitioner's mother, insinuated that petitioner's father could have abused petitioner, and knew that petitioner and petitioner's father were both frequently incarcerated. (Pet. Brf. 66-67.) Most significantly, petitioner failed to present any evidence of McGlothin's whereabouts in 1984. Moreover, McGlothin's reference hearing testimony contradicted or undermined testimony offered by other reference hearing witnesses. McGlothin testified that he only stayed in the home of petitioner's mother for a few hours in 1965. (7RHT 1155-1157.) However, McGlothin frequently visited Maggie's home, where she held card and dominoes games for gambling purposes. (7RHT 1159.) Despite the frequency of his visits, McGlothin never saw Maggie get angry with petitioner. He did not know Maggie to possess a bullwhip. (7RHT 1168.) McGlothin never saw Robert Sr. hit petitioner or any child. (7RHT 1164,

1169.) McGlothin was 10 years older than petitioner and, in 1984, did not know the identity of petitioner's friends. (7RHT 1174-1175.) McGlothin perceived that petitioner "had a problem" because he engaged in criminal conduct. (7RHT 1165.)

Regarding Stephen Harris, petitioner asserts that Harris could have detailed his interactions with petitioner as a child at the community center, their mutual poverty, and their desire for materials possessions. (Pet. Brf. 67-68.) Petitioner mistakenly claims that Harris could have been located since Harris resided in the same neighborhood as petitioner and because Harris' mother had never moved. (Pet. Brf. 68, 73.) Harris testified that he never went to petitioner's home, and petitioner never went to Harris' home. They saw each other on the street or at the community recreation center. (7RHT 1218.) Petitioner would not have known where Harris lived in 1984. At that time, Harris lived on the streets and used crack cocaine, cocaine, and alcohol. (7RHT 1225-1226.) He was addicted to cocaine from 1981 until 1996. During that period, he slept at his mother's home once every two or three months. (7RHT 1233.) In other words, Harris would not have been a credible witness in 1984. In addition, the information attributed to Harris was available from other sources, including petitioner and petitioner's father, and was not the sort of information that could reasonably override Slick's tactical choices. And petitioner did not adequately establish that the homeless, drug-addicted Harris was reasonably available to petitioner or would have provided the same information in 1984.

Petitioner claims that adequate investigation would have discovered John Williams, who would have testified that petitioner had a more difficult upbringing than his own, that their community was thuggish and crime-ridden, that gamblers and pimps were role models for the children in the neighborhood because they had flashy cars and jewels, and that petitioner

fell into the category of kids who had no lunch at school. Williams had attended several semesters of college and worked in the Long Beach Navy Shipyard performing physical labor and construction. (Pet. Brf. 68-70.) At the reference hearing, petitioner failed to present any evidence regarding Williams' whereabouts during the relevant period between Slick's appointment on December 29, 1983 (1RHT 1-4) and petitioner's 1984 trial. Moreover, the information attributed to Williams was available from other sources, including petitioner and petitioner's father, and was not the sort of information that could reasonably override Slick's tactical choices.

2. Other Witnesses Not Presented at the Hearing

Petitioner further claims that trial counsel should have presented evidence from six witnesses whom he claims are deceased (Rose Davis, Lavergne Lewis, Robert Lewis, Sr., Dernessa Walker, Janiroe Lewis, and Shineaka Spillman) and Gladys Spillman, who petitioner chose not to call at the reference hearing. (Pet. Brf. 70.) Billing records for Slick and Kleinbauer do not indicate that they interviewed either Lavergne Lewis (who was married to Robert Sr.) or Shineaka Spillman. (Exh. 1; Exh. R, pp. 2445-2448.) As indicated earlier, Slick, Kleinbauer and Dr. Maloney interviewed petitioner's father (Robert Sr.), his sister Gladys, his sister Rose, Dernessa Walker, and Janiroe Lewis.

Regarding Rose Davis, Gladys Spillman, and Shineaka Spillman, at the reference hearing petitioner provided the video "declarations" that were presented by prior habeas counsel with the petition filed in case number S005412. (Exhs. 19-21.) Petitioner argues that these statements have powerful emotional impact and could have persuaded the jury. (Pet. Brf. 70.) Rose *testified* at petitioner's penalty trial. (4RT 836-838 [Crim

24135].)[18] Gladys testified during the guilt phase of the trial. (3RT 719-724 [Crim 24135].)[19] Because we have only written transcripts of their testimony are available, the emotional impact of their trial testimony may not be fully compared to that of the later recorded statements. Respondent disagrees with petitioner's characterization of the videotaped statements as describing a "tragic upbringing and chaotic home life." (Pet. Brf. 70.)[20]

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[18] During the penalty phase, Rose testified that petitioner was her brother, and that he had a brother, Ellis Williams, and another sister, Gladys Spillman. Ellis was in state prison at the time of petitioner's trial and had been to prison "a couple times." Their father had been in prison as well "a number of times." Their mother died in 1967. (4RT 837-838 [Crim 24135].) Rose loved petitioner, cared what happened to him, and cared about whether harm came to him. The prosecutor did not examine Rose. (4RT 838 [Crim 24135].)

[19] In the transcript of her statement, Gladys (petitioner's sister, younger than him by one year) recounted that petitioner tried to assume the role of father toward her because their father visited but was not part of their household. (Exh. 19A, pp. 2-3, 9.) Petitioner played with Gladys, took her to the store, and bought things for her. (Exh. 19A, p. 3.) He made money by repairing, building and selling bicycles. He shared the money that he made with his family and friends. He bought candy for her and gave her money to take to school. (Exh. 19A, pp. 3-4.) Petitioner was close to their mother. He helped with yard work. After performing the daily chores, such as emptying the trash and watering the lawn, the children bathed and then would debate who would help their mother wash her hair and feet. Petitioner wanted to help and usually prevailed. (Exh. 19A, pp. 4-6.) Petitioner helped Gladys operate the family's old-style wringer washing machine and helped hang the clothing to dry. (Exh. 19A, p. 9.) After Gladys had children, petitioner visited them, took them to the store, and bought them gifts. (Exh. 19A, p. 7.) When Shineake was very young, he played with her. (Exh. 19A, pp. 7-8.) When Gladys was age 23 to 25, and Shineake 2 or 3 years old, petitioner accidentally dislocated Gladys' arm as they wrestled and thereafter refused for fear of injuring her. (Exh. 19A, p. 8.) Gladys loved petitioner. She would be dearly hurt if he were executed. (Exh. 19A, p. 12.)

[20] In her post-conviction statement, Rose described petitioner as "fun" and a "big tease" while they were growing up. (Exh. 20A, pp. 1-2.) She and Gladys would scare him by telling him that the "boogie man"

(continued...)

(...continued)
would get him. He would sleep with them because he was scared. (Exh. 20A, p. 2.) Rose described petitioner as a "good student" in junior high. He went to boys' school for high school. (Exh. 20A, p. 2.) He liked sports, was on the track team, and played baseball and basketball. (Exh. 20A, pp. 2-3.) Petitioner performed chores for the neighbors. Sometimes he accepted money, but he sometimes declined at their mother's instruction. (Exh. 20A, p. 3.) He was polite and well-mannered. (Exh. 20A, pp. 3-4.) As children, they said prayers together every night. Gladys was usually out of the house, so most of the chores fell on Rose. Petitioner helped her wash the dishes and mop the floors. (Exh. 20A, p. 4.) After Rose married, he visited her and her children. He sometimes babysat or helped her clean. He lectured her to clean the house before her husband returned. (Exh. 20A, p. 5.) In exchange, she made banana pudding for him. If she did not have the ingredients, he bought them for her. (Exh. 20A, p. 5.) Petitioner was closest to Rose's son, who was her youngest child. (Exh. 20A, p. 6.) He played basketball and volleyball with them. (Exh. 20A, p. 6.) Petitioner advised her son not to get into trouble and told him that jail was "hell." She believed that he was a good influence on her children. (Exh. 20A, p. 7.) Her second child, Antoinette, corresponded with petitioner. (Exh. 20A, pp. 7-8.) Antoinette had kept all the letters petitioner had written. (Exh. 20A, p. 8.) Petitioner had told her child that he would write two letters for every one she wrote. (Exh. 20A, p. 8.)

When they were growing up, their father was not in their home. Their parents separated when petitioner was a baby. Rose was one year older than petitioner. (Exh. 20A, p. 9.) Their father returned briefly, but left again after their mother became pregnant with Gladys. (Exh. 20A, p. 9-10.) Petitioner cried for his father. Their mother told them that their father would rather take care of someone else's children than his own. (Exh. 20A, p. 10.) At that time, their father lived with a woman whose first name was Laverne. She lived in San Diego. (Exh. 20A, p. 10.) Once, petitioner hid all night in the yard; he hoped that his mother would think that he had run away and would call their father. Rose found him the next morning. (Exh. 20A, pp. 12-13.) Petitioner was afraid their mother would "whoop" him, but their mother hugged him and did not get angry. (Exh. 20A, pp. 13-14.) Children in the neighborhood teased them because their father was not around. (Exh. 20A, p. 14.) Petitioner liked to help out around the house and would help without being asked. (Exh. 20A, p. 14.) When their father was in prison, their mother paid someone to take their children to visit. (Exh. 20A, p. 14-15.) Rose loved her brother and did not want any harm to

(continued...)

Indeed, in their videotaped statements, petitioner's sisters portray their mother as a woman who tried to do her best for her children and worked to support them, who played cards with them at night, provided structure by requiring petitioner to perform household chores, prayed with her children as a group before bedtime, and taught petitioner to be well-mannered and help their neighbors. (See Exhs. 19-20, 19A-20A.) Moreover, their statements fail to mention or suggest any abuse in petitioner's home and contradict the negative impression of petitioner's mother and home life that petitioner now advocates should have been presented through the testimony of Agras, Helms, Cleveland, McGlothin, Harris, and Williams. (Exhs. 19A, 20A.) In any event, at the reference hearing, trial counsel provided sound tactical reasons for not questioning Rose more fully about petitioner's childhood history or for recalling petitioner's father and sister Gladys. (5RHT 861-868, 871-872; 6RHT 1030, 1041-1043; see also 4RT 830-831 [Crim 24135].)

Petitioner claims that Shineaka would have provided a "warm, affectionate portrait of Petitioner" as a man who loved his family and was loved by them in return. (Pet. Brf. 70-71, 82-83.)[21] The video-recorded statement of petitioner's niece, Shineaka Spillman, includes information that she loved petitioner, that he played with her and counseled her to behave and obey her parents, that he bought her candy and items she wanted, helped her learn the alphabet and with schoolwork, and that she considered him to be a "backup father" who she perceived to "always be

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(...continued)
come to him. She did not think he deserved the death penalty. (Exh. 20A, p. 15.)

[21] While petitioner describes Shineaka as "an intelligent and articulate 13-year-old at the time this video was made" (Pet. Brf. 70), Shineaka's 1987 appearance as a 13-year-old do not convey her effectiveness as a witness three years earlier as a 10-year-old.

there." (Exh. 21A, pp. 1-7.) Of course, petitioner's incarceration history (known to Slick) necessarily meant that petitioner had limited contact with Shineaka, regardless of her childish recollections. Shineaka's proposed testimony describing petitioner's "good character" would have logically prompted the prosecution to delve into petitioner's felony convictions and violent uncharged criminal conduct. In other words, had Shineaka testified in accordance with her statement (omitting whatever contact and advice that occurred after his death judgment), the presentation would have emphasized the senselessness and selfishness of petitioner's own criminal conduct.

Petitioner asserts that Lavergne Gibbs-Lewis, a former spouse of petitioner's father, would have documented the sexual predatory behavior of petitioner's father, who was convicted of child molestation after having impregnated petitioner's half-sister. (Pet. Brf. 82-83; see also Exh. J.)[22] Here, the jury heard testimony from Robert Sr. that he had been convicted of child molestation in addition to other crimes. (3RT 706-707 [Crim 24135].) The jury did not, however, hear testimony that the victim of the child molestation was petitioner's half-sister. The failure to discover and/or present these additional facts as "mitigating evidence" was not deficient performance. The victim did not reside in petitioner's household, and the molestation occurred in 1968 when petitioner himself was incarcerated and well after petitioner's own criminal activities had begun. (Exh. J.) Nor is there any evidence that petitioner was aware of his father's conduct. Petitioner fails to demonstrate the details of his father's child molestation offenses were relevant mitigation evidence. (See *Rowland, supra*, 4 Cal.

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[22] Petitioner failed to present evidence at the reference hearing that Lavergne Lewis was available to trial counsel before or during petitioner's trial.

4th at p. 279.) The father's molestation bears no logical relationship to his son's perpetual theft and robbery offenses and petitioner presented no evidence at the reference hearing that would overcome Slick's reasonable tactical choice.

Petitioner asserts the "missing" witnesses were credible. (Pet. Brf. 72.) The referee did not make specific findings regarding the credibility of the individual witnesses because it concluded its finding on Question 2 mooted any need to address Question 3. (Report, p. 38.) However, the referee concluded, "The referee was unimpressed with petitioner's alleged mitigating evidence offered at the reference hearing, and strongly believes that had this evidence been offered in petitioner's penalty trial it would not have been particularly helpful for petitioner and would not have led to a different result." (Report, p. 42, fn. 71.)

C. Petitioner's Exception to the Referee's Findings on Question 4 Lacks Merit

Petitioner takes exception to the referee's response to Question 4, in which this Court asked, "Did Trial Counsel Investigate petitioner's Mental Retardation or Learning Disabilities, the Negative effects of petitioner's institutionalization, petitioner's family, petitioner's history, and petitioner's good character?" Petitioner takes exception to the referee's findings that Slick adequately investigated petitioner's mental state and condition despite not specifically investigating whether petitioner was mentally retarded or suffered from a learning disability. (Pet. Brf. 74-76.) Petitioner further contends the referee did not make findings regarding whether trial counsel investigated the "negative effects of institutionalization" on petitioner because the referee did not expressly mention the "negative effects of petitioner's institutionalization." (Pet. Brf. 76-79; see Report, p. 38.) Respondent addressed these points in its merits briefing. (Resp. Brf. 163-

173.) Respondent incorporates that argument here and makes the following response to petitioner's briefing.

1. Mental Retardation and learning disabilities

Petitioner contends that, even when faced with the expert opinions tendered by Dr. Maloney and Dr. Sharma, Slick performed deficiently by not further investigating and presenting evidence that petitioner was mentally retarded and suffered from learning disabilities. (Pet. Brf. at 74-76.) However, as the reference hearing abundantly established, *neither expert* had anything helpful to offer the defense. Petitioner failed to present evidence and demonstrate at the reference hearing that the information obtained by Dr. Maloney and Dr. Sharma and the opinions provided by them to Slick were of such a nature that Slick could and should have independently contravened those expert opinions.

Petitioner argues the questions contained in the letters that Slick sent to Dr. Maloney and Dr. Sharma were "too generic" and were not geared to investigate whether petitioner suffered from learning disabilities or mental retardation. (Pet. Brf. 74.) Petitioner's criticism should be rejected. Dr. Maloney testified that he did not use the letter as a checklist and did not limit his evaluation to the precise terms of the letter. (10RHT 1670.) Rather, as was his custom and practice, Dr. Maloney performed an initial evaluation, made initial impressions to "try to figure out what seems to be going on, where I'm going to go with it," administered intelligence and other psychological testing, then consulted with Slick. (11RHT 1920; see also 10RHT 1671.)

Similarly, Dr. Sharma testified that he considered the letter and the questions it posed as asking him to look for evidence that could be used in mitigation at the penalty phase. (13RHT 2186-2187, 2203-2206; Exh. B, pp. 300-301.) Dr. Sharma interpreted the question inquiring about petitioner's present mental and physical condition to include mental

retardation. (13RHT 2206-2207.) Mental retardation was included among the things that Dr. Sharma would have been looking for when evaluating petitioner. (13RHT 2208.)

Furthermore, nothing in petitioner's school records (Exh. Z) indicates that he was ever enrolled in a remedial class designed for learning disabilities. Although the records indicate that petitioner repeated the first grade, no evidence was presented that this singular fact should reasonably prompt further investigation of issues of mental retardation or learning disabilities by trial counsel. Nor was evidence presented that a more common and logical explanation, such as immaturity, could reasonably explain the repetition.

Here, trial counsel requested an evaluation of petitioner's mental state and condition from two qualified psychological experts that reasonably sought mitigating evidence that would include mental retardation or learning disability. Neither expert offered a favorable opinion or identified mitigating evidence of a type that logically and reasonably would overcome trial counsel's stated tactical decision, which was to avoid eliciting highly prejudicial information about petitioner's criminal history and his prior convictions.

2. Negative Effects of Institutionalization

Petitioner further takes exception to the referee's lack of a specific finding regarding whether trial counsel investigated the "negative effects of institutionalization" on petitioner. (Pet. Brf. 76-79.) Petitioner claims that the record establishes that trial counsel did *not* investigate the potential negative effects of petitioner's institutionalization because he "did not ask his investigator to explore the effects of institutionalization nor did he apply for funds to hire an expert witness who could have provided testimony regarding the effects of institutionalization." (Pet. Brf. 76.) Petitioner criticizes Slick for failing to ask his *investigator* to explore the effects of

institutionalization or to apply for funds for an expert witness who could have testified about the effects of institutionalization. (Pet. Brf. 76.) In addition to points previously made (Resp. Brf. 170-173), respondent makes the following response.

At the reference hearing, petitioner presented testimony from psychologist Dr. Adrienne Davis concerning this subject. Her testimony was almost entirely premised upon her June 2003 declaration submitted to this Court with the Petition. (1RHT 22-143; Petn. Exh. 15.) In forming her opinions that he possibly had some neurological impairment that was not evaluated at an earlier age, Dr. Davis relied upon Dr. Khazanov's opinions about petitioner's learning disabilities and mental retardation. (1RHT 126.)

As noted above, Slick retained and consulted two forensic psychiatric professionals to evaluate petitioner, psychologist Michael Maloney and psychiatrist Kaushal Sharma. At the reference hearing, petitioner failed present evidence that either Dr. Maloney or Dr. Sharma lacked the necessary expertise to evaluate whether petitioner suffered negative effects from his prior institutionalizations. Nor did petitioner present evidence that Slick failed to provide his experts with the information and materials they deemed necessary to fully evaluate the existence of potential psychological testimony, including testimony about the negative effects of institutionalization upon petitioner. Both experts were given copies of three probation reports that documented petitioner's extensive criminal arrest and incarceration history. (Exh. B, pp. 182-184, 299-302.) Slick also gave Dr. Sharma 331 pages of prison records that further documented petitioner's incarceration history in addition to Slick's personal outline of the materials. (Exh. R, p. 2353.) Nor did petitioner present evidence that different or additional information would have changed the opinions they tendered to Slick in 1984. Nor did petitioner demonstrate, through either the testimony of Dr. Adrienne Davis or Michael Adelson (petitioner's

Strickland expert), that Slick's failure to explore this theme in 1984 constituted constitutionally deficient performance given the opinions from Dr. Sharma and Dr. Maloney that no mitigating mental health circumstances were present or would be helpful.

In any event, exploration of the effects of petitioner's numerous incarcerations would have opened the door to cross-examination that a jury could reasonably conclude undermined an assertion that petitioner's crimes were mitigated as a result of institutional failures. For instance, in his report dated July 25, 1984, Dr. Sharma noted that petitioner's commitment records included a diagnosis of Antisocial Personality Disorder and further stated, "*I agree with that diagnosis.*" (13RHT 2200; Exh. B, p. 305.) At the reference hearing, Dr. Sharma explained that he diagnosed petitioner as suffering Antisocial Personality Disorder based upon his personal interviews with petitioner and petitioner's criminal record. Dr. Sharma summed up his opinion as being, "[t]his is the person who doesn't give a darn about anything else." (13RHT 2239.) Expert testimony in the speculative vein provided by Dr. Davis would have emphasized petitioner's lengthy criminal history, including his misbehavior while incarcerated. Slick reasonably concluded that such evidence was likely to be more harmful than helpful if introduced. (See *Evans v. Secretary, Dept. of Corrections*, *supra*, 703 F.3d at pp. 1327-1328.) Particularly, given his experts' opinions that they had nothing helpful to offer in mitigation, Slick reasonably concluded that further testimony concerning petitioner's various incarcerations and criminal activities should be avoided.

D. Trial Counsel Reasonably Chose to Limit the Presentation of Mitigation Evidence at the Penalty Phase (Question 6)

As Question 6, this Court asked the referee to decided, "After conducting an adequate investigation of the circumstances in mitigation of

penalty, would reasonably competent attorneys acting as diligent advocates have introduced evidence in mitigation at the penalty phase of trial? What rebuttal evidence reasonably would have been available to the prosecution?" Petitioner takes exception to the referee's findings on Reference Question 6 and asserts that reasonable, competent counsel would have introduced evidence in mitigation at the penalty phase. (Pet. Brf. 84-91.) Petitioner's exceptions are not persuasive and should be rejected.

Petitioner's exceptions and argument rely almost entirely upon the opinion of his *Strickland* expert, Michael Adelson. (Pet. Brf. 85-89.) Reduced to its fundamentals, Mr. Adelson opined that petitioner's counsel should have presented evidence in mitigation *even if* that presentation could or would have prompted additional bad acts evidence being presented as rebuttal "because if you didn't, you were dead in the water. It was nothing to lose." (2RHT 265.) Mr. Adelson opined that trial counsel should have called the following individuals as penalty phase witnesses: Georgia Agras, Deborah Helms, Gladys Spillman, Rose Davidson, Shenike Spillman, Cleveland, McGlothin, Steven Harris, John Williams, Lavergne Lewis, his daughter Ramona, and possibly petitioner's wife, Janiroe. (2RHT 278-280, 327-328.) Mr. Adelson's opinion that mitigating evidence – of whatever type and nature – must be presented in all penalty phase proceedings is a position contradicted by the Supreme Court's decision in *Strickland*, *Burger v. Kemp*, and subsequent cases and is further contradicted by the jurisprudence of this Court. (See *In re Andrews* (2002) 28 Cal.4th 1234, 1260-1264 [discussing cases].)

For the reasons discussed in respondent's merits briefing (Resp. Brf. 160-163), substantial evidence supported the referee's finding that trial counsel's adequate investigation did not uncover significant positive information. (10RHT 1679, 1711-1712 [Dr. Maloney did not write a report and had no helpful information]; see Exh. B, pp. 203-208, 234-236 [Dr.

Maloney's notes]; Exh. B, pp. 222-232 [Kleinbauer's partial reports]; Exh. D [Dr. Sharma's report].)

As long as a reasonable investigation was conducted, this Court should defer to counsel's strategic choices. (*Strickland, supra*, 466 U.S. at pp. 690-691.) Here, trial counsel made a reasonable tactical decision to limit his penalty presentation in order to avoid the potential introduction of negative details about the four robbery convictions that had been introduced only by stipulation that specified the crime as robbery, the date of the conviction, and the case number. (6RHT 1030; 4RT 835 [Crim 24135].) Had trial counsel presented evidence concerning the impact of petitioner's prior incarcerations, the prosecution would have had the motive and opportunity to present evidence concerning the circumstances of the prior robberies. Petitioner had used a firearm or a dangerous weapon in all four robberies. Two of the robberies included particularly egregious facts: on February 21, 1977, during a robbery of Cash's Mens Wear, petitioner threatened to kill a store clerk and fired his gun at the clerk after the clerk shot at him (case no. A017555); on June 17, 1977, petitioner was engaged in a shoot-out and an innocent bystander was shot in the eye and killed (case no. A017581). Also, petitioner had told a probation officer that "robberies was [sic] his business and he did not mind serving time in prison." (Exh. A, pp. 2677-2679.) Particularly when juxtaposed with the very negative details of petitioner's four robbery convictions – three occurring over the course of a relatively recent period (1977 through 1982) – trial counsel's tactical decision not to present the underwhelming mitigation evidence developed through his adequate investigation was reasonable.

Petitioner failed to meet his burden to establish that he is entitled to habeas relief on *Claim XIV*, *Claim XV*, and *Claim XVI*.

CONCLUSION

The referee's findings that petitioner met the definition of mental retardation and, therefore, his execution would constitute cruel and unusual punishment in violation of the Eighth Amendment are not supported by substantial evidence. Because petitioner did not meet his burden of proof, this Court should deny *Claim XVIII*. Each of petitioner's exceptions should be rejected because each of the referee's findings to which petitioner has filed exceptions with this Court is supported by substantial evidence and therefore entitled to great weight and deference. As to *Claims XIV*, *XV*, and *XVI* challenging trial counsel's investigation and/or presentation of potential penalty phase evidence, petitioner has failed to carry his burden of proof on both prongs of *Strickland* and cannot prevail on his claims that he was denied his constitutional right to effective assistance of counsel at the penalty phase of petitioner's trial. Respondent respectfully submits that this Court should deny the petition for writ of habeas corpus.

Dated: August 14, 2013

Respectfully submitted,

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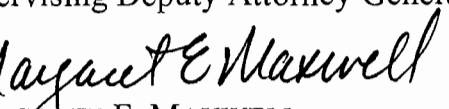

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS AND REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 23,573 words.

Dated: August 14, 2013

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DECLARATION OF SERVICE

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

I declare:

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

On August 14, 2013, I served the attached **RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS AND REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 14, 2013, at Los Angeles, California.

Bernard Santos	
Declarant	Signature

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