IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ALFREDO REYES VALDEZ,

On Habeas Corpus.

CAPITAL CASE
S107508

Related Automatic
Appeal No. S026872

Los Angeles County Superior Court No. KA007782
The Honorable Thomas Nuss, Judge
The Honorable Charles E. Horan, Judge

BRIEF AND EXCEPTIONS TO REFEREE'S REPORT

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

CARL N. HENRY
Deputy Attorney General
State Bar No. 168047

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2055
Fax: (213) 897-6496
E-mail: Carl.Henry@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

	Page
INTRODUCTION	1
SUMMARY OF THE ROBBERY-MURDER CRIME	4
STATEMENT OF THE CASE	6
SUMMARY OF REFERENCE HEARING TESTIMONY	7
EVIDENCE EXCLUDED BY THE REFEREE	7
ADDITIONAL MATTERS CONSIDERED BY THE REFEREE	8
STANDARD OF REVIEW FOR HABEAS CORPUS REFERENCE HEARINGS	8
REFERENCE QUESTION 1	9
A. Standard Of Review	10
B. Analysis	14
REFERENCE QUESTION 2	20
C. Standard Of Review	20
D. Analysis	20
REFERENCE QUESTION 3	27
E. Standard Of Review	27
F. Analysis	27
REFERENCE QUESTION 4	47
G. Standard Of Review	48
H. Analysis	48

TABLE OF CONTENTS (continued)

	Page
CONCLUSION	50

TABLE OF AUTHORITIES

	Page
Cases	
Babbitt v. Calderon (9th Cir. 1998) 151 F.3d 1170	36, 37, 46, 47
Bell v. Cone (2002) 535 U.S. 685 [122 S.Ct. 1843, 152 L.Ed.2d 914]	11, 12
Brown v. Ornoski (9th Cir. 2007) 503 F.3d 1006	18, 47
Evid. Code, § 352	22, 26
In re Andrews (2002) 28 Cal.4th 1234	9, 12, 13, 18, 19, 26, 36, 46, 47
In re Avena (1996) 12 Cal.4th 694	9
In re Clark (1993) 5 Cal.4th 750	8
In re Hardy (2007) 41 Cal.4th 977	9, 13, 19
In re Lucas (2004) 33 Cal.4th 682	9, 12, 13, 36
In re Ross (1995) 10 Cal.4th 184	31
In re Sanders (1999) 21 Cal.4th 697	8
In re Sassounian (1995) 9 Cal.4th 535	9

TABLE OF AUTHORITIES (continued)

	Page
In re Thomas (2006) 37 Cal.4th 1249	9, 11, 13, 19, 26, 47
In re Visciotti (1996) 14 Cal.4th 325	9, 11, 13, 18, 19, 26, 36, 47
Kimmelman v. Morrison (1986) 477 U.S. 365 [106 S.Ct. 2574, 91 L.Ed.2d 305]	10, 11
Kyles v. Whitley (1995) 514 U.S. 419 [115 S.Ct. 1555, 131 L.Ed.2d 490]	14
Morrow v. Superior Court (1994) 30 Cal.App.4th 1252	25, 48, 49
Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d 926	19, 36, 46, 47
People v. Cain (1995) 10 Cal.4th 1	25
People v. Cooper (1991) 53 Cal.3d 771	18
People v. Cudjo (1993) 6 Cal.4th 585	22
People v. Duvall (1995) 9 Cal.4th 464	8, 9
People v. Gonzalez (1990) 51 Cal.3d 1179	8, 11, 12, 21
People v. Gutierrez (2002) 28 Cal.4th 1083	26, 47, 48

TABLE OF AUTHORITIES (continued)

	Page
People v. Hall (1986) 41 Cal.3d 826	22, 25
People v. Kaurish (1990) 52 Cal.3d 648	22
People v. Ledesma (1987) 43 Cal.3d 171	10, 11
People v. *Marsden* (1970) 2 Cal.3d 118	37, 40, 43
People v. Pope (1979) 23 Cal.3d 412	4
People v. Riel (2000) 22 Cal.4th 1153	25, 26, 48, 49
People v. Valdez (2004) 32 Cal.4th 73	1, 3, 5, 6, 19, 21, 22, 26, 29, 32, 33, 37, 40, 42, 43, 45, 46
Samuels v. Mix (2000) 22 Cal.4th 1	25
Sandgathe v. Maass (9th Cir. 2002) 314 F.3d 371	47
Strickland v. Washington (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]	4, 8, 10-15, 18, 21, 25-27, 46, 48, 49
Wiggins v. Smith (2003) 539 U.S. 510 [123 S.Ct. 2527, 156 L.Ed.2d 471]	13, 19, 36
Wildman v. Johnson (9th Cir. 2002) 261 F.3d 832	18

TABLE OF AUTHORITIES (continued)

	Page
Yarborough v. Gentry (2003) 540 U.S. 1 [124 S.Ct. 1, 5, 157 L.Ed.2d 1]	10, 11

Statutes

Pen. Code, § 187	6
Pen. Code, § 190.2	6
Pen. Code, § 667	6
Pen. Code, § 4532	6
Pen. Code, § 1203.06	6
Pen. Code, § 12022.5	6

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ALFREDO REYES VALDEZ,** On Habeas Corpus.	**CAPITAL CASE** S107508 Related Automatic Appeal No. S026872

INTRODUCTION

The habeas petition in this case was filed on June 14, 2002. An informal response ("IR") was filed on July 9, 2002. On January 6, 2004, the judgment of conviction and death penalty in petitioner's automatic appeal were affirmed in *People v. Valdez* (2004) 32 Cal.4th 73 (*Valdez*).[1/] On February 22, 2005, the United States Supreme Court denied petitioner's certiorari petition in case number 03-10453. On November 17, 2004, this Court filed an Order to Show Cause ("OSC") as to whether trial counsel Anthony Robusto's assistance was constitutionally ineffective as alleged in subclaims A, B, H, and I in Claim IV of the petition. A merits-return ("Return") was filed on March 9, 2005. On February 7, 2007, this Court ordered the Los Angeles County Superior Court's presiding judge to select a referee for evidentiary proceedings on four questions arising from subclaims A, B, H, and I. On May 9, 2007, Los Angeles County Superior Court Judge Charles E. Horan was appointed to be the referee. He thereafter took evidence and filed the Referee's Report in this Court on December 8, 2008.

---

1. All "RT" and "CT" notations in this brief are to the record on direct appeal.

This brief follows the headings in the Referee's Report, except for a summary of the robbery-murder, a statement of the case, and discussions of the law concerning the four questions that this Court referred to the referee.[2/] The four questions were as follows:

1. Why did petitioner's trial counsel not introduce evidence at the guilt phase of the trial that the blood on the pants seized from the Monte Carlo automobile had been tested by the prosecution and found not to have come from the victim and did this reason constitute a reasonable tactical choice by trial counsel?

2. Why did petitioner's trial counsel not attempt to introduce at the guilt phase of the trial the proffered evidence regarding Liberato Gutierrez to show that Gutierrez may have murdered and/or robbed the victim and did this reason constitute a reasonable tactical choice by trial counsel?

3. Did petitioner's trial counsel provide ineffective assistance of counsel by failing to adequately investigate and present evidence in mitigation during the penalty phase as alleged in subclaim H of the petition?

4. Why did petitioner's trial counsel not attempt to introduce at the penalty phase of the trial the proffered evidence regarding Liberato Gutierrez to show that Gutierrez may have murdered and/or robbed the victim and did this reason constitute a reasonable tactical choice by trial counsel?

(Order filed Feb. 7, 2007.)

---

2. Los Angeles County Deputy District Attorney Brian R. Kelberg served as respondent's counsel in all proceedings before the referee. There, petitioner's counsel was Marilee Marshall, i.e., petitioner's current habeas counsel (who was also appointed appellate counsel) in this Court.

The referee heard testimony on May 15, 2008, through May 22, 2008, and June 23, 2008, through June 28, 2008. The referee received documentary evidence, and considered petitioner's entire trial record excluding the jury selection matters. The referee excluded some documentary proof offered by respondent that are included as exhibits to the Referee's Report. After hearing testimony from Robusto and 12 other witnesses, the referee received briefs and heard oral argument from counsel. The case was submitted for decision on September 12, 2008, and the Referee's Report was filed in this Court on December 8, 2008.

The referee heard testimony from the following witnesses: (1) Robusto;[3/] (2) petitioner's friends and relatives, i.e., Rosa Valdez (petitioner's mother who testified at trial), Graciela Gamp (petitioner's sister who testified at trial), Victoria Perez (petitioner's sister who testified at trial), Jane Doe (Perez's daughter who did not testify at trial and whose testimony was received at the reference hearing by stipulation), Carolina Reyna (a friend who testified at trial), and Sabrina Zueck (Reyna's daughter who did not testify at trial); (3) petitioner's medical experts, Drs. Nancy Kaser-Boyd and Kyle Boone (neither of whom testified at trial); and (4) petitioner's legal expert, Jack Earley (who did not testify at trial). As to respondent's evidence, besides receiving documentary proof, the referee heard testimony from: (1) Dr. Charles Hinkin (in rebuttal to Drs. Kaser-Boyd and Boone); and (2) two of the investigating officers in this case, Pomona Police Detectives Gregg Guenther and Frank Terrio (both of whom testified at trial). (See *Valdez*, 32 Cal.4th at pp. 82-85

---

3. Petitioner did not testify at the reference hearing, or at trial (although he considered doing so at the penalty phase over Robusto's opposition). (12RT 1713-1714, 1717; Return at pp. 132-143.) Robusto testified before the referee that (pre-trial) petitioner confessed that he: (1) shot the victim; and (2) owned the handgun found in the Monte Carlo car about 24 hours after the murder. (See Referee's Report at pp. 31, 33-35, 50-56, 61-70; RHT 774; Return at pp. 115-129, 160-163; *Valdez*, 32 Cal.4th at pp. 81-85.)

[Terrio's testimony and other police evidence], 87 [Guenther's defense testimony], 106-110 [Guenther's testimony concerning third-party culpability appellate claim], 89-91 [penalty phase testimony from petitioner's nine witnesses, i.e., relatives and friends].)

As to the first three questions in the Order filed February 7, 2007, the referee found that Robusto's trial assistance was reasonable under *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]) (*Strickland*), *People v. Pope* (1979) 23 Cal.3d 412 (*Pope*), and their progeny. As to the fourth question, the referee concluded that Robusto's performance was partially deficient, but there was no prejudice under *Strickland*. Respondent: (1) has no exceptions to the referee's findings and conclusions except as noted in the discussion of each reference question; (2) respectfully disagrees with the referee's deficiency finding on the fourth question (Referee's Report at pp. 104-105); and (3) submits that there was no prejudice under *Strickland* concerning all four questions.

SUMMARY OF THE ROBBERY-MURDER CRIME

On Friday, April 28, 1989, 26-year-old Ernesto Macias ("Ernesto")[4/] cashed a federal income tax refund check for $1,203. The next morning, he planned to fly to Mexico for a wedding. That Saturday morning, he left his home in Pomona where he lived with his cousin Arturo Vasquez. About 9 p.m., Ernesto unexpectedly returned home. Vasquez and Rigoberto Perez were present. They had been drinking beer there for hours. They were soon joined by petitioner, and then Gerardo Macias, who was a cousin to Ernesto and Perez. Macias was the main prosecution witness at the guilt phase trial.

---

4. Respondent will refer to the victim by his first name to avoid confusion with his cousin, Gerardo Macias.

When Macias arrived, Ernesto was in bed under a blanket about to go to sleep. Ernesto bragged that: (1) he had $3,000; and (2) was flying to Mexico early in the morning. Near him was a .22-caliber gun. Macias drove Vasquez and Perez around a corner to Andreas "Pato" Gutierrez's house. While leaving, Macias heard Ernesto tell petitioner in an angry tone (in Spanish) to wait outside. Petitioner stayed when Macias, Vasquez, and Perez left. They returned within minutes since Gutierrez was asleep. After Vasquez turned the knob on his closed front door, he saw blood scattered in the house. He yelled and was joined by Perez. They ran to Macias's car and told him what they saw. They feared Ernesto had shot petitioner. After driving around the dark area, Macias saw a bloodstained body lying on a curb several houses from Ernesto's home. Macias could not tell if it was Ernesto. He drove around the corner, found a telephone booth, called 911, then went home with Perez after taking Vasquez to Gutierrez's house. The victim was Ernesto, who died from multiple close range gunshot wounds to the head and upper body. He was shot inside his house, and walked outside before collapsing where his body was found. His pants pocket was turned inside-out and contained bloodstains. (*Valdez*, *supra*, 32 Cal.4th at pp. 81-82.)

About 24 hours later, petitioner was arrested nearby outside a Monte Carlo car containing a handgun identical to the gun that was near Ernesto before he was shot. An expert opined that this gun could have been the murder weapon. Petitioner's palm print was lifted from the grip part of the gun. The blood surrounding his palm print was consistent with Ernesto's blood-type. Finally, petitioner's print was made when the surrounding blood was wet. (*Valdez*, 32 Cal.4th at pp. 81-85.)

Petitioner, who was unemployed and had five California burglary convictions and a Texas robbery conviction, did not testify at trial. However,

he told police that he left Ernesto's house after the others left, and did not kill or rob Ernesto. (*Valdez*, 32 Cal.4th at pp. 85, 87-89; but see footnote 3, *ante*.)

STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney in Los Angeles County Superior Court on February 3, 1992, petitioner was charged with: (1) murdering Ernesto under Penal Code[5/] section 187, subdivision (a) (count 1); and (2) felony-escape under section 4532, subdivision (b) (count 2). It was alleged that the murder was committed during a robbery under section 190.2, subdivision (a)(17), and petitioner personally used a handgun under sections 12022.5, subdivision (a), and 1203.06, subdivision (a)(1). As to the murder, it was also alleged that petitioner had three prior serious felony convictions under section 667, subdivision (a). Petitioner pled not guilty, denied all other allegations, and the prosecution sought the death penalty.

Trial began on March 16, 1992. (See Referee's Report at pp. 30-38 [summary of Robusto's testimony to referee as to pre-trial investigations and strategy].) On March 23, 1992, the jury found petitioner guilty as charged, and found that the gun and robbery-murder special allegations were true.

On March 24, 1992, the penalty phase began. (See Referee's Report at pp. 35-38, 99-103; 12RT 1713-1714, 1717; *Valdez, supra*, 32 Cal.4th at pp. 87-91.) On April 3, 1992, the jury fixed the penalty at death. On May 22, 1992, Robusto moved for modification of the death penalty recommendation. That day, the court denied the motion, and sentenced petitioner to the death penalty for murdering Ernesto.

---

5. All further statutory references are to the Penal Code unless otherwise noted.

SUMMARY OF REFERENCE HEARING TESTIMONY

The Referee's Report provides a summary of the reference hearing testimony. (Referee's Report at pp. 2-42.) Respondent has no exceptions as to this portion of the report.

EVIDENCE EXCLUDED BY THE REFEREE

Respondent accepts as accurate the referee's summary of evidence that he excluded from consideration. (Referee's Report at pp. 43-45.)

Respondent objects to the referee's exclusion of post-conviction results involving the examination of blood on: (1) the gray pants found in the Monte Carlo car; and (2) the shirt and boots worn by Liberato Gutierrez. (Referee's Report at p. 44.) These results were offered at the reference hearing through exhibits 31(a)-(d). As the referee explained, respondent's exhibits, along with offered testimony, would tend to demonstrate that:

> 1. The donor of the blood on the gray pants, while **not** the murder victim, was also **not** the donor of the blood on the handgun; and was **not** the donor of the blood on the shirt and boots of Liberato Gutierrez; and; [*sic*]
>
> 2. The blood on the shirt and boots of Liberato Gutierrez was from one donor, and that donor was *not* the victim.

(Referee's Report at p. 44 [bold in original].) Respondent agrees with the foregoing and with the referee's following analysis:

> Thus, this evidence would eliminate the suggestion that Liberato Gutierrez was *in truth* involved in any way in the homicide or related events. Further, it would dispel the inference that since the pants blood was not from the victim, perhaps the gun blood was *also* not from the

victim, but rather from "Mr. X", who was the donor of both the gun blood and pants blood. In short, had this evidence been available and been introduced at trial, it would have harmed, not helped, petitioner.

(*Id.* at p. 44 [italics in original].) The referee stated: "Respondent argued that these results bear upon whether trial counsel Robusto was reasonable in his assessment that blood testing at trial would have likely harmed petitioner's case." (*Ibid.*)

However, the referee found that while the test results would undoubtedly be relevant if offered to defeat a claim of factual innocence, for example, or to help resolve an issue of prejudice under *Strickland*, they were irrelevant to the issues before the referee, given the phrasing of reference questions 1, 2, and 4. (Referee's Report at p. 44.) Respondent takes exception to and disagrees with the referee's relevance finding. The excluded evidence provided powerful corroboration of Robusto's credibility when he testified at the reference hearing that petitioner made the pre-trial statements to him confessing his guilt and ownership of the gun.

ADDITIONAL MATTERS CONSIDERED BY THE REFEREE

Respondent accepts as accurate the referee's summary of additional matters that he considered. (Referee's Report at p. 46.)

STANDARD OF REVIEW FOR HABEAS CORPUS REFERENCE HEARINGS

A habeas corpus proceeding is a collateral attack upon a criminal judgment which is presumed to be valid due to societal interest in finality. (*In re Sanders* (1999) 21 Cal.4th 697, 703 (*Sanders*); *People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*); *In re Clark* (1993) 5 Cal.4th 750, 764 (*Clark*); *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (*Gonzalez*).) Petitioner bears

"a heavy burden" to plead and prove grounds for relief by a preponderance of the evidence. (*In re Visciotti* (1996) 14 Cal.4th 325, 351 (*Visciotti*); see *In re Lucas* (2004) 33 Cal.4th 682, 694 (*Lucas*); *In re Sassounian* (1995) 9 Cal.4th 535, 546-547; *Duvall, supra,* 9 Cal.4th at p. 474.)

A referee's findings of fact, while not binding on this Court, are given great weight when supported by substantial evidence because the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying. (*In re Avena* (1996) 12 Cal.4th 694, 710 (*Avena*); see *In re Hardy* (2007) 41 Cal.4th 977, 1020 (*Hardy*).) A referee's findings as to a mixed question of law and fact, and conclusions of law, are subject to independent review by this Court. (*Hardy, supra*, 41 Cal.4th at p. 1021; *Avena, supra*, 12 Cal.4th at p. 710; see *In re Thomas* (2006) 37 Cal.4th 1249, 1256-1257, 1264-1265 (*Thomas*); *In re Andrews* (2002) 28 Cal.4th 1234, 1250-1253 (*Andrews*); *Visciotti, supra*, 14 Cal.4th at p. 345; see also Referee's report at p. 71.)

REFERENCE QUESTION 1

Petitioner urges that Robusto was constitutionally ineffective by failing to present the 1992 guilt phase jury with DNA proof that blood on the pants in the Monte Carlo car did not belong to the victim. (Pet. at 54-55 [subclaim A of Claim IV].) The facts found by the referee plainly defeat petitioner's claim. This claim should also be rejected for the reasons stated in: (1) the informal response (IR at pp. 8-9, 20); (2) the return to the OSC (Return at pp. 100-115); and (3) respondent's post-hearing briefing (Respondent's Proposed Referee's Findings[6/] at pp. 2-64).

---

6. All "Respondent's Proposed Referee's Findings" notations are to the post-hearing brief (labeled "Respondent's Proposed Referee's Findings To California Supreme Court's Reference Questions") that the Los Angeles County District Attorney's office submitted to the referee.

A. Standard Of Review

The United States Supreme Court has declared the following:

> The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense. [Citations.]

(*Yarborough v. Gentry* (2003) 540 U.S. 1, 5 [124 S.Ct. 1, 5, 157 L.Ed.2d 1] (*Gentry*); *Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [106 S.Ct. 2574, 91 L.Ed.2d 305] (*Kimmelman*) ["*Strickland*'s standard, although by no means insurmountable, is highly demanding"]; *Strickland, supra*, 466 U.S. at pp. 687-698; *People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*) ["In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny"].)

When the basis of a challenge to the validity of a judgment is constitutional ineffective assistance by trial counsel, this Court has confirmed the following governing law:

> the petitioner must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.] In demonstrating prejudice, however, the petitioner must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. [Citation.] "The benchmark for judging any claim of ineffective assistance must be whether counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Visciotti, supra,* 14 Cal.4th at pp. 351-352; see *Gentry*, *supra*, 540 U.S. at pp. 5-9.)

This Court has observed:

> [T]he range of constitutionally adequate assistance is broad, and a court must accord presumptive deference to counsel's choices about how to allocate available time and resources in his or her client's behalf. [Citation.] Counsel may make reasonable and informed decisions about how far to pursue particular lines of investigation. Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive.

(*Gonzalez, supra,* 51 Cal.3d at p. 1252 [citation and footnote omitted].) "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions" is "particularly important because of the broad range of legitimate defense strategy[.]" (*Gentry, supra,* 540 U.S. at pp. 5-6.)

"[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*Ledesma*, *supra*, 43 Cal.3d at p. 218; see *Thomas*, *supra*, 37 Cal.4th at p. 1257.) The *Strickland* test is nonetheless "highly demanding" (*Kimmelman*, *supra*, 477 U.S. at p. 382), and review must be "highly deferential" (*Gentry, supra,* 540 U.S. at p. 6). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Gentry, supra,* 540 U.S. at p. 8; *Bell v. Cone* (2002) 535 U.S. 685, 702 [122 S.Ct. 1843, 152 L.Ed.2d 914] (*Cone*) ["a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a

particular act or omission of counsel was unreasonable in the harsh light of hindsight"]; *Lucas*, *supra*, 33 Cal.4th at p. 722; *Andrews*, *supra*, 28 Cal.4th at pp. 1253-1254.)

Strickland held:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. [Citation.]

(*Strickland*, *supra*, 466 U.S. at p. 691; *Andrews*, *supra*, 28 Cal.4th at pp. 1254-1255, 1265; *Gonzalez*, *supra*, 51 Cal.3d at p. 1244 ["trial counsel cannot be faulted for failing to take steps that require cooperation his client declines to give"]; but see *Lucas*, *supra*, 33 Cal.4th at pp. 729-731.)

Petitioner must also "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland, supra,* 466 U.S. at p. 689; see *Cone, supra,* 535 U.S. at p. 698; *Andrews*, *supra*, 28 Cal.4th at pp. 1253-1254.) "There are countless

ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (*Strickland, supra,* 466 U.S. at p. 689.) This Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (*Id.* at p. 690.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" (*Ibid.*; *Andrews*, *supra*, 28 Cal.4th at pp. 1253-1266.)

Finally, prejudice must be affirmatively proved. (*Wiggins v. Smith* (2003) 539 U.S. 510, 534 [123 S.Ct. 2527, 156 L.Ed.2d 471] (*Wiggins*); *Hardy*, *supra*, 41 Cal.4th at pp. 1021-1022, 1025, 1030, 1032; *Thomas*, *supra*, 37 Cal.4th at pp. 1265-1277; *Lucas*, *supra*, 33 Cal.4th at pp. 731, 735; *Andrews*, *supra*, 28 Cal.4th at pp. 1253, 1265; *Visciotti*, *supra*, 14 Cal.4th at pp. 353-357.) As to a finding that a lawyer was objectively unreasonable during the guilt phase, this Court has held:

> In this context, we assess prejudice by evaluating three factors: What evidence was available that counsel failed reasonably to discover? How strong was that evidence? How strong was the evidence of guilt produced at trial? [Citation.]

(*Hardy*, *supra*, 41 Cal.4th at pp. 1021-1022; see *Thomas*, *supra*, 37 Cal.4th at p. 1265.) As to the penalty phase, this Court must "'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" (*Hardy*, *supra*, 41 Cal.4th at pp. 1032, 1035, citing *Wiggins*, *supra*, 539 U.S. at p. 534; see Return at pp. 156-160 [prejudice analysis herein]; *Andrews*, *supra*, 28 Cal.4th at pp. 1255-1266; *Visciotti*, *supra*, 14 Cal.4th at pp. 353-357.) If a death penalty is vacated, a new penalty phase trial is permissible. (*Hardy*, *supra*, 41 Cal.4th at p. 1037.)

B. Analysis

With the exception of the referee's exclusion of respondent's evidence of the post-conviction results concerning the blood on the pants that was previously discussed, respondent agrees with the referee's findings and conclusion that Robusto's conduct was reasonable under *Strickland* and its progeny. (Referee's Report at pp. 47-60.)

As the referee found, Robusto elicited testimony about the blood on the gray pants at the guilt phase trial, and gave a closing argument on the issue. (Referee's Report at pp. 47-50.) As the referee put it:

> Robusto sought to imply that the prosecution had failed to perform an analysis of the blood, or that if they had, they had inexplicably failed to offer it. This was in keeping with a recurring defense theme–that the police and prosecution had conducted a shoddy investigation and that therefore their presentation was not worthy of belief, and was insufficient to convincingly demonstrate petitioner's guilt.

(Referee's Report at p. 50.) Citing three federal cases including *Kyles v. Whitley* (1995) 514 U.S. 419, 445-447 [115 S.Ct. 1555, 131 L.Ed.2d 490] (*Kyles*), the referee concluded that the foregoing was "a common and often effective defense strategy" was that "widely recognized[,]" and noted that petitioner's *Strickland* expert "agrees with the proposition." (Referee's Report at p. 50.)

The referee found that pre-trial "petitioner told Robusto that he had committed the murder[,]" and owned the gun recovered from the Monte Carlo car. (Referee's Report at p. 50.) Pre-trial, Robusto: (1) had the August 19, 1991 lab report stating that the blood on the gray pants was not that of the victim; and (2) possessed a "police report dated February 22, 1991[,]" which stated that Morales (arrested with petitioner) told police that the gun was petitioner's weapon, "petitioner had shown it to Morales while they were in the

car together" and petitioner "stated that he bought the gun from someone." (*Id.* at pp. 50-51.) Robusto also knew that: (1) the car belonged to Juan Velador; (2) Velador told police that petitioner and Morales had borrowed the car; and (3) the DNA testing as to the pants was "different from the conventional blood testing done on the handgun." (*Id.* at p. 51.) As the referee found: "Before trial, Robusto asked petitioner about the gray pants[,]" and petitioner told Robusto that the pants "were not his, and that they had nothing whatsoever to do with the case." (*Ibid.*)

Given the foregoing, the referee found that the "potential usefulness" of further blood testing depended entirely upon the strength of the circumstantial connection between the pants and the gun. As the referee said, petitioner's *Strickland* expert agreed with the proposition. (Referee's Report at pp. 51-52.) The referee explained:

> The stronger the evidence suggesting that the person that left blood on the pants may *also* have left the blood on the gun, the stronger the inference that the donor of the blood on the gun was not the victim. Conversely, absent some suggestion that the pants donor may have in fact been the gun donor, the pants become a mere irrelevant fortuity. Thus, reasonably viewed, on its face, and assuming no countervailing concerns, the evidence would have been at least somewhat helpful to petitioner. [¶] For that reason, petitioner argues that counsel should have introduced the results of the testing of the pants at trial.

(*Id.* at p. 52.) As the referee noted, petitioner's *Strickland* expert (Early) agrees with petitioner, but in arriving at his opinion, "Early overlooked or dismissed several relevant considerations." (*Ibid.* [italics in original].)

The referee noted that when the prosecution rested, the jury did not know: (1) how petitioner and Morales gained possession of the car; (2) how long they had been in possession of the car; (3) how long the gun had been in

the car; or (4) the name of the owner of the gray pants. Conversely, the jury knew: (1) petitioner denied possession of the gun; (2) professed ignorance as to how his palm print got on the grip part of the gun; (3) the gun was part of various stolen guns readied for shipment to Nevada; and (4) no fingerprints were recovered from the magazine inside the gun, or on the live rounds in the gun. As the referee put it, "on the state of the record, the jury was free to conclude that while petitioner had obviously touched the gun at *some* point, he may have done so only while in the vehicle." (Referee's Report at p. 52 [italics in original].)

In contrast, the referee found that Robusto: (1) "knew definitively that the firearm belonged petitioner, for petitioner had admitted this to him, though denying it to the police[;]" (2) knew that the gun was not in the car when it was borrowed, and petitioner brought the gun into the car; and (3) "knew that in reality the pants had absolutely nothing to do with the homicide or the firearm." (Referee's Report at p. 53.) In light of the foregoing, the referee properly found:

> Given petitioner's admission to Robusto that he had killed the victim, coupled with other information known to him, Robusto had every reason to believe that the blood on the weapon was in fact the blood of the victim, and that the blood on the pants had absolutely nothing to do with the blood on the gun.

(*Ibid.*)

The referee found that Robusto also "knew of other evidence, which, if produced by the prosecution, would prove that petitioner had not simply come into fortuitous contact with the weapon while in the Monte Carlo." (Referee's Report at p. 53.) According to a police report, Morales revealed that petitioner was "playing around" with the gun and demonstrating its use as they drove to Pomona prior to their arrest. Robusto also knew that Morales and petitioner

were en route to buy beer and hire three prostitutes prior to their arrest. (*Id.* at pp. 53-54.) Robusto knew that police statements by Morales and Velador contained no hint that petitioner placed the pants in the car, or that the pants had a connection to the gun. (*Id.* at p. 54.) As the referee found, the statements by Morales and Velador confirmed to Robusto what petitioner had confessed pre-trial to counsel about "the car, the gun, and the pants." (*Ibid.*)

Given the foregoing, "Robusto was concerned that if he put on the evidence relating to the testing of the pants, the people would call Morales and Velador as witnesses." (Referee's Report at p. 54.) The referee found that Robusto's concern was "reasonable for two reasons." (*Ibid.*) As the referee analyzed:

> First, their testimony would have effectively demonstrated that the association between the gun and the vehicle was merely fortuitous, greatly weakening any inference that the gun and pants were somehow connected. This would demonstrate the implausibility of the theory that the placement of the blood on the gun and the placement of blood on the pants were contemporaneous, or even related, events. This in turn would dispel the "single donor" theory essential to the usefulness to petitioner of the results of the testing of the blood on the pants. [¶] Second, the testimony [of Morales and Velador] would have taken away any argument that the prosecution had failed to prove that petitioner owned the weapon at the time of the murder, and would have dispelled the notion that his fingerprints on the weapon might be due to momentary contact with the weapon while in the car.

(*Id.* at pp. 54-55.)

The referee added:

> Robusto knew that in order to introduce the results of the testing done on the pants, he would have to notify the prosecution of his intention

well in advance of trial, as well as provide discovery of the identity of all witnesses he intended to call in that connection. [Footnotes and citation omitted.] Robusto believed that the prosecution, thus alerted, would react by conducting further testing on all of the blood-related evidence. Insofar as the pants are concerned, they would attempt to demonstrate that the blood on the pants could not have been left by the donor of the gun blood. [¶] Robusto also believed that the prosecution might well become aware of any attempt he made to do testing of his own, and the defense might even have to divulge the results. [Citations.]

(Referee's Report at p. 55.) Citing holdings in *People v. Cooper* (1991) 53 Cal.3d 771, 814-816, the referee found that Robusto's concerns were reasonable. (*Ibid.*)

Given the foregoing, and for reasons previously stated, respondent objects to the referee's exclusion of respondent's evidence of the post-conviction results concerning the blood on the pants. Respondent nonetheless agrees with the referee's findings that Robusto's pre-trial strategies and trial tactics were reasonable under *Strickland* given the totality of the record in this case. (Referee's Report at pp. 56-60; see *Andrews*, *supra*, 28 Cal.4th at pp. 1241, 1254-1266; *Visciotti*, *supra*, 14 Cal.4th at pp. 330, 351-357; see also *Brown v. Ornoski* (9th Cir. 2007) 503 F.3d 1006, 1012 (*Brown*) ["The relevant question is therefore whether reasonable counsel, knowing the risk that this information would be brought to light, would still call Dr. Summerour to testify"]; *Wildman v. Johnson* (9th Cir. 2002) 261 F.3d 832, 839 (*Wildman*) ["Trial counsel might reasonably have wanted to avoid the impression that he was trying to distract the jury's attention from the more serious charges by using expert testimony to focus on the details of the less important charge. Wildman's disagreement with trial counsel's tactical decision cannot form the basis for a claim of ineffective assistance of counsel. [Citation.] Wildman

therefore has not shown that trial counsel's actions in not retaining a ballistics or arson expert fell outside the wide range of professional competence"]; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 948 (*Murtishaw*) ["The [missing blood or urine] tests were therefore of limited value, and [counsel]'s failure to obtain them was not so substantial as to deny Murtishaw of the counsel guaranteed by the Sixth Amendment. Therefore, [counsel]'s representation did not fall below an objective standard of reasonableness"].)

Petitioner has also failed to affirmatively prove that he suffered prejudice due to Robusto's tactics. (See *Wiggins*, *supra*, 539 U.S. at p. 534 ["petitioner must show that counsel's failures prejudiced his defense"]; *Hardy*, *supra*, 41 Cal.4th at pp. 1021-1022, 1025, 1030; *Thomas*, *supra*, 37 Cal.4th at pp. 1241, 1265-1266; *Andrews*, *supra*, 28 Cal.4th at pp. 1255-1257; *Visciotti*, *supra*, 14 Cal.4th at pp. 330, 351-357.) Petitioner was the last person seen with the victim prior to the robber-murder. He stayed even though the victim had angrily ordered him to leave with the house with Vasquez, Perez, and Macias. Petitioner's palm print was found in the grip part of the recovered gun about 24 hours after the shooting, and his print was made while the blood surrounding the grip was wet. The blood could have come from the victim. The recovered gun fired seven .22-caliber rounds and was missing four bullets, and an autopsy proved that the victim was shot four times with .22-caliber bullets at close range. The bullets removed from the victim's body could have been fired from the gun found in the car. The victim's left pants pocket had been turned inside-out and contained bloodstains, petitioner was unemployed, and police found $100 on petitioner during his arrest. The victim bragged to petitioner, Vasquez, Perez, and Macias that he had $3,000, and was flying to Mexico in the morning. The prior day, the victim cashed a $1,203 income tax check. Police did not find a wallet, money, plane tickets, or a bank book during the post-murder search of the victim's house where he was shot. (*Valdez*, *supra*, 32 Cal.4th at pp. 81-87,

103-106.) The jury thus received strong evidence to find petitioner guilty of murdering Ernesto for purposes of robbery. Given this record, it is inconceivable that the result of the proceedings would have been different if Robusto had introduced more evidence regarding the blood on the gray pants, especially since it would have invited devastating rebuttal evidence. Subclaim A of Claim IV should therefore be denied.

REFERENCE QUESTION 2

Petitioner claims that Robusto was constitutionally ineffective by failing to make a proper offer of third party culpability evidence as to Liberato Gutierrez at the 1992 guilt phase trial. (Pet. at 55-56 [subclaim B of Claim IV].) The facts found by the referee defeat petitioner's claim. This claim should also be rejected for the reasons stated in: (1) a related response in petitioner's automatic appeal in case number S026872 (RB at pp. 98-111); (2) the informal response (IR at pp. 10, 13, 21-22); (3) the answer in the return (Return at pp. 115-129); and (4) respondent's post-hearing briefing (Respondent's Proposed Referee's Findings at pp. 65-112).

C. Standard Of Review

Respondent has previously set forth the standard for reviewing trial counsel's performance in discussing Reference Question 1. The same standard applies here.

D. Analysis

With the exception of the referee's exclusion of respondent's evidence of the post-conviction results concerning the blood on Gutierrez's shirt and boots (Referee's Report at pp. 44-45), and the referee's finding that "while a criminal defense counsel may not introduce false evidence, he may certainly put before the jury evidence he *knows* will lead them to a faulty factual conclusion"

(*id.* at p. 69 [italics added]), respondent agrees with the referee's findings and conclusion that Robusto's performance was reasonable under *Strickland* and its progeny. (Referee's Report at pp. 61-70; see *Strickland*, *supra*, 466 U.S. at p. 691; *Gonzalez*, *supra*, 51 Cal.3d at p. 1244.)

The referee found that Robusto litigated the third party culpability issue prior to trial, and reiterated at trial that he was not offering third party culpability evidence as to Liberato Gutierrez. (Referee's Report at pp. 61-64.) Given petitioner's pre-trial confessions to Robusto (footnote 3, *ante*), Robusto argued the following strategy to the trial court:

> It is *not pointing the finger at Mr. Liberato Gutierrez and saying you're the killer, you're the one that took the money.* That's not the issue. The issue has to do with whether or not these 12 people can believe and rely upon the investigation that was performed by the Pomona Police Department as well as the Sheriff's Department. [¶] And it's important for them to have that information and for them to evaluate that information.

(8RT 1169 [italics added]; see *Valdez*, *supra*, 32 Cal.4th at pp. 107-108.) At the evidentiary hearing in 2008, Robusto confirmed that he was (in 1992) "aware of all of the facts" concerning Liberato Gutierrez. (Referee's Report at p. 65.)

The referee found:

> Even before petitioner confessed to him, Robusto had questioned petitioner about Liberato Gutierrez, and petitioner stated that he did not know him and at no time suggested that Gutierrez was in any way in [*sic*] involved in the crime. In fact, he stated that Gutierrez and his companions from the alley had not been in the home of the victim with petitioner and the other witnesses. [Citation.] Robusto believed that if he offered the evidence on the theory that it would suggest that Liberato Gutierrez might have committed the murder, the prosecution would

introduce the contradictory evidence at their disposal. [Citations.] Robusto also believed the evidence would not meet the requirements for admissibility[.]"

(Referee's Report at p. 65; see *People v. Cudjo* (1993) 6 Cal.4th 585, 609 (*Cudjo*); *People v. Kaurish* (1990) 52 Cal.3d 648, 684-686 (*Kaurish*); *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*).)

The referee found:

It is highly likely that had Robusto successfully urged the court to receive the evidence he offered [pre-trial] on 3/23/91, the prosecution would have offered in rebuttal the evidence outlined earlier in this section [of the report], which evidence would have convincingly pointed to the fact that Liberato Gutierrez was not involved in the crime.

(Referee's Report at p. 66.) For purposes of Evidence Code section 352, the referee explained:[7]

The evidence received at the reference hearing demonstrates that this rebuttal would have potentially involved the testimony of a large number of witnesses, including (1) the officer who tested Gutierrez on the intoximeter [*Valdez, supra*, 32 Cal.4th at pp. 106-110]; (2) an expert to explain the significance of the .30 result; (3) the officer who first encountered the four individuals in the alley; (4) the officer who interviewed the four at the police station and/or the interpreter who assisted in the interviews; (5) the individuals in the alley, including Liberato Gutierrez; (6) the jailer who booked Gutierrez and made the

---

7. "To withstand a challenge under Evidence Code section 352, evidence of a third party's culpability 'need only be capable of raising a reasonable doubt of [the] defendant's guilt.'" (*Cudjo, supra,* 6 Cal.4th at p. 609, citing *Hall, supra,* 41 Cal.3d at p. 833.) "A trial court's ruling under section 352 of the Evidence Code is reviewed for abuse of discretion." (*Valdez, supra,* 32 Cal.4th at p. 108.)

> notations about his property and lack of significant funds; (7) the person who lifted latent fingerprints at the scene and compared them against the rolled prints of Gutierrez; (8) the officer who compared the boots of Gutierrez to the footprints at the scene; and (9) those present at the victim's home shortly before the homicide. Though only made aware of a portion of the available rebuttal evidence, the trial court specifically found that the receipt of the evidence would have involved the undue consumption of time.

(Referee's Report at p. 66.) The referee also found: "More importantly, it is clear that the available rebuttal evidence, even without additional blood testing, would have effectively dispelled any inference that Liberato Gutierrez was involved in the crime." (Referee's Report at p. 66.) As the referee put it: "Thus, *in total*, the available evidence relating to Liberato Gutierrez was incapable of raising a reasonable doubt as to petitioner's guilt, and its receipt, together with logical rebuttal, would have involved an undue consumption of time." (*Id.* at pp. 66-67.)

The referee thus found that "Robusto was reasonable in concluding, as he did, that the evidence did not meet the test of admissibility as set forth in *Hall* and *Kaurish*." (Referee's Report at p. 67.) The referee added that he "knows of no authority for the proposition that an attorney must offer evidence that he reasonably believes to be inadmissible, especially, where, as here, an anticipatory objection is raised." (*Ibid.*) Respondent agrees with both conclusions.

The referee also found that "Robusto believed, as a tactical matter, that the jury would give [third party culpability evidence involving Liberato Gutierrez] little or no weight if argued as such." (Referee's Report at p. 67.) The referee found that Robusto's concern was "well founded" given "the rebuttal evidence at the disposal of the prosecution[.]" (*Id.* at p. 68.)

Further, at the evidentiary hearing, "Robusto convincingly testified that he viewed his credibility with the jury as important." (Referee's Report at p. 68.) The referee explained:

> [Robusto] was concerned that if he "pushed too far" with the evidence by going down the third-party culpability road, the prosecution would react with further testing, and the results would in all likelihood not only completely destroy the third-party culpability argument, but significantly harm his credibility with the jury as well. He was also concerned that the testing might extend beyond just the clothing of Liberato Gutierrez. Further, he believed that if he sought to fully exploit the Liberato Gutierrez evidence, the likely rebuttal, which might include new testing results, would undermine the overarching defense theme that the police had done a sloppy investigation, as the jury would learn of the work done to eliminate Gutierrez as a suspect.[8/] In short, Robusto attempted to get whatever use he could from the fortuitous fact of Liberato Gutierrez while trying to avoid goading the prosecution into a response. [Citation.] In his own words, he believed he was walking a fine line with ". . . one foot on a banana peel and one foot in Forest Lawn." (Exhibit F, page 89.) Given these and other concerns, the referee doubts that Robusto would have offered the evidence in full even had he been given the opportunity to do so. [Citation.]

(Referee's Report at p. 68.)

---

8. Respondent therefore objects to the referee's exclusion of respondent's evidence of the post-conviction results concerning the blood on Gutierrez's shirt and boots. (Referee's Report at pp. 44-45, 61, fn. 19.) The excluded evidence strongly corroborated Robusto's testimony that petitioner had pre-trial: (1) confessed to the murder; and (2) admitted that Liberato Gutierrez was not involved in the murder or the robber.

Given the foregoing, the referee found that "Robusto's decision not to offer the evidence on a third-party culpability theory, insofar as it was based on the concerns addressed thus far, was a reasonable one." (Referee's Report at p. 68.) Respondent agrees.

Respondent disagrees with the referee's finding that "not all of Robusto's reasons were appropriate." (Referee's Report at p. 68.)

This Court has held that "it is always proper to defend against criminal charges by showing that a third person, and not the defendant, committed the crime charged." (*Hall, supra,* 41 Cal.3d at p. 832.) However, the referee seemingly rejects Robusto's ethical concerns as an officer of the court. (Referee's Report at pp. 68-69.) Robusto could not ethically present evidence (or argue to the guilt and penalty phase jury) that Liberato Gutierrez was Ernesto's true killer when petitioner had confessed to counsel (pre-trial) that: (1) he fired the fatal gunshot at Ernesto; and (2) Liberato Gutierrez was not involved in either the killing or the robbery. (See footnote 3, *ante.*) The referee implies that such ethical concern was objectively unreasonable under *Strickland*, stating that a criminal defense attorney "may certainly put before the jury evidence he *knows* will lead them to a faulty factual conclusion." (Referee's Report at p. 69 [italics added].) Respondent disagrees. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1217 (*Riel*) ["an attorney, including a criminal defense attorney, has a 'special duty . . . to prevent and disclose frauds upon the court'"]; *Samuels v. Mix* (2000) 22 Cal.4th 1, 20-21, fn. 5; *People v. Cain* (1995) 10 Cal.4th 1, 42-43, fn. 17 ["Effective assistance does not require counsel to refrain from frankness and honesty in his or her dealings with the court"]; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261-1262 (*Morrow*).)

Attorneys "may ethically present evidence that they suspect, but do not personally know, is false[,]" and "as long as counsel has no specific undisclosed

factual knowledge of its falsity, it does not raise an ethical problem." (*Riel*, *supra*, 22 Cal.4th at p. 1217.) Here, Robusto had actual pre-trial knowledge from petitioner that Liberato Gutierrez was not the perpetrator of the robbery-murder. In other words, he did not merely suspect, but actually knew he would be putting on false evidence if he tried to show that Liberato Gutierrez was the real killer. Robusto thus plainly performed reasonable in determining that he could not present third party culpability evidence as to Liberato Gutierrez.

Having heard petitioner's pre-trial confession that he shot Ernesto and that Liberato Gutierrez was not involved in the killing or the robbery, Robusto performed reasonably in deciding, on ethical grounds, to not present evidence (or argument) that petitioner should be acquitted because Liberato Gutierrez was the true killer. Respondent agrees with the referee's conclusion that Robusto's performance was otherwise objectively reasonable under *Strickland* and its progeny. (Referee's Report at p. 70; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1157-1158 (*Gutierrez*).)

For these reasons, subclaim B of Claim IV should be denied because Robusto's trial assistance was objectively reasonable under *Strickland* and its progeny.

Petitioner has also failed to affirmatively prove that he suffered prejudice under *Strickland* due to Robusto's strategic tactics. (See *Thomas*, *supra*, 37 Cal.4th at pp. 1265-1277 [no prejudice]; *Andrews*, *supra*, 28 Cal.4th at pp. 1241, 1254-1266; *Visciotti*, *supra*, 14 Cal.4th at pp. 353-357.) As shown, the jury received strong evidence to find petitioner guilty of murdering Ernesto for purposes of robbery. (*Valdez*, *supra*, 32 Cal.4th at pp. 81-87, 103-106.) It is not reasonably probable that the result of the proceedings would have been any different if Robusto had offered the third party culpability evidence concerning Liberato Gutierrez. The trial court would likely have ruled it inadmissible under Evidence Code section 352, as previously shown, and there

was overwhelming rebuttal evidence that would have undermined the theory, even if the trial court had allowed Robusto to put it on. Subclaim B of Claim IV should consequently be denied.

REFERENCE QUESTION 3

Petitioner claims that Robusto was constitutionally ineffective at the 1992 penalty phase trial by failing to investigate, consult experts, and present mitigation proof of "severe and unrelenting emotional and physical abuse" that petitioner had "throughout his childhood" that caused "mental state and serious resulting substance abuse" problems. (Pet. at 69-83 [subclaim H of Claim IV].) The facts found by the referee defeat petitioner's claim. This claim should also be rejected for the reasons stated in: (1) the informal response (IR at pp. 9, fn. 2, 11-12, 31-33); (2) the answer in the return (Return at pp. 129-160); and (3) respondent's post-hearing briefing (Respondent's Proposed Referee's Findings at pp. 112-222).

E. Standard Of Review

Respondent has previously set forth the standard for reviewing trial counsel's performance in discussing Reference Question 1. The same standard applies here.

F. Analysis

Respondent generally objects to a referee considering claims not raised in the petition, as the referee did when he considered a claim that petitioner never raised in his petition, i.e., he "suffers from a cognitive deficit" as opined by Dr. Boone, "who did not examine him until 2007, over 15 years after his trial." (Referee's Report at p. 72.) Nonetheless, since the issue was addressed by the parties below, respondent agrees with the referee's findings, analysis, and conclusion that Robusto's overall performance was reasonable under *Strickland*

and its progeny. (Referee's Report at pp. 71-103.) Respondent, however, takes exception to the referee's finding that Robusto's performance was partially deficient. (Referee's Report at pp. 99-103.) To summarize the referee's factual findings, petitioner failed to prove that: (1) he was abused by his father; and (2) he ever suffered from any effects from post-traumatic stress disorder ("PTSD"), brain dysfunction or damage, or attention deficit disorder ("ADD"). (Referee's Report at pp. 90, 94-96.)

The referee found that "if that abuse now alleged never occurred, no investigation by counsel, no matter how exhaustive, would have uncovered it." (Referee's Report at p. 73.) Also, "if the abuse did not occur, the opinions of Dr. Kaser-Boyd, which are almost entirely based on her belief that abuse did occur, become largely useless." Thirdly, "the opinion of Dr. Boone that petitioner currently exhibits cognitive difficulties is largely irrelevant unless it sheds light on petitioner's condition over fifteen years ago, at the time of the trial." The foregoing is "equally true of the opinions of Kaser-Boyd, insofar as she believes that petitioner exhibited PTSD in 2002." (*Ibid.*)

The referee found that there were "overarching difficulties with most of the abuse allegations" largely because they are "quite late in arriving" even though "there was a motive and opportunity for many of petitioner's witnesses to reveal the abuse at a much earlier time." (Referee's Report at pp. 73-74.) Also, the abuse claims come "almost exclusively" from people "closely aligned with, and loyal to, petitioner– his very close friends and family members, many of whom not only believe that he is not deserving of a sentence of death, but who also believe him innocent of the murder, and innocent of the many crimes offered up in aggravation at trial." (*Id.* at p. 74.) "Further, four of the six witnesses have a strong and justified dislike of petitioner's father–Antonio sexually molested two of the witnesses, and two others are the mothers of his victims." As the referee put it: "These strong and pervasive biases–in favor of

petitioner, and against his father–should not be overlooked." (*Ibid.*) This Court should also considered the fact that petitioner's father, mother, sisters, and friends testified at the penalty phase, and none of the witnesses revealed evidence that petitioner: (1) was abused by his father; and (2) suffered from any effects from PTSD, brain dysfunction or damage, or ADD. (See *Valdez, supra*, 32 Cal.4th at pp. 89-90.) These witnesses thus indeed had "a motive and opportunity" to reveal the current mitigation allegations "at a much earlier time" than declarations beginning in 2002. (Referee's Report at pp. 73-75.)

"It is also noteworthy that petitioner has been unable to produce a single unbiased corroborating witness to offer direct or circumstantial proof of abuse." (Referee's Report at p. 74.) The referee explained:

> The allegations of abuse were all brought to light by one investigator employed by the office of petitioner's habeas counsel. This investigator also prepared the habeas declarations dealing with the alleged abuse, and apparently sometimes interviewed the declarants together as to their recollections.

(*Ibid.*) The referee found that Robusto "never met with petitioner's habeas corpus Marshall, because she made him angry and for various reasons he did not feel comfortable with her, including because she told him that petitioner had confessed his guilt to her." (*Id.* at p. 38.)[9/]

The referee found:

> None of petitioner's witnesses, including his experts, has been able to point to the existence of any documentary evidence existing at the time of trial that suggests that abuse of the sort alleged ever occurred. This is true even though the parties have now exhaustively examined

---

9. By contrast, Robusto "met with counsel for respondent, Mr. Kelberg, on two occasions." (Referee's Report at p. 38.)

petitioner's medical records, confidential prison records, juvenile and adult court records, probation reports, and school records.

(Referee's Report at p. 74.)

The referee noted:

> Petitioner chose not to testify at the reference hearing, thus the referee had no opportunity to evaluate his recollections, if any, of abuse. However, trial counsel Robusto testified that he interviewed petitioner prior to trial, and specifically asked him whether his father, or anyone else, had abused him. Petitioner replied in the negative. (RHT 813.) Petitioner has offered no evidence to contradict this testimony, which the referee finds credible.

(Referee's Report at p. 74.)

The referee noted that while it is "undoubtably true" that "criminal defendants do not always tell the truth to their lawyers when interviewed," there is "no evidence that this is the situation in petitioner's case." (Referee's Report at pp. 74-75.) The referee found that it is true that the relationship between petitioner and Robusto was not a "model of congeniality and cooperation," but petitioner nonetheless "trusted Robusto enough to reveal to him that he had lied to the police about the murder weapon, and that in fact the gun was his." (*Id.* at p. 75.) The referee explained:

> More telling, the referee finds that early in their relationship, after Robusto had been successful in obtaining the dismissal of an unrelated murder case against petitioner [see Referee's Report at p. 31], petitioner confessed to him that he had committed the crime of murder in the instant case. [Citations.] There is no evidence in the record to suggest that petitioner ever lied to his counsel, despite his purported distrust of him. The referee concludes that a plausible and simple explanation for petitioner's denial of abuse to Robusto exists–the denial was true. This

evidence alone, while not by itself dispositive of any issue, significantly undermines the credibility of his instant claims of abuse. [Footnote.]

(Referee's Report at p. 75, citing *In re Ross* (1995) 10 Cal.4th 184, 205-206 (*Ross*).)

The referee found that pre-trial Robusto "interviewed many witnesses now claiming to have witnessed abuse." (Referee's Report at p. 75.) "None of them revealed any abuse other than one beating allegedly inflicted upon petitioner by his father." (*Ibid.* [footnote omitted].) As previously noted, several of petitioner's reference hearing abuse witnesses testified at the penalty phase trial. The referee explained:

> Most have testified that they understood the nature of that proceeding at the time of their testimony, and several confirmed at the reference hearing that at the time of trial they understood that abuse evidence would have been helpful to petitioner. Nonetheless, each of them failed to reveal the alleged abuse to Robusto, or to testify to abuse of any sort during their penalty phase testimony. [See *Valdez*, *supra*, 32 Cal.4th at pp. 89-90.] None alleges, as suggested by [*Strickland* expert] Early [citation] and argued by petitioner, that their failure to do so had anything to do with a mistrust of Robusto, or with feeling ill at ease with him. Most of the witnesses simply gave unconvincing denials that they were ever questioned about abuse, while offering implausible excuses for hiding its supposed existence.

(Referee's Report at p. 76.)

The referee found that petitioner's mother's testimony was "devoid of any mention of abuse." (Referee's Report at p. 76.) Also, her denial of having been interviewed by Robusto was contradicted by Robusto's testimony. Robusto was "able to describe the interior of the home, and those present." Robusto testified that he interviewed petitioner's mother pre-trial "on at least

six occasions." (*Id.* at p. 76.) As to the credibility of petitioner's mother, the referee "finds that her denial that the meeting ever occurred to be significant, and concludes that it is an attempt by the witness to explain what is otherwise unexplainable–her failure to reveal abuse though aware of its potential helpfulness in saving her son's life." (*Id.* at p. 77.) The referee also found that petitioner's mother "made contradictory statements as to her reasons for failing to reveal the abuse." (*Ibid.*) The referee additionally found that probation reports "make no mention whatsoever of any" difficulties experienced by petitioner. (*Ibid.*) The referee concluded:

> It is apparent from watching and listening to the witness that she deeply loves petitioner. She had three sons–two are now dead, and one is [on] death row. Her husband is imprisoned for child molestation. The referee notes the undeniably strong bias and motivation of the witness to say and do anything that might help petitioner.

(*Ibid.*) The referee thus concluded that "if abuse of the sort now claimed had in fact occurred, [petitioner's mother] would have both revealed its details to trial counsel, and would have testified to it at the penalty phase when given the opportunity. She did neither." (*Ibid.*; see *Valdez*, *supra*, 32 Cal.4th at p. 90.)

As to petitioner's friend, penalty phase witness Reyna (*Valdez*, *supra*, 32 Cal.4th at p. 90), the referee found that she recalled her interview with Robusto. Robusto testified that he recalled interviewing Reyna, and that she revealed "but one" abuse incident. (Referee's Report at p. 78.) Robusto "specifically asked [Reyna] whether other incidents of abuse had occurred, and she, like the others at the interview, said that none had." (*Ibid.*) As to her penalty phase testimony, the referee found that Reyna was a "grown woman and had a child of her own" and "had absolutely no motive to hide abuse if in fact it existed." Her failure to reveal it to Robusto or to testify to its existence at trial thus "points strongly to the conclusion that it simply had not occurred." (Referee's Report at p. 78.)

As to Zueck (Reyna's daughter), the referee found that the one incident of alleged abuse revealed at the hearing did not appear in her declaration to this Court. (Referee's Report at p. 79.) She later claimed that she witnessed multiple abuses against petitioner by his father. As the referee found: "Most of the incidents she claimed to recall would have occurred when she was between 3 and 5 years of age." (*Ibid.*) The referee concluded: "Given the age of the witness at the time of the events she purports to describe, the referee has no confidence that she is in fact relating incidents that she personally witnessed." (*Ibid.*)

As to Gamp, petitioner's younger sister who testified at the penalty phase under the name Graciela Valdez (*Valdez, supra*, 32 Cal.4th at p. 90), the referee found that she gave numerous contradictory statements. (Referee's Report at pp. 79-80.) She "denied ever revealing any abuse allegations to Robusto, and claimed that she would not have done so even if asked, because of fear that petitioner's father would kill [her mother] and perhaps others." (*Id.* at p. 80.) The referee found credible Robusto's testimony as to interviewing Gamp pre-trial in 1992, where Gamp revealed one incident of abuse. The referee found "the claims of Gamp to be incredible insofar as she stated that she was reluctant to discuss abuse with Robusto[.]" (*Id.* at pp. 80-81.)

As to Perez, petitioner's sister who testified at the penalty phase under the name Victoria Valdez (*Valdez, supra*, 32 Cal.4th at p. 90), the referee found that Perez: (1) admittedly did not personally witness all of the abuse that she related in her declaration; and (2) now has difficulty actually recalling the details of the abuse. (Referee's Report at p. 81.) As to claims of abuse urged by Perez, "the referee simply does not find it credible that petitioner would have been able to conceal injuries of the type referred to herein for many years, as alleged by the witness." (*Id.* at p. 82.) Also, Perez "agreed with most witnesses that the death of [petitioner's brother] Antonio Jr. was no more significant for

petitioner than to the other family members[.]" (*Ibid.*) Perez "directly contradicted" petitioner's position that Antonio Jr. "often interceded in the abuse." (*Ibid.* [footnote omitted].) Moreover: "This witness, like many of the others, gave contradictory answers when asked whether she would have revealed the abuse to Robusto if he had asked about it." (*Ibid.*) Perez also "knowingly testified falsely at the penalty phase in order to assist petitioner, as she believed that truthful answers would hurt him." (*Ibid.*) The referee concluded:

> Her concession that in the past she gave untruthful testimony to assist petitioner, the contradictions contained in her current testimony, her admitted difficulty in recalling the events in question, and her strong bias toward petitioner all combine to make her an unconvincing witness.

(Referee's Report at p. 83.)

As to Jane Doe (Perez's daughter), the referee said that she convincingly testified about sexual molestations against her by petitioner's father. However, those molestations "in all likelihood" came to light about nine years after the robber-murder in this case. (Referee's Report at p. 83.)

As to Dr. Kaser-Boyd, the referee found:

> Rather than shed light on the issues, . . . her testimony was simply a brief for petitioner, generally unsupported by scientific methodology, logic, or candor. She went beyond simply defending her opinions, and seemed to actively distort and tailor her testimony in an attempt to assist petitioner's cause. Answers helpful to petitioner came without hesitation. Answer that were not helpful were only grudgingly offered, and in most instances were coupled with a volunteered explanation.

(Referee's Report at pp. 83-84.) She "began (and ended) her evaluation with a rather uncritical acceptance of the declarations of the six witnesses discussed above, even though she never interviewed them, and had not read their penalty

phase testimony." (*Id.* at p. 84.) "She looked for no independent data corroborating the abuse claims, and was untroubled by its complete absence." (*Ibid.*) "Her faith in petitioner's truthfulness is central to the validity of her opinions[.]" (*Id.* at p. 85.) She opined that petitioner's abuse resulted in PTSD, but the referee found that "petitioner simply does not meet the established diagnostic criteria for PTSD. (*Ibid.*) She "attempted to defend what was at best a grossly misleading declaration[,]" and her opinions "were not corroborated by any testing, scientific or otherwise." (*Id.* at p. 86.) The referee found that her failure to test was likely "due to her fear that testing would not support her hypothesis." (*Ibid.*) The referee also found that her PTSD opinion "remains untested and untestable." (*Id.* at p. 87.) As the referee put it, her opinion "is untethered to demonstrable reality." (*Ibid.*) Also, even if petitioner at some point suffered from some variety of PTSD, Dr. Kaser-Boyd "failed to consider causes other than abuse." (*Id.* at p. 88.) The referee "reviewed hundreds of pages consisting of petitioner's prison records," which suggested that there were non-abuse causes for alleged PTSD that the doctor failed to consider before rendering her opinion that childhood abuse resulted in petitioner suffering from PTSD. (*Id.* at pp. 88-89.) As to PTSD, the referee found that "there is no convincing evidence of this whatsoever." (*Id.* at p. 88.) The referee concluded that Dr. Kaser-Boyd's opinions "carry very little weight with the referee." (*Id.* at p. 89.)

As to respondent's medical expert, the referee found that Dr. Hinkin's testimony was "quite credible, and logically and convincingly undermined the opinions of Kaser-Boyd." Dr. Hinkin, "an equally well-trained and experienced person, was firm in his conviction that petitioner does not, and cannot, meet the criteria for PTSD of any variety." (Referee's Report at p. 89.) Given the foregoing, the referee found that petitioner failed to prove abuse or PTSD. (*Id.* at p. 90.)

As to brain damage or dysfunction opined by Dr. Boone, the referee found that petitioner failed to carry his burden of proof because Dr. Boone's opinions were unreasonable in light of the record. (Referee's Report at pp. 90-95.)

Given the foregoing, petitioner has failed to prove to that he: (1) was abused by his father; and (2) suffered from any effects from PTSD, brain damage, or ADD. He therefore has failed to prove that Robusto performed incompetently in the penalty trial in 1992. (Referee's Report at pp. 90, 94-96; see *Andrews*, *supra*, 28 Cal.4th at pp. 1241, 1254-1266 [no deficient performance or prejudice]; see also *Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1174 (*Babbitt*) ["Counsel's failure to uncover Babbitt's alleged family history of mental illness was also not unreasonable. Counsel's investigator did speak with Babbitt's family members and friends and others who might have had such information, but none of them indicated there was any history of mental illness in Babbitt's family. Other courts have held that 'counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence.'" [Citation.] This comports with the principle that a lawyer may make reasonable decisions that render particular investigations unnecessary"]; *Murtishaw*, *supra*, 255 F.3d at pp. 945-946.)

This is not a case where an alleged "incomplete investigation was the result of inattention[.]" (*Wiggins*, *supra*, 539 U.S. at p. 534; *Lucas*, *supra*, 33 Cal.4th at pp. 725-729; see Referee's Report at pp. 35-38; Return at pp. 132-143; *Andrews*, *supra*, 28 Cal.4th at p. 1265 ["in this case, counsel here did perform some background investigation, including an interview with petitioner's mother despite his objection, after which they pursued a different penalty defense"]; *Visciotti*, *supra*, 14 Cal.4th at p. 352 ["It is not true, as petitioner asserts, that [counsel] elected the penalty phase strategy of seeking

sympathy for petitioner's family without doing any investigation whatsoever. His examination of the family members who testified at the penalty phase of the trial confirms that he had learned from them before they testified some information regarding petitioner's acts of kindness and generosity and his artistic skill"]; see also *Babbitt, supra*, 151 F.3d at p. 1176 ["in this case, counsel did far more than a mere cursory investigation"].)

Besides the evidence discussed in the referee's report, as to petitioner's pre-trial *Marsden*[10] motions or attempted motions on February 10, 1992, and February 26, 1992, the trial transcript contains the following evidence involving Robusto's penalty phase investigations. (See *Valdez, supra,* 32 Cal.4th at pp. 91-93.)

At the hearing on February 10, 1992, the court asked, "[petitioner], what did you want to tell me, sir?" (1RT 62.)[11] Petitioner, without using a language interpreter, claimed: (1) he had only saw Robusto "two or three times" since 1991; (2) he had "numerous witnesses and people to talk to"; (3) he "only had a tenth grade degree"; (4) he did not have a "life history" of crime; (5) he had spent "time in Mexico in the penitentiary"; (6) Robust had not helped him to date; (7) there were "people" and "families" in Mexico and Texas that had to be "talked to" because they were "willing to come and talk for" him because he was "not a bad person" and was an "artist"; and (8) he was "from" the area of "Cuidaud Juarez" in Mexico. (1RT 62-63.)

The trial court asked Robusto to reply to the allegations. Robusto replied that: (1) from his appointment in 1991 up to "this point in time," he had been "working" on this case (and a second murder case against petitioner that

---

10. *People* v. *Marsden* (1970) 2 Cal.3d 118 (*Marsden*). (See Referee's Report at pp. 32, 36, 75, fns. 26-27, 100; Return at pp. 133-143.)

11. The prosecutor made her guilt phase opening statement over one month later on March 16, 1992. (5RT 689, 697.)

was dismissed; see Referee's Report at p. 31); (2) he was "ready" for trial on "this particular murder case" and, in his opinion, the evidence was "very weak" on guilt; and (3) as to people in Mexico and Texas, he had earlier told the court *ex parte* (1RT 53-58) that he believed this was "something of importance" and petitioner wanted counsel or an investigator "out of Texas" to go to "Juarez to contact these people" for "purposes of a potential penalty phase." (1RT 63-68.) Robusto said that petitioner had told him that there were "relatives that live in Juarez that can be of assistance to" petitioner "if and when a penalty phase is reached." (1RT 68.) Robusto said he told petitioner that it was in his "best interest" for him to tell the trial court the above. Robusto said he asked petitioner if he had a "problem" with counsel conducting the investigation, and petitioner told Robusto that "I want you to do that." (*Ibid.*)

Robusto told the trial court that "[t]he other night" was when he first heard from petitioner about "people in Juarez[.]" (1RT 68-69.) Petitioner disagreed, and alleged that he told Robust the foregoing when they "met" and that they discussed the above penalty phase witness issue "a long time ago[.]" (1RT 69.) The court asked, "Do you want him to investigate the people in Juarez? Petitioner said, "Yes, I do want him to." The court said, "That's all I need to know for right now." (1RT 70.) The court expressed concern that the "people in Juarez" issue may present the prosecution with a last-minute discovery issue given the upcoming trial date. (1RT 71-72.) Petitioner repeated that he had asked Robusto "way back" about obtaining information from people in Juarez. Petitioner asked, "Can I have another attorney?" The court said, "No," and found that Robusto could adequately represent petitioner at trial. (1RT 72.) Petitioner interrupted the court and said, "It's not that I don't like him." (*Ibid.*) The court told petitioner that Robusto was handling petitioner's "affairs" in a proper and legal manner. (1RT 72-73.)

Petitioner then stated:

> The reason I asked for this, my mother – my mother – my mother, she knows me better than anybody in this world I suppose. She came and spoke to this man [Robusto]. [¶] This man tells my mother that I was released. My mother was standing out here in this courtroom and talked to this man. I even asked her to make sure that that was him that she talked to. She said, yes, I know [Robusto].

(1RT 74.) After a brief colloquy with petitioner, the court replied:

> I'm sure your mother is a very nice lady. I just think she's mistaken. I don't think [Robusto] told her that. I've known him too long. [¶] She's a very nice woman. I think she's mistaken. I don't think [Robusto] told her that you were released on this case.

(1RT 74-75.)

Petitioner replied:

> [Robusto] told [petitioner's mother] that I was released to go to the county [sic] for me to go home that I was going to call her. You know. There's a lot of things that - I mean it's been ten months and I've only seen him three times. [¶] And it is – this is the law that it's required that he's supposed to come and see me and talk to me about the case. That's why he didn't know nothing about the Juarez thing because I just barely brought it up again. [¶] There's people that I met that I seen lately that back then in October, November, that I seen them and I told them, hey, can you be a witness to this case. Do you remember this and this and that. And they say, yeah, I remember. They know me. [¶] These people are drug dealers. All these people know. They used to go buy drugs there. He could have talked to them. His private investigator could have talked to them. Nothing has been done.

(1RT 75.) The court replied: "I have a feeling, [petitioner], that there's a lot more that's been done than you know about because you're in custody. That's my belief. . . ." (1RT 75.) After the above ruling, petitioner said: "Well, in this matter I am – my constitutional rights if I want to go pro per on this case I could do that." (1RT 76; see *Valdez, supra,* 32 Cal.4th at pp. 98-101.)

On February 26, 1992, petitioner's second *Marsden* motion was heard in the trial court (Judge Nuss).[12/] (1CT 161-162, 206 see *Valdez, supra,* 32 Cal.4th at pp. 92-93.) On February 24, 1992, petitioner filed a 16-page handwritten motion in the court. Thus, on February 26, 1992, after the prosecutor left the court, the court said it had read petitioner's motion. The court asked petitioner if he had "any additional facts" (1RT 104). Petitioner alleged that the "reason" Robusto was "now doing things such as going to my house last week, conferring with my mother about my case, or anything else" counsel did "last week" was due to the first *Marsden* motion. (1RT 105.) Petitioner alleged: (1) he had not met the investigator hired by Robusto; and (2) "I just need to confer with my attorney as often as possible to let him know things that I know[.]" (1RT 106, 108.)

Robusto in relevant part replied: (1) "I do not do things because *Marsden* hearings are brought"; (2) a death penalty case is "the most serious case that a defense attorney can handle"; (3) this case has "been worked"; (4) "I am prepared"; (5) this case is "continually being worked" in that "[n]o case is crystallized two months before the trial" and "[i]t's a constant, ongoing process" wherein "[i]nformation is always being gathered up until and during the course of any type of trial"; and (6) "I believe I have been diligent in representing" petitioner. (1RT 113-114.)

---

12. This ensued: (1) two weeks after the first *Marsden* denial by Judge Piatt; (2) four days before jury selection began; and (3) three weeks before the prosecutor's guilt phase opening statement.

After hearing the above, petitioner replied: "I believe that barely a week ago I gave [Robusto] information about relatives that I have in Juarez, Mexico and Texas. I mean, I gave him addresses of my mother too about two or three days ago." (1RT 114-115.)

Robusto replied: (1) "two weeks ago" petitioner said he had "people" in "Juarez, Mexico" that he wanted counsel to "talk to" and this would be "helpful" if "there was a penalty phase"; (2) he asked petitioner "the names of these particular people" and petitioner was "unable to articulate the names" to counsel; and (3) petitioner said these people were his "aunts, uncles and cousins" and his mother had "names and addresses and phone numbers" for these "particular persons." (1RT 115-116.) Robusto stated:

> I indicated to [petitioner] by way of questioning him what would they indicate to me about [petitioner] during the course and scope of the penalty phase. [Petitioner] indicated to me that he was born in Juarez, Mexico, that he resided in Juarez, Mexico, until he was eight years of age, that he and his family moved from Juarez, Mexico, to the city of Pomona, California, at this point in time, that he stayed in the city of Pomona until he reached the age of 16 or 17 years of age, that he then went back to Juarez, Mexico. [¶] *I later found out from his mother, after interviewing his mother*, that when [petitioner] was 16 or 17 years of age *his father struck him*, he left the home, in essence running away, hitch hiked to Juarez, Mexico, *remained in Juarez, Mexico, for one year approximately*, that being from the time he was 17 until the time he was 18 years of age. [¶] *When I received this information at the last minute*, meaning just before we started to be assigned out to a particular court, *I felt it was important information. However, I didn't feel it was really weighty, but at the same time I wanted to address the issue because it was being requested to me by Mr. Valdez to do this.* [¶] I brought up the

issue with Judge Theodore Piatt, and I indicated to him that I had this problem and I needed to resolve the problem. *That issue was addressed with Theodore Piatt on an ex parte basis.* [See 1RT 53-58.] It was also put on the record with [the prosecutor] being present. It was also put on the record with [petitioner] being present. [¶] Since that time, *in approximately a two-week period of time I have retained* through Department 100 the services of an investigator who is *a Spanish speaking investigator* who is *familiar with the city of Juarez and in the city of El Paso* who has relationships with law enforcement in El Paso as well as law enforcement in Juarez. That person's name is *Eddie Sanchez.* He's an investigator out of Monterey Park. He's on the qualified list of investigators that is issued to all 987.2 attorneys from Department 100. [¶] *Arrangements have been made with Mr. Sanchez to go to Juarez, Mexico, to contact the following people*: He's to contact the aunt and uncle of [petitioner], that is a person by the name of the Mr. And Mrs. Mario Reyes, who live in a particular colony in Juarez; and to contact a Dr. Hernandez, who is a dentist in Juarez, with a specific address and specific phone number which has been provided to Mr. Sanchez. [¶] He's also to contact a cousin by the name of Reyes, with a specific address in El Paso, Texas, who is a lawyer out of Juarez, Mexico, who is attending classes to become a lawyer in the United States of America[.]

(1RT 116-118 [italics added].) After listening to the above, the court ruled: "The Court has heard sufficient information. There's no reason to proceed any further. [¶] The [*Marsden*] motion is denied." (1RT 118.)

On March 9, 1992, during jury selection and one week before the guilt phase opening statement by the prosecutor, the following occurred. (See *Valdez, supra,* 32 Cal.4th at pp. 101-103.) Petitioner told the court that he

wanted to "go pro per" because "I feel that I could do a much better job if I investigate other things that I need to investigate." (2RT 365.) The court asked: "Would you prepared to proceed to trial today?" Petitioner replied: "No[.]" The court asked petitioner how many *Marsden* motions he had made. Petitioner said he had made "two[.]" The court asked petitioner how long Robusto had represented him in this case. Petitioner said, "I believe 11 months." The court asked: "You are pro per on other cases, are you not?" Petitioner said, "Yes." The court asked: "How long have you been pro per on that case?" Petitioner: "I believe about a month and a half." The court denied the untimely pro per motion. (2RT 365-366.) The trial court told petitioner:

> Mr. Valdez, if you believe that there are people that should be talked to by your attorney and his investigator in this regard, I would assume that you've given all that information to [Robusto]. [¶] If in your discussions with [Robusto] you feel that that has not been handled appropriately, it is to your best interests, you may prepare another motion to the Court and the Court will consider it outside the presence of the jury during the course of the trial.

(2RT 367.)

Later, on March 27, 1992, after the People had presented its penalty phase case, and after Robusto had presented the jury with four penalty phase defense witnesses, two of whom were petitioner's sisters, the following ensued. (See *Valdez, supra,* 32 Cal.4th at pp. 93-95.) Petitioner requested a hearing. This hearing was requested after Robusto told the court that if petitioner took the stand it would be against counsel's advice. (12RT 1717.)

The hearing began when petitioner filed a personally handwritten two-page letter in court which he did not show to counsel prior to filing. (CT "Confidential" 205-207; 2CT 303; 12RT 1718.) In his letter, petitioner said that Robusto did not do his "best." (CT "Confidential" 205.) In a "P.S."

section, petitioner asked the trial court: "Can we have a meeting without the prosecutor !! being present?" (CT "Confidential" 207.) In court, in front of the prosecutor, petitioner claimed that Robusto had rendered ineffective assistance. Petitioner said there were people he wanted at the penalty phase, and counsel had neglected to investigate them, or was refusing to call them as penalty phase witnesses. (12RT 1718-1719.)

After the trial prosecutor left the courtroom (12RT 1719), the court took a recess to allow Robusto to read petitioner's letter for the first time. (12RT 1719-1720.) Afterwards, Robusto replied to the points raised in the letter in great detail. (12RT 1720-1724.) Later, the court interrupted petitioner to ask: "Mr. Valdez, excuse me just a minute. What's your motion? Is your motion one to relieve Mr. Robusto so that you can proceed to represent yourself in this matter?" (12RT 1724-1725.) Petitioner did not answer the question. Instead, petitioner replied: "My thing here is that I didn't have witnesses." (12RT 1725.)

The court asked: "In regard to witnesses, have you given to Mr. Robusto or to his investigator the names of any identifying information whereby they could talk to any witnesses?" Petitioner said: "This is short notice." He later said: "No, I haven't." He told the court that he had asked Robusto to bring in (aggravating evidence inmate-victim) "Copeland." Petitioner said Copeland would swear that petitioner did not stab him. Petitioner said he had the names of only some of the people he wanted on the witness stand. (12RT 1725-1726.)

Robusto explained to the trial court as follows:

> *I have no names of any witnesses.* The only witness that has been addressed from the standpoint of a name is Mr. *Copeland.* [¶] I received discovery *months ago* about Mr. Copeland, because Mr. Copeland is the victim of the stabbing in Tracy. With respect – [sic] [¶] I think what [petitioner] is trying to indicate to the court is that he has a particular

individual that could possibly testify with respect to the robbery of Mr. Banuelos and [petitioner] has tried to give me the name, but *he doesn't remember the name*. All he can tell me is that it's a person who was born in Juarez.

(12RT 1727 [italics added].)

Petitioner replied:

No, that's concerning to a different case. His name is Jose Ruiz Palomares (Phonetic). It's in here. It's in the report, but I don't have the report to look at and I don't have – the names should be in there. [¶] There's a jailhouse robbery taking place and there's four suspects. We all went to the hole. The names are there. I cannot remember all their names. I've asked him if you could get all this information for me so I could get names, but, yet, been rejected because he said don't worry, everything is going to be all right out there. I mean, I've seen things and things that she's brought.

(12RT 1727.)

The court asked: "What's your specific motion? What do you want the Court to do?" (12RT 1727.) Petitioner said:

Well, first of all, I asked for a mistrial on the detective. He got up there and mentioned about the prison to the jury [during the guilt phase], and I asked for a mistrial on that.

(12RT 1727-1728; see *Valdez, supra,* 32 Cal.4th at pp. 124-125.) The trial court replied:

We're not talking about that. You gave me a letter this morning. We're only talking about the contents of the letter. [¶] Why did you give me the letter? What did you [sic] do you want the Court to do?

(12RT 1728.) Petitioner said: "I wanted the Court to take into consideration that I haven't had a fair trial in this, that I didn't have the surrounding of this

case, the defense that I was suppose to have." (12RT 1728.) The trial court replied:

> That motion is denied. *The Court finds quite to the contrary, that you have had one of the best defenses that this Court has seen*, that the comments raised in your letter that's been identified as number 66 are incorrect, they are misleading and insufficient.

(12RT 1728 [italics added].)

The above trial transcript evidence corroborates the referee's findings, analysis, and conclusion that Robusto's performance was objectively reasonable under *Strickland* and its progeny. (Referee's Report at pp. 99-103; see *Andrews*, *supra*, 28 Cal.4th at pp. 1241, 1254-1266 [no deficient performance or prejudice]; see also *Babbitt*, *supra*, 151 F.3d at pp. 1174-1176; *Murtishaw*, *supra*, 255 F.3d at pp. 945-946.)

Moreover, petitioner has failed to meet his burden to affirmatively prove that he suffered prejudice at the penalty phase even assuming arguendo that Robusto's investigation was deficient under *Strickland*.[13] Here, attempts were made to humanize petitioner through penalty phase testimony from his father, mother, sisters, and friends. (*Valdez*, *supra*, 32 Cal.4th at pp. 89-91.) Also, as shown, the evidence of guilt was powerful. (*Id.* at pp. 103-106.) Further, the prosecution's aggravation evidence consisted of five prior first degree residential burglary convictions in California and a robbery conviction in Texas. (*Id.* at pp. 87-88.) While in custody, petitioner committed various assaultive crimes against other inmates as well as police and deputies. (*Id.* at pp. 88-89.) He cannot prove that he suffered any prejudice under *Strickland* in this case.

---

13. As the referee found, petitioner failed to produce evidence showing what he would have told Robusto if Robusto had asked for specific details about the robbery-murder. (See Referee's Report at p. 100.) Petitioner therefore is not entitled to relief even if Robusto performed incompetently by failing to adequately interview him about the specific details of the crime.

(Referee's Report at pp. 102-103; Return at pp. 156-160; see *Thomas*, *supra*, 37 Cal.4th at pp. 1265-1277 [no prejudice]; *Andrews*, *supra*, 28 Cal.4th at pp. 1265-1266; *Visciotti*, *supra*, 14 Cal.4th at pp. 353-357; see also *Brown*, *supra*, 503 F.3d at pp. 1013-1016; *Murtishaw*, *supra*, 255 F.3d at pp. 945-946, 953; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 380-383 (*Sandgathe*); *Babbitt*, *supra*, 151 F.3d at p. 1176.) Given the record, and the well-supported finding by the referee that petitioner failed to prove any material mitigation evidence such as childhood abuse, PTSD, ADD, or that brain dysfunction or damage even existed, it is not reasonably probable that there would have been any different result at the penalty phase if Robusto had performed differently. Subclaim H of Claim IV should therefore be denied.

REFERENCE QUESTION 4

Petitioner claims that Robusto was constitutionally ineffective by failing to make a proper offer of third party culpability proof (as to Liberato Gutierrez) at the penalty phase trial. (Pet. at 83-84 [subclaim I of Claim IV].) This claim fails for the reasons set forth in the informal response (IR at pp. 10, 33-34), the answer in the return (Return at pp. 160-163); and respondent's post-hearing briefing (Respondent's Proposed Referee's Findings at pp. 223-234). Specifically, respondent: (1) respectfully objects to the referee's exclusion of evidence of the post-conviction results involving the blood on Gutierrez's shirt and boots (Referee's Report at pp. 33-35, 61, fn. 19); (2) disagrees with the referee's deficiency finding (Referee's Report at pp. 104-105; see Return at pp. 160-163; *Gutierrez*, *supra*, 28 Cal.4th at pp. 1157-1158]); and (3) submits that petitioner has failed to meet his burden to prove that he suffered prejudice at the penalty phase due to Robusto's conduct, assuming arguendo that it was objectively unreasonable.

G. Standard Of Review

Respondent has previously set forth the standard for reviewing trial counsel's performance in discussing Reference Question 1. The same standard applies here.

H. Analysis

Respondent disagrees with the referee's finding that Robusto performed deficiently under *Strickland* by failing to specifically consider presenting third party culpability evidence at the penalty phase trial. (Referee's Report at p. 105.) Due to petitioner's pre-trial confession to Robusto that he shot Ernesto and that Liberato Gutierrez was not involved in the killing or the robbery, Robusto knew, not merely suspected, that Liberato Gutierrez was not the real killer. It thus would have been unethical for Robusto to argue false evidence to the penalty phase jury that it should not recommend the death penalty because Gutierrez was the true killer. (See *Riel*, *supra*, 22 Cal.4th at p. 1217; *Morrow*, *supra*, 30 Cal.App.4th at pp. 1261-1262.) Respondent therefore disagrees with the referee's finding that Robusto's failure to consider the third party culpability theory meant that he was ineffective because he failed to make any tactical choice at the penalty phase involving Liberato Gutierrez. (Referee's Report at p. 105.)

Respondent agrees with the referee's conclusion that Robusto's objectively reasonable strategies (involving Liberato Gutierrez) at petitioner's guilt phase trial applied with equal force at the penalty phase trial. (Referee's Report at p. 105; see *Gutierrez*, *supra*, 28 Cal.4th at pp. 1157-1158 ["given that the jury at the guilt phase had plainly rejected defendant's claim that he was uninvolved in Jones's murder by convicting him of the murder, defense counsel had an obvious tactical reason for refraining from once again urging the jury at

the penalty phase to find that Pablo or some other third party had killed Jones"].)

Simply put, Robusto acted well within the bounds of reasonable competence in determining that, under the circumstances, he could not ethically mislead the court and jury by putting on evidence, or by arguing, that Liberato Gutierrez was the real killer. (See *Riel, supra*, 22 Cal.4th at p. 1217; *Morrow, supra*, 30 Cal.App.4th at pp. 1261-1262.) That reasonable ethical consideration applied not just to the guilt phase, but also to the penalty phase. Robusto thus did not perform incompetently by failing to re-consider (for the penalty phase) his reasonable ethical decision at the guilt phase.

Moreover, as the referee found, any deficient performance by Robusto plainly was harmless under *Strickland*, since Robusto would have made the same decision on the merits to forgo presenting third party culpability evidence at the penalty phase. (Referee's Report at p. 105.) Even if he had presented that evidence, rebuttal evidence existed that would have defeated the claim, namely, DNA and other scientific test results described in documentary evidence that were excluded by the referee. (See Referee's Report at pp. 44-45 [Exhs. 31(a)-(d)].)

For these reasons, subclaim I of Claim IV should be denied.

CONCLUSION

For these reasons, subclaim I of Claim IV should be denied.

Dated: March 5, 2009

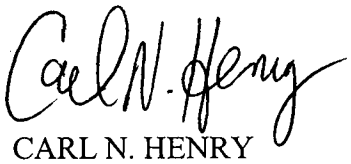
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE HONNAKA
Deputy Attorney General



CARL N. HENRY
Deputy Attorney General

Attorneys for Respondent

CNH:rj
LA2002XH0003
60387209.wpd

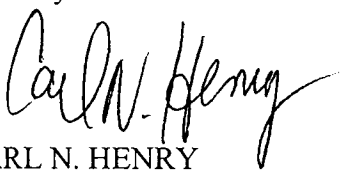
CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF AND EXCEPTIONS TO REFEREE'S REPORT uses a 13 point Times New Roman font and contains 14,831 words.

Dated: March 5, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



CARL N. HENRY
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Alfredo Reyes Valdez, On Habeas Corpus*** No.: **S107508**

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 that same day in the ordinary course of business.

On **March 9, 2009**, I served the attached **BRIEF AND EXCEPTIONS TO REFEREE'S REPORT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Marilee Marshall, Esq.
MARILEE MARSHALL & ASSOCIATES
523 West 6th Street, Suite 1109
Los Angeles, CA 90014

Mary Jameson
Automatic Appeals Unit Supervisor
Supreme Court of the State of California
Earl Warren Building
350 McAllister Street, 1st Floor
San Francisco, CA 94102-7303

Clerk of the Court
LOS ANGELES COUNTY SUPERIOR COURT
Pomona South Courthouse
400 Civic Center Plaza, Dept. M
Pomona, CA 91766
DELIVER TO: Hon. Charles E. Horan, Judge

Michael G. Millman
Executive Director
CALIFORNIA APPELLATE PROJECT
101 Second Street, Suite 600
San Francisco, CA 94105

Brian Kelberg
Deputy District Attorney
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
320 W. Temple Street, Room 540
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 9, 2009**, at Los Angeles, California.

Ronda Jones
Declarant

Ronda Jones
Signature

CNH:rj
LA2002XH0003
60388066.wpd